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ISSN: 2582-6433

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AGREEMENT ON DUMPING AND ANTI-DUMPING DUTIES – ISSUES OF LAW

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ABSTRACT

Adam Smith's counsel, as stipulated in his renowned economic doctrine, advises against producing at home what costs more to make than to purchase. This fundamental principle, often referred to as the concept of Comparative Cost Advantage, underpins the intricate landscape of international trade in the contemporary world. The regulations governing this international trade are encapsulated in the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). This discourse delves into a particularly intriguing aspect of the GATT Treaty Agreement of 1994, specifically Article VI, also known as the Agreement on Anti-Dumping. Article VI, within the GATT framework, is the focal point of Anti-Dumping Laws. To fully appreciate the necessity and significance of this article, it is imperative to first explore the rationale behind this study. With the evolving dynamics of international trade, it is evident that developing nations like India are deeming a more prominent role on the global stage. Consequently, there has been a surge in the use of Anti-Dumping measures, both by India against foreign companies and vice versa. This necessitates a comprehensive understanding of the development, applicability, and scope of Anti-Dumping Laws in today's international trade landscape.

ISSN: 2582-6433

The General Agreement on Tariffs and Trade of 1994 (GATT 1994) enunciates fundamental trade principles among World Trade Organization (WTO) member countries, most notably the "most favored nation" principle. It mandates that imported goods should not incur internal taxes or modifications exceeding those applied to domestic products. Furthermore, it obliges that imported goods receive treatment no less favorable than domestically produced items under national laws and regulations. Additionally, the GATT 1994 establishes regulations pertaining to quantitative limitations, import-related fees, formalities, and customs valuation. Moreover, WTO members have concurred on the creation of schedules containing fixed tariff rates. Conversely, Article VI of GATT 1994 expressly grants the authority to levy specific anti-dumping duties on imports from specific sources, surpassing the bound rates, if such imports threaten domestic industries or impede their establishment.

Key Words: Anti-Dumping, GATT, WTO, Comparative Cost Advantage, International Trade.

CONCEPTUAL FRAMEWORK

The research paper examines the complex landscape of international trade with a focus on the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), specifically delving into the intriguing aspects of the GATT Treaty Agreement of 1994, particularly Article VI, known as the Agreement on Anti-Dumping. The primary objective of this study is to understand the development, applicability, and scope of Anti-Dumping Laws in the context of evolving dynamics in international trade.

The conceptual framework is rooted in Adam Smith's concept of Comparative Cost Advantage, emphasizing the importance of not producing at home what costs more than purchasing. It explores how Anti-Dumping measures have become more prominent, particularly in developing nations like India, and how they impact international trade.

The paper also highlights key legal frameworks governing Anti-Dumping, emphasizing the role of GATT 1994, the Customs Tariff Act of 1975, and various rules and regulations. It outlines the principles for determining dumping, injury, and causation and addresses issues in the current anti-dumping regulations.

ISSN: 2582-6433

The research paper concludes with suggestions and recommendations for potential reforms in anti-dumping laws and emphasizes the need to align the agreement's provisions with its core principles. Overall, the research paper offers a comprehensive examination of the complex world of Anti-Dumping Laws, shedding light on their implications and potential areas for improvement in the realm of international trade.

LEGAL FRAMEWORK

The foundation underpinning anti-dumping inquiries and the imposition of its tariffs lies within the framework of international trade regulations.:

- Based on Article VI of GATT, 1994
- Customs Tariff Act, 1975- Sec 9A, 9B (as amended in 1995)
- Customs Tariff (Identification, Assessment and Collection of Dumped Articles and for Determination of Injury) Rules, 1995
- Investigations and Recommendations by Designated Authority, Ministry of Commerce
- Imposition and Collection by Ministry of Finance

Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 articulates a set of fundamental principles that must be adhered to by member nations when implementing anti-dumping duties, countervailing duties, and safeguard measures. In consonance with GATT 1994, comprehensive guidelines have been delineated within specific agreements. These guidelines have been subsequently integrated into the domestic legislative frameworks of member countries associated with the World Trade Organization (WTO). India, in alignment with these international obligations, enacted legislative modifications on January 1, 1995, to ensure compliance with the GATT agreements.

The Normal Value, as stipulated by the Act, represents the standard market price for the contested goods within the exporting country's domestic market. In cases where establishing the Normal Value through domestic sales is unfeasible, the Act offers two alternative methods for determination:

- A comparable export price to a suitable third-country representative.
- The cost of production in the country of origin, with a reasonable allowance for

ISSN: 2582-6433

administrative, selling, general expenses, and profit.

The 'Export Price' could either be:

- The initial cost incurred for the goods by the initial unaffiliated purchaser.
- The cost of the imported items being sold to an unrelated buyer.
- A price is established using a fair and rational approach.

The term 'Margin of Dumping' is typically presented as a percentage of the Export Price. It signifies the disparity between the Normal Value of a similar item and the Export Price of the product being evaluated. This calculation is generally determined based on a specific methodology, which is pivotal in trade and anti-dumping investigations:

- Analyze the weighted average Normal Value by contrasting it with the weighted average of prices from comparable export transactions.(or)
- Assess Normal Values and Export Prices on a transaction-by-transaction basis for a comprehensive evaluation.[1]

Factors affecting the Normal Value and Export Price when making a comparison

In order to achieve a fair assessment of the Export Price in relation to the Normal Value of goods, it is essential that these assessments are conducted on a consistent trade basis, usually at the ex-factory level, and with a minimal time deviation for the most accurate evaluation. This entails taking into account a range of factors, among which are differences that might impact the comparability of prices between a domestic sale and an export sale.

These factors encompass, among other considerations, the following:

- Physical characteristics

Levels of trade

- Quantities

[1] 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, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R.l, para. 7.35.

ISSN: 2582-6433

- Taxation
- Conditions & terms of sale

It is imperative to emphasize that the factors mentioned above serve as mere indicators. The Authority takes into consideration any aspect that can be substantiated to impact price comparability. It is essential to underline that anti-dumping measures are applicable exclusively when an Indian industry manufactures products akin to the imported goods allegedly subjected to dumping.[2]

In India, a manufactured product must either match the dumped goods precisely or, if an exact match is unavailable, closely resemble those goods in terms of their defining attributes.

DETERMINATION OF DUMPING

The Indian industry is obligated to substantiate that the influx of dumped imports is either causing or posing a significant threat to the Indian domestic sector. Furthermore, any substantial hindrance to the establishment of an enterprise is also recognized as a form of injury. It is essential to underscore that demonstrating material damage or its potential cannot rely on unsubstantiated claims, mere statements, or conjecture. Adequate evidence must be presented to substantiate the assertion of material injury.[3]

Typically, 'Material Injury' is determined by the authorities by examining the following:

- Import Quantity: Analyzing the substantial volume of imported goods that have been dumped into our market, evaluating their sheer quantity and origin.
- Price Disruption: Investigating how these dumped imports influence the pricing dynamics of similar domestic products, assessing any noteworthy price fluctuations and their impact on consumers.
- Producer Welfare: Scrutinizing the consequent effects of these imports on domestic producers, including their ability to compete, maintain quality, and sustain business operations.

[2] Panel Report, United States – Anti-Dumping and Countervailing Measures on Steel Plate from India, WT/DS206/R and Corr.1, adopted 29 July 2002, paras 6.93-6.94.

[3] 3 In order to calculate the dumping margin, most countries divide the dumping amount by the CIF export price because any anti-dumping duties imposed will be levied at the CIF level.

ISSN: 2582-6433

A "Causal Link" represents a crucial element in establishing a relationship between the detrimental impact on the domestic industry and the protective measures employed against injury arising from imported goods. It is imperative to determine the existence of this link between the harm experienced by the Indian industry and the influx of dumped imports.

To ascertain this connection, the authority meticulously assesses the quantity of dumped imports, taking into account the extent of any substantial increase in their volume, both in absolute terms and concerning production or consumption within India. This thorough examination serves the purpose of ascertaining whether the injury sustained by the domestic industry can be attributed to the "Volume Effect" resulting from these dumped imports. In essence, it is essential to discern the precise cause-and-effect relationship between import levels and the injury incurred by the domestic industry to make informed decisions regarding protective measures.[4]

LAWS OF ANTI-DUMPING IN INDIA

Upon comprehending the overarching structure of the WTO code and the Anti-Dumping Agreement, it is imperative to delve into the legal framework governing Anti-Dumping measures in India. The genesis of Indian Anti-Dumping legislation can be traced back to the year 1985, with the introduction of the Customs Tariff (Identification, Assessment, and Collection of duty or Additional duty on Dumped Articles and for Determination of Injury) Rules, 1985. Subsequently, the anti-dumping laws in India have evolved to encompass a comprehensive set of regulations and procedures that define the nation's stance on addressing unfair trade practices:

- In accordance with Article VI of GATT 1994, commonly referred to as the Agreement on Anti-Dumping, anti-dumping measures are established.
- The legal foundation for anti-dumping in India is the Customs Tariff Act of 1975, specifically Section 9A and 9B, as amended in 1995.
- Detailed procedures and guidelines for anti-dumping are laid out in the Anti-Dumping Rules, specifically the Customs Tariff (Identification, Assessment, and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules of 1995.
- Investigations and recommendations pertinent to anti-dumping matters are conducted by

[4] Oxford Analytica, June 17, 1993.

ISSN: 2582-6433

the Designated Authority under the Ministry of Commerce.

- The imposition and collection of anti-dumping duties are carried out by the Ministry of Finance, as stipulated by established regulations.

ISSUES

Are the measures designed to address unfair competitive advantages resulting from government policies that distort the market in achieving their intended objectives effectively? Or are they often falling short of their goals? A significant disparity exists between the practical application of anti-dumping regulations and their intended purpose. The fundamental aim of anti-dumping rules is to establish trade barriers in response to market distortions. Nevertheless, they struggle to differentiate adequately between market distortions and legitimate, healthy competition. Consequently, foreign competitors often find themselves penalized for engaging in accepted trade practices. This disconnect between the fundamental principles and objectives of the anti-dumping agreement and its implementation is striking. As negotiations progress, it is anticipated that many nations will prioritize reforms in the realm of anti-dumping measures.[5]

The ongoing anti-dumping negotiations hold significant importance for the overall outcome of the round. One fundamental issue lies in the inadequacy of anti-dumping regulations to confine the use of anti-dumping measures strictly to cases that fall within the established definition of unfair trade. This discrepancy underscores a disparity between the fundamental tenets, principles, and aims of anti-dumping agreements and the prevailing operational practices. Thus, the primary objective of the WTO negotiations should be the rectification of this disparity by amending the agreement's provisions, aligning them with its core principles.[6]

Substantial resistance to reforming the anti-dumping agreement within the World Trade Organization (WTO) primarily emanates from political leadership and administrative bodies, each motivated by vested interests. The opposition is prominently voiced by governments of countries that habitually employ anti-dumping measures, with notable stalwarts including the United States, the European Union, Canada, and Australia. Notably, some new entrants into this

[5] THE HINDU (June 15, 2007).
[6] Jorge Miranda, *Should antidumping laws be dumped?* 28 LAW AND POLICY IN INTERNATIONAL BUSINESS 56 (1956).

ISSN: 2582-6433

group, such as India, Argentina, Indonesia, Brazil, and South Africa, have also emerged as opposing voices against the proposed reforms.[7]

The Doha declaration grants authorization for negotiations aimed at amending the current Anti-dumping Agreement, with a crucial emphasis on retaining the Agreement's fundamental concepts, principles, and efficacy. To maintain adherence to the prescribed scope of these negotiations, the involved parties must establish a clear understanding of the underlying concepts, principles, and objectives from the outset.[8]

The imperative overhaul of the existing anti-dumping legislation necessitates an examination of its core issues. In this regard, the current anti-dumping investigations carried out by importing countries' authorities exhibit significant deficiencies. These deficiencies have created a notable disconnect between the stated objectives of anti-dumping policies and their practical outcomes.[9] In the initial phase, it is imperative to elucidate the fundamental concepts, principles, and objectives integral to the anti-dumping agreement. Regrettably, previous negotiations within the framework of the GATT/WTO have predominantly overlooked the necessity to establish a consensus regarding the rationale behind national anti-dumping laws and their intended purposes. This oversight could potentially lead to an impasse that jeopardizes the entirety of trade discussions. In contrast, in numerous other sectors, such as agriculture and services, negotiating parties have made substantial headway by reaching agreements on core principles. However, the anti-dumping agreement conspicuously remains silent on these essential aspects. While it does set out standards governing the conduct of anti-dumping investigations and the application of remedies, it notably omits any discussion on the underlying problem it aims to address—namely, the issue of dumping itself. The agreement adeptly defines the solution but fails to articulate the problem it ostensibly seeks to resolve.[10]

Initiating WTO antidumping negotiations should commence with an essential step, namely, the definition of fundamental concepts, principles, and objectives as outlined in the Agreement.

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7 Michael O. Moore, "Antidumping reform in the WTO: A pessimistic appraisal", vol 12 (3) Pacific Economic Review, page 357 (2007).

8 *Id*.

9 Saneep Chauhan, GATT TO WTO (2001).

10 Robert W. McGee, "Some thoughts on anti-dumping laws: utilitarianism, human rights and the case for repeal", vol. 96 (5), European Business Review, page 27 (1996).

ISSN: 2582-6433

Remarkably, prior WTO and GATT negotiations have overlooked this critical task. This omission, perhaps, stems from antidumping's historical precedence over the multilateral trading system, with anti-dumping laws taking root in the early 20th century. Consequently, addressing this historical oversight becomes imperative to ensure the efficacy of contemporary trade negotiations.[11]

SUGGESTIONS AND RECOMMENDATIONS

Listed below are several recommendations to address concerns related to Anti-Dumping Laws:

- Require evidence of market distortions
- Eliminate the cost test
- Revise criteria for the use of constructed value
- Eliminate the use of third-country sales in calculating normal value
- Prohibit zeroing
- Eliminate asymmetric treatment of indirect selling expenses
- Revise the arm's-length test
- Special consideration for off-quality or secondary merchandise
- Tighten standards on the causation of injury
- Change criteria of negligibility
- Need for stringent initiation standards

CONCLUSION

Under the provisions outlined in the General Agreement on Tariffs and Trade (GATT), national authorities are prohibited from imposing duties that exceed the Margin of Dumping. However, it is advisable for the relevant government authorities to consider imposing a duty that is lower but sufficient to alleviate the harm inflicted on the domestic industry. In accordance with Indian laws, the government is mandated to confine the anti-dumping duty to the lower of the two factors, namely, the dumping margin and the injury margin.

The 'Injury Margin' is defined as the disparity between the fair selling price and the landed cost

[11] Rajendra K Gupta, *WTO and implications for India Economy – A Review* (2005) available on http://www.indianmba.com/Faculty_Column/FC218/fc218.html

ISSN: 2582-6433

of the product under evaluation. The calculation of the landed cost for determining the Injury Margin takes into account the assessable value under the Customs Act and the basic customs duties. It is essential to note that, apart from the computation of the Margin of Dumping, the Designated Authority also computes the Injury Margin in the aforementioned manner.

Additionally, it is crucial to emphasize that any exporter with a Margin of Dumping less than 2% of the Export Price will be exempt from anti-dumping duties, even if the presence of dumping, injury, and the causal link is firmly established. This measure aims to strike a balance between protecting domestic industries and fostering international trade.[12]

Further, it is essential to understand the significance of the DE Minims margin, as it plays a crucial role in determining the termination of investigations against any nation in specific situations:

- In cases where an exporter's Margin of Dumping is minimal, specifically less than 2% of the Export Price, even when dumping, injury, and the Causal Link are unequivocally established, certain exceptions may apply.
- Additionally, if the quantity of dumped imports from a specific source falls below 3% of the total imports, it can lead to an exception as long as the cumulative imports from all countries with individual shares of less than 3% collectively constitute more than 7% of the total.
- These exemptions aim to balance trade remedy measures with considerations of minimal impact and proportionality, aligning with the principles of fairness and economic efficiency.

By applying these exceptions judiciously, trade regulators can ensure that anti-dumping measures are used prudently, safeguarding both domestic industries and international trade relationships.

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[12] Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.167.

ISSN: 2582-6433

- Harmonized Commodity Description and Coding System, developed by the World Customs Organization in Brussels.
- In order to calculate the dumping margin, most countries divide the dumping amount by the CIF export price because any anti-dumping duties imposed will be levied at the CIF level.
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ISSN: 2582-6433

LITERATURE REVIEW:

International Trade Law by Ishita Chatterjee[13]

This extensively covers various facets of International Trade Law, focusing on critical elements such as GATT and its associated agreements, both contentious and non-controversial, as well as the WTO. It provides clear and concise insights into the incorporation, function, and structure of UNCTAD, a United Nations organ. Additionally, the book elucidates the Bretton Woods system, the genesis of IMF and IBRD, pivotal in international liquidity and capital. Furthermore, it delves into UNCITRAL, established by the United Nations, for the purpose of unifying and codifying trade law.

Lex Mercatoria[14]

This collection of essays serves as a tribute to Francis Reynolds, commemorating his illustrious legal career upon his retirement. These essays are a testament to his invaluable contributions to the realm of law, particularly in the domains of English commercial and maritime law on a global scale. The topics explored encompass contract law, the law of agency, the carriage of goods by sea, international sale of goods, bankers' commercial credits, and the intricate field of conflict of laws.

The WTO Anti-Dumping Agreement: A Detailed Commentary[15]

This article presents a comprehensive commentary on the WTO Anti-Dumping Agreement, serving as a vital reference for government officials, practitioners, and academics involved in anti-dumping issues. The commentary provides a clear analysis of the relevant rules and their interpretations based on WTO case law. Authored by experienced practitioners actively engaged in numerous WTO disputes, it offers valuable insights into anti-dumping investigations and challenges before both the WTO and national courts, making it an authoritative resource for a profound understanding of this critical international trade agreement.

[13] Ishita Chatterjee, International Trade Law (Central Law Publications 2016).
[14] Orsolya Toth, The Lex Mercatoria in Theory and Practice (Oxford University Press 2017).
[15] Philippe De Baere, Annemieke van Damme, & Clotilde du Parc, The WTO Anti-Dumping Agreement: A Detailed Commentary (Cambridge University Press 2021).

ISSN: 2582-6433

A Handbook of Anti-Dumping Investigations[16]

Anti-dumping procedures in international trade have garnered increasing attention, leading to tensions between countries. This handbook comprehensively covers the core aspects of anti-dumping investigations as outlined in WTO provisions. It offers a well-researched, clear, and practical guide, starting with the steps in an anti-dumping investigation and moving on to essential elements like calculating dumping margins and assessing injury and causation. The handbook is a valuable resource for investigators conducting these proceedings, government officials in international trade policy, affected businesses, and legal practitioners, consultants, and academic scholars involved in international trade matters.

[16] Judith Czako, A Handbook on Anti-Dumping Investigations (Cambridge University Press 2012).