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ANTI DUMPING LAW AND PRACTICE: AN INDIAN PERSPECTIVE

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Foreword

This paper, 'Anti Dumping Law and Practice: An Indian Perspective' by Aradhna Aggarwal is part of a capacity building exercise at ICRIER and has been prepared under the guidance and supervision of Professor Mathew Tharakan of the University of Antwerp. The study was part of the research programme on the WTO-related issues, funded by the Sir Ratan Tata Trust.

The subject of anti dumping is very topical and highly controversial. This paper reviews the anti dumping investigations carried out by the Government of India since 1993 and looks for the economic rationale for levying the anti dumping duty. The author's conclusion is that, as in most other countries, protection appears to have been the dominant motivation behind the levying of anti dumping duties in India. The paper also highlights the fact that the anti dumping law in India does not require a public interest test for imposing anti dumping duty.

I have no doubt that this paper will generate more debates on this very important and topical subject and will help clarify the issues that arise in dealing with "unfair" competition.

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Anti dumping Law and Practice: An Indian Perspective[*]

Aradhna Aggarwal

I Introduction

Trade policy regimes in most countries have transformed from inward oriented protectionist regimes to more outward and liberal trade regimes. However, any government that maintains a liberal trade policy is subject to pressures for temporary protection to specific industries. GATT therefore contains some contingent measures, which permit the signatories to withdraw their normal obligations under specified circumstances and impose higher protection against import of one or more goods from one or more countries. Contingent protection measures fall under three categories – antidumping, countervailing and safeguard measures.

The present study focuses on antidumping measures. Broadly speaking a product is said to have been dumped if it is introduced into the commerce of another country at less than the normal value of the product and it causes/threatens material injury to an established industry of the country. Article VI of the GATT stipulates that 'in order to offset or prevent dumping a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such countries'. Almost all WTO member countries have adopted/amended their antidumping legislation largely in accordance with the GATT provisions to deal with dumped imports. Some of the countries that are not members of WTO. have also acquired their antidumping legislation[1]. Almost 90% of total world imports are now entering countries in which anti-dumping laws are in place.

[*] I am heavily indebted to Dr. Isher Judge Ahluwalia for her constant encouragement and useful comments on an earlier version of the paper. Grateful acknowledgement is made of guidance and several valuable comments received from Prof. Tharakan. I would also like to thank Prof. Anwarul Hoda for his useful suggestions. My thanks to Sharad Bhansali, Arun Goyal, Vishwajeet Sinha and Rajesh Mehta for useful discussions. My thanks are due to Radhika Ayengar for valuable research assistance.

[1] Russia, for instance. China had also acquired its anti dumping legislation prior to becoming WTO member.

There has been a spectacular growth of anti-dumping investigations in recent years. The number of such investigations launched in 1999 was more than double that of those started in 1995. It increased from around 156 in 1995 to 358 in 1999[2] (WTO, 2001)[3]. Moreover, the use of antidumping is no longer confined to a limited number of industrialized countries. A large number of developing countries are now launching anti-dumping investigations. The share of developing countries in total cases was 10% at the beginning of the 1990s; it is almost 50% now. A large-scale recourse to antidumping has raised fears among researchers, analysts and specialists of its (mis)use as a protectionist measure. While some have raised questions about the ambiguities in antidumping regulations and procedures, others have questioned economic rationale behind such actions. Economic analysis by many scholars suggests that antidumping legislation is economically inefficient and that antidumping practices do not conform to the economic explanation of protection [Hutton and Trebilcock 1990, Hyun Ja Shin 1998, Bourgeoise and Messerlin 1998, Willig 1998, Leclerc 1999, Prusa and Skeath 2001][4]. The analyses of the legal provisions and antidumping practices in various countries [Murray and Rousslang 1989, Lindsey 2000, Araujo et. al 2001, Vermulst 1989, Tharakan 1994,1995, Didier 2001, Hsu 1998, Almstedt and Norton 2000 among others[5]], at the same time, indicate that the anti-dumping code is vague and that this vagueness has allowed the countries to have their own interpretation of the law. As there are ambiguities in the very definition of dumping

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2 The total number of cases reported in 2000,were 254

3 WTO (2001) : Rules Division Antidumping Measures database, WTO Secretariat.

4 Hutton,S and Trebilcock M,1990,'An Emperical Study of the Application of Canadian Anti-Dumping Laws: A search for Normative Rationales' Journal of World Trade, 24:3,vol: 123 ,no:4.Hyun JA Shin, 1998, ' Possible Instances Of Predatory Pricing in Recent U.S. Antidumping Cases', Robert Z. Lawerence, ed, Brookings Trade Forum. Bourgeoise, J and Messerlin, P, 1998,'The European Community's Experience',Brookings Trade Forum 1998, pp127. Willig, D , Robert, 1998,' Economic Effects of Antidumping Policy', in Robert Z. Lawrence, ed., Brookings Trade Forum. Leclerc, J, M,1999, 'Reforming Ani-dumping Law: Balancing and interests of Consumers and Domestic Industries', Mc Gill Law Journal ,vol:44, pp 113-139. Prusa, Thomas J. and Susan Skeath. ,2001, 'The Economic and strategic motives for anti dumping filings' NBER working paper 8424, http://www.nber.org/papers/w8424.

5 Murray, Tracy, and Donald J. Rousslang, 1989, 'A Method for Estimating Injury Caused by Unfair Trade Practices', International Review of Law and Economics, vol 9 ,pp 149-64. Lindsey, Brink,2000,' The US Antidumping Law, Rhetoric versus Reality', Journal Of World Trade, vol: 34, No: 1, pp1-38. Araujo Jr, JT, Macario, C and Steinfatt, K, 2001, 'Antidumping in the Americas' ,Journal of World Trade,vol 35,no: 4,pp 555-574. Tharakan, PKM,1995, 'Political Economy and Contingent Protection', The Economic Journal, 105(Nov), 1550-1564. Didier, P, 2001 ,' The WTO Anti-Dumping Code and EC Practice, Issues for Review in Trade Negotiations ', Journal Of World Trade , vol 35, no: 1,pp 33-54. Hsu, L, 1998,' The New Singapore Law on Antidumping and Countervailing Duties', Journal Of World Trade, vol 32, no:1, pp 121-145. Almstedt, K and Norton, M,[2000], 'China's Antidumping Laws and the WTO Antidumping Agreement,(including Comments on China's Early Enforcement of its Antidumping Laws ', Journal Of World Trade, vol 34, no: 6, pp 75-113. Tharakan, 1994,'Anti-dumping policy and practice of the European Union: an overview', - In: Economisch en sociaal tijdschrift, 48:4(1994), p. 557-575

and in every step of calculating dumping and injury margin, such ambiguities facilitate dumping findings (see, Tharakan 1991,1996,1999 Tharakan and Waelbroeck 1994[6]). Most studies of antidumping however, have been for developed countries [see, Blonigen and Prusa 2001[7] for a recent survey].

This paper aims at addressing the issues concerning antidumping system in the Indian context. India has emerged as one of the most frequent users of antidumping measures among the developing countries. The first antidumping duty in India was levied in 1993. Between 1995 and 2000 India initiated 176 cases (individual country-wise) which is 12% of the total cases initiated over the world. Table 1 shows that the antidumping cases per billion of goods' imports are 0.69 in India as compared with 0.06 for the world. Among the active user countries accounting for two-thirds of the total antidumping investigations during 1995-2000, India is the second largest country in terms of incidence, next only to Argentina.

Table 1: Share of selected countries in world antidumping initiations : 1995-2000

Country	Share in total initiation	Incidence*
United States	0.12	0.03
EC	0.15	0.02
Canada	0.05	0.06
Korea	0.03	0.06
Argentina	0.09	0.73
Brazil	0.05	0.24
Mexico	0.03	0.07
India	0.12	0.69
World	100.00	0.06

Note: * Incidence is defined as cases per billion $ of imports. It is calculated for 1995-1999.
Sources: WTO database; World Economic Outlook.

[6] Tharakan, PKM, 1991, 'Some Facets of Antidumping Policy: Summary of the contents of the Volume', Policy Implications of Antidumping Measures, Elsevier Science Publishers B.V. (North-Holland). Tharakan, 1996,'Anti-dumping measures and strategic trade policy', - Antwerpen, 1996. - 9 p. . - (Publications / UFSIA. Centre for Development Studies ; 13; Tharakaran PKM(1999): Is Antidumping Here to Stay?,The World Economy, Vol. 22,2,179-206; Tharakan, P .K.M and J. Waelbroeck, 1994, 'Antidumping and Countervailing Duty Decisions in the E.C. and in the US: An Experiment in Comparative Political Economy', European Economic Review, vol 38 ,pp 17l-93.

[7] Blonigen B.A. and Thomas J.Prusa, 2001,'Antidumping', Working Paper 8398, NBER.

The analysis is organised in two sections. Section II of the paper analyses various economic justifications offered to support antidumping legislation and explores whether there are any reasons based on economic efficiency to support the imposition of anti dumping duties in India. It addresses the questions : What are the different forms that dumping may take? Under what conditions might dumping be harmful ? What indicators could help determine whether these conditions will be met in practice? Have actual antidumping cases in India met these conditions? Section III addresses antidumping related issues in India at the legal and the operational level. It examines antidumping provisions and the administration of these provisions in India. While analysing the legal and operational aspects of the antidumping legislation, this study heavily draws on the existing studies, as well as the antidumping provisions in the selected active user countries - US, Canada, European Union, Mexico, Argentina, Brazil and Korea. Finally, Section IV concludes the analysis by drawing policy implications for reforming the antidumping system.

II Antidumping Law and Practice : Economic Perspectives

The rationales for antidumping laws have long been subject to analysis by economists (see for instance, Viner 1923, Barcelo 1971, Trebilcock and John Quinn 1979, Deardorff 1993)[8]. The most frequently offered economic justification for antidumping laws is that these laws protect the competitive process and the consumer from monopoly power of the foreign exporters. Following the thinking in antitrust literature, most scholars define economic efficiency in terms of consumer welfare standards. Applying this standard to antidumping remedies rules out the protection of domestic producer interests *per se* as a primary economic justification for the remedies. There are however, two protection-based justifications for imposing antidumping duties: optimal tariff argument of protection and

[8] Viner, Jacob, 1923, 'Dumping: A Problem in International Trade', Chicago, IL: University of Chicago Press. Barcelo, J , 1971-72,' Antidumping Laws as Barriers to Trade-the US and the international Dumping code', 57 Cornell L R, pp 491-560. Trebilcock M J. and J. Quinn, 1979, The Canadian anti dumping act : A reaction to Professor Slayton, Canadian-US Law Journal,2, 101. Deardorff, A,V, 1993,' Economic Perspectives on Anti-Dumping Law' in R.M. Stern,ed., The Multilateral Training system: Analysis and Potions or change (Ann Arbor, Mich: University of Michigan Press, 1993) 135.

strategic trade policy argument. While the former emphasises terms of trade gains from protection, the latter is based on externalities generated by some sectors. Critics of the antidumping legislation however, argue that there is little economic argument that can support the practice of antidumping. They explain antidumping measures by the political economy of protection. The political economy argument highlights the role of the domestic political influences mainly lobbying by influential domestic producers in determining the antidumping cases (see Tharakan and Waelbroeck, 1994, Tharakan 1995 among many others). This section analyses all the four arguments one by one as a potential justification for antidumping laws and examines empirically whether the operation of the Indian antidumping system can be justified by any of these arguments. It examines the following hypothesis : *In most cases in India the use of antidumping measures may be justified on economic grounds.*

Dumping in the literature is defined in two ways : price dumping and cost dumping. The former refers to international price discrimination while the latter is the practice of selling at prices below per unit cost. The antidumping law in the WTO Agreement however refers to price dumping. The sales below costs are not considered 'the ordinary course of trade'. Article 2.1 of the WTO antidumping agreement stipulates:

A product is considered as being dumped i.e. introduced into the commerce of another country at less than its normal value if the export price of the product from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

The rest of the analysis will therefore focus on price dumping.

II.1 Consumer welfare argument

The consumer welfare argument suggests that the economic rationale of antidumping laws is to prevent predatory pricing. The concept of predatory pricing is borrowed from the domestic competition policy (Hutton and Trebilcock 1990). Since competition policies are designed to prevent anti-competitive practices primarily by domestic firms, such policies define predatory pricing (see, Ordover 1998[9] for survey) as the situation where a domestic firm prices below cost so as to drive competitors out of the market and acquire or maintain a position of dominance. Predation involves efforts to achieve or exploit monopoly power, restricts competition in domestic markets and injures consumers through monopoly pricing in the long run. Competition policies deter predatory pricing by domestic firms to preserve the process of competition and protect the interests of the consumer. An open trade policy also aims at achieving these goals. In that context, antidumping policy is suggested to be a trade policy instrument that*, if used appropriately*, curbs anti-competitive practices by foreign firms by deterring predatory pricing. In international trade, predatory pricing is a strategy by which an exporter attempts to drive competitors from export markets and obtain monopoly power by cutting its export price below its home market price. Predation involves short-term gains to the consumers but leads ultimately to the failure of domestic producers and exposes the consumers to monopolistic prices. This argument therefore, suggests that antitrust and antidumping both seek to prevent similar harms and are based on the same premise i.e. monopoly power is inimical to the proper operation of a market economy, and companies tend to restrict competition and create monopolies through predatory pricing. Delving into the origins of antitrust and antidumping rules, Sykes (1998)[10] finds that the justification for both sets of laws at the outset was to protect the competitive process and the consumer from monopoly power. The first antidumping law, passed in Canada in 1904, was surrounded by anti predation rhetoric. In the United States, the 1916 Antidumping Act was aimed at predatory pricing by foreign exporters but was superseded by the 1921 Antidumping Act, which

[9] Ordover J. (1998) Predatory pricing in P Newman (ed) The new Palgrave Dictionary of Economics and the Law, Vol 3, Macmillan

[10] Skyes A.O (1998) Antidumping and Antitrust: What Problems Does Each Address? In R.Z.Lawrence ed Brookings Trade Forum 1998

closely resembled the Canada's antidumping law. Its supporters, Sykes observed, presented their antidumping rules as antimonopoly legislation to combat predatory pricing.

Though the current WTO antidumping legislation does not explicitly state the underlying rationale for antidumping law and does not include predation as a condition for dumping, preventing predation, economists argue, remains the strongest economic justification of antidumping laws. They point out that charging two or more prices for a like product in two or more markets separated by tariffs, transport costs and technical standards, is economically rational in many situations (see for instance Viner 1923, Deardorff 1993, Willig 1998, Messerlin and Tharakan 1999[11]). For instance, a company may increase its profits by charging higher prices in markets with lower price elasticities of demand, but lower prices in markets with higher price elasticities of demand. If the lower price elasticities of demand occur in the company's home market relative to its foreign markets, the company may charge higher prices in home markets to maximise its profits. Furthermore, an exporter may charge consumers a lower price in foreign markets when he introduces a product in a new market to create market for the product (Boltuck 1991[12]). Exports at low price might be aimed at developing trade connections/increasing market share in new markets. In addition, if a firm produces what Deardorff (1993) called 'learning by doing' products then the firm by charging lower prices in foreign markets will gain in experience as well as in the sales revenue obtained. Price discrimination in this case may be motivated by steep learning curve for the product (Vermulst 1999[13]). These two forms of price discrimination are pro-competitive (Warner 1992[14]). Society benefits from the low prices and increases in productivity efficiency and the industry learns more about the product. The law now seems to permit some short-term promotional price

[11] Messerlin and Tharakan, 1999, ' The question of contingent protection', - In: The world economy, vol 22 no:91, pp. 1251-1270 .

[12] Boltuck, Richard D, 1991, Assessing the effects on the domestic industry of price dumping, in PKM Tharakan ed Policy Implication of Antidumping Measures

[13] Vermulst1999,' Competition and anti-dumping: continued peaceful co-existence?', http://www.feem.it/web/activ/wp/abs99/67-99.pdf

[14] Warner P L, 1992,' Canada-United States Free-Trade: The case for replacing Antidumping with antitrusts', 23 Law and Poicy International Business. 791.

discrimination[15]. Bernhofen (1995[16]) focused on price discrimination in the intermediate good market. He argued that price discrimination in these markets arises from differences in country-specific final good production costs. The price differential is shown to increase as the productivity difference increases. Some scholars (Kronby 1991, Warner 1992[17] Willig 1998) argue that in times of slack home market demand, an exporter may sell his excess output in export markets with the objective of maintaining full capacity. In this case price discrimination is a rational business strategy. It may reduce capacity of less efficient domestic producers but improves global resource allocation and hence increases global welfare. Clearly, when price discrimination is caused by reasons other than predatory intent and is consistent with competitive conditions in the importing market then it can be socially beneficial, despite its adverse effects on domestic producers of competing goods (Willig 1998, Boltuck 1991). Domestic consumers benefit from the low prices, and if the importing market is perfectly competitive, the benefits to consumers outweigh the losses of domestic producers. Price discrimination ought not to be actionable in such cases as it does not violate competition laws (Palmeter 1991[18], Tharakan 1995,Trebilcock and Howse 1999[19], and many others). Antidumping duties are needed only to offset the unfair advantage that foreign exporters attempt to derive by charging lower prices than would be possible under normal market conditions. Thus, preventing predation is a potentially important and beneficial role for antidumping policy.

India is not legally obliged to use a predation test in antidumping. However, antidumping actions can be justified in economic terms if these are found to be limited to predatory dumping. It is therefore important to examine whether the antidumping law does in fact uphold plausible notion of free trade and really targets predation. This paper

[15] My thanks to PKM Tharakan for making this point.

[16] Bernhofen, M , 1995, 'Price dumping in intermediate good markets', Journal of International Economics, vol 3. 159-173.

[17] Kronby,M ,1991,' Kicking the Tires: Assessing the Hyundai Anti-Dumping Decision From a Consumer Welfare Perspective', 18, Can. Bus.L.J, 95.

[18] Palmeter, N.D. 1991 The anti dumping law: A legal and administrative non tariff barrier in R. Boltuck and R.E.Litan ed. Down in the dumps : Administration of the unfair trade laws (Washington DC : Brookings) 64-94

[19] Trebilcock M.J. and R. Howse, 1995, The regulation of international trade, London, England Routledge.

examines the application of antidumping policies in India and addresses the question : was socially harmful behaviour actually present when protection was granted ? Though there exist a few studies focusing on economic rationale of antidumping actions in developed countries (see, Hutton and Trebilcock 1990, Dutz 1998[20] and Leclerc 1999 for Canada; Hyun Ja Shin 1998 for the US; Bourgeois and Messerlin 1998 and Nicolaides and Wijngaarden 1993[21] for the EC; see also, Prusa and Skeath 2001), such analysis is scarce for developing countries.

Conditions for successful predation

For any form of price discrimination to take place certain necessary conditions have to be fulfilled. Such necessary, but not always sufficient, conditions include the international segmentation of markets and/or a market structure characterized by imperfect competition in the country of the firm carrying out the price discrimination *(Tharakan 1995, p. 190)*. If there were no barriers to market access anywhere then price differences with other markets would be leveled out because of import competition (Vermulst 1999). Mastel (1998, p. 43[22]) argues '*if a company engages in foreign markets and its home markets is open, the price differential will induce re-exports of dumped products to the dumper's home markets*'[23]. Another necessary condition for dumping to take place is the presence of imperfect home country markets characterised by high degree of concentration, asymmetric distribution of financial resources and substantial barriers to entry. The imperfect competitive markets make foreign competition difficult. This allows firms to charge higher prices in domestic markets. The rents thus created can be used to price discriminate internationally.

[20] Dutz,M. 1998, Economic impact of Canadian anti dumping law in R.J.Lawrence ed Brookings Trade Forum 1998.

[21] Nicolaides,P and Wijingaarden Van.R,1993, 'Reform Of Antidumping Regulations: The Case of the EC', vol 27, no:3 , Journal Of World Trade ,31 at 40

[22] Mastel, G, 1998, 'Antidumping Laws and the US Economy, (Armonk, N,Y: M E Sharpe) p.43.

[23] This is one of the reasons why conceptually no dumping is supposed to take place within the European Community..(Vermulst 1999).

The two conditions described above are necessary for any form of price discrimination. For price discrimination to be predatory more stringent conditions have to be met. For instance, for successful predation at the international level, firms need to have capacity not only for domestic dominance, as suggested above, but also for global dominance in their industry. If the predatory firms do not have the capacity for global dominance, third country competitors will move in and bring down the prices again during the hypothesised post-predation price-hike period[24]. The position of dominance also implies that the predator has substantial resources and that he can sustain losses for a longer period of time to drive away the competitors. However for this argument to hold, there must be imperfections in the capital market. The potential victim may be located in a country with less developed markets and/ or his capability to raise the capital must be limited. Further it has to be assumed that outside financing is costlier than internal financing. Finally, the threat of predation needs to be credible. Credibility of the threat in fact is central to the issue of successful predation (Tharakan 2000)[25]. If the threat is not credible then it cannot be used as an effective signal to competitors and potential entrants in other markets not to enter or compete rigorously. It is therefore important that the predator builds a reputation as a predator. In sum, the possibility of successful predation depends on a set of crucial assumptions. The most important among them is that the predator has dominance not only in domestic markets but also in international markets. Other important conditions include, market segmentation, imperfect capital markets and credibility of the threat.

According to one school of thought (see Tharakan 2000 and references therein), predation is unlikely to exist. It is suggested that predation is a costly strategy. The predator must meet a number of stringent conditions and yet there is no way to rule out (re) entry during the post predation period. Many scholars however suggest that the possibility

[24] My thanks to PKM Tharakan for making this point.

[25] Tharakan PKM (2000) 'Predatory Pricing and Antidumping' in Norman G. And J.F. Thisse eds Market Structure and Competition Policy Cambridge University Press.

of predation cannot be ruled out. Predation attempts whether of national or foreign origin must be detected and countered because it leads to welfare loss.

Identification of predation

For predation tests, much could be borrowed from the existing competition laws. In India, however, investigations into predatory pricing have been infrequent and in the cases where the law is enforced, the MRTP Commission generally applies the Areeda-Turner test (1975)[26] which requires a comparison of price with marginal/average variable costs (see Bhattacharjea 2000a[27]). Employing the cost-based rules to determine predation is not practical at international level (Hyun Ja Shin 1998, Hutton and Trebilcock 1990, Bhattacharjea 2000b[28]). Besides, a large body of theory (see Ordover 1998 for survey) shows that simple comparisons of price with average or marginal costs are unsatisfactory. Competition authorities in certain countries have developed and deployed methods for detecting predation attempts (See Tharakan 2000 and references therein) . These could be used for identifying predation in antidumping cases. The most appropriate among them is the 'two tiers approach'. In the first stage of any investigation the extent of market power of the supposed predator is assessed. Only those cases in which the existence of market power is confirmed pass on to the second stage where price-cost comparisons are made. Recent empirical studies have evolved certain criteria to analyse the likelihood of the existence of monopolising behaviour in the first stage. These criteria are based on the structural characteristics of the industries and are examined to determine if predation could have been a successful strategy in those industries. Following the existing literature, this paper adopts four criteria which, it is argued, must be met if predation is to be a likely explanation of price discrimination and evaluates the antidumping duties in terms of these criteria in order to judge whether there was a likelihood of predatory dumping occurring

[26] Areeda,Phillips and Donald F.Turner(1975) 'Predatory pricing and related practices under Section 2 of the Sherman Act' Harvard Law Review 88(4),697-733.

[27] Bhattacharjea A. (2000a) : Predation, protection and the public interest' Economic and Polictical Weekly, Dec 2, 2000, 4327-4336.

[28] Bhattacharjea A. (2000b) Trade,foreign investment and competition policy : Some Insights from "New" Trade Theory and Recent Indian Experience www1.woldbank.org/wbiep/trade/services/bhattacharjea.pdf.

into the Indian markets. Cases that fail to meet any of these criteria *probably* do not involve predatory dumping. These criteria are :

(1) import penetration should be high, to indicate that domestic firms might be driven out of business;

(2) The large suppliers have to be dominant at the world level, otherwise predation attempt will not succeed ;

(3) export markets should be concentrated / the number of foreign sellers should be small, so that they can exercise monopoly power in the future;

(4) Exporters should be dominant producers in their domestic markets.

The Data set

India initiated, between 1993 and 2001, 99 cases involving 223 countries. Proceedings of these cases are reported in the Government of India Gazettes. Database included all these *223* cases. Even those cases in which antidumping duty was not imposed were included since it is possible that these cases might have represented instances of predatory dumping. This database has limitations as the authorities have not evolved any fixed format for publishing antidumping cases. The level of information varies widely from case to case. Trade statistics provided in the Gazettes wherever necessary were supplemented by the DGCIS (Directorate General of Commercial and Intelligence Statistics) data. Using the database thus created, this study examined whether the four criteria described above had been met in majority of the cases. Identification of the cases that satisfy all the conditions for successful predation has not been attempted here due to limitations of the database.

1. Import penetration ratio

The import penetration rate defined as the ratio of imports to net availability (i.e. domestic production minus exports plus imports) shows to what degree domestic demand is satisfied by import. A low penetration rate may imply the existence of high import

barriers. However, in an open regime, a high penetration rate may reflect industry-specific characteristics favourable to international trade, such as low transport costs for goods with a high value per unit. It could also reflect weak competitiveness of domestic firms and their inability to resist foreign competition. In either case, a high import penetration reflects a high exposure of domestic industries to foreign competition and possible predation (Hyun Ja shin 1998). There is therefore need to look for evidence that antidumping cases are filed against those exporters that have high import penetration ratio

The authorities generally report in the gazettes the share of exporter country in domestic demand during the period of investigation. However as stated above , this is not obligatory for the authorities to do so. The import penetration ratio data was found to be available for 99 (of 223) cases. This was ranked and grouped in a class-wise distribution (Table 1). These data show that in around 77% of cases the share of exporter country was less than 25%. Average import penetration ratio in this class was as small as 6.7%. In 13 cases, it was between 25% and 50%. In only 10 out of 99 cases did the imports constitute more than 50% of demand. Exporters dominated the market by supplying more than 75% of demand in only 2 cases. In these 2 cases average penetration was as high as 86.7%.

Table 1 : Distribution of Import penetration ratio (IPR) in selected AD investigations

IPR	No of cases	% to total cases	Ave. IPR (%)
0-25	76	76.8	6.68
25-50	13	13.1	34.65
50-75	8	8.1	61.53
75-100	2	2.0	86.72
Total number	99	100.0	11.27

Source : Government of India Gazettes

Table 2 shows a class-wise composition of 76 cases in which imports accounted for 25% or less domestic demand. In 75% of the cases imports constituted less than 10% of total domestic demand. The number of those serving less than 5% of the market was

around 45%. It may be observed that the frequency of exporters declines as we move on to higher categories of import penetration ratio.

Table 2: Distribution of the lowest category of Import penetration ratio

Import penetration ratio	No of cases	% to total cases
0-5	33	43
5-10	24	32
10-15	15	20
15-20	4	5
20-25	0	0
Total number	76	100

Source : Government of India Gazettes

From the above observations, it is clear that the authorities investigated few cases in which import penetration was high. One caveat however is important : information in many cases was not available.

Table 3 lists those cases in which imports have made large inroads into domestic markets It may be observed that all these cases involve non-market economies. It is noteworthy because the rules for determining the existence of dumping is quite different when the affected country is a non market economy (Boltuck and Litan 1991[29]). Prusa and Skeath (2001) argue that the motivation for filing against a non market economy is likely to be quite different than that for filing against a market economy. They even dropped the cases against non-market economies from their analysis.

[29] Boltuck, Richard D and Robert E. Litan (eds.),1991, ' Down in the Dumps: Administration of the Unfair Trade Laws', Washington, DC: The Brookings Institution.

Table 3: Import penetration ratio of selected countries in selected Indian industries

Product	**Country**	**IPR**
PTFE	Russia	50.0
Orthocholoro Benzaldyhyde	China PR	51.8
Newsprint	Russia	54.0
Magnesium	ChinaPR	57.9
8-Hydroquinoline	China PR	67.0
Potassium Permanganate	Chain PR	69.7
Calcium Carbide	China PR	70.6
Stronium carbonate	China PR	71.3
CFL	China PR and Hong Kong	79.0
Analgin	China PR	94.5

Source : Government of India Gazettes

2. Share of subject countries in total imports

Exporting at unfairly low price would result in large import volumes. The greater is the share of the subject country in total imports the greater is the possibility of its driving out others by lowering its price. If there is competition in the international market with a large number of trading partners having small share in total exports, then predatory practices by a single country, having a small share, are not likely to succeed. This hypothesis termed 'big supplier' hypothesis (Prusa and Skeath 2001) therefore is: '*If antidumping cases were predominantly directed at dominant trading partners that fact could be construed as evidence of the use of antidumping to combat unfair trade'*.

To examine the above hypothesis, information was collected on the share of defendant countries in total imports of the subject goods in the year preceding the

investigation. The DGICS trade statistics were used as the database for the analysis. This information was compiled for 77 countries involved in different antidumping cases. It included all those cases in which import penetration ratio of the defendant countries was above 50%. Table 4 presents the information in summary form. It may be observed that in 46 out of 77 cases, the share of the subject country in total exports was below 25%. The number of cases declined as one moved to higher classes. Only in 8 cases, the share of the exporter exceeded 75% of total imports. If 50% is taken as a cut-off point to define big supplier, then only 18 cases qualify for antidumping duty. In their study, Prusa and Skeath (2001) also found that only about *one-quarter* of the observations on 'new users' (developing countries) antidumping activity supported the big supplier hypothesis. Thus, there is evidence that antidumping cases are not necessarily aimed at big suppliers in India. The cases in India are filed independently of the volume of imports and possible predation. It may be noted that in traditional user (developed) countries 90 % of cases are directed against big suppliers (Prusa and Skeath 2001). Thus , on the basis of this criterion, antidumping decisions in developed countries seem to be more often consistent with the economic motive[30] than those in India, a developing country.

Table 4 : Distribution of import of subject country to total import ratio

Import of subject country/total	No. of cases	% to total cases
0-25	46	60
25-50	13	17
50-75	10	13
75-100	8	10
Total number	77	100

Source: DGICS Trade Statistics

Table 5 presents case–wise details of big suppliers. It shows that of the 18 cases, 13 cases directed against big suppliers involved non-market economies. Of the five cases

[30] It is important to note that non economic considerations such as political pressures, national security interest, historical economic relations are also found to be influencing EU and US AD decisions (Hansen and Prusa 1996, 1997; Tharakan and Waelbroeck 1994a, 1994b).

directed against market economies, 2 were against EU and 3 against Japan, an individual country. Moreover, of the ten cases identified above (Table 3) as having large import penetration ratio, 7 appeared in Table 5 as well. These were : Calcium carbide, 8-Hydroquinoline Magnesium, analgin, CFL, ortho Cholro Benzaldyhyde and potassium permanganate. All these cases thus make the case for possible predation provided they satisfy other conditions, as well. It may be noted however that they all are against China.

Table 5 : Share of big supplier countries in total imports of subject goods

Product	**Country**	**Share in total imports**
Calcium carbide	China PR	84.6
Potassium permanganate	China PR	86.35
Bisphenol A	EU	57.38
EPDM	Japan	58.336
NBR	Japan	60.48
8-Hydroquinoline	China PR	64.45
TMBA	China PR	65.28
Fused magnesia	China PR	69.79
Magnesium	China PR	71.34
Chloroquine Phosphate	China PR	74.43
Heophylline and Caffeine	China PR	80.15
ortho Cholro Benzaldyhyde	China PR	84.76
IBB	China PR	92.00
Sodium ferrocynide (2001)	EU	92.44
TSP	Japan	93.62
Sodium ferro cynide(1996)	China PR	93.69
Analgin	China PR	94.45
CFL	China PR and Hong Kong	94.00

Source: DGICS Trade Statistics

3. Concentration in export markets

The number of foreign suppliers should be small to carry out a successful predatory strategy. The smaller is the number of exporter countries of a particular product to a

country, the easier it is to drive them out through predation. The hypothesis to be tested is : If AD investigation is directed at that commodity which is exported to the country by a small number of exporters then it may be consistent with the economic motive of curbing predatory dumping'.

For examining the hypothesis, information was collected using the DGCIS trade statistics, on the number of exporter countries during the year preceding investigations. This information was collected for 77 cases and is summarised in Table 6 below. The number of exporter countries is assumed to be small if it is four or less. The Table shows that of the seventy-seven cases, only 9 qualify for predatory dumping using this criterion. In all other cases, the number of exporter countries was 5 or greater. In 44 cases (57%) cases the number of countries exporting the product exceeds 15. Thus the evidence based on the number of exporters provides support for the economic incentive only in 9 (12%) cases. Even in these cases, given the small size of the Indian markets in the world economy, the existence of few suppliers is not necessarily prima facie evidence of the exercise of monopoly power. The subject products are in general intermediate goods in the chemical sector and are reasonably standardised and therefore difficult to monopolise.

Table 6: Number of exporters-wise classification of the AD cases

No. of exporters	No. of cases	% of total cases
1-4	9	12
5-10	16	21
11-15	8	10
16-20	20	26
20-25	16	21
26 and above	8	10
Total number	77	100

Source: DGICS Trade Statistics

Table 7 below shows that almost all the cases in which the number of exporter countries is small involve China . Only two such cases involve EU, which is a group of countries. It may also be noted that only 4 of the 7 cases that qualified for possible predation on the basis of the import penetration ratio and big supplier hypothesis, appear here. These are : 8-Hydroquinoline, Analgin, ortho Cholro Benzaldyhyde Potassium permanganate.

Table 7 : Number of exporters in selected cases

product	Country	no: of exporter country
8-Hydroquinoline	China PR	6
Analgin	China PR	2
ortho Cholro Benzaldyhyde	China PR	5
Potassium permanganate	China PR	2
Stronium	China PR	3
Choloquine Phosphate	China PR	3
IBB	China PR	3
Sodium ferro cynide	China PR	3
Sodium ferrocynide	EU	3
heophylline and Caffeine	China PR	4
Theophylline and Caffeine	EU	4

Source : DGCIS Trade Statistics

4. Concentration in exporters' home markets

Exporter must also be operating in highly concentrated markets for successful predation. Only dominant players in the home market are in a position to lower prices in export markets and suffer losses to drive other competitors out. Furthermore, the firms which do not even dominate the domestic markets are unlikely to dominate the global markets[31]. The analysis of exporters' domestic dominance requires information on their market share. In the absence of this information the present study makes use of the information on the number of known exporters. The gazettes report the number of *known*

[31] My thanks to PKM Tharakan for this point.

exporters of the dumped products from the target country. Information on the number of *known* exporters was collected and examined for only those cases in which only one country was involved at a time. The information is summarised in Table 8 below. It may be noted that in many instances (slightly less than 50% of the cases), antidumping investigations were carried out simultaneously against several countries exporting the same product to India. These were considered to be unlikely cases of predation and hence were excluded.

Table 8 : Distribution of the number of exporters

Number of known exporters	No. of cases
1	11
2	8
3	2
4	5
More than 4	16

Source : Author's computation

In 26 of the 50 cases, the number of *known* exporters varied between 1 and 4. Of the 26 cases, in only 7 cases, the number of exporter countries was also small (between 1 and 4) or the subject country dominated the export/domestic markets. These 7 cases were : citric acid, 8-hydroquinoline, barium carbonate, potassium permanganate, analgin[32], sodium ferrocynide (EU) and chloroquine phosphate. In others, the number of supplier countries was large. Of these 7 cases, only three : 8-hydroquinoline, analgin and potassium permanganate satisfied other conditions of predation as well, in the first stage. These cases could then be subjected to second tier tests. However, the objective of the analysis is not to suggest that only these cases could have involved predation. In the absence of the complete information, it merely suggests that there were few cases of possible predation in India.

[32] Analgin was exported by Taiwan also but its share was negligible. It was therefore included it in the analysis.

II.2 Strategic Trade Policy Argument

In recent years, some policy analysts have advocated protectionist trade measures under the rubric of "strategic trade policy" (Katrak 1977, Svedberg 1979, and Brander and Spencer 1981[33]). The argument is that in some international markets that are characterized by external economies of scale also, there are only a few firms in effective competition In concentrated markets, firms set prices in excess of the marginal cost of production, which results in firms typically making excess returns. There is an international competition over who gets these profits. The theory argues that strategic trade policy would enable domestic companies to capture rents in these imperfectly competitive markets at the expense of foreign firms. For instance, a subsidy to domestic firms, by deterring investment and production by foreign competitors, can raise the profits of domestic firms by more than the amount of the subsidy. Tariff may do the same. Assuming that other governments do not retaliate, antidumping duty can shift rents from foreigners to domestic companies. The rapid development of these strategic industries, such as the high technology electronic and communications sectors (Tyson 1992 [34]) confers beneficial spillovers on the rest of the economy. Moreover, it is also argued that dumping in such industries termed 'strategic dumping' by Willig (1998), gives foreign firms an advantage . If the exporters' home market is foreclosed to foreign rivals and if each independent exporter's share of their home market is of significant size relative to their scale economies, the exporters will be able to have a significant cost advantage over foreign rivals. With access to both home and foreign markets, they gain a cost advantage over domestic firms that are unable to compete abroad. This advantage, which is obviously contingent on the home market being sufficiently large, eventually gives the exporting firms market power. Strategic dumping, Willig points out, is likely to damage the importing country by reducing the ability of domestic firms to take full advantage of scale economies. If domestic firms are unable to compete effectively, over time domestic

[33] Homi Katrak,1977, 'Multinational Monopolies and Commercial Policy', Oxford Economic Papers, vol 29 , pp 283-91. Svedberg Peter, "Optimal Tariff Policy on Imports from Multinationals", Economic Record, (55) 1979: 64-7. James A. Brander and Barbara J. Spencer, 1981, 'Tariffs and the Extraction of Foreign Monopoly Rents Under Potential Entry', Canadian Journal of Economics, vol 14, pp 371-89.

[34] Tyson, L. D,1992, 'Who's bashing Whom?', Institute for International Economics.

consumers may be injured by the exercise of market power by exporting firms. Anti dumping duty in this case therefore is a rational trade policy.

To facilitate the illustration, consider Figure 1 in which the free trade equilibrium between two firms is shown by the solid lines (or reaction curves) R_A (domestic firm) and R_B (foreign firm). Each firm's reaction curve shows the amount of sales that would maximize its own profit, given the sales of its rival. As one moves northwest along the domestic firm's reaction curve (starting from the x-axis), one observes the response to a larger and larger volume of imports from the foreign firm. Domestic sales fall, but by less than the increase in imports. The price falls, as do the profits of the domestic producer. Equilibrium, given by point E, is at the intersection of the two reaction curves, because only at that point is each firm doing as well as it can, given the strategic behaviour of its rival. Now let the government of country A impose an import tariff. This raises the delivered cost in the domestic market for the foreign firm, and shifts its reaction curve downward as shown in Figure 1.

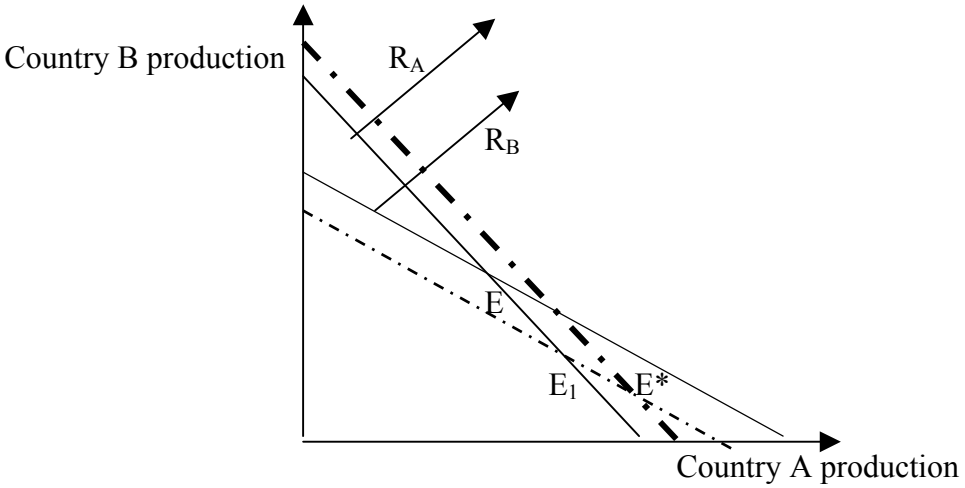

Figure 1

The intersection point shifts to E_1. But that is not the final equilibrium. Since the domestic firm's output rises, its incremental cost falls. Similarly, the exporter's marginal cost rises. This has further repercussions on their reaction curves in both markets. The domestic firm's reaction curve shifts to the right, and that of the exporter downward. These

shifts in turn increase the domestic firm's sales and decrease the exporter's sales in both markets. This further lowers the domestic firm's incremental cost and raises that of the exporter, causing further output changes, and so on. Since all these changes work in the same direction, the qualitative prediction for the final outcome is unambiguous. The reaction curves after all these changes have worked out are shown by dashed line, and the resulting equilibrium is marked E^*. The figure shows that the domestic firm has reinforced its advantage in the home market. The exporters' market analysis is not shown here. However, it may be noted that domestic firms gained in the export market also. Import protection acted as export promotion. In theory, a role for strategic trade policy emerges in two situations: imperfect competition and economies of scale in production. In these cases, a government, by protecting its companies in international competition, can shift rents from foreign rivals to domestic corporations. International trade expands market size, allowing the realization of economies of scale and increased competition in imperfectly competitive industries. This greatly expands the gains from trade.

In order to evaluate antidumping applications in terms of this argument, it is necessary to examine the industry-wise composition of these investigations. If antidumping cases are concentrated in strategic industry then expanding trade gains and improving national welfare is the economic rationale of antidumping in India. Sectors with high linkages that diffuse new technologies over a broad spectrum of industries have been dubbed as "strategic sectors". Identification of strategic industries however raises serious difficulties (Tharakan 1994). An important question that comes up is : What should be criteria for identifying strategic industries? Is it value addition, technology intensity, comparative advantage or employment? There is no evidence that one industry (microchips) or set of industries (computers and related industries) is inherently superior to another. Consider a high technology intermediate good, such as semi conductors. Because these serve as inputs into a whole range of modern producer and consumer electronics, the promotion of such an industry may be considered as a foundation for promoting high technology activities. When domestic producers of such an input gain tariff protection against foreign suppliers, the price of this input rises, and with it the costs of those

allegedly desirable high technology industries that incorporate the input. Rather than launching a whole sector, protecting an input can raise the costs of domestic users and cause them to cede the market to imported finished products. In 1991, when the U.S. imposed a 62% tariff on screens for laptop computers imported from Japan, the computer makers began moving their production overseas to escape the elevated cost[35].

In India the Technology Vision 2020 Report published by TIFAC defines strategic industries as those industries that are likely to give a country a decisive advantage in terms of the technological strengths in the long run. The report has identified aviation, electronics, sensors, space communication and remote sensing, critical materials and processing, robotics and artificial intelligence as the critical areas. However , an examination of the industry-wise composition of antidumping investigations reveals that antidumping investigations are concentrated in the chemical and steel sector. These are medium/ medium-high technology sectors. Products are standard products, are intermediate products and have specific uses. In most cases, they are not likely to be characterised by external economies of scale. Besides, international markets in most cases are not concentrated in these products. Table 6 above shows that in 9 of the 77 cases, the number of exporter countries was 5 or greater. In 44 (57%) cases the number of countries exporting the product exceeded 15. Clearly, a majority of antidumping cases in India fails to satisfy the strategic trade policy argument, as well.

II.3 Optimal Tariff Argument

The possibility that a tariff could improve national welfare for a large country in international markets was first noted by Torrens (1844[36]). The argument suggests that if the country has important internal markets then it might force exporters to diminish their price by imposing a small tariff. The foreign exporters may absorb most of the increase in prices to keep their share in such an important market and the country imposing the tariff

[35] Business Week, December 2, 1991: 38-9. Restricting imports of machine tools had different but equally adverse consequences. See The New York Times, October 7, 1991: D1,D4.

[36] Torrens, Robert , 1844, 'The Budget: On Commercial and Colonial Policy', London, Smith, Elder

could gain more than it loses. Since the welfare improvement occurs only if the terms of trade gain exceeds the total deadweight losses, the argument is commonly known as the *Terms of Trade Argument* for protection. In figure 2 below, under free trade situation, the world price (and hence the domestic price) is P_W; domestic producers produce M_1; domestic consumers consume M_2. This country imports (M_2 - M_1). The consumer surplus is AP_WD. The producer surplus is BP_WC. Now suppose that the government imposes a tariff of *t* on M. By the reasoning above, this causes the world price to decrease to P'_W. In the domestic market, the price of M is $P'_W(1+t)$. As for the small country, imposing tariff leads to increase in production from M_1 to M_3., decline in consumption from M_2 to M_4.

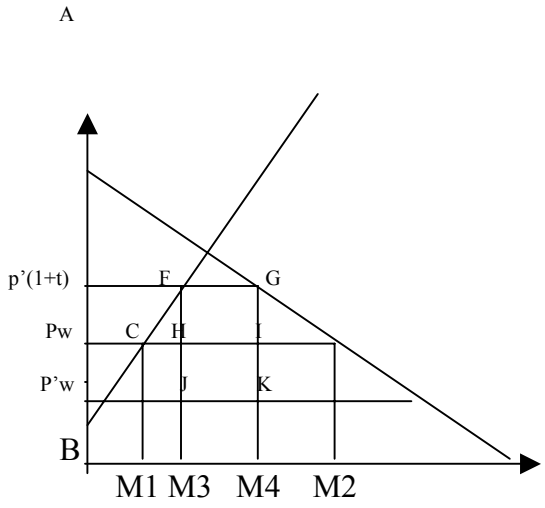

Figure 2

Imports decrease from (M_1 - M_2) to (M_3 - M_4). The consumer surplus is $AP'_W(1+t)G$, which has decreased The producer surplus is $BP'_W(1+t)F$, which has increased There is an efficiency loss - a production distortion loss FCH and a consumption distortion loss GID. The impact of tariff on efficiency is same whether the country is small and large. However, there is a difference in the government tariff revenue. For the small country, it was the area FHIG. The large country, on the other hand, forced a decrease in the world price, so it has the *additional* revenue JHIK. Thus the total tariff revenue is FJKG. The additional revenue JHIK is called the **terms of trade gain** because it comes

from an improvement in the country's terms of trade. The efficiency loss of FCH + GID is offset by the terms of trade gain JHIK. The level of a tariff that maximizes a country's welfare is known as the optimal tariff rate. Figure 3 shows the general relationship between tariff levels (t) and national welfare (NW) that arises out of the above analysis. If the tariff is set at zero, (t=0), then we will presume the country allows imports to enter freely in this market. The level of national welfare attained in free trade is given by NW_{FT}.

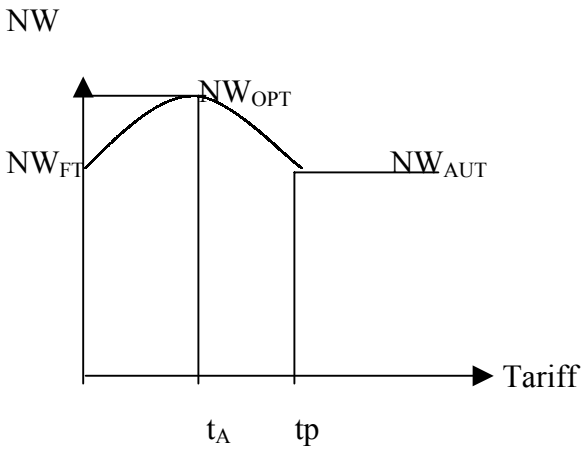

Figure 3

As long as the import country is large in its import market, a small tariff will raise national welfare in the country. In the diagram, one can see that national welfare rises as the tariff is raised from 0 to t_A. At low tariff rates, an increase in the tariff raises the terms of trade gain faster than the increase in the deadweight losses. The terms of trade gain will begin to fall at a higher tariff rate. Since the deadweight losses continue to rise, both effects contribute to the decline in national welfare. At the prohibitive tariff, t_p in the diagram, the previously positive terms of trade gain is zero. The only effect of the tariff is the deadweight loss. Note that any additional increases in the tariff above t_p, will maintain national welfare at NW_{Aut} since the market remains at the autarky equilibrium. From the above analysis it is clear that the optimal tariff argument is valid only under two conditions.

- The tariff imposing country should be a large exporter.
- Increase in tariff should be small (Johnson 1954[37])[38].

To examine the first condition, import data of selected developed countries for those sectors that have most frequently been subject to antidumping investigations was compiled and presented here in Table 12. The data pertain to the year 1997. These data suggest that Indian market is insignificant as compared with other developed countries. Even Korea's markets are several times larger than that of India. Certainly, India does not offer large markets and is not in a position to affect world prices in any of these sectors.

Table 12: Sector-wise imports of selected countries (1997)

(Million $)

Country	Organic chemicals	Pharmaceuticals	Petrochemicals	Iron and Steel
Germany	9480.1	7117.8	9372	11957.2
India	1757.7	388.9	667.4	1422.3
USA	16837.6	8230.6	15871.8	6695.2
UK	7529.3	5194.6	6343.8	5554.3
Japan	6992	4243.2	2210.3	4520.6
Korea RP	4895.1	724.8	1887.2	5724.7

Source: International Trade Statistics Year Book ,1998 UN

For evaluating the applicability of the second condition, *ad valorem* equivalent of selected antidumping duties were estimated. The specific duty was multiplied by the volume of imports of the product from the subject country and then was divided by the value of imports from the subject country to arrive at the *ad valorem* equivalent of the duty in the year it was imposed. Though this methodology is subject to several limitations, it

[37] Johnson HG(1954) 'Optimum Tariff and Retaliation' Review of Economic Studies 21, 142-153.

[38] Besides, other countries should not retaliate by raising tariffs themselves.

provides a rough estimate of the *ad valorem* equivalent of antidumping duties. The results are presented in Table 13 below. It shows that MFN rates themselves had been above 40% in all the cases except Low Carbon Ferro Chrome (LCFC) where it was 30%. Antidumping duties were not small either. In caffeine and theophylline it exceeded even 100%. This is therefore no small tariff increase as suggested by the optimal tariff argument. Thus the optimal tariff argument does not offer any economic justification for antidumping cases in India.

Table 13: *Ad valorem* equivalent of AD duty and MFN tariff rates of selected products subject to AD Investigations (%)

Product	Date of Preliminary. duty	subject country	Apr1996-mar1997	Apr1997-mar1998	MFN Tariff rate
Bisphenol A	25-10-96	USA	20.0		40.4
Acrylonitrile Butadiene Rubber	30-12-96	Korea RP		16.8	45.6
Acrylonitrile Butadiene Rubber	31-3-97	Germany		21.5	45.6
Acrylic Fibre	31-3-97	USA			40.4
Acrylic Fibre	31-3-97	Thailand		18.3	40.4
Acrylic Fibre	31-3-97	Korea RP		30.8	40.4
3,4,5-Tri Methoxy Benzaldehyde	31-1-95	China PR	45.6		40.4
Theophylline	31-1-95	China PR	184.2		
Caffeine	31-1-95	China PR	170.7		
Low Carbon Ferro Chrome	23-5-96	Russia			30.0
Low Carbon Ferro Chrome	23-5-96	Kazakhstan	73.06		30.0

Source : Author's computation based on DGCIS statistics.

From the above analysis it is clear that the use of antidumping measures is not contingent on market characteristics connected with predatory dumping, strategic trade policy argument or optimal tariff argument. Economic explanations have rarely anything to do with antidumping as it is practised in India. However, the abuse of antidumping measures is by no means India's monopoly. Most studies on antidumping cases in developed countries also indicate the absence of any reason based on economic efficiency

to support the imposition of antidumping duties[39]. An extensive review by the OECD of antidumping cases in Australia, Canada, the EU and the US found that much less than 10% of the antidumping cases would have passed the rigorous predation standards[40]. Now the question that comes up is : Is the antidumping system administered protection in India? To address this question, in what follows, the paper examined the structure of domestic markets of those products that have been subject to antidumping investigations.

II.4 Political Economy Argument : Preliminary Evidence

Theoretically, predation by exporters is successful where domestic industry is concentrated. This is because the elimination of just a few firms would enable foreign firms to enjoy a monopoly. Moreover, high entry barriers in these industries allow foreign firms to raise prices without any threat from potential entrants once domestic firms are driven out of business (see, Hyun Shin Ja 1998). In practice however, it is possible that dominant domestic producers in concentrated industries use the antidumping laws to protect themselves from foreign competition. Oligopolists may use their lobbying power effectively to obtain protection from import competition (Tharakan 1994, Tharakan and Waelbroeck 1994, Hutton and Trebilcock 1990). This argument suggests that if dumping investigations are heavily biased in favour of concentrated industries then predatory dumping may not be the reason for such investigations.

The Government of India gazettes, in general, provide information on the number of producers, number of petitioners and their market shares. This information was not available for all the cases. The available information was summarised in Tables 9 and 10. It may be observed that a striking feature of the investigated cases in India is the extreme concentration in domestic markets. In more than one-quarter of the cases, the industry had a sole producer. In around 80% of the cases , the industry had one to four producers. In

[39] Op.cit note 4.

[40] Finger J.M., Francis Ng and Sonam Wangchuk (2000) ' Antidumping as safeguard policy' presented at the University of Michigan, Gerald R.Ford School of Public Policy and Japan Economy Program conference, Oct 5-6,2000.

only 11 cases, the industry had more than 6 producers. What is more striking is the concentration among petitioners. In 90% of the cases the number of petitioners was between one and three . In those cases where there was only one petitioner, his average market share was 89.7%,. In the cases where the number of petitioners was 2 and 3, average market share was 62.7% and 76.6 % respectively. Clearly, the petitioners were the dominant producers in their industry. In around 49% of the cases there was a sole petitioner and on an average his share was 89.7%. Of the 97 cases there were only 3 cases in which the number of petitioners exceeded 5. This is in contrast with the findings for the US where unconcentrated industries initiated more than 50% of all dumping cases; at most, only one-third were initiated by highly concentrated industries (Hyun Ja Shin 1998).

Table 9: Domestic market structure of industries subject to AD investigations

no: of Producers/Petitioners	No: of cases (producers)	No: of cases (petitioners)	Average market share*
1	23	47	89.7
2	11	22	62.7
3	9	18	76.6
4	12	4	59.3
5	13	3	67.8
6	3	0	-
More than 6	11	3	-
Total	82	97	-

Note : * this information is based 83 cases
Source: Government of India gazettes

Table 10 shows the distribution of petitioners' market share. This information was available for 83 cases. Of the 83 cases, 77 cases are such in which petitioners' market share is 50% or more. Evidence that the domestic complainants were in dominant market position raises the possibility that the antidumping law was being used for inefficient protectionists purposes.

Table 10 : Distribution of petitioners' market share

Petitioners' Market share	Number of cases	Average market share of petitioners
25-50	6	30.2
50-75	20	61.3
75-90	16	81.2
90-100	41	97.4

Source: Government of India gazettes

The analysis above suggests that predatory behaviour is not the prime target of antidumping policies. Antidumping investigations in India fail to distinguish between normal commercial pricing and predatory pricing practices. Anti-dumping duties are primarily sought by industries that enjoy near monopoly conditions in the domestic market. In most cases the monopolist firm / firms applied for antidumping investigation to gain protection.

Most Indian antidumping investigations have taken places in two major industries: chemical and steel. The chemical industry is a science-based industry (Pavitt 1984[41]). It is also a capital intensive and high volumes industry. Most Indian companies however are much smaller than the minimum economic size. For instance, in the petrochemical industry apart from Reliance, other companies in India do not have globally competitive size plants. In the earlier years, to encourage the growth of the domestic industry, Government of India had laid down policies regulating and protecting the industry. Weak patent laws and high import tariffs protected the industry. These policies helped the industry's growth to a certain extent. However, the absence of competition, the use of obsolete technology and less than optimum size did not allow the industry to become globally competitive. The changeover from a regulated to globalised and liberalised business environment and strong IPR regime has exposed the industry to international

[41] Pavitt (1984) `Sectoral Patterns of Technical Change : Towards a Taxonomy and a Theory', Research Policy, 13, 343-373.

competitive threats. So far as steel is concerned, India is the tenth largest producer of steel. However, over the last few years the performance of the Indian steel

Table 11: Industry-wise distribution of AD investigations :1992-2001

Industries	No. of products
Chemicals and petrochemicals	34
Pharmaceuticals	14
Steel and other metals	6
Consumer goods	4
Others	9

Source : Annual Report of DGAD :2001-2002

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industry has been adversely affected due to overcapacity, cheap imports, economic slowdown, declining global steel prices and also antidumping duty imposed by the USA on Indian exports. Most major steel companies, with the exception of Tata Steel, have thus been reporting losses. Dominant producers have therefore been lobbying for protection to safeguard their interests in these industries. Standardised products and concentrated markets have facilitated the filings and investigations. In most cases, it is observed that once antidumping duty is imposed on imports from a particular country, imports from other countries tend to surge. This induces the domestic firms to file cases against these countries as well. Of the total 75 products subject to antidumping investigations, 17 products have more than one case. Of the total (filed) 99 cases, 20 involved 4 or more countries. In some cases [42], the number of countries involved was as high as 7,8 and even 9. Furthermore, it is observed that the MFN rates are as high as 30%-40%. Since, the antidumping duties are imposed in addition to the MFN duties, the antidumping actions are providing very high protection levels. Thus, the antidumping policy that is devised to protect competition itself reduces it!

[42] These were for instance, imports of Graphite electrode, BOPP and oxo alchols.

III Anti Dumping Law and Practice : Legal Perspectives

Anti dumping policies and practices have been subject to criticism not only by economists but also by legal experts. While the former do not find economic rationale behind them the latter point out that they are heavily biased in favour of finding dumping. While analysing EC practice of dumping finding, Vermulst (1999) concludes that the rigidity and—for some aspects—the inherent unfairness of EU anti-dumping practice add an additional dumping situation namely: incidental dumping caused by calculation methods, which insufficiently take account of economic realities. Experts in other developed countries also have leveled similar criticism. The problems of developing countries with the application of the anti dumping investigations may even be more serious due to the lack of legal expertise and financial resources (Vermulst 1997[43]). Moreover, a study by UNCTAD (1995)[44] reveals that laws in these countries are usually less detailed than even the multilateral agreements. An analysis of antidumping law and practices in developing countries, therefore, may add new insights on the shortcoming of the antidumping system. In what follows, the paper examines the shortcomings of the Indian antidumping law and practice using legal perspectives. The rest of the analysis is organised in three sections. Section III.1 analyses methodological aspects of dumping and injury determination; Section III.2 examines other procedural aspects and finally Section III.3 evaluates infrastrutural aspects.

III.1 Methodological Aspects

The WTO Antidumping Agreement (ADA) relies on the basic principles enunciated in GATT (1994) and elaborates procedures to be followed for initiating and conducting antidumping investigations. According to Article VI of the GATT (1994) the following conditions have to be met before antidumping duties can be imposed.

(i) Dumping occurs and,

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[43] Vermulst,E 1997,'Adopting and implementing Anti-dumping Laws-Some suggestions for Developing Countries', Journal Of World Trade, vol 31, no:2,pp 5-24.

[44] UNCTAD(1995) Enhancement of .....'. TD/B/WG.8/6, Nov. 15,1995.

(ii) dumping has caused/ is threatening to cause material injury to the domestic industry.

In some countries (for instance, EU, Australia and Canada, in addition to finding dumping and injury, a public interest condition has to be met before dumping can be imposed. In what follows, the paper takes up these conditions one by one and examines shortcomings at each stage of the antidumping investigation.

Dumping Determination

The establishment of dumping is a technical mathematical exercise. The definition of dumping contained in the ADA implies that the margin of dumping is obtained by deducting the export sales price from the normal value, where normal value is the home market sales price of the exporter countries. Experts point out that though the concept in itself appears to be simple, it is subject to several complexities at the operational level. The process of calculating dumping margin involves four steps :

(1) calculation of normal value

(2) calculation of export prices

(3) adjustments to make export prices and normal value comparable.

(4) Calculation of dumping margin

1. Calculation of normal value

WTO stipulates that ' normal value is the price, *in the ordinary course of trade*, for the *like product* in the domestic market of the *exporting country*.' In this definition, domestic market....' means the product needs to be destined *for consumption in exporting country*. In brief, therefore, normal value is "the comparable price, in the ordinary course of trade, for identical or like goods when destined for the consumption in the exporting country."

A proper identification of 'like product' based on economic considerations is the first step in calculating normal value (Almstedt and Norton 2000). If 'like product' is defined in a too strict a way then it may lead to imposition of duties in cases where it should not. If on the contrary, the relevant market is defined too broadly then duties will not be applied when they should be (Hoekman and Mavroidis 199645). The agreement (Art. 2.6) defines like product as a 'product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration'. Legal definition of like products in some of the individual countries is more elaborate. Apart from appearance and physical characteristics, 'uses' also find special mention in the legal documents of these countries. For instance, in Mexico, like goods are products which, although not alike in all respects, are similar in their characteristics and composition, fulfil the same functions and are commercially interchangeable with those with which they are being compared. In the US ' it is a product which is like or, in the absence of like, most similar in characteristics and uses with the merchandise subject to investigation. In Korea 'like products' means a product that is identical in all respects, including physical characteristic, quality, recognition by the users, etc.'. The legal provision adopted by the EC is the same as that in the WTO agreement. In practice, the EC requests domestic producers and exporters in the questionnaire to prepare 'model comparison tables' with view to determine whether the domestically sold products and the exported product are alike. Since certain model or type may not be sold in the domestic market of the exporting country, it often makes adjustments for greater accuracy. India follows the EC practice46. In many cases however, accurate identification of the like product is difficult due to non-dedication of a separate category in the trade statistics and / or lack of full information on the characteristics of exported products. The authority in such cases enjoys wide discretion in choosing the like product. Besides, with increasing technological sophistication it is becoming increasingly difficult to establish identity between two products. One may observe contradictions in the

[45] Hoekman,B and Mavroidis,P,1996, 'Dumping, Antidumping and Antitrust' , Journal Of World Trade, vol 30, no: 1,pp 27-52.

[46] See the case of LCFC case (47/ADD/94) where the adjustments were made for 'chrome concentrate' content

approach adopted by the authority. In some cases, the authority agreed that there was difference in the technology used and hence quality but argued that 'so long as the products are interchangeable they are to be treated as like products'47. In some other cases, on the contrary, the physical characteristics of the product were different and the end-usage varied with product specification but because the technological and manufacturing processes were the same, the authority treated the product as the like product48. Again the argument was : the products had a 'high degree of inter changeability'. These subjective arguments need to be justified quantitatively. This calls for a more objective criterion to identify the like product. Hoekman and Mavroidis (1996) argued that there is need to apply economic analysis and concepts including basic actors such as cross –price demand elasticities. However, such exercises are not done in any country and the choice of the like product remains at the discretion of the authority; India is no exception.

After the identification of the like product, the next step is to avail information on prices prevailing in the domestic market of the exporting country. The ADA is vague on 'prices' in the domestic markets. There may be differences in the prices at different levels of trade depending upon the distribution structure of the economy. The Agreement merely suggests that the export price and the normal value should be compared at the same level of trade. To avoid vagueness, most countries compare exports and the normal price at the ex-factory basis. India also follows the common practice of calculating normal price at the ex-works level. Some experts (for instance, Didier 2001), however, point out that in the exercise of calculating the normal price at the ex-factory level, much depends on the reference price. In many cases, for instance, the basis of normal value is the first resale price by the distributor/dealer to unrelated consumer. This according to Didier (2001) gives upward bias to normal value as 'further downstream in the domestic distribution chain the reference price is taken the higher it is. Those who sell direct to the related consumers are

[47] Antidumping investigation concerning import of Ethylene Propylene Rubber and Ethylene Propylene Diene Rubber from Korea

[48] Import of seamless tubes from Austria, Czech Republic, Russia, Romania, Ukraine....)7/1/99/DGAD)

better placed than those who sell via a captive network in domestic markets. Thus the domestic market structure may also affect the antidumping assessment. Furthermore, adjustments that are to be made to arrive at the ex-factory level prices may also be a major source of ambiguity in the calculations of normal value. In general, the authority examines the adjustments claimed by the exporters to arrive at the ex-works price. It is at the discretion of the authorities to decide what adjustments may be allowed. In many cases it is found that the authorities allowed for some adjustments during the preliminary finding but disallowed them in the final finding[49]. Any bias in the adjustments may cause bias in the normal value as well.

The more serious ambiguity however is introduced due to the use of *constructed normal values*. It may not always be possible to use the actual information on normal price and the investigating authorities may have to *construct* normal price. Article 2.2 lists conditions in which the investigating authorities may construct normal value. These are as follows.

1. Normal value may be constructed when there are no sales of the like product *in the ordinary course of trade* in the domestic market of the exporting country. Sales of the like products in the domestic markets of the exporting country may be treated as not being in the ordinary course of trade and may be disregarded in determining normal value if such sales are made at prices below per unit cost (plus administrative and selling costs) within an extended period normally one year (but not less than six months) and in substantial quantities i.e. they represent not less than 20% of the total transaction volume[50]. Though the Indian antidumping legislation follows the ADA, the designated authority, in practice does not follow the rule strictly. The authority rejects the actual price whenever the reported prices

[49] Case of polysterene imports from Malaysia (12/2/97 ADD).

[50] If prices which are below per unit costs at the time of sale are above the weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time

are smaller than the cost of production. No justification is provided within the framework of this rule; no reference of this rule is made, either.

Sales between affiliated parties are also treated as not being in the ordinary course of trade. The U.S. law permits, but does not require, the Commerce Department to base normal value on sales to affiliated parties in the home or third country markets. Similarly EC also allows the use of such prices provided there is evidence that the prices are not affected by such association. The decision is entirely at the discretion of the authorities. In India, however, the practice is not to permit the sales to affiliated parties.

2. The second situation in which the use of constructed normal value is permitted is when the volume of the domestic market sales in the exporting country is low. Home market sales will normally be considered a sufficient quantity for the determination of the normal value when the similar product destined for the home market of the exporting country constitutes 5 % or more of the sales of the product under consideration destined for sale in importing country. While most countries adopt this criterion, some countries specify their own standards. For instance, in Mexico, as a general rule, the comparable prices of identical or like goods in the domestic market are deemed to be representative when only they account for at least 15% of the total volume of sales of the subject merchandise. In the EC, the rule of 5% is applied at two levels : (i) at the broad category level (ii) at the level of the model/type. Didier (2001[51]) argued that in most cases the requirement fails to meet at the model/type level and this provides the authorities an opportunity to use constructed value. Besides, the law provides for the use of a lower volume of sales when the prices charged are considered representative for the market concerned. This is at the discretion of the authorities and increases the scope of manipulations further. The law in India does not define low volumes of sales! This widens the scope of arbitrary decision even further.

[51] Op cit note:3.

These conditions are thus vague; have elastic interpretation and in many cases leave the scope for manipulation in such a way as to allow the authorities to use constructed prices instead of the actual prices.

Two alternative methods for constructing normal value have been provided in the ADA. *One,* the authorities may use the price of goods exported to third countries adjusted for the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importing countries and the like goods sold by the exporter to importers in the third country, in a prescribed manner. However, price to any third country may not be a comparable representative price. The choice of the 'third' country may itself affect the price. *Two*, the authorities may use the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Costs may need to be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations'. The provision is subject to different interpretations with regard to the concept of the cost of production, treatment of the non-recurring costs, treatment in case of start up operations and the length of a start up operation. No limit is made in the text with respect to the circumstances considered, the types of costs or the types of operations or the types of adjustments. Furthermore, when the amounts for administrative, selling and general costs (SGA) and for profits cannot be determined on the basis of actual information, investigating authorities have a complete discretion to choose profits and SGA either of the exporter in question in respect of production and sales in the same general category of products[52] or of any other exporter/producer subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin. Conceptually, antidumping cases are firm-specific and not country/good specific. Since

[52] see the Anti dumping Duties on imports of Cotton Type Bed Linen (WTO Document DS141-panel findings of 30 Oct 2000- appealed.

different producer incur/achieve different SGA/profits either as a result of selling different types of the like products or because of difference in efficiency, these provisions are likely to introduce bias in the calculation of normal values. Thus, unrealistic normal profits and /or SGA costs, selection of higher cost data and disputable allocation of non-recurring costs may introduce serious ambiguities in the calculation of constructed normal value.

In India, the calculation of constructed normal value is fraught with more serious ambiguities. Here the major problem is that of non-response or incomplete /inaccurate and inconsistent information on prices and costs provided by the exporters. The distribution of response rate of exporters- estimated by dividing the number of responding exporters in each country-case by the total number of exporters to whom the authorities sent questionnaire, is presented in Table 14. In only 63 of the 171 cases for which desired information was available, the response rate was as high as 75% to 100%.

Table 14: Distribution of response rate of exporters

Response rate of exporters (%)	No of cases
0	59
0-25	14
25-50	11
50-75	24
75-100	63

Source : Author's computation based on Gazettes of India

In some cases, exporters clearly stated that information on cost and prices was confidential and expressed the fear that the information, if provided, might be leaked to the third country[53]. A more important reasons for non-response however, appears to be a marginal share of India in the exporters' total export[54]. Table 16 shows that India is an inconsequential trade partner of most countries with less than 1% share (except Argentina).

[53] AD case of Polystrene from Singapore.

[54] Legal experts support this line of reasoning.

Perhaps, the small share of India in total export discourages exporting firms from investing on defence.

Table 16 : Share of India in total exports of selected countries : 2000-2001

(Million$US)

Country	Total Export (US $	Exports to India	Exports to India/Total Exports
China	249195	1561	0.0063
Argentina	26663	500	0.0188
Brazil	56138	294	0.0052
Korea RP	171826	1326	0.0077
Mexico	166455	60	0.0004
Canada	275183	306	0.0011
EU	2283000	11859	0.0052
U. S.	771991	3653	0.0047

Source: Direction of Trade Statistics 2001

In the absence of information on actual price and costs, investigating authority, for constructing normal values, rely on the best available information which almost invariably is provided by the complainants. The risk of upward bias in the computation therefore is very high. Moreover, the construction of normal value requires several adjustments. It is at the discretion of the authorities to decide what adjustments should be allowed in the construction of normal values. Besides, in the absence/ lack of actual information, even adjustments are based on the information provided by the petitioners. This further increases the risk of upward bias in the normal values. The calculations of normal prices are not disclosed to anyone. It is therefore not known even to the parties concerned how have the calculations been done. Finally, for the non cooperating exporters the dumping margin has been referenced on the basis of the highest domestic price without adjustments and the lowest CIF (see the case of black and White photogtraphic paper, 19/1/99-DGAD). Since in over 80% of the cases, most exporters did not cooperate, finding dumping was a foregone conclusion.

It is interesting to note that out of the 63 cases in which 75% to 100% exporters responded, in only 33 normal value was based on actual price/cost*; in only 31 cases (18% of the total cases) normal values based on actual information could be calculated for all known exporters.*

Table 15: Summary cases with actual n.v.

% of exporters with n.v.based on actual information	No: of cases
0	99
0-25	12
25-50	10
50-75	17
75-99	2
100	31

Source : Author's computation based on Gazettes of India

Clearly, in several cases where exporters responded, their information was either incomplete or was not in the desired format. It is also observed that any failure by the foreign firms to respond to the authorities' onerous reporting requirements allows the authority to disregard all its data and instead use the best information available, which typically means data reported in the domestic firm's petition. The case of 'certain catalysts from Denmark[55]' may illustrate this point. In this case, there was no sales of the like product in ordinary course of trade in the domestic markets of Denmark. For constructing normal values, the respondent firm provided data on costs. But the authorities, for further examination, requested the exporting firm to provide data on export price to third countries as well. The respondent however, declined to furnish data on export price to third countries stating that 'the information on export price to third countries will affect the exporters' future trading activities in these countries'. The authorities, on this pretext, discarded all its information and constructed normal value using the list prices provided by the

[55] Case no. ADD/IW/39/95-96, Government of India Gazette.

complainants. In another case, an exporter stated that exports to third countries have been at a loss. The authorities argued that since the exports to third countries which account for the bulk of the exporter's sales are at a loss then domestic sales could not be at a profit and using this plea they used the constructed cost of the subject good[56]. In many cases the authorities depended on the list prices provided by the petitioners. In the case of 'Certain Catalysts' the exporter argued that the list prices exist in the list only while the actual price vary widely depending on the market conditions. The company provided evidence in support of this argument. However, the authorities described the list prices as the best available information.The antidumping proceedings are thus arbitrary and entirely at the discretion of the investigating authorities.

Non market economies

The legal provision makes the non-market economies particularly vulnerable to dumping findings (see Tharakan 1994 for references). The ADA allows the investigating authorities to ignore the nominal prices or costs in the non-market economies and base the normal value estimated on the price or cost of a producer of the like product in an surrogate market economy "which may be regarded as a substitute for the purposes of the investigation. The constructed cost depends on the choice of the surrogate country- its competitiveness and market structures. If the cost of production in the selected country is higher, it may result into higher normal value. There is no limit on the choice of the surrogate economy. It could be the investigating country itself. The legal provision in the EC stipulates that '...normal value shall be calculated on the basis of the price/constructed value in a market economy third country, or the price from such a third country to other countries, including the Community or.... on any other reasonable basis including the price actually paid or payable in the community'. In Korea however, it is clearly stated that '....the normal value is considered as the price of the like product consumed in the ordinary course of trade economy countries *other than Korea'*. In India the law is silent on the choice of the third country. However, the authorities follow the EC practice. In some cases,

[56] Imports of seamless tubes from Austria, Czech Republic, Russia, Romania, Ukraine....)7/1/99/DGA.

normal values are calculated on the basis of the prices prevailing in India. For instance, in the case of imports of Isobutyl Benzene from China, India was the surrogate country. Where such practice is followed finding dumping is almost a foregone conclusion. In some other cases, the surrogate country was directed by the complainant. In the case of L*CFC from Russia* (47/ADD/94), following the petitioner's choice, the authorities selected Zimbabwe as the reference country and the price of the product were constructed on the basis of the power rates prevailing in that country!

2. Estimation of export prices

The ADA does not define export price (see Didier 2001). This lack of definition allows countries to interpret it unilaterally. In Canada, the law specifies that the export price of goods is an amount equal to the lesser of the exporter's sale price for the goods and the price at which the importer has purchased or agreed to purchase the goods. In the US the "export price" is the price at which the subject merchandise is first sold to a U.S. purchaser unrelated to the foreign manufacturer prior to the date of importation into the U.S. The EC defines export price as the price actually paid or payable for the product when sold from the exporting country to the Community. In most countries, export prices are estimated at the ex-factory level. Ex-factory export prices are arrived at after making numerous adjustments. These include adjustments for taxes, discounts and rebates actually granted and directly related to the sales concerned, packaging costs, costs relating to the export and transportation of the product, costs charged for the product's entry into the country, including transport, maintenance, insurance, loading and unloading and handling costs, and other unforeseen costs incurred from the commencement of transportation at the point of export until delivery to the buyer. In India, adjustments that are claimed by the exporters are examined by the Designated Authority. It is at the discretion of the authority whether to accept or reject them.

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory

arrangement between the exporter and the importer or a third party, the export price has to be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine (Antidumping Agreement, Art. 2.3). In cases involving constructed export prices, additional allowances are to be made for costs incurred between importation and resale, including duties, taxes, and profits accruing, any commissions paid, any direct selling expenses incurred in the importing country; any indirect selling expenses associated with economic activity; any costs and expenses resulting from further manufacturing activities; and an amount for profit allocable to the selling, distribution and further manufacturing expenses incurred in importing country. The greater the number of adjustment, the greater is the risk of bias in the estimations! At any point of adjustment, this procedure may create a risk of artificial dumping findings if the overhead costs and or / profits are overestimated. In the absence of actual information in most cases, the authorities use the best available information to construct the export price. This is based either on Trade Statistics provided by Directorate General of Commercial and intelligence Statistics or on list prices provided by complainants. In most cases adjustments are made on the basis of the best available data which is generally provided by the petitioners. These adjustments may introduce downward bias in the export prices risking positive dumping findings.

3. Fair Comparison

The WTO agreement stipulates that 'a fair comparison shall be made between the export price and the normal value'. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, level of trade, quantities, quality, physical characteristics, currency conversion and any other differences which are also demonstrated to affect price comparability. Antidumping legislation in different countries has different levels of elaboration on these adjustments. EC legislation provides a long list of adjustments. These include adjustments

for physical characteristics, import charges and indirect taxes, differences in discounts and rebates, including those given for differences in quantities, level of trade, transport, insurance, handling, loading and Ancillary costs, L/C fees, stevedoring, CFS, forwarding, pallestising , customs clearance and Port charges and fees and Credit, differences in the direct costs of providing warranties, guarentees, technical assiatance and sevices, as provided for by law and/or in sales contract, differences in commission paid in respect of the sales under consideration. However, experts have shown that the EC has seldom granted level of trade adjustments and price comparability (See Didier 2001, Vermulst and Driessen 1997 [57]). Indian legislation, on the other hand, follows the ADA with no further details. It is however added that the list of adjustments provided is only indicative and any factor which can be demonstrated to affect the price comparability, will be considered by the Authority. If any interested party demands price adjustments because of a difference in physical characteristics or quantity and condition of sales, he/she shall establish the fact that the difference directly affected the market price or on the manufacturing costs and that the difference is quantifiable. In many cases, the authorities expressed their inability to introduce adjustments for difference in the quality as it could not be quantified.

4. Dumping margin

The WTO agreement stipulates that, 'the dumping margin shall be the amount by which the normal value exceeds the export price'. The existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. *A normal value established on a weighted average basis may be compared to prices of individual export transactions* if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods. It is significant to note that the alternative methods of comparing the normal

[57] Vermulst, E and Driessen, B,1997,'New Battle Lines in the Anti-Dumping war, recent Movements on the European Front', Journal Of World Trade,vol 31 no: 3,pp 513-158.

values and export prices is a major change introduced after the Uruguay Round. However, the agreement does not specify which method of comparison is preferable. Besides, it does not differentiate between antidumping investigations and administrative reviews. The US Department of Commerce, in an investigation, follows the cited WTO standards but in administrative reviews, it continues to compare a monthly weighted average normal value to an individual export price (or constructed export price) for comparable merchandise. Indian legislation follows the WTO standards in antidumping investigations and reviews, both. Dumping margins are provided by the type/ model of the product within the broad category of the like products. In the case of 'Certain Catalysts from Denmark', the subject catalysts were found to be imported under two different custom sub headings. Since such imports under two categories were allowed under distinct conditions the authority calculated different dumping margins under the two headings. However, this is no indication of unbiased estimates. A review of the antidumping proceedings indicates that in many cases average export prices are compared with one estimate of normal value. This happens quite frequently in those cases where the normal value is constructed. In this process export price may get lowered and the possibility of positive dumping findings increases.

In sum, the use of constructed export prices and normal values, numerous adjustments that need be made to ensure their comparability and unfair comparisons between export and normal values create a high degree of risk of artificial dumping. In India, these calculations are treated as highly confidential and are not disclosed even to the parties concerned. It is therefore difficult to justify the procedure .

INJURY

The term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry. An injury determination must be based on positive evidence and involve an objective examination of the effect of the

dumped imports on prices in the domestic market for the like product, and the consequent impact of the dumped imports on domestic producers of such products. Besides injury, it must also be demonstrated that there is a causal link between dumping and injury.

Methods used for injury determination may be a matter of grave concern. Disentangling various causes of injury to domestic industry and finding out that part of injury which could be ascribed to dumping is a complicated task. There is no mathematical formula for determining the existence or injury. The decision whether the standard of material injury has been satisfied is essentially a matter of judgement about which few general principles can be stated. The decision is an exercise of discretion. US is the only economy that has been using sophisticated models for determining injury (see Kaplan 1991 for a detailed analysis; see also Boltuck 1991[58]). It is using five different counterfactual models to measure injury determination. These models ascertain how the conditions of that industry would differ from its current state had dumping not occurred and then carry out a comparison with the factual world to determine the extent to which dumped imports change prices and or/ quantities[59] (See Tharakan 1995). Lindsey (2000) examined the five different calculation methodologies used by the Department of Commerce to measure dumping in detail. He found that only one has relevance to detecting market distorting price discrimination. He reviewed all antidumping final determination and found that only two of the 107 affirmative findings relied exclusively on this methodology. In a pioneer study Finger et al (1982)[60] have made distinction between the technical and political variables and analysed their impact on the dumping and injury decisions for the US antidumping cases. They found that in dumping decisions the technical variables were predominant while in the injury decisions, the political factors had a greater impact.

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[58] Kaplan, Seth, 1991,' Injury and Causation in USITC Antidumping Determinations: Five Recent Approaches', in P .K.M. Tharakan (ed.), Policy Implications of Antidumping Measures, Amsterdam, Oxford, Tokyo: North Holland , 143-73.

[59] The possibility of disclosure of confidential information under administrative protective order in the USA makes it possible for parties to have such analyses carried out through their consultants(Tharakan 1999)

[60] Their findings were supported by Tharakan and Waelbroeck (1994) for the EC.

Most countries including EC (Vermulst and Waer 1991[61]), rely for estimating injury mainly on price undercutting by dumped imports. This method involves the comparison of adjusted weighted average sale prices of foreign products with the prices of similar products in the domestic market. The Designated Authority in India follows the EC practice. Injury margin is calculated as the difference between the fair selling price due to the domestic industry and the landed cost of the product under consideration. Landed cost for this purpose is taken as the assessable value under the customs Act and the basic customs duties. This calculation of the extent of price cutting itself is subject to several ambiguities. There is ambiguity in the calculation of the fair domestic price. Fair domestic price is calculated by projecting the actual cost at the optimum level of capacity utilisation. In doing so, the authorities use the actual price data for the whole industry and not for the most efficient units. In the case of Iso butyl Benzene from China (1994), initially the authority calculated fair domestic price of the most efficient units among domestic producers. However, in the final finding, upon the request of the complainants, the authority worked out fair selling price on the basis of the data for the industry as a whole. This method gives upward bias to the fair domestic price for two reasons. First, the calculations are based on the information provided by the domestic producers. Two, in many cases, the industry has highly inefficient cost structure due to wrong location, smaller size, obsolete technology, high cost of electricity and waste of raw materials. No account is taken of the fact that the price difference can be caused by a host of factors other than dumping such as competitiveness, better policies of the exporters, and difference in quality. The more inefficient the industry, the greater is the likelihood of higher injury margins. Thus the system primarily protects inefficiency. Aside from this, it is also observed that though the ADA specifies several factors for injury examination, in practice the authorities confined themselves to production, capacity utilisation, profits/losses, market share , absolute imports and the share of imports. In none of the cases did the authorities examine efficiency measures such as productivity, technological development, employment and returns on investment. What is more interesting to note is that in many

[61] Vermulst E. and P. Waer, 1991,The calculation of injury margins in EC anti dumping proceedings, Journal of World Trade, 5-42.

cases sales, production and capacity utilisation (and even profits) of the domestic producers increased[62] but because the petitioners showed losses, injury was established. Much depends on how the authorities argue. There is no scientific method of determining injury. All these decisions depend on whether the authorities decide to extend protection to an industry or not.

Cumulation

One of the most widely criticised provision in injury determination is that of cumulation. The WTO agreement *permits* an investigating authority to cumulate dumped imports of a product from more than one country that are simultaneously subject to antidumping investigations. The investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping is more than *de minims* (2%) and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the like domestic product.

Using this provision, authorities aggregate all like imports from all countries under investigation and assess the combined effect on domestic industry. It may be noted here that dumping margin is calculated separately for each exporter. Though the WTO agreement states that the authorities may cumulatively assess …., antidumping legislation in almost all countries states that the authority shall cumulatively assess the volume and effects of such imports. Besides, while the ADA states that cumulation is permissible only if the imports compete amongst themselves and with products alike to those imported which are manufactured in the country, in actual practice most countries tend to cumulate without consideration for the conditions of the competition. Indian legislation is no exception. Since the products are alike, the authorities simply justify the condition of competition. Cumulation increases the likelihood of affirmative findings. Two reasons are

[62] See for instance AD cases involving Isobutyl Benzene, Analgin,Acrylonitrile Butadiene Rubber, Polystrene.

offered for such expectation (1) adding one more country to a set of given countries raises the market share of investigated firms which is likely to result in greater likelihood of affirmative findings; (2) cumulation has super additivity effect : holding the market share of defendant firms constant, aggregating over the exports of several countries increases the probability of an affirmative injury determination. Hansen and Prusa (1996[63]) found for the US that the probability of a positive finding is higher when defendant firms are many and small than when they are few and large (holding the market share constant). Tharakan et al. (1998[64]) confirmed this finding for the EC injury determination as well. Gupta and Panagariya (2001[65]) showed that the presence of a large number of exporters exacerbates the free rider problem, which leads every firm to invest less on defence. This results in super additivity effect. Another reason why cumulation is inappropriate is that there are significant difference in the market share or export volume trends over past years from different exporting countries which shows that there are difference in the conditions of the competition for different countries.

Anti dumping duty

The decision whether or not to impose an antidumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the antidumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by authorities of the importing member. The ADA (Art. 9.1) expresses preference for a lesser duty ; however, it does not make it mandatory. Member countries therefore use wide discretion in this matter as well (Table 17). Following EC, India practiced lesser duty law till the late 1990s. The Custom Tariff Act as amended in July 1999 however, provides that antidumping duty could be recommended upto the

[63] Hansen, Wendy L and Thomas J. Prusa, 1996, 'Cumulation and ITC decision making: the sum of the parts is greater than the whole, Economic enquiry 34, 746-69.

[64] Tharakan, P .K.M David Greenaway, and Joe Tharakan,1998, 'Cumulation and Injury Determination of the European Community in Antidumping Cases', Weltwirtschaftliches Archiv, vol 134, pp320- 39.

[65] Gupta, P and Panagariya, A ,2001, ' Injury Investigation in Anti-dumping and the Super-Additivity Effect: A Theoretical Explanation ', IMF working paper no:WP/01/110.

dumping margin to provide protection to the domestic industry against the dumped products. This is in line with the USA and Canada.

Table 17 : Applicability of the lesser duty rule in selected countries

Brazil	**Mexico**	**Argentina**	**USA**	**EU**	**Canada**	**India**
Desirable but not necessary	May but not necessary	May but not necessary	No, duty equal to dumping margin	Yes,duty is equal to injury	May if it is in the public interest	Not mandatory

Source : WTO

Anti dumping duty normally takes three form: *Ad valorem* , specific or variable. *Ad valorem* duties are expressed as a %age of the c.i.f. export price, specific duties are expressed as fixed amount per unit; and the variable duty is expressed as the difference between the c.i.f. export price and the fair domestic price. *Ad valorem* duties are related positively with the export prices and are cumbersome to calculate. Specific duties are the easiest to administer. Variable duties are calculated by subtracting landed value of exports from predetermined levels of domestic fair price. With changes in the landed value of exports, variable duties also vary. However since these duties are based on the fixed fair domestic price, these are not superior to specific duties. Moreover, with change in the exchange rates, the landed value of exports also changes. This results in change in the duty even if no other condition of dumping is changed. Designated authorities in India imposed specific duties till the late 1990s. This posed a peculiar problem in the Indian context. With a downward revision in custom duties, landed values of exports also changed. This induced several review cases. It was realised that specific duties may not be appropriate in a country where custom duties are revised frequently. From 1999 onwards therefore, the authorities have been imposing variable duty. This is defeating the purpose of lowering tariff rates and is establishing the case of administered protection more strongly.

There are two systems of duty assessment : prospective duty assessment and the retrospective system. Under the former system (adopted by EC), duty is imposed for five years. These are subject to annual reviews. In the latter system adopted by the US the order only provides an estimate of the antidumping duty liability, the actual amount is determined in subsequent reviews on annual basis. In this system the actual duties are assessed every year. It is therefore argued to be too complex and resource and time consuming (Qureshi 2000, Vermulst 1997[66]). India has adopted prospective duty assessment rather than the alternative restrospective system. However, the duty in this case depends on the historical estimates and is not responsive to changing circumstances.

Price Undertaking

One of the provisions of the WTO agreement relates to price undertaking. Under these agreements exporters agree to revise the prices to the extent that the authorities are satisfied that either the dumping margins or the injurious effects of the dumping are eliminated. Undertakings may be offered by the exporters themselves or suggested by the authorities. Even if the authorities decide to accept undertakings they are to complete the injury investigation and if no injury is found then the undertaking is automatically lapsed. The availability of this option confers discretionary powers on the authorities that can be manipulated (see Vermulst 1987[67]). Undertakings it is found play a very important role in the termination of antidumping cases in the EC. In an empirical analysis of the determinants of the acceptance of price undertakings in the EU Tharakan (1991) indicates that since the criteria for accepting /rejecting undertaking is left vague, political economy plays an important role in the EC decision to accept/not to accept undertakings. For instance, Japan and less developed countries are denied this softer option by the EC. Price undertaking was not frequent in India till recently. There were cases when the exporter firm offered undertaking but the authorities did not accept them[68]. It could be that price

[66] Qureshi, A,2000, 'Drafting Anti-Dumping Legislation ',Journal Of World Trade ,vol 34, no: 6, pp 19-32.

[67] Vermulst E.A. 1987, Anti dumping law and practice in the United States and the European Communities, North Holland.

[68] For instance, Bayer offered price undertaking in the case of NBR originating from Germany

undertakings were much below the injury margin[69]. In recent years however, the trend has been changing. In 2001, five undertakings were accepted by the authorities. This trend is likely to extend the discretionary powers of the authorities.

Public interest :

Even if dumping and injury have been proved, it could well be that the gains to the consumers from lower prices more than outweigh the losses suffered by the producers. The public interest standard stipulates that the imposition of duties should be made only if it is in the interest of the community. The WTO agreement however does not require a public interest test for imposing antidumping duty. It merely allows the consumer organisations to provide relevant information to the investigating authorities. Brazil, Mexico and US have no provision for community interest; EU, Canada, Australia and Argentina on the other hand require community interest to be one of the conditions for imposing the duty. Though in principle public interest clause could lead to more balanced approach to antidumping measures, in practice this gives greater discretionary powers to the authority. The antidumping law in most countries does not define or elaborate on public interest and leaves the matter at the discretion of the authority. There is no guidance on how to weigh the injury to producers against the injury to consumers and users. It has been observed that the community interest clause rarely led to a decision not to impose duties in instances where dumping and injury was found to exist[70] (Hoekman and Mavroidis 1996). Leclerc (1999) revealed that in Canada, between 1992 and 1997 only five public interest inquiries were held but not one of those five inquiries resulted in the tribunal reversing its initial decision to impose antidumping duties. While analysing the 'public interest clause' practiced by the EC, different authors (Messerlin 1991, Vermulst 1987, Tharakan et al. 1998[71]) have pointed out that in an overwhelming majority, the commission has equated

[69] This view was expressed by legal experts.

[70] Australia also has adopted the 'public interest' clause in its AD legislation. It is observed that the Australian authority has never made made a recommendation on public interest ground (Hoekman and Mavroidis 1996). However there have cases where AD duties could have been imposed but since taking action was not in the interest of the public , exporters were given only warning.

[71] Messerlin,P.A. 1991, The Uruguay negotiations on anti dumping enforcement : Some basic issues, in PKM Tharakan ed Policy implication of anti-dumping measures (North Holland),

the producer interest (importers) with the community interest while consumers' interests are neglected. In recent years however, the issue of public interest has gained momentum in the EC[72]. By the year 2000 there were two cases where the authority had concluded that community interest did not justify the imposition of duty.

Table 18: Provision of public interest in selected countries

	Brazil	**Mexico**	**Argentina**	**USA**	**EU**	**Canada**	**Aus.**	**India**
Public interest clause	no	no	yes	no	Yes	yes	Yes	no

In India, the provision of community interest is not mandatory. This omission is not warranted. Despite the shortcomings of the public interest clause, experts support strongly its inclusion in the law. They argue that it is not sufficient to give negatively affected parties merely the opportunity to present their argument, they must be given the legal standing to do so. For a public clause to be effective, the term public interest should be given a clear operational definition and the factors that might form a test for public interest should be clearly stated. Moreover, it is important that it is looked into at the same time that injury to producers is established. In most countries where this clause is operative, it is invoked at the final stages of an investigation. This limits its impact (Hoekman and Mavroidis 1996). It should be invoked for deciding whether to initiate an investigation[73]. What is therefore important is to strengthen this clause by reforming it. An effective public interest clause will make the antidumping process more sensitive to consumer welfare.

The above analysis indicates that it is quite at the discretion of the authorities to prove that dumping has occurred and that it has caused injury. Public interest clause is non-existent. Virtually any industry that considers itself adversely affected by foreign

[72] Experts (for instance, Vermulst and Driessen 1997 attribute it to the Anti dumping proceedings concerning Unbleached (grey) cotton fabrics from China, Egypt, India, Indonesia, Pakistan and Turkey' initiated on 21 Feb, 1996.

[73] This is the practice in Singapore.

competition and presents a competently assembled petition, stands a good chance demonstrating that it is under attack. The authorities might not be breaking laws but they have been manipulating them (see, Anderson 1993[74]). Table 19 shows that in India positive dumping is proved in over 96% of the cases finally decided. Preliminary duty is imposed in 100% of cases.

Table 19: Summary of the antidumping duty imposition against selected subject countries

	Initiations	Finally decisions	Duty imposed	Preliminary Duty imposed	Awaited
China	41	26	25	13	2
EU	21	15	14	5	1
Korea	15	14	13	1	-
Japan	13	11	10	2	-
USA	11	10	10	1	-
Russia	11	8	8	2	1
Taiwan	10	6	5	4	

Source : Annual Report of DGAD 2001-2002;

Duty was withdrawn after mid term review in 9 (58.9%) of the 19 cases. Six cases have been subject to sunset review; in 4 of them the duty was withdrawn.

III.2. Other Procedural Issues

Condition for the initiation of antidumping case

The WTO agreement stipulates that an investigation shall not be initiated unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the petition expressed by domestic producers of the like product, that the

[74] Anderson, James E.,1993, 'Domino Dumping II: Anti-dumping', Journal of International Economics ,vol 35 , pp133-50.

application has been made "by or on behalf of the domestic industry." The petition will be considered to be made "by or on behalf of the domestic industry" if it is supported by 50% of the industry expressing opinion and 25% of the total domestic production. These conditions are subject to abuse if majority of producers do not express their opinion. If the total production is worth Rs. 1000 and if producers producing Rs 800 worth of production do not express opinion then as per the first condition, producers producing only Rs. 100 worth of production may apply. To avoid that problem, in most countries it is emphasised that the investigation shall not be initiated unless the condition of 25% is met. Experts however, (Didier 2001) express their concern over the fact that only 25% of domestic producers can trigger protection affecting 100% of consumers. The WTO agreement does not have the option to allow employees of domestic producers of the like products to initiate an application for a dumping investigation. This option therefore is not set out in the domestic legislation of most countries. U.S. law however, expressly recognizes that industry support for a petition may be expressed by either management or workers. If the management of a firm expresses a position in opposition to the views of the workers in that firm, The US Department of Commerce discounts the production of that firm altogether in its determination.

The Indian antidumping law follows the WTO standards. In practice however, the authorities examine the share of the petitioners in the total domestic production and if it is established that the petitioners constitute 25% of the domestic production, the case is initiated. There is no procedure whereby it is ascertained at the time of initiation whether there is dissemination of information regarding the petition among all the producers in the industry. No provision is made to determine support/ opposition of producers in the industry before the case is initiated.

The WTO law has a special provision for cases involving a regional industry. The petitioner is only required to show that a majority of domestic production in the relevant region, as opposed to the entire country, support the petition. The U.S. and EC statutes

contain a special rule for determining industry support if the petition is filed on behalf of a regional industry. In India however no such provisions have been made in the law.

DOMESTIC PRODUCERS in the industry refer to the producers unrelated to the exporters or importers or those not themselves importers of the allegedly dumped or subsidized product[75]. The concept of related producers in the agreement depends on control. One producer is deemed to control another when it is legally or operationally in a position to exercise restraint or direction. In Brazil, Canada, Mexico, the related producers are excluded from the definition of domestic producers. Under the U.S. law, however, the Department of Commerce or the ITC *may (but need not)* exclude the related domestic producer. In the case of EC, producers that are related to the exporters or importers, or are themselves importers of the allegedly dumped product, *have been* excluded from the definition of domestic producers. India follows the same practice. The scholars (see for instance Didier 2001) however argue that the practice of excluding related party is less tenable where these affiliates no longer import the like product from a dumping country but produce it in the importing country only. Korean legislation has a provision to this effect. Producers who imported six months prior to the date of receipt of the application and those whose import quantity is insignificant are included in the definition of domestic producers. Some scholars criticise the absence of a definition of control also. They argue that this omission risks arbitrary decisions by the investing authorities. Vermulst (1997) suggested that a condition 'provided that sufficient demonstration is brought out that one party actually exercise a decisive influence over the pricing policy of the other in the trade of the like product' could be added to make the law more meaningful. It is also pointed out (Alms and Norton 2000) that the definition of control presents problems in non-market economies where most enterprises are state owned. This may prevent initiation. Finally, in countries with substantial presence of FDI, a number of producers are likely to be excluded from the definition of domestic producers.

[75] The European community brought successful proceedings in the GATT against the US for extending the definition of 'producers' to include firms supplying materials, etc., to those actually making the like product.

Content of application

The applicants must provide information on the volume and value of production, a complete description of the dumped products, the names of exporters, the price of the production in domestic markets. Besides an application must include complete evidence of dumping, injury and causal link between the two. Simple assertion unsubstantiated by relevant evidence cannot be considered sufficient to meet the requirement of initiation. Filing a case therefore requires legal expertise and involves enormous legal costs. Legal costs involved in an AD case filing are prohibitive and there are instances in which domestic firms that are facing losses due to import competition can not afford the legal costs of filing application. These are only dominant firms in concentrated markets that tend to file cases to safeguard their interests. This is perhaps one of the reasons why in India most cases are in highly concentrated chemical and steel industries.

Basis for rejection /termination of investigation

There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports from a particular country shall normally be regarded as negligible if these are found to account for less that 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing country collectively account for more than 7 per cent of imports of the like product in the importing country. There are variations in the standards. For instance, in the EC the share of dumped imports into total domestic consumption is considered while the ADA considers only the share of dumped imports into all imports. During the administrative review phase, the US Department of Commerce applies a 0.5% *de minimis* dumping margin standard, which was the de minimis standard applied under pre-Uruguay law. In Mexico the law and the regulations do not

expressly establish which *de minimis* margins are to be observed by the Secretariat. Nevertheless, the Secretariat must observe the provisions of the 2% dumping margin. No government has introduced a higher *de minimis* standards than those required by the WTO agreement. The objective of introducing this condition is that the exporter accused of dumping should have a significant market share, experts however, criticise the law for such low standards of dominance. The threshold are much lower than those used by the competition authorities for defining 'dominant position' (30% or 40% in general). They argue that if dominance is defined in a specific way for domestic competition, the same criterion should be applied to foreign competition as well (Hoekman and Mavroidis 1996)

Period of investigation

The investigation period is the period used to determine dumping margins and injury margins. The longer the period, the more work it is for the defendant parties to complete the questionnaire and for the investigating authorities to verify the information provided. In the EC , the investigation period is normally one year; in the US it is six months (Vermulst 1997). In India it varies from 6 months to 18 months. This period is determined arbitrarily. No justification is given for the choice of the period of investigation. It is simply informed by the authority in the Government Gazette.Since dumping and injury margins are based on the period of investigation, it is important that the authorities evolve certain criteria for determining this period.

Maximum length of investigation

The WTO stipulates one year as the maximum length of investigation. It can be extended maximum to 18 months but in no case more than that. Most countries have adopted a system of time limits for various stages of an AD investigation. In Canada for instance, the Deputy Minister of National Revenue may within 30 days after giving written notice of a properly documented complaint initiate an investigation, in Brazil and US this period is 20 days while in Argentina it is 45 days. After the initiation, questionnaires are issued to foreign exporters. The ADA grants generally 30 days to respond to the

questionnaire. There are variations in the time limits. For instance, in Argentina minimum and not the maximum time period is 30 days. WTO has not specified any time limit for preliminary determination. However, in most countries such limits are specified. In Argentina, it is four months from the opening of investigation, in Canada, 90 days and in Mexico 130 days. In The US, the ITC must make its preliminary injury determination within 25 days. If it makes a negative finding then the investigation is terminated. Finally, the authorities must issue final determination within 120 days of preliminary determination in Argentina, 120 days in Canada and 75 or 135 days in the US.

In India the initiation notice is issued normally within 45 days of the date of receipt of a properly documented application. The Preliminary finding will normally be made within 150 days of the date of initiation and final finding is usually made within 150 days of the date of preliminary determination. Time limits may put enormous pressure on the authorities particularly in complex cases. It is therefore argued (Vermulst 1997) that the developing countries may adopt only the 18 months deadline and not the stage-wise time limits.

Table 20 : Maximum length of Investigation in selected countries

WTO	One year and in no case more than 18 months
Brazil	One year and in no case more than 18 months
Mexico	260 days
Argentina	One year , no limit for the extended time period specified
USA	Investigations : 407 days Administrative reviews – 545 days
EU	One year and in no case more than 15 months from its initiation.
Canada	210 days and in exceptional cases 255 days.
Korea	Within a year of publication date of the official gazette. With extension not more than 18 months
India	One year and in no case more than 18 months

Source : WTO

Disclosure of information

The WTO agreement stipulates that only non-confidential summaries of confidential information are available to the parties concerned. This is however, of little use to the defendants and complainants. Following the WTO standards, the Indian system also rules out any checks and balances in dumping and injury determination. Even the injury margin is not disclosed in the public gazettes. In principle this is to protect the companies' interest. In practice however, this puts the defendant at a disadvantage to refute or verify the claims of injury. Such a situation may lead to increased propensity to affirmative findings in injury determination. The situation may be tackled by abolishing the strict confidentiality rule and the use of more technically sophisticated and economically relevant injury determination methods. In the US, the possibility of disclosure exists. Under APO the counsel gets access to such information. However he is first required to provide strict undertaking of confidentiality (Tharakan1994). Lindsey (2000) analysed injury determination in the US on the basis of the confidential information. Such system may be evolved in India also for greater transparency.

III.3 Institutional aspects

Authorities responsible for conducting investigations

The ADA refers to authorities throughout but there is little elaboration on this except a footnote wherein it is stated that 'When the term "authorities" is used, it should be interpreted as meaning authorities at an appropriate senior level'. Thus the national authorities have a wide choice in this matter – except that the authorities should be of appropriate seniority and that it needs to function in a quasi-judicial manner. A comparative analysis of the eight countries shows that the designated authorities either comprise of the relevant governmental organ dealing with trade or designated officials to whom the responsibility is devolved by the government (Qureshi 2000). In America and Canada there is bifurcation between the dumping and injury determining agencies. The latter are independent agencies. However, appointments to these agencies are made politically.

Table 21: Authorities responsible for conducting investigations

Country	Designated Authority	Constitution of the Desig. Authority
ARGENTINA	The National Commission for Foreign Trade - a decentralized agency of the Secretariat of Industry, Trade and Mining of the Ministry of Economic and other Public Works.	The Commission is directed by a Board whose Members are elected on the recommendation of the Ministry of the Economy and Public Works and Services.
MEXICO	The Secretariat of Trade and Industrial Development (SECOFI)	-
BRAZIL	The Secretary for Foreign Trade (SECEX) of the Ministry of Industry, Trade and Tourism.	-
CANADA	Dumping : the Deputy Minister of National Revenue (DM) Injury: The Secretary of the Canadian International Trade Tribunal	The Tribunal is an independent quasi-judicial body that reports to Parliament through the Minister of Finance.
UNITED STATES	The U.S. Department of Commerce conducts investigations on dumping The U.S. International Trade Commission ("ITC") investigates injury.	The U.S. International Trade Commission ("ITC") is an independent federal agency. It is composed of six Commissioners who are appointed by the President with the advice and consent of the Senate.
EC	The EC has three institutions to deal with anti-dumping investigations. These are the European Commission (EC), the council of Ministers and the Advisory Council. Dumping and injury determination are now split between Commission's Directorates-General I.C (dumping) and I.E (injury)	European Commission (EC) – an independent institution who takes a decision regarding initiation of an investigation. The commission is required to consult the Advisory Committee on the issues concerning dumping determination The Advisory Committee consists of representatives of member states.
KOREA	the Trade Commission under the Minister of the Finance and Economy	

Source : WTO

The agreement does not require the authorities for dumping and injury determination to be distinct or separate. As per the agreement the same authority may deal with both. National practices in this respect vary. While the developing countries have one single authority to deal with both dumping and injury, developed countries US, Canada and EU have elaborate AD machinery (Table 21). In India, there is a single authority - Directorate General of Anti Dumping and Allied duties (DGAD) under the auspices of the Ministry of Commerce, designated to initiate necessary action for investigations and subsequent imposition of Anti-dumping duties. A senior level joint secretary and Director, four investigating officers and four costing officers assist the DGAD. Besides there is a section under the DGAD headed by a Section Officer to deal with the monitoring and coordination of the functioning of DGAD. Vermulst (1997) argues that the use of one agency seems preferable for developing countries as there is substantial overlapping of data used for determining dumping and injury and it is efficient and manpower-friendly to put one agency in charge of both. However, some experts (Qureshi 2000) point out that the involvement of two separate authorities may ensure a greater transparency and reduce the possibility of bias[76]. It is also argued that having recourse to independent outside experts during the investigation process might be useful for developing countries. The authorities may request assistance for more technical aspects of the investigations In India however, investigations are carried out by the designated authority internally. The authorities do not take any recourse to independent experts.

An appeal against the order of the DGAD (India) lies to Custom, Excise, and Gold (Control) Appellate Tribunal (CEGAT) – a judicial tribunal. It reviews final measures and is independent of administrative authorities. This is consistent with the WTO provision of independent tribunals for appeal against final determination and reviews. It stipulates that each member ... shall maintain judicial tribunal ... procedures for purpose, *inter alia* of the prompt review of administrative actions relating to final determinations and reviews of

[76] My thanks to PKM Tharakan for making this point.

determination.... Such tribunals shall be independent of the authorities responsible for the determination or review in question. Despite this legislation, not all member countries maintain such tribunal (see for instance, Table 22).

Table 22 : Authorities responsible for conducting judicial reviews

Brazil	**Mexico**	**Argentina**	**USA**	**EU**	**CANADA**	**Korea**
No provision in AD regulation	Yes, Fiscal tribunal of the federation	yes	Yes, US court of International trade	No, they are initiated by the EC after consultation with the Advisory Committee.	Yes, Federal court of Appeal.	No, it is done by the Minister of Finance and Economy.

Source: WTO

Administrative practice, handbook or guide

There is no specific provision in the WTO Agreements requiring that the national authorities maintain a handbook or guide explaining domestic practice with respect to antidumping and countervailing duty measures. This guide is likely to provide an overview of anti-dumping laws and procedures for the benefit of the domestic industry. However, since it is not mandatory to maintain such guide, some member countries (for instance, Mexico) do not have it. In some cases it is not updated. India provides an Anti-Dumping Guide by the directorate General of Anti-dumping and allied Duties, Ministry of Commerce, Govt. of India. The guide provides broad guidelines on the legal provisions on antidumping mechanism in India. However, it does not contain information on various technical and procedural aspects.

IV Conclusion

This article examined the antidumping policy in India from two different perspectives: economic and legal. Part I focused on economic perspectives and examined whether the policy could be justified using economic arguments. The most frequently offered justification for anti dumping laws is the prevention of predatory pricing. The paper examined whether predatory behaviour was actually present when protection was granted. The analysis was carried out with the aid of four criteria, which, it was argued, must be met if predatory dumping is to be a likely explanation : the number of foreign sellers should be small; the share of subject countries should be high in total imports; import penetration should be high; and finally exporters should be enjoying dominant position in their markets. Cases that fail to meet any of these criteria probably do not involve predatory dumping. Applying these criteria to antidumping investigations in India between 1993 and 2001, this paper found that they were met only in a few cases. Although the methodology and the data set were subject to severe limitations and could not be expected to identify accurately every instance of predation, the analysis did indicate that antidumping investigations in India did not deal with predatory behaviour in general. The paper also examined whether the antidumping actions could be justified on the grounds of the optimal tariff argument and the strategic trade policy arguments. The analysis indicated that conditions attached with these arguments were not satisfied in the Indian case. It may therefore be concluded that in the majority of the cases antidumping policy cannot be justified on economic grounds. Preliminary evidence presented in the paper indicates that the political economy argument is the strongest argument in explaining India's current antidumping actions. Such actions have given protection to highly concentrated industries. Dominants producers lobby and litigate antidumping cases. In the process, they incur huge expenditure sacrificing economic efficiency. Besides, since most cases are in the intermediate products' markets higher prices may be having adverse effects throughout the economy. One may therefore conclude that antidumping policy that is designed to ensure fair competition and improve economic efficiency may in fact reduce them. These results are consistent with evidence reported elsewhere in the literature.

Analysis in Part II focused on legal provisions and discussed shortcomings in the antidumping code in India. As per the agreement, India has specially undertaken to bring its antidumping legislation in conformity with the antidumping agreement.. However, it would still require drafting of regulations to fill gaps in the antidumping agreement, to address issues where the agreement explicitly offers members choices between different approaches. These are for instance, treatment of various adjustments, definition of control, consumer interest, review mechanism and so on. Several ambiguities in the legal provisions such as a number of allowable adjustments with limited interpretation; the use of constructed normal and export values and unrealistic adjustments use of surrogate country methodology for non-market economies, asymmetrical comparisons between the export and normal values introduce bias in favour of finding positive dumping margins. Determination of injury margin is subject to even more severe ambiguities and is highly discretionary. The administrative procedure is considered highly confidential increasing the risk of its misuse. To minimise the manipulation of the law for protectionist purpose and to limit discretionary powers of the authorities, more explicit rules should be developed and definitions of different concepts used in the process should be given clearly and the procedure of determining dumping should be made more transparent.

It may however be noted, that further fine-tuning and refining of the antidumping policy is not the answer to prevent its misuse. Scholars argue that the antidote is competition policies. Efforts should be directed at integrating antidumping policy with the competition policies. The competitive merits of antidumping requests in that case will be evaluated by the competition authorities using the same standards and the framework of competition policies. This will result in the adoption of stricter criteria for determining predation in such cases and will prevent its misuse. Moreover, the injury standard for antidumping cases should also be brought closer to the antitrust standard, which takes into account the behaviour's effect on the competitive structure of the industry as a whole, rather than the material injury it causes to domestic firms. This however require the implementation of comprehensive competition policies and credible enforcement agencies. This has not been the case in India. The existing legal framework is weak and has been

marked by a notable lack of economic analysis in its implementation. The current law does not even have a properly defined concept of predatory pricing. In similar cases of alleged predatory pricing, the Commission used different standards and came to very different conclusions. In recent years, there seems to have been a growing use of the section of the Act dealing with predatory pricing in cases dealing with international trade (the case of soda ash from the US). However, evidence suggests that the current law is not efficient in tackling such cases (see Bhattacharjea 2000a, 2000b). Some scholars in India therefore argue that the use of competition policy framework for antidumping actions may not prevent their misuse. However, the problem is due to weak and ineffective law and the solution is : make it more effective. The new competition policy bill has been pending with the parliament . It should be of utmost importance to get it passed and integrate the antidumping policy with this law.

To sum up : the first best option would be to abolish antidumping altogether. Governments must attempt to dismantle the antidumping mechanism and merge it with the competition policy. While this would be preferable, it may not be feasible in practice to pursue it unilaterally. It could be pursued through bilateral agreement or in the context of plurilateral arrangements. The two instances - the EEC and the ANZCERTA, of successful abolition of the antidumping law indicate that there is possibility of doing away with this form of protection within the framework of regional integration agreements. Countries could also negotiate "cease-fire" arrangements on antidumping measures with those major trading partners who are willing to reciprocate through bilateral agreements[77]. Another option would be to follow a strict predation standard in investigating antidumping cases and limit the scope of antidumping to predatory cases alone. This requires a major revision of the definition of dumping in the next round of multilateral negotiations limiting the concept of antidumping to predatory pricing. The national authorities can then pattern their antidumping procedures along the lines used by competition authorities in countries where competition law is well developed.

[77] My thanks to PKM Tharakan for making this point.