

Anti Dumping Agreement

**Key provisions of the Agreement,
Practice and WTO jurisprudence**

**Mukesh Bhatnagar
Professor
Centre for WTO Studies
Indian Institute of Foreign Trade**

India's Investigating Authority

- Directorate General of Anti Dumping & Allied Duties (DGAD)
- Initiation, Investigations & Recommendations for Anti dumping and CVD by Designated Authority, DGAD which is under the Department of Commerce.
- Designated Authority in India is a Single member authority
 - Independent in nature
- Imposition & collection of anti-dumping duty and countervailing duty by Department of Revenue, Ministry of Finance
- DG Safeguards–A separate Directorate to deal with Safeguard measures in the Ministry of Finance.
- DG SGQRs for safeguard Quantitative Restrictions

Legal texts / provisions

GATT Article VI

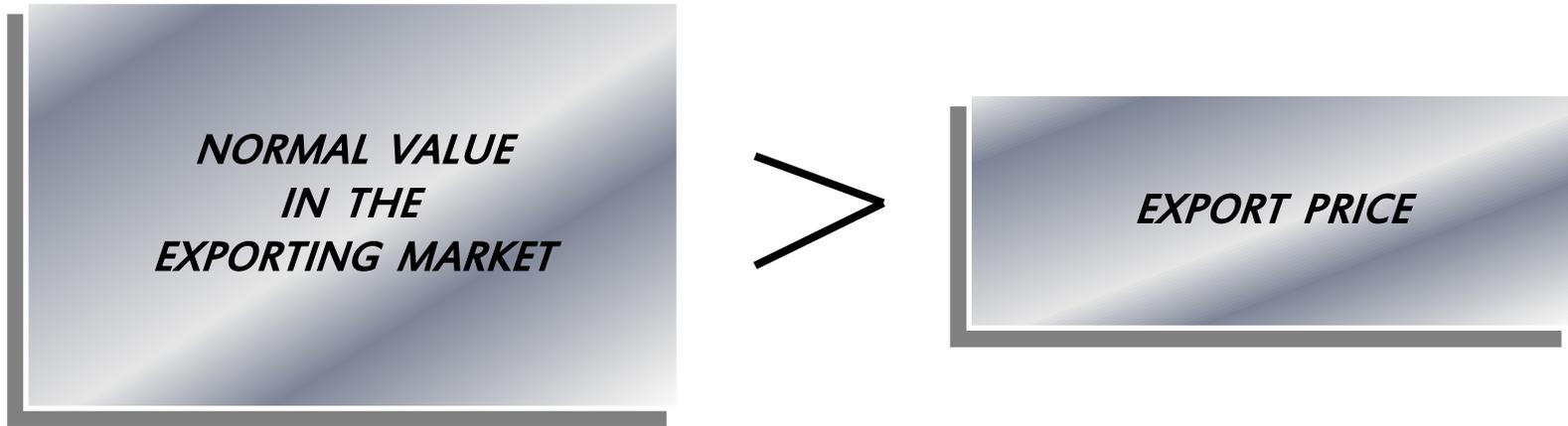
Agreement to implement Article VI–Uruguay
Round outcome

Commonly known as the Anti Dumping
Agreement

Key concepts

- ▶ Dumping
- ▶ Injury
- ▶ Causal link

WHAT IS DUMPING ?



- ▶ **Difference between Normal Value and Export Price (based on fair comparison) is known as ‘Margin of dumping’**

What is dumping?

- ▶ Article -2.1
- ▶ Export price less than the normal value.

Normal Value Article 2.1

- ▶ Comparable price, in ordinary course of trade, for like product in exporting country.
- ▶ Home market sales in country of export–
Default option.

Normal Value Article -2.2

- ▶ If home market sales not in ordinary course of trade or insufficient, then other two options for Normal Value.
- ▶ Sufficiency test– home market sales 5% or more of export from exporting country of the product under consideration. (Footnote 2 of ADA)

Normal Value– other two options

Article –2.2 ADA

- Comparable price of like product when exported to an appropriate third country, provided that this price is representative, or
- Cost of production in country of origin plus reasonable amount for SGA and profits.

Ordinary course of trade

Article -2.2.1 ADA

- ▶ Ordinary course of trade test– by reason of price
 - 80/20 test–
 - Representative sales in home market–
 - Recovery of Cost
 - to exclude sales at below cost if more than 20%
- ▶ Arms length transactions:
Association/Affiliation of buyers and sellers
 - As a general practice to examine shareholding patterns in the transacting parties to determine affiliation if any;

Normal Value: Export price to a third country

- ▶ Comparable price to an appropriate third country
- ▶ Provided this price is representative

Normal Value: on constructed cost basis

- ▶ Construction of normal value on cost-plus basis
 - Cost of production in the country of origin
 - Plus reasonable amount for administrative, selling and general costs and profits

Constructed Normal Value Calculation

Description	Rs./MT
Raw Material Cost	49,492
Add Utilities	1,489
Prime Cost	50,981
Add Manufacturing Expenses	1,900
Add Depreciation	1,244
Add Employees Remuneration	1,948
Less By Product / Steam credit	-1116
Factory Cost	54,957
Add Administrative Expenses	113
Add Interest	599
Less Other Income	(23)
Total Cost	55,646
Add Profit @5% on (Total Cost-Interest)	2,752
Constructed Normal Value	58,398

Article –2.4 ADA

- ▶ **Fair Comparison of normal value and export price for dumping margin determination.**
 - **Model Matching / Grouping**
 - Closely resembling or similar models/types for model matching
 - At same level: Generally at Ex–factory level
 - **Adjustments and apple to apple comparison**
 - Physical characteristics
 - Level of trade
 - Quantities
 - Taxation
 - Conditions and terms of sale

Article –2.4.2 Comparison Methodology

Determination of Dumping Margin

- Normally to be established on Weighted Average to Weighted Average comparison of NV with EP (WA-WA)
- Transaction to transaction comparison of NV and EP (T-T)
- Weighted average normal value with individual export transactions in certain situations– export prices differing in regions, purchasers or time periods (WA-T).
- Zeroing of negative dumping margin?

What is zeroing

- ▶ Not to offset negative dumping margins found at interim/model level comparison, while aggregating the overall dumping margin

WTO Disputes on Zeroing

- ▶ Around 18 disputes related to the issue of zeroing
- ▶ EC–Anti–dumping duties on Cotton type Bed linen–First case by India (DS 141)
- ▶ The Panel found that use of zeroing was inconsistent with Article 2.4.2 of ADA (30 October 2000) upheld by the Appellate Body (1 March 2001)
- ▶ Thereafter, series of disputes relating to US practice of use of zeroing in original investigation and administrative reviews
- ▶ Appellate Body held that use of zeroing in the original investigation and in administrative reviews was inconsistent with Article 2.4.2 and Article 9.3 of ADA
- ▶ Other important rulings in DS 322, DS 344 and DS 350

Like Article (Article –2.6)

- ▶ With reference to ‘Product under consideration’ i.e. the allegedly dumped product
- ▶ Identification of ‘like product’ in the exporting country market/ domestic like product;
- ▶ **Like Product:** Identical Product– alike in all respects
- ▶ or in the absence of such product another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration
- ▶ Follows the criteria of
 - similarity of physical characteristics,
 - end use of the product,
 - consumer preferences,
 - Tariff classification

Article –3 ADA Injury

- ▶ Injury determination based on positive evidence.
- ▶ Material Injury
 - “harm which is not inconsequential, immaterial, or unimportant”
- ▶ Threat of Material Injury
 - “clearly foreseen and imminent”
 - Lesser used provision. Used along with Material Injury claim
- ▶ Material Retardation
 - A situation generally not used– criteria not very clear.

Article –3.2 ADA – Injury

- ▶ Determination of ‘volume effect’ and ‘price effect’ of the dumped imports on the domestic industry
 - Volume effect:
 - Significant rise in imports in absolute terms or relative to production or consumption in the importing country
 - Price effect
 - Consequent impact on prices
 - Significant Price undercutting, underselling, price suppression and/or price depression

Price Undercutting– Imported goods land at prices below the domestic sales price

Particulars (During POI)	(Rs./Kg)
Landed Value of Imports from Subject Country (a)	109.08
Net Sales Realization (b)	112.86
Price Undercutting (b–a)	3.78

Price Underselling– Imported goods land at prices below the domestic industry ought to get sales price (NIP)

Particulars (During POI)	(Rs./Kg)
Landed Value of Imports from Subject Country (a)	110
NIP (b)	115
Price Under Selling (b-a)	5

Price Suppression–Landed value of import prevent the price increase by domestic Industry

Particulars	Unit	Base Year	2 nd Year	3 rd Year	POI
Landed Value	Rs./Kg	105	108	112	115
Cost of Sales	Rs./Kg	100	110	115	125
Net Selling price of DI	Rs./Kg	110	113	117	122

Price Depression–The Landed Value has depressed the domestic selling price

Particulars	Unit	Base Year	2 nd Year	3 rd Year	POI
Landed Value	Rs./Kg	105	103	100	98
Net Selling price of DI	Rs./Kg	110	108	105	102

Article –3.4 ADA – Injury

- ▶ Mandatory examination Article 3.4 Economic Parameters
- ▶ Relevant economic factors that are considered when determining material injury include:
 - Actual or potential decline in output, sales, market share, profits, productivity, return on investment, and capacity utilization;
 - Factors affecting domestic prices;
 - Magnitude of margin of dumping;
 - Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment;

WTO Jurisprudence

- ▶ Article 3.4 of ADA
- ▶ Appellate Body report in Thailand– Anti dumping duty on Poland’s Steel H–Beams (DS 122)
- ▶ AB Upheld Panel’s ruling that it is a mandatory obligation to consider all of the listed factors

Mexico AD Duty on Rice and Beef from the USA– DS 295

- ▶ AB ruling on Article 3.1 of ADA
- ▶ Violation of obligation of “Positive Evidence”/ “Objective Examination” by Mexico
- ▶ Date of Initiation: 11 December 2000
- ▶ POI for dumping: 1 March to 31 August 1999.
- ▶ POI for Injury determination: 1 March to 31 August of years 1997, 1998 & 1999.

Mexico AD Duty on Rice and Beef from the USA– DS 295

- ▶ Panel held: "the data used by Economía in the injury analysis, relating to the March to August period of 1997, 1998, and 1999, did not provide an 'accurate and unbiased picture' of the state of the domestic industry and, thus, **did not result in an 'objective examination'** as required by Article 3.1."
- ▶ Upheld by the AB

Mexico AD on Rice and Beef – contd./

- ▶ Panel held: “a *prima facie case* was established that the information used by Economía did not provide reliable indications of current injury and, therefore, did not meet the criterion of positive evidence in Article 3.1”.
- ▶ Upheld by AB

Article –3.5 ADA Causal Link

- ▶ Causal link between dumped imports and injury caused to the domestic industry must be demonstrated.
- ▶ Establishment of causal link based on all relevant evidence.
- ▶ Non-attribution analysis and examination of other known factors.
- ▶ Following mandatory examination to be invariably done:
 - Volume and prices of un-dumped imports
 - Demand situation and its effect
 - Changes in pattern of uses of the product under consideration
 - Trade restrictive practices and conditions of competition between foreign and domestic producers
 - Developments in technology
 - Export performance and productivity of the domestic industry
 - Any other factor brought before the Authority

Article 3.5– Causation and Non-Attribution– WTO jurisprudence

- ▶ It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

Article 3.5– Causation and Non-Attribution– WTO jurisprudence

- ▶ The Appellate Body observed that the non-attribution language applies "solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*."
- ▶ AB: "to ensure non-attribution, investigating authorities must "appropriately assess the injurious effects of those other factors," a step which involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports." The AB noted that the AD Agreement does not prescribe the process by which Members choose to engage in separating and distinguishing the relevant effects.

Article -4 of ADA Definition of Domestic Industry

- ▶ Domestic producers as a whole of the like product or those whose collective output constitutes a **major proportion** of the total domestic production of the product.
- ▶ Producers related to the exporters and importers, or who are themselves importers may be excluded from the domestic industry for the purpose of definition of domestic industry.

Definition of Domestic Industry –Article 4.1 WTO Case laws

- ▶ **Argentina–Anti–dumping on Poultry from Brazil (DS 241)**
- ▶ “A” major proportion rather than “the” major proportion
- ▶ Panel held that there can be more than one “major proportion” for the purpose of defining “domestic industry” indicating that each individual “major proportion” need not exceed 50%
- ▶ Rejected Brazil’s claim that Argentina violated Article 4.1 by defining “domestic industry” in terms of domestic producers representing 46% of total domestic production

Definition of Domestic Industry –Article 4.1

WTO dispute EC–Fasteners (DS 397)

The Appellate Body held that a proper interpretation of the term “a major proportion” under Article 4.1 requires that the domestic industry defined on this basis encompass producers whose collective output represents “a relatively high proportion that substantially reflects the total domestic production”. In the special case of a fragmented industry with numerous producers the practical constraints on an authority’s ability to obtain information may mean that what constitutes “a major proportion” may be lower than what is ordinarily permissible in a less fragmented industry. However, even in such cases the authority “bears the same obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion”

EC Fasteners–DS 397 contd./–

- ▶ The Appellate Body found that in the fasteners investigation the collective output of those producers included in the domestic industry definition which accounted for 27% of the total domestic production, represented a low proportion in relation to the total
- ▶ AB reversed Panel's findings that EU did not act inconsistently with Article 4.1 in defining domestic industry comprising producers accounting for 27% of total EU production of fasteners

Article 5 ADA – Application for AD investigation

Pre-initiation procedure

- ▶ **Application for investigation -**
 - (a) by the domestic industry; or**
 - (b) suo moto initiation**

- ▶ **Pre-initiation examination**
 - **Product under consideration (product being dumped)**
 - **Determination of domestic like product**
 - **Standing of domestic industry (Article 5.4)**
 - **Accuracy/adequacy of evidence on both dumping and injury (Article 5.3)**

Application for AD investigation –Article 5.2

- ▶ To include evidence of dumping, injury and causal link. All relevant particulars.
- ▶ Simple assertion, unsubstantiated by relevant evidence not considered sufficient for initiation of investigation.
- ▶ Application to contain information as is reasonably available to the applicant.

Application for AD investigation –Article 5

- ▶ Obligation on Investigating authority to examine the ‘adequacy’ and ‘accuracy’ of evidence in application before initiation–Art. 5.3
- ▶ Standing requirement for making application–Art. 5.4
 - Test of 50% support.
 - Test of 25%–domestic producers making application to account for 25% production of the product.

Case law Guatemala –Cement (DS 156)

- ▶ Evidentiary standard for initiation of investigation (Article 5.3)– Challenge by Mexico
- ▶ Panel report circulated on 24 October 2000
- ▶ Panel found that Guatemala violated Article 5.3 because the application for the initiation of Anti-dumping investigation did not have sufficient evidence of dumping, threat of injury and casual link to justify the initiation of investigation

Initiation and subsequent procedures

- ▶ Gazette Notification of Initiation
- ▶ Information Gathering– Questionnaires
- ▶ Preliminary determination
- ▶ Verification of information of domestic industry & exporters
- ▶ Oral Hearing
- ▶ Issue of Disclosures statement
- ▶ Final Determination
- ▶ Overall timeline of investigation– One year normally, extendable by six months (Article 5.10)

Application for AD investigation –Article 5

- ▶ Mandatory requirement to inform government of the exporting country before initiation– Art. 5.5
- ▶ Article 5.8– De Minimis provisions:
 - De Minimis margin of dumping $< 2\%$
 - Negligible volume of imports–De minimis $< 3\%$ of total imports in importing country.
 - Individually $< 3\%$ but together with other countries $> 7\%$ – not treated as De Minimis or negligible.

Article 6 ADA – Evidence/ Principles Governing Investigations

- ▶ 6.1 –exporters are generally given 30 days time to furnish questionnaire response. Extensions allowed on cause shown.
- ▶ 6.2– All interested parties full rights to defend their interests.
- ▶ 6.3 – oral hearings.
- ▶ 6.4– Obligation on Authority to provide timely opportunity to all to see the information– maintenance of Public file.
- ▶ 6.5– Confidential information– to be treated confidential on good cause shown

Confidential information–Article 6

- ▶ 6.5 Confidentiality–
- ▶ 6.5.1–Non–confidential summaries– sufficient details and meaningful.
- ▶ 6.5.2– If confidentiality not warranted / parties not willing to make information in sufficient non confidential form, Authority may disregard such information BUT cannot make such information public.

Article 6 ADA– Evidence

- ▶ 6.7– Exporter’s verification. Annex I
- ▶ 6.8–Use of ‘Facts Available’ in case of non-cooperation by interested parties.
 - Annex II gives guidance.
- ▶ 6.9– Disclosures of ‘essential facts’
 - an important mile stone of the investigation.
 - probably last chance to offer comments
- ▶ 6.10–Limited Examination or ‘sampling’
 - Exporters, producers, importers or types of products so large.
 - Statistically valid sample or selection of exporters which can reasonably be investigated but to cover largest volume of exports from the country.

Article 6 ADA– Evidence

- ▶ 6.11 – Interested Parties–
 - exporter, foreign producer, importer, trade or business association, governments of the exporting country, producers in the importing country.

- ▶ 6.12 Industrial Users of the product–
 - right limited to give information relevant to the investigation.

Article 7 Provisional Measures

- ▶ 7.3– Not before 60 days from the date of initiation.
- ▶ Where preliminary affirmative determination of dumping, injury & causal link. Such measures necessary to prevent injury being caused during investigation.
- ▶ Provisional measures in force for 4 to 6 months or in case of members following Lesser Duty , these periods are 6 to nine months.

Article 8– Price Undertakings

- ▶ 8.1 – Proceedings can be suspended or terminated on voluntary price undertakings.
- ▶ 8.2 Acceptance after preliminary affirmative findings of dumping & injury.
- ▶ 8.3–Refusal, if impractical or as a general policy– Reasons to be given.
- ▶ 8.6–periodical information of export prices.In case of violation of undertakings, investigation recommences and provisional measures come into effect.

NIP– What is it

- ▶ NIP or Non-injurious price is the fair selling (notional) price (FSP) that the domestic industry should realize by selling the like product in a fair competition.

How is NIP determined– (Components of NIP)

- ▶ Raw Material cost, Utility Cost, Manufacturing Expenses including Packing and Depreciation
- ▶ Allowance for selling & General Administrative Expenses. Selling & Distribution expenses such as freight, discounts, commission etc are not considered for determination of cost of sales at ex-factory level.
- ▶ Allowance for Reasonable Return

Calculation of NIP

Description	Rs./MT
Raw Material Cost	49,726
Add Utility Cost	1,489
Prime Cost	51,216
Add Manufacturing Expenses	1,900
Add Depreciation	1,244
Add Employees Remuneration	1,948
Less By Product / Steam credit	-1116
Factory Cost	55,192
Add Administrative Expenses	113
Add Interest	599
Add Selling & Distribution Expenses	-
Less Other Income	(23)
Total Cost	55,882
Add Return on Capital employed less Interest	4,775
Non-injurious price	60,657

INJURY MARGIN

- ▶ Difference between the fair selling price (non-injurious price) and the landed value

Steps involved in injury Margin Determination

- Determination of Non Injurious Price (NIP) of the like article
- Assessment of Landed Value of the product under consideration

Calculation of Injury Margin

Particulars	Rs. Per/Kg
NIP	2.70
Landed Value	2.20
Injury Margin	0.50

Assessment of Landed Value of Imports

- ▶ Handling charges @1% are added to the CIF Value of imports to arrive at the assessable value.
- ▶ Applicable basic Customs Duty and education cess is added to the assessable value to arrive at landed value per unit of the like product during the POI.

RELIEF TO DOMESTIC INDUSTRY

- Lesser duty rule–DM or IM

Only that amount of duty which is sufficient to remove the injury to the domestic industry.

Article 9 Imposition & Collection of Duties

- ▶ 9.1 Duty less than dumping margin–optional. Some members including India, EU, NZ Land, Australia follow Lesser Duty Rule.
- ▶ 9.3.1– Retrospective assessment system. Determination of final liability on actual export transactions.
- ▶ 9.3.2–Prospective assessment system– refund applications in cases of duty paid in excess of actual dumping margin.

Imposition and Forms of Duty

- ▶ Fixed Duty
- ▶ Variable Duty
- ▶ Ad Valorem Duty

Anti-dumping Measures Taken by WTO Members - 1.1.1995 to 31.12.2012

Country	Cases Initiated	Measures Imposed
Argentina	303	215
Australia	247	99
Brazil	279	133
Canada	166	106
China	200	156
EU	451	285
India	677	508
Indonesia	96	43

Anti-dumping Measures Taken by WTO Members 1.1.1995 to 31.12.2012 -contd.

Country	Cases Initiated	Measures Imposed
South Korea	113	72
Mexico	109	89
South Africa	217	129
Turkey	162	146
USA	469	312

916 cases out of total 4230 initiations were against China.
664 Measures out of total 2719 Measures are against China
97 Measures against India.

Source: WTO

Main Sectors of Anti-dumping Measures

Sector	Number of Measures
Chemical and allied products	585
Plastics, resins and rubber articles	338
Paper, Paperboard and articles	121
Textiles and articles	239
Articles of Stones, Plaster, Glass	93
Base Metals and articles	769
Misc. Manufactured articles	64

Source: WTO

Duty assessment systems

- ▶ Prospective assessment
 - India, the EU, Canada, Brazil, Australia
- ▶ Retrospective assessment followed only by the US.
 - Anti Dumping order
 - Administrative review

Article 9.5–New Shippers Review

- ▶ Asked by new exporters or those who did not ship during original investigation period.
- ▶ provided the exporter has not exported during original investigation and not related to any of the exporters or producers who are subject to antidumping duty on the product
- ▶ New Dumping Margin determined for such new shippers.
- ▶ Provisional assessment of imports during the pendency of such reviews.
- ▶ Generally conducted on accelerated basis.

Article 11 – Reviews

- ▶ Article 11.2 – Changed circumstances review
- ▶ Article 11.3 – Expiry or sunset review

Article 11 – Reviews

- ▶ Article 11.1 provides that an AD duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury;
- ▶ 11.2– If there is a changed circumstance in which either dumping or injury to the domestic industry ceased or changed any interested party can request for an interim review

Article 11.2 – Reviews

- ▶ Could be *suo moto*, by the authorities
- ▶ Or upon a substantiated request from any interested party
- ▶ After a reasonable period has passed from the date of its imposition: generally one year
- ▶ Follows same procedure as in the original investigation except interim findings.
- ▶ May lead to termination or modification of the definitive duty

Article 11.3 – Expiry or Sunset Reviews

- ▶ Article 11.3 of ADA provides that
 - Any definitive AD Duty shall be terminated on a date not later than five years from its imposition , or from a most recent review if that covered both dumping and injury;
 - Unless the authorities conduct a review before this date, suo moto or on a substantiated request from the domestic industry, and find continuation or likely recurrence of dumping and injury

Article 11.3 – Expiry or Sunset Reviews

- ▶ Objective
 - To determine whether the expiry of ADD is likely to lead to the continuation or recurrence of dumping and injury.
- ▶ Initiation
 - Own initiative or duly substantiated request made by the domestic industry. However, seldom self initiated. Usually, an alert letter is issued to the DI which may substantiate the need for continuation of ADD.
 - Agreement does not give much guidance on the standards to be followed for the review

WTO Committee on A D practices

- ▶ Meets twice a year
- ▶ All preliminary and final action to be notified to the committee
- ▶ Members to submit six monthly reports on anti dumping action

A photograph of several bright yellow tulips in the foreground, with a marina and sailboats visible in the background under a cloudy sky. The tulips are in various stages of bloom, with some fully open and others as buds. The background shows the masts and rigging of several sailboats docked in a harbor, with some buildings and lights visible in the distance. The sky is filled with soft, white and grey clouds, suggesting an overcast day.

Thank You