

# The Incompatibility of Anti-Dumping Laws

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## ABSTRACT

This research paper is an evaluation as to how far the anti-dumping laws and rules enabled WTO to resolve relevant trade disputes and to protect the interests of developing countries. The paper primarily examines in a legal and procedural paradigm, whether anti-dumping measures provided in the WTO-DSB forum and incorporated into respective foreign trade laws of countries have been effective or merely costing the importing countries, while countries that keep dumping do so with impunity, because dumping is just condemned, not prohibited. The Article VI of the General Agreement on Trade and Tariffs (GATT) deals with Anti-dumping and Countervailing Duties. Interpretation of the Article VI.1 would reveal that: 'that dumping is an act by which products of one country are introduced into the commerce of another country at less than the normal value of the products'. 'In connection with the effect of Article VI on the practice of dumping itself, in the Havana Meet in 1954-55, it was agreed that contracting parties should, within the framework of their legislation, refrain from encouraging dumping, as defined in that paragraph, by private commercial enterprises'. This lopsidedness in the GATT regulations was not corrected in the WTO regulations. The cost of anti-dumping investigations and substantiating the same and all the associated consultative processes are time consuming and not evenly poised on the two parties to the dispute concerned. One instance is the unsustainable practice of DSB constituting Panel with members drawn from the country which initiated action. This goes against the very root of natural justice. One of the principles of natural justice and the related legal maxim is that, 'No person shall sit in judgment of his/her own cause'. Fairness demands that the members should be drawn from a third country. The structure of the panel should be three; one each from developed and developing countries and the third to be elected by majority of the parties. This structure is to facilitate to decide by majority voting, in case where consensus fails. In sum, the legal paradigm and the procedural drags involved in anti-dumping measures, have costed the developing import-intensive countries more while countries that exported keep dumping, at will, because dumping is just condemned, not prohibited.

**Keywords--** GATT, WTO, Anti Dumping Law

## I. INTRODUCTION

Trade generates opportunities for growth and development. It creates jobs, raises income, reduces price, tackles poverty and so on resulting in improved living standards of people. World trade has indeed pulled,

billions of world's population out of extreme poverty. While this is one side of the story, there is the growing feeling that, certain unethical world trade practices cause concern on issues such as environmental degradation and economic disparities.

The World Trade Organization (WTO) established with following key objectives, (i) Set and enforce rules for international trade, (ii) Resolve international trade disputes and (iii) Secure for developing countries a legal pathway to access affordable remedies could have done better enabling faster development fostering the cause of poverty eradication. On one crucial aspect, that is prevention of dumping, remedying the injured party due to dumping and allied issues there are inadequacies.

This research paper is an evaluation as to how far the anti-dumping laws and rules enabled WTO to resolve relevant trade disputes and to protect the interests of developing countries.

## II. REVIEW OF LITERATURE

Aradhna Aggarwal (2002), in the research study, Anti Dumping Law and Practice: An Indian Perspective: Indian Council for Research on International Economic Relations, New Delhi-110 003, pointed out, between 1995 and 2000 India initiated 176 cases which was 12% of the total cases initiated over the world. The number of antidumping cases per US \$ billion of imports of goods, was 0.69 in India as compared with 0.06 for the world. Thus, among the active user countries accounting for 2/3<sup>rd</sup> of the total antidumping investigations during 1995-2000, India was the second largest country in terms of incidence, next only to Argentina.

Peter Harris (2016), Chair of Australian Government Productivity Commission in the Research Paper 'Developments in Anti-Dumping Arrangements' pointed out Much of the growth in Australian anti-dumping activity had been concentrated in the steel sector, which experienced particularly intense price competition in recent years. While cyclical pressures explained a part of this price pressure, a prolonged global supply glut has been a major contributing factor. The upshot of this intense price competition had been that steel products accounted for 86% of anti-dumping and countervailing investigations and 60% of all of the measures imposed in 2014-15. Measures on steel products currently made up 60% of all measures in force.

Madan Sabnavis, Bhagyashree Bhati and Mradul Mishram (2017), Industry Research Team, CARE Ratings, India, on their Research Work, 'Anti-dumping duty on 47 Steel Products' quoted, the Government of India, imposed antidumping duty on hot-rolled flat products of alloy or non-alloy steel that originated or are exported from China, Japan, Korea, Russia, Brazil and Indonesia and this duty was being imposed on foreign companies including Hyundai, POSCO, Nippon Steel, Sumitomo, JFE Steel Corporation. The duty has to stand effective from 8th August 2016 for a period of five years. The amount for import duty spans between \$478 per tonne to \$561 per tonne. This, in turn, resulted in fall in imports in all the months of the financial year 2016-17 on a y-o-y basis. On an annual basis, steel imports declined by a sharp 38.3% to 7.2 million tonnes in 2016-17 compared to that in 2015-16.

Rou Li in the Research work on, 'Anti-dumping, Cost and Chinese Export: Based on Multilateral Resistance Term of Gravity Model',  $\ln X_{odj} = a_0 + a_1 \ln Y_0 + a_2 \ln Y_d + a_3 \ln t_{odj} + a_4 \ln \Pi_{oj} + a_5 \ln p_{dj} + e_{ij}$ , where  $X_{odj}$  is country o's export to country d in industry j,  $Y_0$  and  $Y_d$  represent the GDP of country o and country d respectively, the sign of  $a_1$  and  $a_2$  are positive,  $t_{odj}$  is the cost of export and  $a_3$  is negative which is  $1-\sigma$ , with  $\sigma > 1$ , that is ' $\sigma$ ' elasticity coefficient of substitution of products from different places exceeds 1,  $\Pi_{oj}$  and  $P_{dj}$  are the ease with which countries can export and import, known as Multilateral Resistance Term or the trade barriers. With other explanatory inputs into the models, Rou Li observed, that anti-dumping investigations significantly restrained export of the concerned product by increasing either or both fixed and variable costs.

## II. OBJECTIVE OF THE PAPER

To examine whether anti-dumping measures have been effective or merely costing the importing countries, while countries that keep dumping do so with impunity, because dumping is just condemned, not prohibited.

### *Dumping: Condemnation, No Prohibition*

The Article VI of the General Agreement on Trade and Tariffs (GATT) deals with Anti-dumping and Countervailing Duties. Interpretation of the Article VI.1 would reveal that: 'that dumping is an act by which products of one country are introduced into the commerce of another country at less than the normal value of the products'. Further Article VI.1 would stress that, for the purposes of the Article VI, 'a product is to be considered as dumped, 'if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, (b) in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (ii) the cost of production of the product in the

country of origin plus a reasonable addition for selling cost and profit'. Of course, due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

The Article VI.1 stresses that "the contracting parties recognize that dumping is to be **condemned** if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'. It has to be noted that Article VI.1 only condemns dumping with lot of 'ifs' and 'buts'. It does not prohibit dumping, per se.

Early in 1954-55 a proposal for prohibition of dumping was not approved by the GATT in the Havana conference. In the discussions at the Review Session of the GATT provisions of dumping, in 1954-55, the rejection of a proposal to add a clause specifically obligating contracting parties to prevent dumping by their commercial enterprises, was approved. Instead, it was agreed to add the value statement, 'In connection with the effect of Article VI on the practice of dumping itself, it was agreed that contracting parties should, within the framework of their legislation, refrain from encouraging dumping, as defined in that paragraph, by private commercial enterprises". This lopsidedness in the GATT regulations was not corrected in the WTO regulations.

Thus it is very clear that "nothing, in Article VI of the General Agreement on Trade and Tariffs (GATT) or anywhere else in the WTO agreements, **prohibits or constrains the act of dumping**. Even if WTO Members wanted to make dumping illegal it would be difficult to do because the WTO has no way to constrain the behaviour of private parties. That said, Art VI does take a position on the subject. The drafters of the GATT chose to add to the definition of dumping provided in GATT VI:1, the editorial comment that dumping "is to be condemned" if it "causes or threatens material injury" to an industry in the territory of a contracting party"[1]. The statement amply makes it clear that there is no prohibition but only condemnation of dumping that is provided.

**When there is something available why anyone goes behind what is not available and get confused to say that dumping is not prohibited; therefore, you cannot impose any penalty. For the larger interests of the entire public, it is desirable to follow the definition wherein dumping is to be condemned, as against the interest of the private parties.**

An act which is condemned shows that the person committed the act is guilty of it. WTO recognizes injurious dumping as an unfair trade practice which needs regulation. To achieve this goal, the promoters propounded the Anti-Dumping Laws, and the Member countries enacted it in their laws. Under the same law, the developed countries are obliged to give 'special regard' to the developing countries.

Admitting and appreciating that, the above novel ideas are going to really transform the world, where the rich and the poor countries jointly work for their mutual benefits, with special regard for the developing countries, the world set out and entered the new millennium without knowing that the WTO has no way to constrain the behaviour of private parties. In the past two decades, whenever the laws were applied on the cases, the vulnerable Members found that, it needs modifications. The cases discussed below would show the fact. Besides, a few vital issues are also placed for the consideration to modify the laws, so that it may serve the public purposes over the private purposes.

#### **Agreement, Not Law**

A Contract is enforceable by law, but an agreement isn't. GATT is agreement, not Contract, hence not legally enforceable. At the outset, it may be mentioned that, the anti-dumping agreement 1994 (ADA), is a trade agreement. Instead of implementing the same as a multilateral trade agreement, the WTO ventured to implement it as a law by making the countries to incorporate provisions in their customs legislations and other related legislations provisions making dumping as offence by either side. However, the members, particularly the developing countries, now realize that, the same is not effective. First of all, it does not have the force of law as it lacks the sovereign sanctity as the WTO is not a sovereign, but just a multilateral entity. Secondly, it lacks the attributes of law. When both these components are absent, no instrument can assume embodiment of legal nature and characteristics. Thirdly, legal drafting demands coherence. All essential terms should be defined precisely, leaving no scope for wrong interpretations. Should avoid vague usages such as 'explore the possibilities of constructive remedies' and 'special regard' etc. The objectives and the intentions of the law should be made as the preamble and mandatory.

#### **Facets of incompatibility of Anti-dumping provisions**

The inclusion of the provisions to give special regard to the developing countries is the realization of the fact that, there cannot be fair competition among the unequals, i.e. the developed, and developing countries which is the valid reason. But the remedy is left in the lurch, by merely making the statements such as, "explore the possibilities of the constructive remedies" as held in the cases discussed herein. These are few of the infirmities of the law to show its **incompatibility**.

Over the years, the countries have experienced that, Anti Dumping Agreement is not only incapable to address the issues, but also served as a double edged sword against the developing countries. One side it forced them to open their markets which were hitherto protected. On the other hand, whenever developing countries initiated or defended the anti-dumping actions they use the loopholes of these laws to defeat them. The facts presented in the succeeding paragraphs, would substantiate this.

There are several cases, wherein genuine claims of the developing countries have been rejected on flimsy, unfounded and technical reasons, ignoring the merits, forcing these countries, wasting money, time and efforts to appeal against these impugned orders to get them reverted. Besides the law, the legal doctrines such as reason, justice including natural justice, equity, good faith, etc. are also applicable. The Rule of Law envisages that it is incumbent on the authorities to apply these doctrines to do justice rather than traversing to find some reasons to deny it. Equity demands that, in particular circumstances, where the existing laws would not allow a fair or reasonable remedy to the victim, the jury should apply the principles of natural justice to uphold the doctrine of equity. With regards to the doctrine of 'good faith', it is worthy to mention that, according to Blake's Legal Dictionary, good faith refers to the 'state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation'[2]. In the case of US – Hot-Rolled Steel, the Appellate Body (AB) invoked the principle of '**good faith**' and stated that "the principle implies that a Member country should not impose unreasonable burdens on another Member. Apparently, the AB viewed 'fundamental fairness' in the WTO Agreement as another expression of the basic principle of 'good faith'".

It could be argued that, though the nomenclature indicates that, the ADA as a law, it being a trade agreement do not provide for any extraneous input to go beyond its perimeters to apply these doctrines. This position could depict the ADA at best as a hybrid, and in any case, it may not be a law in its letter and spirit. This is another **incompatibility**.

Historically, the ADA is a progeny of the GATT, as authored by Arthur Dunkel, to rejuvenate the western developed economies, which were shattered due to the great depression and the world wars. After the II world war, the Afro-Asian and Latin American countries became independent sovereign states, which were served as the colonies of the Western Countries and exploited for trade and commerce. Once they lost the colonial markets, it became necessary to find an alternative device to re-enter the protected markets of these poor countries. For this purpose, they devised the GATT envisaging the policies of Liberalisation, Privatisation and Globalisation (LPG) with the ostensible phrases like 'Free Trade', 'Fair competition', 'free movements of factors of production such as capital, labour etc. to impress the poor countries. Obviously, the poor countries became the members of WTO, opened their markets began their trade operations believing in good faith that they are entering into a level ground, where exists an atmosphere of free trade, fair competition with special consideration for developing countries.

#### **Antidumping Provisions Need Assessment**

The functioning of the Anti-dumping laws and their impact on the international trade for until now



covering a span of about 25 years warranted an assessment, for its viabilities in the light of its limitations. As evaluated in this article, they proved far from its compatibility to effectively deal with its members. When the developing countries export their product to developed countries, they initiate anti-dumping action, ignore their valid arguments of defence, refuse to give special regard and using the loopholes they impose ADD on the developing countries. Thus, the developing countries are forced to appeal to get the impugned orders reverted. The cases discussed below indicate this point. While they want to impose their terms such as free movement of capital, entrepreneurs, raw materials on the developing countries, they refuse free movement of labour to the rich countries. Also they deny the mandated 'special regard' to the developing countries as provided in Article 15 of the ADA. The following facts substantiate the statement.

One of the ideas of the WTO is to transform the world into a global village by removing the trade barriers. But, the promised global movement of capital, goods and human capital under the LPG environment has not happened, developing countries accuse because several impediments to flow of goods and talents from developing countries is blocked by developed countries in or other explicit or implicit manners, circumventing the feeble WTO provisions, which are only agreement type, with no legal binding teeth.

Very recently, it was reported that, the U.S Administration spoke out defiantly in the face of global criticism of its plan to impose tariffs on steel and aluminum imports, claiming trade wars are 'easy to win.' [3] Reacting to the announcement, Politicians, industry, and unions in Europe have reacted with alarm with the European Commission (EU) warning of resorting to proposal for 'WTO-compatible counter-measures' to balance the situation. The European Commission said, "we will not sit idly while our industry is hit with unfair measures that put thousands of European jobs at risk." [4]. Reacting to this, China urged the U.S to "exercise restraint and respect international trade rules. If all countries followed the example of the U.S. it will undoubtedly result in serious impact on the international trade order. China has previously warned it was ready with counter-measures should the US administration deploy tariffs." [4]

#### **Threat from Major Countries**

The above situation brings home the pathetic fact that, while the mighty EU and China are now poised to face the threat of U.S. with counter threat and demanding compatible measures from WTO, India, a developing country, alone had to plead for consideration of special regard way back in the beginning of the millennium which were arbitrarily denied on unfound grounds. The claims of India in the case of US – Anti-dumping and Countervailing Measures on Steel Plate from India (WT/DS206/R, adopted on 28<sup>th</sup> June, 2002), various points of defence advanced in support of its

claims, the contentions on which the Panel rejected the claims and the comments of this author, are given below:

**Point of Defence:** The United State Department of Commerce (USDOC) violated the first sentence of Art.15 of ADA (*It is recognised that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement*), by failing to give special regard to India's status as a developing country when considered the application of anti-dumping duties.

**Contention:** The Panel rejected the argument stating that, a general obligation is imposed by first sentence of Art.15, the precise parameters of which are to be determined based on the facts and circumstances of the particular case, held that Members cannot be expected to comply with an obligation whose parameters are entirely undefined.

**Comments:** It appears that, either the Panel failed to understand or willfully neglected the simple language of the clause that, *special regard must be given by developed country*. The verb in the sentence '*must be given*' conveys a mandate, leaving no room for any ambiguity. It is pertinent to mention that, in the case of European Community (EC) – Bed linen also the Panel took similar hostile stand which was, only on appeal to the Dispute Settlement Body (DSB) reversed it. The findings of the DSB in that case are: Quote,

"The Panel pointed out that "Remedy" is defined as, "a means of counteracting or removing something undesirable; redress, relief". The term "constructive remedy" might consequently be understood as helpful means of counteracting the effect of injurious dumping. The Panel held that the EC (i.e., the present EU) did not explore the possibilities of constructive remedies prior to imposing anti-dumping duties. The Panel concluded that the EC failed to act consistently with its obligations under Article 15 of the Anti-Dumping Agreement (ADA). (Panel report Paragraph 6.238)

(a) The EC agreed that the second sentence of Art. 15 imposes a legal obligation on Members and also that bed-linen producers were part of the textile industry, that this was an 'essential interest' of India, and that anti-dumping duties (ADD) would 'affect' this interest.

(b) The Panel pointed out that 'Remedy' is defined as, 'a means of counteracting or removing something undesirable; redress, relief'. The term 'constructive remedy' might consequently be understood as helpful means of counteracting the effect of injurious dumping. The Panel held that the EC did not explore the possibilities of constructive remedies prior to imposing ADD. The Panel concluded that the EC failed to act consistently with its obligations under Article 15 of the ADA. (Panel report Paragraph 6.238)

(c) The Appellate Body (AB) held that with respect to Art 2.4.2, the EC had to establish 'the existence of margin of dumping' for the product. We are unable to agree with the EC that Art 2.4.2. provides no guidance as to how to

calculate an overall margin of dumping for the product under investigation.[1] Unquote.

The findings of the DSB in the Bed Linen case as given above go to show that the provisions of the ADA are simple and sufficient to deliver justice, which may not be understandable when it is looked at with prejudice. Ignoring these realities, by arbitrarily rejecting the valid arguments of India, the Panel had committed impropriety, causing grater injury over and above imposing unjustified ADD on the Indian respondent.

Judicial propriety expected that, the Members of the jury update their information as to how the other country-Members of WTO interpret and apply the laws in the interests of justice, based on the above principles. Had the Panel happened to glance at the findings of the DSB, in the anti-dumping case of EC-Bed linen which was adopted on 12-3-2001, much earlier to the current case in their hands, it could have enlightened themselves so that they could have avoided the arbitrary rejection of the genuine case of a developing country for whom the mandate under Art.15 has been provided. It may be argued that, there is no scope, in the present WTO set up, for relying on the precedents, as it is not mandated in the ADA. If so, it is the **incompatibility** of the ADA. Even if it is not mandatory, there is no bar from taking it as guidance. In the legal realm the precedents are a source of law and are mandatory to apply them where applicable as per the rule of precedents. Jun Kazeki, the Counsellor at the Permanent Mission of Japan to the WTO has argued that “anti-dumping authorities and trade policy officials need to follow up and examine quite a number of case laws in addition to the ADA itself given the importance of dispute settlement jurisprudence under the WTO”. [7]

It was suggested that, India on its part should appeal against the impugned order claiming all loss, damages and costs. It is a fact that, the developing countries are rallying around India, in the negotiations and deliberations during the formation of the WTO right from the beginning. Keeping the spirit, India should take the lead to represent the issue in the next Ministerial Conference of WTO that, the developed countries refuse to honour the commitment of giving ‘special regard’ to developing countries, with the facts and figures about the total number of cases and the untenable grounds relied upon for the refusal. It is hoped that, no developing country would let down India when the issue is raised to impose suitable measures against the defaulters.

Another unsustainable practice of DSB is the nature and structure of the Panel with Members drawn from the country who initiates action. This goes against the very root of natural justice. One of the principles of natural justice and the related legal maxim is that, ‘No person shall sit in judgement of his/her own cause’. Fairness demands that the members should be drawn from a third country. The structure of the panel should be three; one each from developed and developing countries and the third to be elected by majority of the parties. This

structure is to facilitate to decide by majority voting, in case where consensus fails.

Another suggestion is that when the precedents are made applicable, Members will adhere to the already existing decisions. It will serve two purposes. Firstly, it will reduce the volume of work. Secondly it eliminates contradictory decisions on the same subject matters. In the present scenario, some of the issues could be resolved affirmatively in one part of the world, while the same issues could be resolved negatively in another part of the world, applying different interpretations and yardstick. To avoid such adverse situation, making precedents applicable as an unwritten law with fewest exceptions only, if need be, will bring some sort of uniformity in the proceedings Panel or AB.

**Point of Defence:** U.S. violated the second sentence of Art.15 (*Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interest of developing country Member*), by failing to explore the possibilities of constructive remedies before applying the duties.

**Contention:** Referring to the Panel in EC-Bed-linen case that, Art.15 refers to ‘remedies’ in respect of injurious dumping’, the Panel held that the possibility of applying different choices of methodology is not a ‘remedy’ of any sort under the ADA. Therefore, according to the Panel, Art.15 does not impose any obligation to consider different methodology for the investigation and calculation of dumping margins in the case of developing country Members. According to the Panel, the requirement to explore did not include requirement to provide the basis of result of that exploration as was contended by India.

**Comments:** Comments as given in paragraph 13.1. hold good for this point also.

**Point of Defence:** India claimed that USDOC should have given ‘special regard’ to the special situation of the Steel Authority of India (SAIL) as a developing country respondent when making choices in connection with calculating the final dumping margin, rather than treating SAIL in the same way as any other exporter.

**Contention:** According to the Panel, simply because a company is operating in a developing country does not mean that it somehow shares the “special situation” of the developing country Member.

**Comments:** SAIL is an entity owned by the people of India and represents its country. It is operating as per the applicable laws including the international laws. It operates throughout the world. No normal person of ordinary prudence would say that, such a company is simply operating. The contention is untenable and was imported only to reject a genuine case.

**Point of Defence:** India also claimed that, SAIL filed a proposal for a suspension agreement (the equivalent in US practice of a **price undertaking**) with USDOC. According to India, SAIL was treated no differently than

developed country exporters would have been in this regard.

**Contention:** The USDOC officials only orally stated that they would not discuss a suspension agreement because, US steel industry and US Congress would oppose any such agreement.

**Comments:** The mandates of ADA are equally applicable to all WTO members. No Member, even the super power, can sidestep these laws. The provision of Art.7 of ADA which are mandatory, provides for **price undertaking** (Suspension Agreement in US context) by which the respondent can avoid AD proceedings against it. In the given case, India, the Respondent, had made a valid offer of price undertaking which was avoided by US Department of Customs, (USDOC) officials, by an oral submission presented above. It appears that, the USDOC officials give the impression that the US Steel Industry and US Congress would oppose any law including WTO laws. This needs serious consideration by WTO and it is questionable. The irresponsible action of USDOC would have caused India waste of time, efforts and money to get the impugned order reverted in appeal. USDOC is liable to compensate to India. There should be provisions to penalise the party who arbitrarily reject genuine cases.

**Point of Defence:** The requirement of Art.15 'to explore' includes requirement to provide on the basis of the result of that exploration.

**Contention:** According to the Panel, the requirement to explore did not include requirement to provide on the basis of the result of that exploration as was contended by India.

**Comments:** The arguments of India are valid. The text of the provision, "*Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interest of developing country Member*", postulates that:

- (a) Constructive remedies have been provided for by the Anti-dumping Agreement.
- (b) The verb "*shall be explored*", makes it is mandatory on the developed countries to explore the constructive remedies to provide the same to the developing countries.
- (c) The objective of the provision is to provide constructive remedies for which the developed countries have to explore them.
- (d) The simple logic is to explore the constructive remedies to provide.
- (e) In view of the above logical reasoning, the contention of the Panel that 'the requirement to explore did not include requirement to provide' is an absurdity.
- (f) This has been substantiated by the DSB in their findings in EC– Bed linen case. The Panel in that case held that, the EC did not explore the possibilities of constructive remedies prior to imposing anti-dumping duties. The Panel concluded that the EC failed to act

consistently with its obligations under Article 15 of the ADA. (Panel report Paragraph 6.238).

The above material facts establish that some of the developed countries do not honour the WTO laws. At the same time, an objective appraisal of the provisions of the ADA will indicate the needs to modify the same to meet the challenges being faced by the WTO.

#### **Causal Link for Injury to Domestic Industry**

The principle lay down in Art. 9.1 of ADA is that the imposition of Anti-Dumping Duty (ADD) is only permissive, that too, the duty be less than the dumping margin if such lesser duty is enough to remove the injury. No other action can be taken by the importing country to prevent dumping. It has been made clear by the use of the word 'permissive' in Art 9.2., the legal and procedural framework does not provide even for the slightest preventive measures against the guilty even after establishing the facts of dumping, injury and causal link. The ADA recognizes the right of the importing countries to safeguard their domestic industries by allowing them with the discretion of imposing the Anti-Dumping Measures (ADM). This discretion, however, is further regulated by certain provisions of the ADA. Importing countries can impose the ADD only after carrying out the investigation to establish that:

- (a) The dumped goods are sold below the Normal Value;
- (b) There is an Injury;
- (c) The injury is caused by the dumping (the Causal Link).

In the anti dumping proceedings, it is imperative to prove that the dumping has caused injury to the domestic industry. No anti dumping duty shall be recommended without a finding of this causal relationship. That is to say, dumping should lead to Injury.

#### **Onus of Proof**

The onus of proving the above facts involving the Multi-National Companies (MNCs) of the developed countries by the nascent industries of a developing country like India, which is a burden that too when the frequencies of dumping/repeated dumping are very high. The concepts of Free Trade and Fair Competition should be brought into play among the equals; otherwise it would be a disrespect to law forcing the unequal to compete; similar to the merit system where the weak are made to compete with the mighty. The ADA provides for very lenient measures against the violators, which are the deficiencies of this law, due to which the incidents of dumping and repeated dumping are increasing, particularly into economies that are large populated, democratic and people with plurality culture, in nut shell like India. As per available data, as on 30-6-2014, India happened to initiate 690 Anti-Dumping Investigations (ADI), resulting into the imposition of ADD in 535 cases. A developing country cannot afford the resources to meet the threat of injurious and repeated dumping. The following provisions of the ADA are the deficiencies:

The clauses “provisional measures **may be applied**” as used in Art 7.1 and ‘definitive Anti-Dumping **duty may be levied**’ as used in Art. 10.6 of the ADA give the wild discretion to impose or not to impose the ADD.

Art 9.1 of the ADA reads ‘it is desirable **that the imposition be permissive** in the territory of all members, and **that the duty be less than the margin if such lesser duty would be adequate to remove the injury**. This is a protective provision to support the exporter, instead of imposing penalty for committing the economic offence of dumping. It is relevant to mention that, people smuggle goods in to India, to save the duty. The act of dumping is also committed to save the duty. Both smuggling and dumping are covered under the same law i.e. the Customs Tariff Act, 1975 as amended. While one type of offender is punished, there is no punishment for the other. This is against the logical reasoning. This discrepancy of the ADA is supportive to the exporter.

#### **Offset Dumping Measure is no Deterrence**

The ADD, even if imposed, could be levied only to **offset** dumping. As such no corrective measures are possible and there is no scope for prevention of even the repeated dumping. Thus the importing country is burdened with anti-dumping action perpetually. This is how India happened to initiate 690 cases within a period of five years. Even for this, India is blamed. It is reported that ‘the EU has noted that India is the largest user of the WTO anti-dumping mechanism with 241 anti-dumping measures since the Uruguay round. The EU has evidently decided to tackle the issue by referring 27 cases to WTO to be resolved through the dispute settlement mechanism’.[6] Even while considering the argument that, dumping being a trade distortion, bringing the same within the ambit of penal provisions would discourage the traders, a minor penalty would go a long way in reducing the incidents of repeated dumping.

Art. 5.8 of the ADA provides that if the dumping margin is less than 2%, expressed as a percentage of the export price, it shall be considered to be **de-minimis (negligible)** and the investigation shall be terminated immediately. It may be noted that sometimes the 2% dumping margin, depending upon the volume, may amount to injury equal to a considerable amount which the importing country might have suffered. Added to this, the expenses for conducting the investigation, etc also to be borne by the importing country. It may also be noted that even 2% would be an incentive to attract customers whereby the MNCs could easily capture that market. Under these circumstances the two percentage dumping margin is not negligible.

#### **Sunset Review – Supportive of offender!**

Art.11.3 of the ADA provides for the **sunset** review. Under this provision, the ADD once imposed will be terminated after five years of the imposition, unless a review is conducted. This provision not only enables the exporter to repeat dumping but also the victim is again burdened with the liability of gathering evidence to prove the persistence of injury. It is suggested that,

once the injury is established and the ADD is paid by the exporter for five years, it is to be continued unless proved by the exporter that no further injury is being caused by him. It is for the exporter to demonstrate that no injury persists instead of the burden is shifted to the importer.

Art.10.8 of the ADA provides that “no duties shall be levied retrospectively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation’. But, Art. 10.2. Provides that ‘ADD may be levied retroactively for the period for which provisional measures, if any, have been applied. These contradictory provisions need suitable modifications.

#### **Arms Length Test**

Under Art. 2.1of the ADA, a product is to be considered as dumped when it is imported at less than its **normal value**. However, the ADA does not define the term ‘normal value’ leaving enough scope for misinterpretation. In the **U.S Hot Rolled Steel case**, the AB has apprised the fact that the Investigating Authority (IA) must exclude the sales which are not made in the “**ordinary course of trade**’, upholding the ‘**Arms Length Test**’.

Art.5 of the ADA provides for the appointment of the Designated Authority (DA) to determine whether dumping and injury is committed. The importing country alone designates the authority which, in all probabilities, will be influenced by the local industries. As such, the investigation and the decision thereby need not necessarily be free from bias, as affinity of the I.A. normally tends towards his own country. In order to validate the findings, the I.A. from a third country be appointed, in the manner suggested earlier.

#### **No over-ruling by DSB**

‘The standard of review by the DSB of the WTO does not permit over-ruling a decision by a National Authority (NA) and substituting the same with its own decision, supported by valid reasons, even if the facts and figures were proper and the evaluation was un-biased in terms of Art. 17.6 of the ADA. Art 17.6.1.reads, ‘in its assessment of the facts of the matter, the Panel shall determine whether the authorities’ establishment of the fact was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned’. Such a provision whittles down the standard of review. Given the wide discretion enjoyed by the NA in determining the issues, inability of the DSB to alter the same even if it were wrong, is absurd. Hence, there is a need to change the standard of review. It has been suggested that, “the DSB should be allowed to over-rule the AD action taken by the NA if the same is not justified in the totality of the circumstances”.[7] Further, Joost H.B. Pauwelyn argued that “the entire body of Public International Law is applicable for the DSB”.[8] The pertinent question is, what purpose the DSB serves as an



Appellate Body, if it cannot set aside a wrong decision which has been proved wrong? It is suggested that the DSB may be elevated to the level of International Court of Justice with jurisdiction of Civil Public International Law to deal with all trade disputes and its precedents are binding on all successive proceedings in terms of the rule of precedents. This will minimize the volume of work in all proceedings.

#### **Importer's Liability is More**

There is no provision in the ADA to implicate the importer, who places the import order and thus causing the injurious dumping. The importer, who is aware of the market, knowingly places the order to take undue advantage. In an import/export contract both parties violate the Anti-Dumping Law if and when dumping is committed and, therefore, both are equally liable. However, the fact remains that the importer's liability is more for the simple reason that he is fully aware of the market situation of his own country and without his order no exporter will resort to dumping. It is, therefore, suggested that if and when this serious lacuna of the Anti-Dumping Law is rectified by incorporating suitable provisions to implicate the importer for his liability of dumping, the incidents of dumping into India would drastically come down. However, it is cautioned to note that as in the case of Vitamin C, where the lone applicant of the anti-dumping investigation happened to be sole producer of the product in India, whose production capacity is only one third of the demand, clandestinely trying to monopolise his product by preventing dumping at the cost of the consumers of India.

If the purpose of any law is to regulate the behaviour of the people for an orderly way of life including trade, the discrepancies of the ADA, as noted above indicate the fact that the ADA is not compatible. Any dispute, if and when, brought within the legal framework, it needs to be processed legally and the law will take its own course. When a law is in place, the parties concerned would be cautious not to violate it; otherwise it would attract penalty. When the law is set in motion, the natural consequences and the legalities will follow.

The permissive, deficiencies and the loopholes as cited above, hinder to operate the ADA properly to work towards its goal. It works as the 'best compliment' to the exporters to repeat dumping and force the burden of proof on the importer on every occasion of dumping. There is no preventive measure in the ADA and the lobbies of the super powers manage their affairs as noted above.

#### **Penal Ingredient in the Law**

Since India has incorporated the ADA, by enacting the amendment of 1995 to the Customs Tariff Act, 1975, it became a law of India, applicable to the people of the country including the traders. This law is a special law within the meaning of Section (Sec.) 41 of the Indian Penal Code, 1860, (IPC).

Besides the Custom Tariff Act, 1975, India has enacted the following Economic Laws as Special Laws to deal with the economic offences which are containing the penal provisions:-

- Foreign Exchange Management Act, (FEMA) 1999, Chapter IV of this act provides for penalties, enforcement and power to compound contravention.
- Foreign Contribution (Regulation) Act, 1976. Sec. 22, 23, 24 and 25 of this Act provide for penalty, punishment, power to impose additional fine and penalty for offences respectively.
- Money Laundering Act which provide for penal actions against the violators

The 'penal ingredient' in the law is a time tested element which serves to check the violations to a greater extent due to the deterrence. The existing Economic Laws in India are Special Laws and they contain the penal provisions. Whereas the Anti-Dumping Law is devoid of the same, though it forms part of Custom Tariff Act, 1975 which prescribes penal provision for violations.

### **III. CONCLUSION**

The cumulative effect of the deficiencies/limitations of the ADA as given above, and the ratios applied by the judicial authorities in the decided cases reveal that, the Anti-Dumping law is not compatible to deal with the issues.

As a testimony to this, it has been reported that, "Larsen and Tubro, Executive Chairman, Mr. A.M. Naik had asked the Government to frame strong Anti-Dumping Laws to protect India's manufacturing sector from cheap imports from China.[9]

Simon Lester and Bryan Mercurio, the noted Authors, have expressed their opinion that 'Anti-dumping laws are somewhat anomalous in their goals and their substance'.[10]

The U S -1916 Act, imposed criminal and civil penalties using a different legal standard for dumping. The US had argued that 1916 Act does not specifically target dumping, but rather targets predatory pricing. However, based on the text of the 1916 Act, the Appellate Body found that 'the Civil and Criminal Proceedings and penalties contemplated by the 1916 Act require the presence of the constituent elements of 'dumping' and therefore, it follows that there is a specific action against 'dumping'. Thus, we agree with the European Communities (EC), India, Indonesia and Thailand that the 'test' established in US - 1916 Act 'is met not only when the constituent elements of dumping are explicitly built into the action at issue, but also where they are implicit in the express conditions for taking such actions.'[11]

In a Working Paper No. 85 on Anti-dumping Law and Practice: An Indian perspective by Aradhana Aggarwal (April 2002), as part of a capacity building exercise at Indian Council for Research on International



Economic Relations (ICRIER), in page 33, it has been maintained that-

Quote “Anti-dumping Law and Practice: A Legal Perspective: The problems of Developing Countries with the Application of the Anti-dumping investigation may even be more serious due to the lack of legal expertise and financial resources (Vermulst 1997) [12]. Moreover, a study by UNCTAD (1995)[13] reveals that laws in these countries are usually less detailed than even the multilateral agreements. The paper examines the short comings of the Indian Anti-dumping law and practice using legal perspectives.’ Unquote.

According to Tomer Broude, Hebrew University, Jerusalem, ‘If dumping itself is indeed an injurious trade phenomenon that ought to be discouraged or ‘remedied’, as the advocates of Anti-dumping laws have it, then the existing anti-dumping regime is self evidently ineffective in its preventive role’.[14]

The facts and testimonies as presented in this article clearly indicate that the Anti-dumping laws as it exists, is **incompatible** to meet the problems. It is, therefore, necessary to modify it suitably in the light of the past experience. It is relevant to mention that, on 23-1-2017 the first amendment was carried out to modify the Trade Related aspects of Intellectual Property Rights (TRIPS) Agreement. As there are sufficient reasons as given above, there will be no hitch in amending it. In the same way the ADA could also be amended. All Members of WTO particularly the developing countries jointly raise the issue in the next Ministerial Conference to realize the free trade and fair competition, as envisaged by the WTO, in its true spirit.

The legal paradigm and the procedural drags involved in anti-dumping measures, have costed the developing import-intensive countries more while countries that exported keep dumping, at will, because dumping is just condemned, not prohibited.

## REFERENCES

[1] Andrew T. Guzman & Joost H.B. Pauwelyn. (2009). *International trade Law*. New York: Aspen Publishers, P-433.

[2] Dr. Youngjin Jung & Sun Hyeong Lee. (2003). The legacy of the byrd amendment controversies: Rethinking the principle of good faith. *Journal of World Trade*, 37(5), P-928.

[3] The Hindu (2018, 3<sup>rd</sup> March). *Chennai Ed.*, P-14.

[4] Ibid.

[5] Jun Kazeki. (2010). Anti-dumping negotiations under the WTO and FANs. *Journal of World Trade*, 44, P-948.

[6] The Hindu. (2003, 16<sup>th</sup> Dec). Online Ed. *Business Page*.

[7] C.Satapathy. (2006, 21<sup>st</sup> Jan). Review of WTO rules on antidumping and countervailing measures. *Economic and Political weekly of India, A Sameekha Trust Publication*, P-267.

[8] Pauwelyn Joost. (2001) The role of public International law in the WTO; How far can we go?. *American Journal of International Law*, 95(3), 535-578.

[9] The Hindu. (2012, 25<sup>th</sup> Aug). *Bangalore Edition*, P-16.

[10] Simon Lester & Bryan Mercurio with Arwel Davie & Kara Leitner. (2008). *World trade law – Text, materials and commentary*. Oxford and Portland: Hart Publishing. P- 465.

[11] Ibid P-512.

[12] Vermulst. E. (1997). Adopting and implementing Anti-dumping laws – Some suggestion for developing countries. *Journal of Word Trade*, 31(2), 5-24.

[13] UNCTAD. (1995 15<sup>th</sup> Nov). Enhancement of the understanding of the implications of the new rules deriving from the Uruguay Round agreements and their follow-up, and identification of where and how developing countries and economic in transition concerned could be assisted to: (a) make use of the special clauses of the final act providing differential and more favourable treatment; and (b) implement and benefit from the commitments undertaken. *TD/B/WG.8/6*. Available at: <https://unctad.org/en/docs/c1em14d2.en.pdf>.

[14] An Anti-dumping “To Be or Not To Be” in Five Acts: A New Agenda for Research and Reform. (2014). *Journal World Trade*, 37(2), P-306.