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Introduction

As the United States and Germany recognised in the 19th century, and Japan and Korea understand today, protectionism in international trade is the most advantageous trade policy so long as there is a larger trading partner whose market is open. This is because, through dumping, industries can use the cash flow for their protected home markets to prevail against even their more efficient open-market competitors. Anti-dumping and countervailing duty laws are the only mechanism to redress this imbalance.[1]

Broadly defined, dumping is international price discrimination. Dumping occurs when an exporter sells merchandise in the importing country at a price below that at which it sells like merchandise in its home country. A more restrictive definition is that dumping occurs when an exporter sells merchandise in the importing country, at below the exporter's cost of production.[2]

Art. VI of the General Agreement on Tariff and Trade, 1994[3] condemns dumping of imports when they cause injury to the domestic industry in the importing country. Art. VI is a relatively short provision, dating from 1947, with little detail or interpretation provided. Members of the WTO have therefore agreed to provisions on how Art. VI should be interpreted.

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994[4] contains provisions which must be strictly adhered to when conducting anti-dumping[5] investigations. If a country has AD legislation, it must be consistent with the Agreement. Most importantly, the practises and procedures in actual investigations must conform to the Agreement.

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1. Michael H. Stein, "The Uruguay Round and the Trade Laws: Antidumping, Countervailing Duties, Common Provisions", *I The Commerce Department Speaks on International Trade* as cited in Raj Bhala, *International Trade Law* 601 (Charlottesville: Michie Law Publishers, 1998).
2. Raj Bhala, *International Trade Law* 601 (Charlottesville: Michie Law Publishers, 1998).
3. Hereinafter Art. VI.
4. Hereinafter the Agreement.
5. Hereinafter, AD.

In summary, the Agreement[6]

1. Establishes procedural rights that WTO member states must offer to exporters in other member nations in AD investigations. There is an agreed definition of dumped price, which companies wishing to avoid dumping can take into account. In addition, once an investigation has been initiated, exporters involved should have defined rights with regard to preparing a defence and influencing the outcome of the decision;

2. Establishes the right for a country to seek protection, usually in the form of increased tariffs, against dumped imports when such imports are causing injury to a domestic industry;

3. Defines concepts and procedures for governments when conducting AD investigations. It provides a clear set of procedures, which creates a more certain system that nevertheless contains considerable room for flexibility and the exercise of discretion.

There are three basic requirements regarding substance contained in the Agreement that must be met before any AD measures can be adopted. These requirements are: -

1. Dumping – the product is considered to be dumped if its export price in an export market is less than the comparable price for that product in the domestic market (the comparable domestic price must at least cover costs);

2. Injury – the domestic industry making the complaint must suffer material injury. That is it must experience significant and measurable problems.

3. Causal Link – it must be demonstrated that it is the dumped imports that are causing the injury. If other causes of injury are established, the proportion of injury caused by dumping must be material.

The Indian law on AD is laid down in the Customs Tariff Act, 1975[7] which is to be read with the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.[8]

In this paper, an effort is made to evaluate the Indian law on Anti-Dumping and see whether it conforms to the minimum requirements as laid out in the Agreement. On perusal of the Indian legislation on AD, it is clear

6. Cliff Stevenson, *The Global Anti-Dumping Handbook* 9 (London: Cameron May Ltd., 1999).
7. Hereinafter, the Act.
8. Hereinafter, the Rules.

that it is merely a reproduction of the various provisions of the Agreement. Thus, *prima facie* the Indian legislation on AD is in compliance with the requirements of the WTO Agreement. If any discrepancy is to be found, it will only exist due to the judicial interpretation of the Indian law. The approach, therefore, is to discuss only those aspects of the law that have undergone judicial review and to present any discrepancy as a result thereof.

Definition of Dumping

Sec. 9A (1) of the Act states that when any article is exported from any 'country' or 'territory' to India at less than its 'normal value', then the Central Government may, by notification in the Official Gazette, impose an AD duty not exceeding the margin of dumping of such article upon the importation thereof. Explanation (a) to the provision defines the margin of dumping as the difference between its export price and its normal value.

It has been held[9] categorically that the Central Government can impose an AD duty not exceeding the said dumping margin. The difference between the fair selling price and the landed value of the articles imported will be the dumping margin. AD duty must be imposed in such a manner as to cancel the injury margin. Even if the injury margin is beyond the dumping margin, AD duty cannot exceed the dumping margin.

Normal Value

Explanation (c) to Sec. 9A(1) defines the term 'normal value'. Normal value means the comparable price, in the ordinary course of trade, for the like article when meant for consumption in the exporting country or territory.[10]

The leading case in the determination of normal value is the Supreme Court (SC) decision in the *Haldar Topsoe* case.[11] In the appeal before the SC, it was laid down that the Act had provided sufficient guidelines for determination of normal value and to some extent, these had been placed in a preferential sequence. In so doing, the SC upheld the decision of the Customs, Excise and Gold Appellate Tribunal (CEGAT) - the appellate authority

9. *Automotive Tyre Manufacturers Association* v. *Designated Authority* 117 ELT 625 (T).
   See also, *Automotive Tyre Manufacturers Association* v. *Designated Authority* 122 ELT 412 (T) wherein held that AD duty is attracted only when the goods are exported below normal value. No AD duty can be levied in case of negative dumping margins, i.e. when goods are exported above normal value.
10. Explanation (c) (i) to Sec. 9A(1) of the Act.
11. *Designated Authority Anti-Dumping Directorate Ministry of Commerce* v. *M/s Haldar Topsoe A/s* 2000 JT (8) 120 (SC).

for AD matters in India. The Designated Authority is the primary authority specified for determining AD. The SC reiterated that in determining the 'normal value' under Sec. 9A(1)(c), the 3 options before the Designated Authority are: -

1. finding out the comparable price for the like article in the ordinary course of trade when meant for consumption in the exporting country or territory of the same exporter;

2. if the exporter is not having a domestic market in the exporting country then his price of the article to an appropriate third country;

3. in the absence of such an export price of a specific exporter to an appropriate third country to find out the cost of production of the said article in the country of origin incurred by the said exporter and add to its administrative, selling and general costs and profits.

Subsequent determinations of normal value have been on the basis of the SC decision in the *Haldar Topsoe* case.[12]

Another issue of interest on 'normal value' is whether the cost of production can be the 'normal value'. On this CEGAT has ruled[13] that it is commercially unfeasible to say that cost price is 'normal value'.

Territory in Ad Law

Another issue before the SC in the *Haldar Topsoe* case[14] was that when determining the comparable price for the like article in the ordinary course of trade when meant for consumption in the exporting country or territory, whether a Customs Union or Free Trade Area formed of two or more States is 'territory' for purpose of determining comparable price for determining normal value?

The argument advanced against such approach to determination of normal value was that AD duties are exporter and exporting country specific[15] and even if two or more countries are part of a Customs Union/Free Trade Area, the export price of an entity from another country of the Customs Union/Free Trade Area cannot be the basis for determining comparable price and normal value. This argument was upheld by the CEGAT but rejected by the SC.

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12 *Id.* See also, *Dow Chemical Pacific Ltd.* v. *Designated Authority* 121 ELT 704 (T).

13 *Amijal Chemicals* v. *Designated Authority* 119 ELT 338 (T).

14 *Id.*

15. See *Oswal Woollen Mills Ltd.* v. *Designated Authority* 118 ELT 275 (T).