

9 | Anti-Dumping and South Asia

Prabhash Ranjan*

1. Introduction

Anti-dumping is an issue that has attracted the attention of all countries and has generated debates among all the stakeholders – whether lawyers, economists, political leaders or activists. The use of anti-dumping as a trade remedial measure in the global trade regime is not new. In fact, the seeds of anti-dumping were sown way back in the eighteenth century in the United States (US).¹ During the early twentieth century, the dumping practice was most widespread among German firms.² The US enacted many anti-dumping legislations during and after the First World War,³ which included the anti-dumping legislation adopted in 1916.⁴ Since then, many developed countries have used anti-dumping measures to thwart the effects of imports from other countries. However, the use of anti-dumping measures underwent a paradigm change after the formation of the World Trade Organization (WTO) in 1995. It marked a new era of substantive and procedural multilateral rules on many trade topics including anti-dumping. This is not to state that before 1995 there were no multilateral rules on anti-dumping. Article VI of the General Agreement on Tariffs and Trade (GATT) of 1948 did provide a bare framework for anti-dumping measures that included a common definition of dumping. After the formation of the GATT, many countries felt that anti-dumping was being used as a barrier to trade and hence during the Kennedy Round of GATT negotiations (1962-67), an Anti-Dumping Code to limit the use of anti-dumping measures was negotiated.⁵ However, problems with the use of

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1 Jackson (1997), p. 255.

2 *ibid.*

3 *ibid.*

4 This Act of the US was a criminal statute and aimed at protecting the US industries from predatory pricing. See generally – WTO Appellate Body Report, US - Anti Dumping Act of 1916, WT/DS136/AB/R and WT/DS162/AB/R of August 28, 2000.

5 See Jackson (1997), p. 256.

anti-dumping measures persisted, as the US did not adequately comply with the Anti-Dumping Code. Hence, the GATT contracting parties negotiated a new anti-dumping code during the Tokyo Round of trade negotiations (1973-79). The adoption of new substantive and procedural rules on anti-dumping was carried forward to the Uruguay Round of negotiations, which finally led to the formation of the WTO and the adoption of a new anti-dumping agreement called ‘Agreement for the Implementation of Article VI of GATT’ (in short, known as the Anti-Dumping Agreement, henceforth ADA). This Agreement replaced the earlier anti-dumping codes and further elaborated the multilaterally agreed rule on anti-dumping enshrined in Article VI of GATT.⁶

The adoption of the ADA saw the increasing use by the developing countries of anti-dumping as a trade remedial measure. This represented a marked change and a break from the past, and has ushered in a whole new series of anti-dumping measures, opted by both the developed and developing countries, that act as barriers to international trade. Hence, when the Doha Round of trade negotiations was launched in 2001, anti-dumping came up as one of the most critical areas for review.

The mandate provides that this review would take place without prejudice to the basic definition and concept of anti-dumping and its role.⁷ In other words, countries agreed that anti-dumping as a trade remedial tool would not be scrapped notwithstanding the argument made by many economists that anti-dumping measures are essentially protectionist devices and adversely affect the interest of the consumers.⁸

This paper follows the ground rule laid down on anti-dumping in the Doha work programme. It is a political reality that no country is willing to give up anti-dumping as a trade remedial tool and hence the discourse on anti-dumping, instead of arguing for its abolition, should focus on how to tighten its use and application so that it is able to perform its basic function of being a trade remedial measure. Furthermore, of late there has been a decline in the use of anti-dumping measures. For instance, according to the WTO secretariat, in the period from July to December 2005, the number of anti-dumping investigations came down to 82 from 106 during the same period in 2004.⁹ Similarly, for the period January to June 2005, the number of anti-dumping investigations came down to 96 from 106 during the same period in 2004.¹⁰ Although these are marginal decreases, the trend is encouraging.

Scope of the Paper

Given the background on the use of anti-dumping measures as a probable barrier to international trade, more specifically market access, this paper will look at the ways to discipline its use in the context of the South Asian region. While on the one hand, the present paper attempts to assess the trends and patterns in imposition of anti-dumping measures by the South Asian countries on imports from other countries, on the other, it addresses the cases of imposition of anti-dumping measures on South Asian products by other importing countries. It will also seek to assess the anti-dumping

6 For more on the history, see Jackson (1997) pp. 256-57, and Trebilcock and Howse (2005), pp. 233-35.

7 See the Doha Ministerial Conference Declaration 2001, WT/MIN (01)/DEC/1 (November 14, 2001), paragraph 28.

8 McGee (1996), pp. 27-33. Also see Yarrow (1987), pp. 66-79. George Yarrow has argued that dumping can normally be expected to enhance the economic welfare of the importing nation and to increase competition in the latter's market.

9 See WTO Press Release 2006 at http://www.wto.org/english/news_e/pres06_e/pr441_e.htm (visited on August 5, 2006).

10 See WTO Press Release 2005 at http://www.wto.org/english/news_e/pres05_e/pr418_e.htm (visited on August 5, 2006).

Table 9.1 Anti-dumping initiations undertaken by the South Asian countries

| Country | No. of anti-dumping initiations | | | | | | | | | | |
|------------|---------------------------------|------|------|------|------|------|------|------|------|------|------|
| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 |
| India | 6 | 21 | 13 | 28 | 64 | 41 | 79 | 81 | 46 | 21 | 25 |
| Pakistan | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 3 | 3 | 5 |
| Sri Lanka | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Bangladesh | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Nepal | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Source: World Trade Organization, Anti-Dumping Database, available at www.wto.org (visited on August 20, 2006).

legal regimes of the South Asian countries vis-a-vis the ADA. The paper will also evaluate the ongoing negotiations on anti-dumping by examining the proposals made by the South Asian countries and also some other important developing countries. The proposals advanced by the South Asian countries and other developing countries will also be examined in the light of the interpretations developed by the WTO panels and the Appellate Body (AB) in disputes to which they have been parties. The endeavour will be to see how closely linked or divorced are the proposals made by the South Asian countries and the interpretations developed by the panels and the AB. The overall objective will be to identify the crucial areas of the ADA that call for reform in the light of the relevant case law. A final objective of this paper is to analyse the ADA from the public interest perspective and to evaluate the stand of the South Asian countries in this respect.

However, a word of caution is due here. South Asia is not a homogeneous region where all the countries have the same interests. Indeed, the countries in South Asia have varied interests especially when it comes to anti-dumping. On the one hand, there is a country like India which has emerged as one of the most prolific users of anti-dumping measures in the world, while on the other, there are countries, such as Nepal, Bangladesh, and Sri Lanka, which have never imposed anti-dumping duties (Table 9.1) and also still do not have an enforceable anti-dumping legislation. Notwithstanding these differences, this paper will endeavour to build upon some of the common issues that affect South Asia as a whole when it comes to anti-dumping measures.

2. Country-wise Status of Anti-dumping Legislation

2.1 Bangladesh

Bangladesh does not have a separate full-fledged anti-dumping law. It incorporates the anti-dumping law in its Customs Act of 1969. Bangladesh has not been an ac-

tive user of anti-dumping measures. As of now, it has not initiated any anti-dumping investigation and hence has never imposed any anti-dumping duty on any import. However, there have been three instances when Bangladeshi exports were targeted and anti-dumping duties imposed.

The US and India imposed anti-dumping duties on exports of cotton shop towel and lead acid batteries, respectively, from Bangladesh. In both the cases, the anti-dumping duty was withdrawn and the issue never went up to the dispute stage. India withdrew the anti-dumping duties on Bangladeshi lead acid batteries after consultations were held as per the procedure established under the WTO Dispute Settlement Understanding (DSU). This dispute did not reach the panel stage. The third case where Bangladeshi exports were targeted was when Brazil imposed anti-dumping duties on imports of jute bags coming from Bangladesh. This anti-dumping duty is still continuing. Bangladesh has not made submissions in the ongoing Doha Round for reforming the ADA or for disciplining the use of anti-dumping measures.

2.2 Nepal

Nepal became a WTO Member in 2003. It was the first least developed country (LDC) to become a Member of the WTO after completing the accession process. Nepal is still in the process of fulfilling many of its commitments under the WTO, and developing an anti-dumping law is one of them. At present, a draft law called the Anti-dumping and Countervailing Duties Act, 2004, is being discussed. This draft law has not been presented in the Nepali parliament and hence technically cannot be called a bill.

Nepal like Bangladesh has never imposed an anti-dumping duty on any imported product nor has it launched any anti-dumping investigation. However, two items of its exports to India, namely, zinc oxide¹¹ and acrylic yarn,¹² do attract anti-dumping duty. Nepal has never been involved in any anti-dumping dispute in the WTO nor has it made any submissions towards reforming the ADA.

It is important to reflect on the reasons why the LDCs like Bangladesh and Nepal do not have a full-fledged anti-dumping regime. The most important reason is that for the LDCs the most significant demand in the WTO is to get duty-free-quota-free (DFQF) market access in the markets of the developed countries. Hence, most of the negotiating capital and energies of these countries is directed towards achieving this goal. Moreover, these countries are still to develop their internal capacities to deal with complex issues like anti-dumping.

Having a full-fledged anti-dumping regime would require putting in place separate administrative and judicial review systems, allowing for appeals to be made, etc. which involves not only legislation and regulation but also effective implementation mechanisms.¹³ This will undoubtedly require a lot of resources. At present, it may not be possible for these countries to devote their scarce resources towards building such regimes and infrastructure.

11 An anti-dumping initiation was invoked against zinc oxide imports coming from Nepal to India in March 2001 and the final findings were made in March 2002.

12 An anti-dumping initiation was invoked against imports of acrylic yarn from Nepal to India in July 2001 and the final findings were made in July 2002.

13 Qureshi (2000), pp. 19-32.

2.3 Sri Lanka

Sri Lanka also does not have a full-fledged anti-dumping law although it has drafted the Anti-dumping and Countervailing Duties Bill to give effect to Article VI of GATT (discussed throughout this paper). This bill was presented in the Sri Lankan parliament on February 1, 2006. However, it has not been passed or adopted by the Sri Lankan parliament.

Sri Lanka has not imposed an anti-dumping duty on any product or import coming from any country. However, there is one instance where a Sri Lankan product has been subjected to anti-dumping duties. Turkey has imposed anti-dumping duties on rubber bicycle tyres and tubes from Sri Lanka. The two countries are trying to sort out the problem through diplomatic consultations. This particular case has not come to the dispute settlement body of the WTO as of now.

2.4 Pakistan

Pakistan's experience with anti-dumping has also been limited although it has been a bit more substantive as compared to Bangladesh, Nepal, and Sri Lanka. Pakistan enacted its anti-dumping law in 2000 in the form of an Anti-dumping Ordinance.¹⁴ Between 2002 and 2006, Pakistan initiated 12 anti-dumping investigations (Table 9.2). In the majority of cases, the final anti-dumping duty was levied, whereas in others the investigation is still going on. Pakistan has not made any submission on anti-dumping in the ongoing negotiations.

14 National Tariff Commission of Pakistan, <http://www.ntc.gov.pk/adint.asp> (visited on August 13, 2006).

Table 9.2 Anti-dumping initiations made by Pakistan from 2000 to 2006

| Products and importing countries | Date of investigation |
|--|-----------------------|
| Polyester Staple Fibre – Indonesia, Korea and Thailand | 09-08-2006 |
| Ceramic Tiles – China | 27-03-2006 |
| Tinplate – France, Germany, Italy, UK, and USA | 06-12-2005 |
| Formic Acid – Finland and Germany | 08-09-2005 |
| Pthalic Anhydride – India | 11-08-2005 |
| Polyester Filament Yarn – Indonesia, S. Korea, Malaysia and Thailand | 12-05-2005 |
| Urea Formaldehyde Moulding Compound – China | 12-01-2005 |
| PVC Resin (suspension grade) – S. Korea and Iran | 25-06-2004 |
| Acrylic Tow – Uzbekistan | 16-03-2004 |
| Glacial Acetic Acid – Taiwan | 01-09-2003 |
| Sorbitol – France and Indonesia | 06-03-2003 |
| Tinplate – South Africa | 26-02-2002 |

Source: National Tariff Commission of Pakistan, available at <http://www.ntc.gov.pk/adint.asp> (visited on August 13, 2006).

2.5 India

The only country in the South Asian region that has substantive experience with anti-dumping is India. It has emerged as one of the biggest imposers of anti-dumping duty in the world. India enacted the anti-dumping law in 1995 by amending the Customs Tariff Act of 1975. Sections 9A, 9B, and 9C were added in the Customs Tariff Act to incorporate the anti-dumping provisions. Since 1995, India's anti-dumping investigations have witnessed a steep rise. As can be seen from Table 9.3, beginning with 2 initiations in 1992-93, India went up to 30 initiations in 2002-03. This number has come down to 12 in 2004-05. The total number of anti-dumping initiations made by India has however crossed the 150 mark.

The other striking feature of India's anti-dumping initiations is that the conversion rate of an anti-dumping investigation into a final anti-dumping duty is very high. For instance, in 2001-2002, out of 30 anti-dumping initiations or investigations, the final anti-dumping duty was imposed in 24 cases. Again, this conversion rate has come down in recent times. For instance, in 2004-05 out of 12 anti-dumping cases that were initiated, the final anti-dumping duty was imposed only in one case. It has been argued by one author that the EC's request for consultations in the DSB of the WTO, listing complaints on the arbitrary use of anti-dumping measures by India and industrial recovery, partly may be responsible for this decline.¹⁵

15 Bhattacharjea (2005).

Table 9.3 Year-wise break-up of the anti-dumping cases by India from 1992-93 to 2004-05

| Year | Number of cases initiated | Number of cases where final findings/preliminary findings were issued | Number of definitive measures imposed |
|---------|---------------------------|---|---------------------------------------|
| 1992-93 | 2 | 2 | 0 |
| 1993-94 | 1 | 1 | 0 |
| 1994-95 | 6 | 6 | 3 |
| 1995-96 | 5 | 5 | 2 |
| 1996-97 | 5 | 5 | 2 |
| 1997-98 | 14 | 13 | 3 |
| 1998-99 | 13 | 12 | 4 |
| 1999-00 | 19 | 19 | 10 |
| 2000-01 | 28 | 25 | 22 |
| 2001-02 | 30 | 29 | 24 |
| 2002-03 | 30 | 17 | 23 |
| 2003-04 | 14 | 13 | 9 |
| 2004-05 | 12 | 2 | 1 |

Table 9.4 Product-wise break-up of the anti-dumping initiations made by India

| Product category | Number of anti-dumping initiations |
|------------------------------|------------------------------------|
| Chemicals and Petrochemicals | 87 |
| Pharmaceuticals | 30 |
| Fibres/Yarn | 16 |
| Steel and other metals | 14 |
| Consumer goods | 13 |
| Other products | 19 |
| Total | 179 |

Source: Annual Report (2004-05) of the Directorate General of Anti-Dumping, Government of India, 60.

A product-wise break-up of the anti-dumping cases by India demonstrates that maximum cases are in the chemicals and petrochemicals sector, followed by pharmaceuticals, and fibres and yarns (Table 9.4).

Similarly, there have been numerous cases where anti-dumping initiations have been launched against India (Table 9.5).

Table 9.5 Anti-dumping initiations against India (1995-2004)

| Year | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | Total |
|---------------------------------|------|------|------|------|------|------|------|------|------|------|-------|
| No. of anti-dumping initiations | 3 | 11 | 8 | 12 | 13 | 10 | 12 | 16 | 15 | 8 | 108 |

Source: Annual Report (2004-05) of the Directorate General of Anti-Dumping, Government of India, 87.

In the case of India, since the number of anti-dumping investigations is high, there are certain interesting observations that can be made. According to some studies of Indian anti-dumping cases, protectionist purposes rather than fostering of a competitive structure in the market has been the dominant factor behind imposing anti-dumping duties.¹⁶ In fact, it has been argued that the magnitude of protection in the use of anti-dumping measures in India is much higher than in the US or the EC.¹⁷ There are also other pointers towards the possible protectionist use of anti-dumping measures in India, such as the high conversion rates of request for initiations to final imposition of anti-dumping measures, especially till 2002, as shown in Table 9.3. The other factor that points towards the possible protectionist use of anti-dumping by India is the reduction in time taken for the provisional and final anti-dumping findings, which is even lesser than that for the US and the EC.¹⁸ It has also been argued that the generous use of anti-dumping measures by India has inflicted a high import

16 For more on this, see Singh (2005).

17 *ibid.*

18 See Bhattacharjya (2005).

cost on user industries since out of the 135 industries that have succeeded in getting protection (as of March 2003), 128 are producers of intermediate goods.¹⁹

3. Substantive Issues

There are many substantive issues for reform in the ADA. All of these issues cannot be dealt with here. This paper only deals with those substantive issues on which South Asian countries have made submissions or where the South Asian countries appear to have a real interest. It can, however, be reiterated that out of five South Asian countries, only India has taken an active part in the ongoing negotiations on anti-dumping. Apart from India no other South Asian country has made any submission. Hence, the submissions that have been analysed in this paper are those made by India. But the domestic anti-dumping laws of respective South Asian countries (particularly Pakistan and Sri Lanka) have been dealt with at appropriate places along with the Indian anti-dumping law.

3.1 Constructing 'Normal Value'

India has made some important submissions in the ongoing negotiations on anti-dumping. One such submission is to amend Article 2.2.2 of the ADA. This Article lays down the methodology to determine the amounts for administrative, selling and general costs (SG&A) and for profits. It is important to recall that in cases where sales is not taking place in the ordinary course of trade, the ADA states that the dumping margin will be determined by comparing the export price (price at which a country sells in the export market) with the cost of production in the country of origin plus a reasonable amount of SG&A costs and profits²⁰ (in short, known as constructed normal value). Now the calculation of this reasonable amount of SG&A is to be made as per Article 2.2.2. This Article states that the determination of SG&A and profits shall be based on actual data pertaining to production and sales. In case this determination cannot be made on the basis of actual data then Article 2.2.2 provides three options to the investigating countries/authorities to determine the SG&A costs and profits.²¹ However, Article 2.2.2 does not create any hierarchy amongst these three options. In other words, the importing country or its investigating authority has the complete discretion to choose any of these three options and does not necessarily need to exhaust the first option given in Article 2.2.2 (i) before coming to the option given in Article 2.2.2 (ii).

India, in its submission, has argued that Article 2.2.2 should be amended to provide a hierarchy between the three options, and subsequent options should be resorted to only if the preceding options cannot be used due to lack of data or other reasons.²² It is interesting to note that India's submission is based on its argument made in an anti-dumping dispute on cotton type bed linen with the European Commission (EC). In this dispute, the EC used the option given in Article 2.2.2 (ii) to calculate the constructed value. This option states that if the 'actual data' option given in the chapeau

19 *ibid.*

20 Article 2 of the ADA.

21 Article 2.2.2 (i), 2.2.2 (ii) and 2.2.2 (iii) of the ADA.

22 India's submission to the Negotiating Group on Rules, TN/RL/W/26, October 17, 2002.

of Article 2.2.2 cannot be used, then the 'weighted average' option could be used. On the other hand, India contended that the 'weighted average' option given in Article 2.2.2 (ii) could only be used if both the conditions, one given in the chapeau and the other given in Article 2.2.2 (i) i.e. 'actual amounts incurred by the same producer for the same general category of products' cannot be used. In other words, India argued that there was a hierarchy amongst the three options given in Article 2.2.2.

The panel in the EC-Bed Linen case²³ did not agree with India's interpretation. It held that there is nothing in Article 2.2.2 to suggest that the options to determine the constructed normal value are to be exercised in any hierarchical order.²⁴ The panel argued that if the intention of the treaty makers was to provide a hierarchy, they would have explicitly mentioned that in the provision itself. In the absence of such an express intention, it cannot be held that any kind of hierarchy exists amongst the options given in Article 2.2.2 of the ADA. The only hierarchy that existed was between the condition given in the chapeau and the three conditions given subsequently. Hence, the panel held that the EC had complete discretion to apply the third option given in Article 2.2.2 (ii) if the condition given in the chapeau of Article 2.2.2 could not be exercised. The EC was therefore not required to demonstrate that it had exhausted the second option given in Article 2.2.2 (i) before exercising the option given in Article 2.2.2 (ii).

It is submitted that the panel erred in its interpretation. It is true that no express hierarchy is mentioned in Article 2.2.2, but this should not be construed as complete discretion to the investigating country to exercise any of the three options. Any anti-dumping investigation is both producer- and product-specific. If this characteristic of an anti-dumping investigation is not taken cognizance of, then the investigation may not yield a fair result. Calculating the constructed normal value is a very important aspect of the dumping investigation, as it would determine whether a particular producer or exporter is dumping or not. The future course of action will depend on this determination. Therefore, the process of constructing the normal value should first focus on the specific producer or exporter. The option given in Article 2.2.2 (i) provides for this. The counter argument could be that since the concerned product is also important in the anti-dumping investigation, the focus also has to be on the like product, which is given in the option in Article 2.2.2 (ii). However, the panel itself had held that the option given in Article 2.2.2 (i) also covers like product. The panel said 'Article 2.2.2 (i) allows the calculation of the profit amount on the basis of data for the exporter concerned, corresponding to a general category of products, including the like product'.²⁵ Hence, this option covers both the factors that are quintessential in any anti-dumping investigation. In the option given in Article 2.2.2 (ii), the specific exporter or the producer will not be considered. This Article states that the weighted average of other exporters or producers under investigation will be used to construct the normal value. Hence, it may happen that a specific producer may not be dumping at an individual level; however, he may be labeled as a dumper under the option in Article 2.2.2 (ii) since the data of other exporters or producers will be used. Moreover, what happens in cases where the investigating country has the data regarding the

23 WTO Panel Report, European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141/R of March 1, 2001.

24 *ibid*, para 6.54 to 6.62.

25 *ibid*.

specific producer? If complete discretion is given then it may not exercise the option under Article 2.2.2 (i) and use the option given in Article 2.2.2 (ii) as it may be more useful in proving that a specific producer or exporter is dumping.

This particular finding of the panel was not challenged by India when the dispute went to the Appellate Body (AB) and hence the AB did not get an opportunity to interpret whether such a hierarchy existed amongst the options given in Article 2.2.2 or not²⁶

If we look at the relevant laws of the South Asian countries, we will find that they do not provide for any hierarchy amongst the options given to construct the normal value. Section 8 (2) of the Pakistani Anti-dumping Ordinance, 2000 creates a hierarchy only between the basic principle where the data regarding the same producer and the like product is used to construct the normal value and the other three options given in Articles 2.2.2 (i), (ii), and (iii) of the ADA. It lists these three options in Sections 8 (2) (a), (b), and (c) without creating any hierarchy amongst these options.²⁷ Similarly, the anti-dumping and countervailing duties bill of Sri Lanka also lists the three options given in Articles 2.2.2 (i), (ii), and (iii) in Section 8 (2) without indicating any hierarchy amongst the options.²⁸

The argument made by India in the EC-Bed Linen dispute was later converted into a proposal to amend Article 2.2.2 so as to provide for a hierarchy amongst the options given in the Article to construct the normal value. The Friends of Anti-Dumping (FAN)²⁹ group of countries has also made a similar proposal. Unlike India's move, the proposal made by the FAN group does not propose a hierarchy amongst the options given in Article 2.2.2. Instead, it proposes clearer, more comprehensive and representative criteria for calculating the constructed value.³⁰ From the discussion above, it is clear that there is certain ambiguity in Article 2.2.2 of the ADA. This Article is important as it helps in determining whether dumping is taking place or not. Therefore, the interpretation of this Article goes a long way in establishing the future course of action, that is whether anti-dumping duties should be imposed or not. Hence, it is necessary to clarify Article 2.2.2 of the ADA. One such step in clarifying this Agreement would be to provide a hierarchy amongst the options given in the Article as suggested by India.

Another important proposal that India has made, in its submission to the WTO, is to apply a 'Reasonability Test' for calculating profits under Articles 2.2.2 (i) and (ii). This 'Reasonability Test' is important, as it has been found by countries, such as India, that some investigating countries, while calculating the constructed normal value under various options provided by Article 2.2.2 (i) and (ii), applied the profit margins which did not reflect the profits actually realized by the producers/exporters inside and outside India. Thus the profit rates used for purposes of calculating the constructed normal value were found to be unreasonable. India has suggested that the reasonableness criterion enshrined in Article 2.2.2 (iii), which requires that amount of profit that is established for constructing the normal value should not exceed the profit normally realized by the exporters/producers in the country of origin, could be used to determine the profit figures while using the options given in Articles 2.2.2 (i) and (ii).³¹ In

26 WTO Appellate Body Report, European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141/AB/R of March 1, 2001.

27 Section 8 (2) of the Anti-Dumping Duties Ordinance, 2000 of Pakistan.

28 Section 8 (2) of the Anti Dumping and Countervailing Duties Bill of Sri Lanka.

29 The FAN group comprises the following countries – Brazil, Chile, Colombia, Costa Rica, Hong Kong (China), Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand, and Turkey.

30 Submission made by the FAN group to the Negotiating Group on Rules, TN/RL/W/6 of April 26, 2002.

31 India's submission, TN/RL/W/26 of October 17, 2002.

fact, this submission of India is again drawn from the argument that it made before the panel in the EC-Bed Linen case. India argued that Article 2.2 of the ADA imposed a substantive requirement of ‘reasonability’ while constructing the normal value using any of the options given in Article 2.2.2 of the ADA.³² India further argued that Article 2.2.2 (iii) explicitly mentions the reasonableness criterion while constructing the normal value and this reasonableness criterion should also guide the calculation of profits while constructing the normal value using the options given in Article 2.2.2 (i) and (ii).

The panel rejected this argument and held that there is nothing in Article 2.2.2 that imposed a substantive ‘reasonability’ test on countries while using options given in Articles 2.2.2 (i) and (ii). The panel held that the calculation methodologies given in Article 2.2.2 are assumed to be reasonable by definition and there is no onus on countries using these options to fulfil a separate ‘reasonability’ test. The same argument was made by the panel in the Thailand–H Beams case³³ where the panel argued that if one of the methodologies given in Article 2.2.2 is applied, the result is by definition reasonable.

The panel may have been correct in rejecting India’s argument, as it is duty-bound to interpret a particular treaty by giving ordinary meaning to the words. Article 2.2.2 (ii) does not impose a substantive ‘reasonability’ test as suggested by India and hence the panel cannot impute such a meaning to Article 2.2.2 (ii). However, India’s argument also has some merit as it has been found that countries do not act judiciously while constructing the normal value (calculating a much higher profit as it helps in proving that dumping is taking place).³⁴ Hence, the solution to this problem is to amend the ADA and impose the substantive ‘reasonability’ test while constructing the normal value using Article 2.2.2.

Another interesting interpretation of Article 2.2.2 came up in the Thailand-H Beams case.³⁵ In this case Poland argued that the term ‘same general category of products’ in Article 2.2.2 (i) should be construed broadly. The panel rejected this argument. Article 2.2.2 (i) comes in the picture when the actual data for the like product cannot be used to construct the normal value. Article 2.2.2 (i) provides for the use of data of ‘same general category of products’ if the data of the like product is not available. This ‘general category of products’ includes the like product and hence should be closely linked to the like product. If this category is too wide or big then it may include a wide array of products and may not give a clearer indicator of the amounts incurred in the sales of the like product. It is important to remember that the use of ‘same general category of products’ is the second best option available to construct the normal value, and this option is used when the first option of actual data regarding the sales of the like product cannot be used. Hence this second best option should give an estimate as close as possible to the like product which is under investigation.

In the EC-Bed Linen dispute, the AB did have the opportunity to interpret Article 2.2.2 (ii) per se. This provision, as discussed above, gives an option to construct the normal value. According to this provision, when the actual data regarding SG&A and

32 WTO Panel Report, European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141/R of March 1, 2001.

33 Panel Report, Thailand – Anti-dumping Duties on Angles, Shapes from Poland,

34 India argued in the EC-Bed Linen case that the profit margin of one producer was taken as the profit margin for all the other producers. This profit margin was 18.65%, which was almost three times the profit margin determined for the other two countries in the investigation, namely, Egypt and Pakistan. Hence, India argued that the profit margin was unreasonable. WT/DS122/R, September 28, 2000.

35 See Panel Report, Thailand – Anti-dumping Duties on Angles, Shapes from Poland, WT/DS122/R, September 28, 2000.

for profits of the exporter/producer under investigation is not available, then the weighted averages of actual amounts incurred by other exporters and producers subject to investigation for the like product may be used to construct the normal value. In the bed linen dispute, the EC used the data of only one producer to construct the normal value for other producers whose data was not available. India objected to this arguing that Article 2.2.2 (ii) required the weighted averages of exporters and producers (in plural), which meant that the data of more than one producer or exporter should be used while constructing the normal value. The panel disagreed with India and held that producers and exporters in plural subsume even a singular producer or exporter. Hence, the EC was not in violation of Article 2.2.2 (ii) by using the data of only one producer to construct the normal value for the other producers subject to investigation.

However, the AB reversed the findings of the panel and held that the option given in Article 2.2.2 (ii) could be used only when there was more than one exporter or producer.³⁶ It held that the presence of words like ‘weighted average’, ‘amounts’, ‘other exporters or producers’ meant that single producer or exporter could not be subsumed within the meaning of the phrase ‘other exporters and producers’ given in Article 2.2.2 (ii) of the ADA. The AB held that calculating ‘weighted average’ implied taking the data of more than one exporter or producer into account as an average cannot be calculated on the basis of data of only one exporter or producer.³⁷ Hence, the AB found the EC acting in violation of Article 2.2.2 (ii) and upheld India’s argument.

The AB ruling has provided a very essential clarification regarding Article 2.2.2 (ii). Countries like India should propose to add a footnote to Article 2.2.2 (ii) stating that this option can be used only if there is more than one ‘exporter or producer’. Such a footnote would ensure that this option is not misused again as it was done by the EC. Some may argue that a judicial pronouncement provides sufficient clarity and there is no need to have an additional footnote in the ADA. However, going by the practice followed by many developed countries, they have used certain methodologies even after the AB has denounced such practices. For instance, even after the AB ruled in the EC-Bed Linen case against the use of zeroing (discussed below) as a methodology to calculate dumping, the US has still used this methodology to calculate dumping margins in a dispute against the EC, which once again led the AB to reiterate that the use of zeroing is against the ADA.³⁸ Hence, even if the AB has held that the option under Article 2.2.2 (ii) cannot be used when there is a single exporter or producer, possibilities of such a practice being used again by the other developed countries cannot be ruled out. However, if a footnote is provided in the ADA, it will become a binding obligation that all Member countries will have to fulfil.

The other important ruling that the AB gave in the EC-Bed Linen case was that while constructing the normal value the investigating country cannot ignore those sales that are made by other exporters and producers that are not in the ordinary course of trade.³⁹ This ruling reversed the finding of the panel that held that certain sales may be excluded in the construction of normal value when using the option given in Article 2.2.2 (ii).

36 WTO Appellate Body Report, European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141/AB/R of March 1, 2001, para 74.

37 WTO Appellate Body Report, European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141/AB/R of March 1, 2001, paras 75-78.

38 *ibid.*

39 WTO Appellate Body Report, European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141/AB/R of March 1, 2001, para 84.

3.2 Zeroing

One of the most contentious issues in anti-dumping is the use of ‘zeroing’ methodology to determine dumping margin. This methodology has been used by some developed countries to calculate the dumping margin with reference to Article 2.4.2 of the ADA that provides for determination of dumping margins. It states that dumping margins shall be calculated by comparing the weighted average of normal value with a weighted average of prices of all comparable transactions. It further states that dumping margins can also be calculated on the basis of comparison of normal value and export prices on a transaction-to-transaction basis.⁴⁰ Hence, this Article gives two options to calculate dumping margins. Before discussing these options, it is important to understand what is meant by ‘margin’ in the phrase ‘dumping margin’. The panel in the EC-Bed Linen case interpreted the word ‘margin’ as meaning the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation.

Some countries have used the zeroing methodology while calculating the dumping margins using the first option related to the weighted averages. While calculating the weighted averages, countries count the negative dumping margins as zero. Hence, if we assume that there are five figures as follows -3 , -2 , 1 , 0 , 2 , and 3 , then zeroing would convert -3 and -2 to zero, and then find out the weighted average. This figure would be completely different from the figure that would be arrived at had the negative figures not been converted to zero. Moreover, the weighted average, when the negative figures are converted to zero, would be much more than when the negative figures are not converted to zero. Hence, the use of the zeroing methodology results in an inflated weighted average.

The EC, while calculating the dumping margin of bed linen from India, used the zeroing methodology for certain models of bed linen. The EC divided all bed linen imports from India into different types or ‘models’. Then, for each ‘model’, the EC calculated the weighted average normal value and the weighted average export price, and compared them to determine the dumping margins for each ‘model’. For some ‘models’ the dumping margin was negative, i.e. the weighted average normal value was more than the weighted average export price, while for others it was positive. The EC added together the different dumping margins of different ‘models’ to calculate the overall dumping margin. In doing so, the EC counted the negative dumping margins of some ‘models’ as zero and as a result reached the conclusion that the overall dumping margin was positive and hence dumping was taking place.⁴¹

The EC defended the use of the zeroing methodology by arguing that Article 2.4.2 of the ADA states that a dumping margin is to be established by comparing the weighted average normal value with the weighted average export price for all comparable transactions. According to the EC, imports of bed linen from India comprised of several non-comparable types or ‘models’ and hence the EC had to first calculate the individual dumping margins of each of the ‘models’ and then (second stage) add up these different dumping margins to find the final dumping margin. According to the

40 Article 2.4.2 of the ADA.

41 WTO Appellate Body Report, European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India, WT/DS141/AB/R of March 1, 2001, paras 46 to 49.

EC, Article 2.4.2 does not provide any guidance regarding how to add the individual dumping margins in the second stage and hence the use of zeroing is not illegal.

However, the AB rejected the EC's argument and denounced the zeroing methodology. It held that the EC's interpretation of the word 'comparable' occurring in Article 2.4.2 of the ADA was erroneous. The word 'comparable' in Article 2.4.2 does not mean that only certain types or 'models' could be compared. Article 2.4.2 does not talk of any division of a product under investigation into different categories. Whether an investigating country splits the product under investigation into separate categories/models or not, it is incumbent upon it to compare two weighted averages for all the transactions, since all these transactions are comparable. The AB held that Article 2.4.2 does not in any way envisage a two-stage determination of the dumping margin as has been done and argued by the EC. There is nothing in Article 2.4.2 to suggest that determination of dumping margins is to be carried out separately for different types or 'models'. This Article is a specific obligation on the investigating country to establish the dumping margin by comparing the weighted average normal value with the weighted average export price for the product under investigation as a whole.

Moreover, even if one assumes and accepts the two-stage dumping margin determination process suggested by the EC, there is no rationale for the EC to convert negative dumping margins of certain 'models' to zero in the second stage. A true weighted average would be reflected only if all the values, positive or negative, are added up and not when the negative values are converted to zero. The zeroing methodology is an unfair way to determine the dumping margin and hence violates the general obligation on countries given in Article 2.4, which obligates an investigating country to make a fair comparison between the export price and the normal value.

The issue of zeroing also came up in a dispute between the US and Canada on the import of soft wood lumber known as the US-Softwood Lumber case.⁴² In this case, the US adopted an almost similar approach to establish the dumping margin as was done by the EC against the bed linen imports from India. The US divided the soft wood lumber imports from Canada into different categories, types or models and then calculated the dumping margins for each of these models. In models or categories where the dumping margin was negative (weighted average normal value being less than weighted average export price), the US converted such margins to zero (zeroing methodology). It then added all the dumping margins of different models to establish the overall dumping margin. Since the negative dumping margins were not allowed to offset the positive dumping margins of some models, the result was that the final dumping margin was an inflated one. The AB ruled against the zeroing methodology adopted by the US to establish the dumping margin arguing that it was in violation of Article 2.4.2 of the ADA. The AB ruling in this case was in line with its earlier decision in the EC-Bed Linen case.

42 WTO Appellate Body Report, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R of August 11, 2004.

43 India's submission to the Negotiating Group on Rules, TN/RL/W/26 of October 17, 2002.

44 *ibid.*

India⁴³ and the FAN group⁴⁴ of countries have made a proposal to clarify Article 2.4.2 of the ADA to explicitly prohibit the practice of zeroing. In fact, the FAN group has made another proposal for the amendment of Article 2.4.2. These countries have

argued that Article 2.4.2 should explicitly provide that regardless of the basis of comparison of export prices to normal value, all positive and negative dumping margins on the imports from an exporter or a producer of the product subject to investigation must be added up.⁴⁵ The FAN group of countries have gone a step ahead and suggested that the first sentence of Article 2.4.2 should be amended to clarify that the Article applies to all the subsequent anti-dumping reviews also.⁴⁶

Given the submissions made by the developing countries on the use of zeroing, one would have expected that these countries would prohibit the use of zeroing in their domestic anti-dumping laws. However, if one looks at the anti-dumping laws of the South Asian countries, one finds that the amendments that have been proposed in Article 2.4.2 do not find any mention in their domestic anti-dumping laws. Section 12 of the Anti-dumping Ordinance of Pakistan merely reiterates what is given in Article 2.4.2 of the ADA. It does not explicitly prohibit the use of zeroing while establishing the dumping margin. Similarly, Section 11 of the Anti-Dumping and Countervailing Duties Bill of Sri Lanka also reiterates the comparison method given in Article 2.4.2 without explicitly prohibiting the use of zeroing methodology. Some may argue that countries like Pakistan and Sri Lanka have not been affected by the zeroing methodology. Moreover, they have also not made submissions or proposals to prohibit this methodology and hence it should not be expected from them to explicitly prohibit the zeroing methodology. This is not a very tenable argument as the exports of Pakistan and Sri Lanka can also be labelled as ‘dumped’ by the EC or the US by using the zeroing methodology. As discussed above, any number of AB rulings has failed to ensure that countries give up the use of this zeroing methodology. States may give up this methodology due to a particular ruling for a particular product, but to ensure that this methodology is not used in other cases, it is imperative to bring about an amendment in Article 2.4.2. The many rulings by the AB denouncing this practice have strengthened the hands of the developing countries. The demands for such an amendment will gain even more support if the developing countries start amending their domestic laws banning the use of zeroing when they investigate an anti-dumping charge to establish dumping margins.

3.3 Determination of Injury

A critical component of the anti-dumping investigation is to determine whether injury has been caused to the domestic industry, and if yes, then whether there is a causal link between dumping and injury to domestic industry. Article 3 of the ADA contains provisions for determination of injury to domestic industry. There has been a certain ambiguity in the operation of Article 3 of the ADA mainly because it is always difficult to determine whether injury has been caused to domestic industry. It is important to bear in mind the difference between an industry getting affected due to dumping and an industry suffering injury. For instance, if the import of an efficient product leads to the closure of industries that were producing an inferior quality of the product before, then such a closure cannot be called injury although the domestic industry has suffered. Hence, mere distress to an industry or an industry suffering

45 FAN's submission, TN/RL/W/113 of June 6, 2003.

46 *ibid.*

losses due to imported products should not be confused with injury to domestic industry due to dumping. Injury to domestic industry due to dumped imports is a more definitive concept and requires to be supported by substantial economic evidence. This substantial economic evidence is necessary to ensure that there is no misuse of the anti-dumping provisions. However, there have been cases where the injury provisions given in Article 3 of the ADA have been misused by countries to justify the imposition of anti-dumping duties. Therefore, many countries in the ongoing negotiations have sought to clarify its provisions. The discussion below will *inter alia* focus on some issues related to Article 3, the relevant case laws, the proposals made by the South Asian and other developing countries, and the provisions to determine injury in the domestic anti-dumping laws of the South Asian countries.

Article 3.1 states that the determination of injury shall be based on positive evidence and would involve an objective examination of three factors. These factors are as follows:

- (i) volume of dumped imports;
- (ii) effect of dumped imports on prices of like products in the domestic market; and
- (iii) impact of these dumped imports on domestic producers of the like product.

The application of Article 3.1 depends on how terms like ‘positive evidence’ and ‘objective examination’ are interpreted. In *US-Hot Rolled Steel*⁴⁷ case, the AB ruled that ‘positive evidence’ relates to the quality of the evidence that authorities may rely upon in making an injury determination. It also held that the word ‘positive’ implies that the evidence on which injury determination is based is affirmative, objective, credible and of verifiable character. Assessment of these features will vary from case to case and will depend on facts and circumstances of different cases.

In the *Thailand–H-Beams*⁴⁸ case, the panel while interpreting the meaning and scope of ‘positive evidence’ held that an injury determination must be based only upon evidence disclosed by the investigating authorities to the parties to the investigation. In other words, the panel held that the confidential information that the investigating authorities rely upon as evidence does not form part of the ‘objective evidence’ as given in Article 3.1 of the ADA. The AB reversed this finding of the panel and held that Article 3.1 permits an investigating authority making an injury determination to base its determination on all relevant reasoning and facts before it and this includes both non-confidential and confidential information. The AB in this case gave a detailed contextual support for its interpretation by looking at different provisions of the ADA, such as Articles 3.7, 5.2, and also Article 6.

47 WTO Appellate Body Report, United States – Anti-dumping Measures on Certain Hot Rolled Steel Products from Japan, WT/DS184/AB/R of July 24, 2001.

48 WTO Panel Report, Thailand – Anti-dumping Duties on Angles, Shapes, and Sections of Iron or Non Alloy Steel and H-Beams from Poland, WT/DS122/R of September 28, 2000.

The provision of keeping certain information confidential is given in the ADA itself. The various provisions of Article 6 of the ADA allow the investigating authorities to not disclose certain information if it is confidential. Whether any information is confidential or not would depend on various factors as given in Article 6. Hence, the

ADA itself provides for the non-disclosure of certain information on the ground of confidentiality and at the same time also allows such confidential information to be used as evidence in an anti-dumping investigation.

This explains the AB reasoning that if such confidential information can be used as evidence in an anti-dumping investigation, then there is no reason why it cannot be used in determining the injury to domestic industry. Nevertheless, it is worth dwelling a bit on the panel's ruling.

If one looks carefully at anti-dumping cases, one would find that invariably protectionism has been the principal reason for most of the anti-dumping initiations. The protectionist propensities of anti-dumping initiators have received benevolent treatment from the investigating authorities. In the circumstances there are substantial reasons for concern regarding the confidential information provision. In the guise of confidential information and with the intent of helping industries to shield their inefficiency, the investigating authorities may show that there is injury and that anti-dumping duties need to be imposed. The ruling by the AB, in some ways, gives a fillip to classifying the use of facts that cannot be verified as confidential with the intent to use anti-dumping as a protectionist tool. Therefore, it is submitted that as far as possible the determination of injury should be based on evidence that is available to the contesting parties or that can be verified by the contesting parties. Confidential information by its very nature cannot be disclosed and hence cannot be verified by the parties to the investigation. This may give some element of discretion to the investigating country, which may be misused. On the other hand, if the determination of injury is based, as far as possible, only on information that can be verified and ascertained, which would include disclosed information, the scope of misuse will be reduced to a considerable degree. Most of the time, non-confidential information cannot be verified and hence it becomes difficult to find out whether such information is positive evidence or not. If national anti-dumping authorities are authorized to base their determinations on undisclosed evidence, it is difficult for parties to present their views on that evidence or even produce counter evidence.⁴⁹

Another important concept in injury determination given in Article 3.1 of the ADA is 'objective examination'. Article 3.1 imposes an obligation on countries to objectively examine certain economic factors related to the volume of dumped imports and its impact on prices and domestic producers of like product. The AB in the US-Hot Rolled Steel case held that 'objective examination' regarding the volume of dumped imports and its impact in injury determination is concerned with the actual investigative process. The AB held that the obligation of conducting an 'objective examination' while determining whether injury has taken place or not requires that the investigating country or authority makes an objective assessment of the facts at hand, is not biased in favour of any group or party, and adheres to the principle of good faith. Whether an injury examination is objective or not can be determined only after looking at the investigation process. If, for example, the investigating country concludes that injury has taken place without showing how dumped imports have impacted the producers of the like product or affected the prices of the like product in the importing country,

49 Matsushita et al. (2006), p. 421.

then there is a violation of the ‘objective examination’ obligation imposed by Article 3.1. For example, in the US-Hot Rolled Steel case, the AB held that the US practice of evaluating only one part of an affected industry in injury determination could not be called an ‘objective examination’. For an injury determination to be the outcome of an objective examination, it is important that the industry as a whole is examined and not just a part of that industry.

Similarly, the AB has held that the obligation to have objectivity in an injury examination or investigation is something not just required by Article 3.1 but also by Article 3.4 of the ADA. Article 3.4 of the ADA states that the impact of dumped imports on domestic industry shall include the analysis of all relevant economic factors and indices having a bearing on the state of the industry. It supports the argument that the objective examination regarding the determination of injury has to look at the totality of the factors involved. Article 3.4 provides a list of factors that need to be taken into account while determining the impact of dumped imports on domestic industry. An important question that has arisen in many disputes is regarding which factors given in Article 3.4 need to be taken into account while determining the impact of dumped imports. In many cases such as in EC-Bed Linen, Mexico-Corn Syrup⁵⁰, Thailand-H Beams,⁵¹ it has been held that all the factors given in Article 3.4 are mandatory. Hence, all the factors have to be taken into account while making injury determination. In fact, Article 3.4 states that even other factors apart from these 15 factors given in Article 3.4 could be considered. The presence of the word ‘including’ in Article 3.4 makes it clear that the factors mentioned are mandatory but not exhaustive. Indeed, Article 3.4 itself states that the list is not exhaustive. Hence, in certain cases, objective examination of dumped imports may demand evaluating more than the listed 15 factors to determine whether injury is taking place or not.

In this regard, countries like India, in the ongoing negotiations, are demanding that the mandatory injury parameters used to make an assessment of the impact of dumped imports on the domestic producers of the like product should be further elaborated.⁵² India in its submission has argued that out of the 15 factors, some have been loosely defined and their meaning and application is not very clear. For instance, one factor is ‘productivity’. According to India, the meaning of ‘productivity’ is not very clear here. It is not clear whether ‘productivity’ is to be measured in terms of per unit employee or per unit investment.⁵³

However, it is interesting to note that while India is asking for clarifications in the provisions relating to injury determination, it has, however, a very poor record of injury assessment at the domestic level. It has been argued that the manner in which anti-dumping cases are handled in India reflects a complete lack of transparency as in most of the anti-dumping investigations there is no proper and adequate dissemination of information to all interested parties.⁵⁴ All important facts are subsumed under the so-called ‘confidentiality’ clause.⁵⁵ Similarly, the Indian anti-dumping law and anti-dumping investigation also suffers from lack of objectivity in injury analysis; the clarity regarding injury provisions is also missing, although there has been a qualitative improvement in the recent past.⁵⁶

50 WTO Panel Report, Mexico – Anti-dumping Investigation of High Fructose Corn Syrup (HCF) from the United States, WT/DS132/R of January 28, 2001.

51 Appellate Body Report, Thailand – H Beams, WT/DS122/AB/R.

52 India’s submission, TN/RL/W/26 of October 17, 2002.

53 *ibid.*

54 Kumaran (2005).

55 *ibid.*

56 *ibid.*

As has been discussed above, it is important for countries like India to start making those changes in their domestic law that they propose or demand in the WTO. The Indian anti-dumping law could elaborate on the injury parameters by bringing in more objective factors where dumping would lead to material injury to domestic industry. For example, an objective examination includes assessing the impact of dumping on the overall industry and not just on one part or segment of the industry (taking a clue from the US-Hot Rolled Steel case).

3.4 Causation

In an injury determination process, one of the most important exercises is to establish a causal link between the dumped imports and injury to domestic industry. If the injury to domestic industry is not due to dumped imports but due to other factors, then anti-dumping duties cannot be imposed. Article 3.5 of the ADA puts an obligation on the investigating country to demonstrate that dumped imports are causing injury to domestic industry. Article 3.5 also imposes an obligation on the investigating country to examine and find out all the factors that are affecting the domestic industry (causing injury to domestic industry). There may be certain factors apart from dumped imports that may be causing injury to domestic industry. The onus is on the investigating country to differentiate these other factors from the dumped imports that may be affecting the domestic industry. The purpose of this differentiation is to find out the actual reason behind injury to domestic industry; whether it is dumped imports or 'any known factors other than dumped imports' such as contraction of demand or changes in patterns of consumption.⁵⁷

A few disputes that have come to the panels and the AB have highlighted the ambiguity surrounding the phrase 'any known factors other than dumped imports' occurring in Article 3.5 of the ADA. In Thailand-H Beams case,⁵⁸ the panel held that known factors other than dumped imports would include factors that are raised by the interested parties to the dispute before the investigating authorities. In other words, if one of the interested parties does not raise a particular factor it will not become a 'known factor' under Article 3.5. The investigating country or the authority need not determine any 'known factor' on its own. This ruling of the panel was not reviewed by the AB. However, it is submitted that this ruling goes against the jurisprudence on anti-dumping that endeavours to bring in fairness and transparency in the conduct of anti-dumping investigations.

Article 3.5 puts an obligation on the investigating country or authority to demonstrate the causal link between dumped imports and injury. As regards causality, this is a broader obligation. Within this broader obligation is the narrower obligation that requires the investigating country to find out the reasons for injury to domestic industry. These reasons, as discussed above, could be of two types. One reason is the presence of dumped imports and the other reason is non dumped imports or factors other than dumped imports. It should be the obligation of the investigating country to consider both the possibilities. To only examine those factors that are raised by the interested parties implies that the investigating country is not fulfilling its obligation

⁵⁷ See Article 3.5 of the ADA.

⁵⁸ WTO Panel Report, Thailand – Anti-dumping Duties on Angles, Shapes, and Sections of Iron or Non Alloy Steel and H-Beams from Poland, WT/DS122/R of September 28, 2000.

of establishing all the factors responsible for the material injury. There may be certain factors other than dumped imports that may not be raised by the interested parties because they may not be aware of these. In such a scenario, it should be the obligation of the investigating country to raise the concerned factor. If such a factor is not discovered then one of the reasons for injury to domestic industry may go unnoticed and hence result in an erroneous injury determination.

Article 3.5 also lists certain factors that may be important as factors other than dumped imports. These factors are volume and prices of imports not sold at dumped prices, contraction in demand, changes in patterns of consumption, trade restrictive practices, and competition between foreign and domestic products. The analysis of these factors should be mandatory. Hence, the investigating country or the authority should be under an obligation to at least look at these factors and find out whether they are responsible for causing injury to the domestic industry. It should also be under an obligation to look at any other factor responsible for causing injury to the domestic industry.

The AB held in the US-Hot Rolled Steel⁵⁹ case that in order to assess the reasons behind dumping the investigating country or the authority should be able to distinguish the effect of the dumped imports and the other known factors causing injury to domestic industry. In the absence of such a differentiation, the actual reasons in instances of dumping will never be known and hence it will not be established whether there is a causal link between dumped imports and injury to domestic industry.

Another case where the issue of causation came up was the Brazil Iron Tube case.⁶⁰ In this dispute, the AB admitted that the ADA contained the following three ambiguities:

- (i) The ADA is silent on how a causal factor other than dumped imports becomes 'known' or 'should become known' to an investigating authority undertaking determination of injury.
- (ii) The ADA also does not state how a country should raise a factor to make it 'known'.
- (iii) The ADA does not define the degree to which a factor must be unrelated to the dumped imports to not to qualify as the other factor.⁶¹

In this dispute, the AB held that the non attribution obligation, that is the obligation on the investigating country to distinguish dumped imports from the other factors causing injury to domestic industry, does not imply that the investigating country has to analyse the collective impact of the non-dumped factors on the industry. In other words, the investigating country would have fulfilled its obligation under Article 3.5 if it distinguishes between the dumped imports and non-dumped factors. The investigating country is not required to find out the collective impact of these non-dumped factors. Hence, if the investigating country has identified three non-dumped factors plaguing domestic industry and has carried out the analysis for each of these factors

59 WTO Appellate Body Report, United States – Anti-dumping Measures on Certain Hot Rolled Steel Products from Japan, WT/DS184/AB/R of July 24, 2001.

60 WTO Appellate Body Report, European Communities – Anti Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/AB/R of July 22, 2003.

61 For more on this, see Bhalla (2001).

in their individual capacity of how they cause injury to domestic industry, then it does not need to do a collective analysis of all these three factors.

This would appear to be an erroneous interpretation of Article 3.5. The obligation under Article 3.5 is to distinguish the dumped imports from the non-dumped factors, and the purpose of doing so is to find out the real cause of injury to domestic industry. The logical step in fulfilling this obligation is to assess the non-dumped factors collectively and find out their collective impact on domestic industry. For instance, if three non-dumped factors have been identified, then it is possible that individually they may not be causing injury to domestic industry, but collectively they may cause such an injury. In the former case, the investigating authority will link injury to dumped imports, but the reality will be different and will be known only when the collective impact is analysed and examined. Hence, in the absence of collective assessment, many injuries would be linked to dumped imports, which in reality may not be due to the dumped imports but due to non-dumped factors.

Many countries including India⁶² and the FAN⁶³ group have made submissions in the ongoing negotiations on further elaborating Article 3.5 so that investigating authorities have proper guidance while distinguishing other factors from dumped imports for causing injurious effects to domestic industry. These countries have also argued for the need to specify an appropriate standard for establishing causality between dumped imports and material injury to domestic industry.

The Indian anti-dumping law does not provide clear provisions regarding causation. In many cases, the moment injury and dumping are shown, causation is presumed. The Indian anti-dumping investigating authorities have also failed in fulfilling their obligations under Article 3.4 and Article 3.5.⁶⁴ This is notwithstanding India's strong demand for amending the ADA so as to have more elaborate provisions regarding the mandatory factors that need to be examined for injury determination or to have stricter provisions regarding non-attribution as given in Article 3.5 of the ADA .

3.5 Back-to-back Initiations

Another important submission that India has made is to stop back-to-back initiation of anti-dumping duties. India has argued that an anti-dumping investigating authority shall not initiate an anti-dumping investigation where an investigation on the same product or a broader category of another product from a particular country resulted in a negative finding within 365 days prior to the filing of the petition seeking initiation of a new investigation.⁶⁵ In other words, India's submission is that there should be at least a one-year moratorium for the investigating agency to initiate an anti-dumping investigation if in the earlier investigation it had been held that no dumping was taking place or even if there was dumping, there was no injury to domestic industry or no causation. This is an important feature of the ADA, as it has often been seen that countries endeavour to initiate anti-dumping proceedings simply to harass the other country. Moreover, if a particular anti-dumping initiation has resulted in a negative finding proving that either there is no dumping or even if there is dumping, no injury

62 India's submission, TN/RL/W/26 of October 17, 2002.

63 FAN group of countries submission, TN/RL/W/6 of April 26, 2002.

64 See Kumaran (2005).

65 India's submission TN/RL/W/26 of October 17, 2002.

has been caused to domestic industry or even if there is injury there is no causal link, then there is no reason to believe that things would change within one year to justify the launch of a fresh anti-dumping initiation against the same product or the same group/category of products. Back-to-back initiations have become a very useful harassment tool for many producers. Many producers, knowing very well that their application for imposition of anti-dumping duties will not be successful, still make such applications to cause harassment to their competitors in other countries, as launch of any anti-dumping investigation means that the investigation will go on for 15–18 months, the producer who is being investigated will have to produce all kinds of data, etc., which in turn means imposing additional costs on his business.

China has also argued that a new paragraph to Article 5 of the ADA be added to explicitly provide that the investigating authorities shall not initiate an anti-dumping investigation where an investigation of the same product on the same country has resulted in a negative finding till 365 days are over.⁶⁶

3.6 Thresholds

The ADA provides certain de minimis levels for an anti-dumping investigation to be launched. These de minimis levels imply that in cases where the volume of dumped imports or injury is negligible, no anti-dumping investigation will be launched. According to Article 5.8 of the ADA, the margin of dumping shall be considered to be de minimis if it is less than 2% of the export price. Similarly, the margin will be considered to be de minimis if the volume of dumped imports from a particular country constitutes less than 3% of the total volume of dumped imports.

The intent behind having de minimis levels is that when the dumping margin is so negligible that it will not cause any injury to domestic industry, there should not be any need to impose an anti-dumping duty. However, many countries have argued that the de minimis levels given in Article 5.8 are too small. Even if the dumping margins are more than 2% or 3% as given above, the possibility of injury to domestic industry is very rare. At the time of launching the anti-dumping investigation, the investigating country knows that this investigation will not succeed because the dumping margin is very small and hence there cannot be injury. However, such anti-dumping investigations could serve the purpose of causing harassment and affect the trade interest of many exporters/producers. Hence, many countries have argued that these margins should be revised upwards so that frivolous anti-dumping investigations that are only intended to harass are kept out.⁶⁷

India and China have proposed that the present 2% de minimis margin be raised to 5% for imports from the developing countries. Similarly, India has also argued that the de minimis dumping margin for volume of imports should also be increased from the present 3% to 5% for imports from the developing countries. India has also proposed that the present arrangement given in Article 5.8, that provides for action to be taken against countries whose individual volume of imports is less than 3% but collective volume is more than 7% of total imports, be deleted.⁶⁸ If these amendments

66 China's submission, TN/RL/W/66 of March 6, 2003.

67 The submissions on this have been made by China, India and also the FAN group of countries.

68 India's submission, TN/RL/W/4 of April 25, 2002.

are made then the use of anti-dumping measures for harassment purposes could be checked to some extent. In fact, the de minimis margins should also be used in the review cases, which is not the practice so far especially in the case of the EC.⁶⁹ Hence, the ADA should make it clear that the de minimis margin will also apply to the review cases.⁷⁰

The other important point to note is that the revision of the de minimis margins has been demanded only for the developing countries. In other words, the developed countries would continue to have 2% and 3% as the de minimis margins and developing countries can initiate anti-dumping investigation on imports from the developed countries. There are two ways of looking at this differentiation that has been proposed between the developed and developing countries. One is that such a difference is warranted by virtue of the special and differential treatment. The other view is that some countries like India that are among the biggest users of anti-dumping duties, do not want the pace at which anti-dumping investigations against imports of the developed countries are launched to be affected. It, therefore, does not support revisions of anti-dumping duties for the developed countries. The second opinion cannot be dismissed completely given the track record of India vis-a-vis the use of anti-dumping measures. It is also important to note that the FAN group of countries has not made a proposal to revise the dumping margins only for the developing countries. Hence, the anti-dumping laws of the South Asian countries state the same de minimis margins as given in the ADA. Section 54 (3) (a) and (b) of the Anti-Dumping and Countervailing Duties Bill of Sri Lanka gives 2% (expressed as a percentage of price) and 3% (volume) as the de minimis margins. Similarly, Section 41 of the AD ordinance of Pakistan also gives the same de minimis margins although it does not mention the word de minimis. The Pakistani AD law states that dumping margins below 2% and 3% as described in Article 5.8 would be considered negligible and no anti-dumping investigation will be launched. Similar is the case with the Indian anti-dumping law.

It is submitted that countries like India should amend the domestic anti-dumping laws and allow for de minimis margins of 5% as they have proposed in the ongoing negotiations. In case this is not possible, then they should at least amend their laws to allow for a higher de minimis margin for the developing countries although the possibility of such a provision being challenged on violation of the MFN principle cannot be ruled out completely.

3.7 Public Interest

One of the most contentious issues in anti-dumping is the issue of public interest. It is often argued that anti-dumping laws do not take into account the public interest dimension. What is public interest is a moot issue.⁷¹ However, for our purpose we can assume that public interest in anti-dumping should imply the involvement of all the stakeholders who get affected by dumping. In other words, when a particular country dumps a particular product into another country, then this affects not just the industry of the country where dumping is taking place but also the consumers of that country. These consumers could be the general public or the industrial users. So,

69 Didier (2001).

70 *ibid.*

71 For example, a paper by Canada on public interest (TN/RL/GEN/85 of November 17, 2005) discusses whether imposing anti-dumping duty to the full margin is in public interest or not.

a particular dumping may cause injury to domestic industry, but may enable consumers to buy products at cheap rates. However, while calculating anti-dumping duties what is examined is only the impact on the industry and not on consumers (general public or industrial users). Hence, the entire approach to assessing anti-dumping is very one-dimensional.

This can be gauged from two things in the ADA. First, the conditions for imposing anti-dumping duties require injury to domestic industry. It does not require assessing the impact of dumping on consumers. Hence, the focus is only on injury to industry. Changing this is beyond the mandate of the ongoing Doha round of negotiations. The present mandate is to preserve the basic concepts and definitions regarding dumping.

Second, in an anti-dumping investigation, the participation of consumer organizations and industrial users is limited. For instance, the mandatory list of ‘interested parties’ in an anti-dumping investigation as given in Article 6.11 of the ADA does not include consumer organizations or industrial users. However, Article 6.11 also gives the discretion to the Member countries of the WTO to include any other body or relevant person in the list of interested parties. But, it is not mandatory for countries to have consumer organizations as ‘interested parties’ although it is mandatory for them to have domestic industry producing the like product as interested parties.⁷² Since most of the anti-dumping cases are for protectionist purposes, countries do not make consumer organizations or industrial users interested parties in the anti-dumping investigation process.

The advantage of becoming an ‘interested party’ in an anti-dumping investigation is that the investigating agency provides all the information to the ‘interested parties’. Hence, if a consumer organization is not an ‘interested party’, it will never come to know about the details of an anti-dumping investigation.

To be sure, Article 6.12 of the ADA provides that investigating authorities are under an obligation to provide opportunities to consumer organizations and industrial users to represent their case. However, the investigating authorities are not under any obligation to implement whatever is said by consumer organizations or industrial users, nor are they under any obligation to share information regarding the anti-dumping investigation with them.

The fault in not making the consumer organizations or industrial users ‘interested parties’ in an anti-dumping investigation does not lie as much with the ADA as it does with individual Member countries. The ADA gives the discretion to Member countries to include consumer organizations or industrial users or anybody else in the list of ‘interested parties’. If the countries do not take advantage of this provision then the fault lies with the countries. A look at the anti-dumping laws of the South Asian countries will illustrate this point. Section 2 (j) of the Anti-dumping Ordinance of Pakistan gives the definition of ‘interested parties’. This section states that ‘interested parties’ includes exporters, importers, producers of the product concerned or like product and the respective governments. It does not include consumer organizations or in-

72 Article 6.11 of the ADA.

dustrial users in the list. However, since the definition of ‘interested parties’ uses the word ‘includes’, it implies that the list given in the Pakistani anti-dumping law is not exhaustive. Moreover, item vii in section 2 (j) gives the discretion to the anti-dumping authorities to include any other person in the list of ‘interested parties’. However, the moot issue is that why does the Pakistani anti-dumping law not explicitly state that consumer organizations and industrial users are also ‘interested parties’ just like the producers, exporters or importers of the product concerned or like product. Similar, is the case with the Indian anti-dumping law.

In the case of the Sri Lankan anti-dumping bill, ‘interested parties’ is an exhaustive list. Section 84 of the Anti-Dumping and Countervailing Duties Bill states that ‘interested parties’ means traders, business associations or organizations and the government of the countries. There is no mention of consumers in this section. The use of the word ‘means’ implies that the list is exhaustive and it does not cover consumer organizations or industrial users. Hence, the Sri Lankan anti-dumping law does not even give the discretion to the anti-dumping investigating authorities to include consumer organizations or industrial users in the list of ‘interested parties’.

It is submitted that the South Asian countries should amend their respective anti-dumping laws to include consumer organizations and industrial users in the list of ‘interested parties’. This would bring in substantive fairness in the anti-dumping investigations. The FAN group of countries has made a proposal to the effect of taking into account the industrial users and consumer organizations in the definition of ‘interested parties’ in the ADA.

3.8 Lesser Duty Rule

One of the core issues in an anti-dumping investigation – once it is determined that dumping is taking place and this dumping is directly responsible for injury to domestic industry – is to determine the quantum of anti-dumping duty. The quantum of anti-dumping duty that can be imposed should not be more than the dumping margin. In other words, the quantum of anti-dumping duty should not be more than the difference between the export price and the normal value. Article 9.1 of the ADA states that the quantum of anti-dumping duty that a country can impose is equivalent to the full dumping margin or is less than that. Therefore, a country cannot impose an anti-dumping duty that is more than the dumping margin although it can impose a lesser duty. In fact, Article 9.1 itself states that it is desirable for countries to impose a lesser duty, that is duty less than the dumping margin, if such duty is good enough to remedy the injury caused to domestic industry. However, it is not mandatory for countries to impose this lesser duty.

India has made a submission arguing that the lesser duty rule should be made mandatory. In other words, countries should impose duties less than the full dumping margin in order to rectify the injury to domestic industry. Here again what surfaces is the contrast between the demand or the proposal in the WTO and the anti-dumping laws of the South Asian countries. India, which wants a mandatory lesser duty rule in the

WTO, does not have a mandatory lesser duty rule in its domestic anti-dumping law. Section 9 A of the Customs Tariff Act of 1975 gives the power to the Central government to impose an anti-dumping duty not exceeding the dumping margin. In other words, the Indian anti-dumping authorities can impose anti-dumping duties up to the full dumping margin. However, the Indian anti-dumping law just like the ADA also gives the discretion to the Central government to impose duty less than the dumping margin. The precise words in Section 9A are 'impose anti-dumping duty not exceeding dumping margin'. So, if the investigating authorities want they can impose duty less than the dumping margin. However, the Pakistani anti-dumping law does not give any discretion to the investigating authorities. Section 50 of the Anti-Dumping Ordinance puts an obligation on the National Tariff Commission of Pakistan to impose an anti-dumping duty equivalent to the amount of dumping margin. So, in the case of Pakistan, the anti-dumping duty has to be equal to the dumping margin and cannot be less than the dumping margin, as the ADA or the Indian law states.

In this regard, the anti-dumping law of Sri Lanka is the most advanced. Section 38 (4) of the Sri Lankan Anti-Dumping and Countervailing Duties Bill states that the investigating authorities shall examine whether less than full dumping margin is sufficient to remedy the injury caused to the domestic industry. If such a duty is sufficient then the duty, that is duty less than the full dumping margin, will be imposed. Hence, the Sri Lankan law is clearer vis-à-vis the lesser duty rule as compared to the Indian or the Pakistani law. The South Asian countries should make the lesser duty rule mandatory in their domestic anti-dumping laws.

4. Conclusion

There are many flaws in the ADA and it is foolhardy to think that all the flaws in the Agreement would be corrected in one attempt. There is a very strong lobby of states that wants to retain the anti-dumping law in its present form, especially the US. However, the South Asian countries like India have made many submissions in order to discipline the use of anti-dumping measures that have been highlighted in this paper. Some of these submissions are an attempt to convert the case law on the ADA into permanent amendments, whereas others are reflections of the lacunae that exist in the Agreement. This paper has attempted to analyse these proposals. An interesting thing that emerges is that none of the South Asian countries have been able to put their own house in order, and this can especially be said about India. All these countries do not practise what they seem to propose at the multilateral level. The paper has argued that the South Asian countries, especially India, should amend their domestic anti-dumping laws in order to incorporate the changes that they are advocating. One may wonder why India or other South Asian countries should unilaterally bring about these changes in their anti-dumping laws. India, or for that matter any other country, is not under any obligation to implement what it is proposing in the negotiations. However, the issue here is that you cannot be seen to be doing something in complete contrast

to what you demand. There has to be some sort of link, if not complete harmony, between your actions and words. India has the dubious distinction of being one of the most prolific users of the anti-dumping instrument (at times even the highest user), notwithstanding the fact that its share in the world trade in goods is well below 1%. Hence, India certainly dents its credibility when it asks for changes in the ADA or expects the US or the EC to bring about changes in their anti-dumping laws. This is not to suggest that as a policy a country should always first implement what it is demanding or proposing in trade negotiations. However, in the case of anti-dumping, the South Asian countries especially India could consider doing this since there seems to be a big gap between what these countries are doing and what they are proposing. Further, the paper has also cited studies which have shown that in India anti-dumping seems to have been used as a protectionist device and has harmed the interests of Indian industry. Hence, it is imperative to ensure that anti-dumping as an instrument is not used for protectionist purposes at home. Given the context and the mandate of this paper, it has reiterated some of the demands that the South Asian countries have made in the ongoing negotiations, supporting it by the relevant case law. Some of these demands include prohibiting the use of zeroing methodology, making the lesser duty rule mandatory, and revising the de minimis margins in the anti-dumping investigations. Apart from this, the paper has also assessed the issue of public interest in anti-dumping from the angle of consumer participation in the anti-dumping proceedings. The paper argues that consumer organizations and industrial users should be made 'interested parties' in the anti-dumping investigations.

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