CHAPTER – 2

LITERATURE REVIEW

The Uruguay Round of Multilateral Trade Negotiations, formally concluded on 15 April 1994 in Marrakesh, Morocco, led to the adoption by the WTO Members of new Agreements dealing with the major instruments of contingent protection, i.e. Anti-dumping, Countervailing and Safeguard Measures. Many researchers have tried to analyze the use of Anti-dumping measures, its pattern and probable causes.

2.1 CONCEPTUAL FRAMEWORK

This section of literature review includes the concept of antidumping, dumping, the difference between antidumping duty and normal customs duty, and the principles and procedures laid down by WTO.

2.1.1 Concept of Antidumping

Dumping is said to occur when the goods are exported by a country to another country at a price lower than its normal value. This is an unfair trade practice which can have a distortive effect on international trade and competition. Anti dumping is a measure to rectify the situation arising out of the dumping of goods and its trade distortive effect. Thus, the purpose of anti dumping duty is to rectify the trade distortive effect of dumping and re-establish fair trade. The use of anti dumping measure as an instrument of fair competition is permitted by the WTO. In fact, anti dumping is an instrument for ensuring fair trade and is not a measure of protection per se for the domestic industry. It provides relief to the domestic industry against the injury caused by dumping.

Anti dumping, in common parlance, is understood as a measure of protection for domestic industry. However, anti dumping measures do not provide protection per se to the domestic industry. It only serves the purpose of providing remedy to the domestic industry against the injury caused by the unfair trade practice of dumping. In fact, anti dumping is a trade remedial measure to counteract the trade distortion caused by dumping and the consequential injury to the domestic industry. Only in this sense, it can be seen as a protective measure.
2.1.2 Dumping

Dumping means export of goods by one country / territory to the market of another country / territory at a price lower than the normal value. If the export price is lower than the normal value, it constitutes dumping. Thus, there are two fundamental parameters used for determination of dumping, namely, the normal value and the export price. Both these elements have to be compared at the same level of trade, generally at ex-factory level, for assessment of dumping.

Often, dumping is mistaken and simplified to mean cheap or low priced imports. However, it is a misunderstanding of the term. On the other hand, dumping, in its legal sense, means export of goods by a country to another country at a price lower than its normal value. Thus, dumping implies low priced imports only in the relative sense (relative to the normal value), and not in absolute sense. Import of cheap products through illegal trade channels like smuggling does not fall within the purview of anti-dumping measures.

2.1.3 Difference between anti dumping duty and Normal Customs duty

Although anti dumping duty is levied and collected by the Customs Authorities, it is entirely different from the Customs duties not only in concept and substance, but also in purpose and operation. The following are the main differences between the two:

1. Conceptually, anti dumping and the like measures in their essence are linked to the notion of fair trade. The object of these duties is to guard against the situation arising out of unfair trade practices while customs duties are there as a means of raising revenue and for overall development of the economy.

2. Customs duties fall in the realm of trade and fiscal policies of the Government while anti dumping and anti subsidy measures are there as trade remedial measures.

3. The object of anti dumping and allied duties is to offset the injurious effect of international price discrimination while customs duties have implications for the government revenue and for overall development of the economy.

4. Anti dumping duties are not necessarily in the nature of a tax measure inasmuch as the authority is empowered to suspend these duties in case of an exporter offering a price undertaking. Thus such measures are not always in the form of duties/tax.
5. Anti dumping and anti subsidy duties are levied against exporter / country inasmuch as they are country specific and exporter specific as against the customs duties which are general and universally applicable to all imports irrespective of the country of origin and the exporter.

Thus, there are basic conceptual and operational differences between the customs duty and the anti dumping duty. The anti dumping duty is levied over and above the normal customs duty chargeable on the import of goods in question.

### 2.1.4 WTO Provisions:

GATT/WTO lays down the principles and procedures to be followed by the member countries for imposition of antidumping duties. Detailed guidelines have been prescribed under the specific Antidumping Agreement which has also been incorporated in the national legislation of the member countries of the WTO. Indian laws were amended with effect from 01-01-1995 to bring them in line with the provisions of the respective GATT Agreement.

Dumping is said to have taken place when an exporter sells a product to India at a price less than the price prevailing in its domestic market. Where Dumping causes or threatens to cause material injury to the domestic industry of India, the Designated Authority initiates necessary action for investigation and subsequent imposition of antidumping duties.

### 2.1.5 Legal framework for Anti Dumping, Anti Subsidy and Safeguard measures in India

Sections 9, 9 A, 9 B and 9 C of the Customs Tariff Act, 1975 as amended in 1995 and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 and Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 framed there under form the legal basis for anti-dumping and anti subsidy investigations and for the levy of anti-dumping and countervailing duties. These laws are in consonance with the WTO Agreements on Anti Dumping and Anti Subsidy countervailing measures.
2.1.6 Institutional arrangement in India for anti dumping, anti-subsidy and safeguard action against unfair trade practices

Anti dumping and anti subsidies & countervailing measures in India are administered by the Directorate General of Anti dumping and Allied Duties (DGAD) functioning in the Dept. of Commerce in the Ministry of Commerce and Industry and the same is headed by the "Designated Authority". The Designated Authority’s function, however, is only to conduct the anti dumping/anti subsidy & countervailing duty investigation and make recommendation to the Government for imposition of anti dumping or anti subsidy measures. Such duty is finally imposed / levied by a Notification of the Ministry of Finance. Thus, while the Department of Commerce recommends the Anti-dumping duty, it is the Ministry of Finance, which levies such duty.

2.2 DEFINITIONS:

Various sources have been searched to find out how “dumping” has been defined. A brief summary of the same has been provided below:

The Oxford Dictionary of English explains the meaning of dumping as selling to a foreign market at a low price, if such goods are unsalable in the home market. Thus, it is export of the products at a lower price.

According to the Columbia Electronic Encyclopaedia, dumping is defined as selling goods at less than the normal price, usually as exports in international trade, either by a producer, a group of producers, or a nation. It broadens the meaning of dumping to include not only the producer(s), but also the nation. It has been observed over a period of time that Governments may condone or even sponsor dumping activities either for political reasons or to achieve a favourable balance of payment position. The basic motive behind such activities is to establish monopoly over foreign trade by driving the competition out.

As per Wikipedia, Dumping, in economics, is a kind of injuring pricing, especially in the context of international trade. It occurs when manufacturers export a product to another country at a price below the normal price with an injuring effect. The objective of dumping is to increase
market share in a foreign market by driving out competition and thereby create a monopoly situation where the exporter will be able to unilaterally dictate price and quality of the product.

According to Investopedia, in the context of international trade it’s when a country or company exports a product at a price that is lower in the foreign importing market than the price in the exporter's domestic market. Because dumping typically involves substantial export volumes of a product, it often endangers the financial viability of the product's manufacturers or producers in the importing nation.

Dumping is considered a type of price discrimination. It occurs when a manufacturer lowers the price of an item entering a foreign market to a level that is less than the price paid by domestic customers in the originating country. The purpose is to obtain a competitive advantage in the importing market.

A standard technical definition of dumping is the act of charging a lower price for the like product in a foreign market than the normal value of the product, for example the price of the same product in a domestic market of the exporter or in a third country market. This is often referred to as selling at less than "normal value" on the same level of trade in the ordinary course of trade.

Under the World Trade Organization (WTO) Antidumping Agreement, dumping is not prohibited unless it causes or threatens to cause material injury to a domestic industry in the importing country. Dumping is also prohibited when it causes "material retardation" in the establishment of an industry in the domestic market.

If a company exports a product at a price that is lower than the price it normally charges in its own home market, or sells at a price that does not meet its full cost of production, it is said to be "dumping" the product. It is a sub part of the various forms of price discrimination and is classified as third-degree price discrimination. Opinions differ as to whether or not such practice constitutes unfair competition, but many governments take action against dumping to protect domestic industry.

The Cambridge Advanced Learner’s Dictionary and Thesaurus defines dumping from three different viewpoints. From the perspective of Economics, dumping is the practice of selling goods in another country so cheaply that companies in that country cannot compete fairly.
According to Business dictionary, published by Web Finance Inc. dumping means exporting goods at prices lower than home market prices. In price-to-price dumping, the exporter uses higher home-prices to supplement the reduced revenue from lower export prices. In price-cost dumping, the exporter is subsidized by the local government with duty drawbacks, cash incentives, etc. Dumping is legal under GATT (now WTO) rules unless its injurious effect on the importing country's producers can be established. If injury is established, GATT rules allow imposition of anti-dumping duty equal to the difference between the exporter's home-market price and the importer's FOB price.

According to Dictionary of International Trade published by Global Negotiator - Dumping is the practice of selling a product in a foreign market at an unfairly low price (a price that is lower than the cost in the home market, or which is lower than the cost of production) in order to gain a competitive advantage over other suppliers. Dumping is considered an unfair trade practice under GATT and World Trade Organization agreements. It is regulated by national government through the imposition of anti-dumping duties, in some cases calculated to equal the difference between the product’s price in the importing and the exporting country.

According to article “Dumping – Meaning, Types, Price Determination and Effects of Dumping” (Article shared by : Smriti Chand on Your Article Library)

Dumping is an international price discrimination in which an exporter firm sells a portion of its output in a foreign market at a very low price and the remaining output at a high price in the home market. Haberler defines dumping as the sale of goods abroad at a price which is lower than the selling price of the same goods at the same time and in the same circumstances at home, taking account of differences in transport costs.

As per Viner’s definition, Dumping is price discrimination between two markets in which the monopolist sells a portion of his produced product at a low price and the remaining part at a high price in the domestic market. Other two types of dumping as per Viner are

(i) reverse dumping in which the foreign price is higher than the domestic price. The home market price is lower than the cost price.
(ii) When there is no demand of that commodity in the domestic market and it is sold in two different foreign markets, out of which one market is charged a high price and the other market a low price.

Practically dumping means selling of the product at a high price in the domestic market and at a low price in the foreign market.

T. E. Gregory, an English economist, points out that the term “dumping” is used at one time or another to cover all the four following practices (Viner, 1996, 3):

1. Sale at prices below foreign market prices,
2. Sale at prices with which foreign competitors cannot cope,
3. Sale at prices abroad which are lower that current home prices,
4. Sale at prices unprofitable to the sellers

According to “The Great Soviet Encyclopedia, 3rd Edition (1970-1979)”, Dumping is the sale of goods in foreign market at ‘throw away’ prices that are lower than production costs. It is a tactic of monopolies.

The economic nature and the mechanism of Dumping were thoroughly revealed in the work of V. I. Lenin. He pointed out that “Within a given country the cartel sells its goods at high monopoly price but sells them abroad at a much lower price to undercut the competitors to enlarge its own production to the utmost”1 - While limiting production for the domestic market, cartels expand production for the foreign market, selling goods at a loss and charging customers within the country very high prices. While limiting production for domestic market, charging customers within the country monopoly prices. The distinguishing traits of dumping are a sharp distinction between high domestic prices and low export prices, expansionist method of suppressing competitors, and a systematic rather than occasional practice of exporting at throw away prices Dumping is practised by and a systematic rather than occasional practice of exporting of exporting at throwaway prices.

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1 Poln. sobr. soch., 5th ed., vol. 27, p. 412 (THE FREE DICTIONARY by FARLEX)
Dumping is practiced by monopolies that engage in marketing both within the country and abroad. When export is carried on by firms not involved in production or by government organizations, dumping means exporting at prices lower than those at which the corresponding goods were bought on the domestic market. In this case the losses are covered out of state budget capital. In a majority of cases the existence of export subsidies is evidence of dumping, especially when these subsidies reach significant dimensions. The exporter’s losses are the most important characteristic of dumping, regardless of the method used to cover them.

In the legislation of the capitalist countries, dumping is defined as selling goods on foreign markets at prices lower than those in effect on the domestic market in the country of export. In this case the importing country has the right to impose the so-called antidumping tariff. The antidumping tariff is an addition to standard tariff. The anti-dumping tariff may be as large as the difference between the domestic price in the country where the goods originated and the export price. The General Agreement on Tariffs and Trade (GATT), which was signed in 1947, defines dumping as distributing the products of one country in the market of another at a price lower than “normal,” if this practice causes or threatens to cause significant harm to some industry started by one of the participating countries or if it substantially retards the creation of national output. An international antidumping code adopted in Geneva in 1967 by a conference on tariffs of the GATT countries and known as the Kennedy round provides for corresponding legislation to include a section on “damage caused” to local enterprises and a section on preliminary submission of proof of damage.

Dumping aggravates the contradictions among the capitalist countries, disrupts traditional trade relations, increases the supply of goods on the world market regardless of the level of the exporter’s production costs, intensifies competition, and leads to an undermining of the established level of world prices. In this respect the 1962 antidumping law in Austria is interesting. It is the first to specify quantitative criteria on dumping prices: a price 20 percent or more below the price on the domestic market in the country of origin or at least 8 percent lower than the price existing in the world market.
In countries that practice dumping, the standard of living of the toiling masses is lowered as a result of the rise in domestic prices and taxes. In countries that are the object of dumping, the development of national industries becomes more difficult and unemployment increases. By means of dumping, large monopolies suppress their competitors and capture new salesmarkets, thereby expanding the sphere of their dominance and increasing profits. This commercial dumping is frequently called “price dumping.”

Since World War II, the United States has carried on dumping of agricultural products on a large scale. For example, between 1961 and 1965 subsidies for wheat export were 23 percent and for cotton they were 36 Percent. From 1954-55 to 1963-64 the amount of export financed by the state was 54 % of all U. S. agricultural export. At the end of the 1960s the forms and methods of dumping became more concealed in nature; export subsidies showed a tendency to decrease but at the same time direct supplementary payments, a concealed form of subsidizing the exports of agricultural output were being introduced for the agricultural producers.

The governments of the capitalist states are taking steps against dumping. For example, in February 1970 the British Board of Trade adopted a decision to institute a temporary antidumping tariff on the import of nitrogen fertilizers from Belgium and West Germany. This tariff was later expanded to include the same products coming from Italy, Austria, the Netherlands, and Sweden. This decision was made because foreign suppliers were selling their goods in Great Britain at dumping prices. Because all foreign suppliers of nitrogen fertilizers to Great Britain committed themselves not to sell these products at such low prices, it was decided by GREAT Britain not to impose the antidumping duty as long as the firms hold to their commitments.

A typical variation of dumping in the current stage of the general crisis of capitalism is currency dumping, which arises as a result of a discrepancy between the domestic and foreign buying power of the national currency.

Dumping and anti-dumping as per “The balance”:

**Dumping** is when a country's business firms lower the sales price of their exports to gain unfair market share. They drop the product's price below the price at home market. They may even push the price below the actual cost to produce. They raise the price once they've eliminated the competition in the foreign market.
In November 2017, the Trump administration imposed a 20% tariff on Canada's $10 billion of lumber exports. The U.S. Commerce Department said that the dumping injures the American lumber industry. The action resulted hike of lumber prices for imports.

The U.S. president Trump first announced the tariff in April 2017. The threat was enough to reduce imports of Canadian softwood lumber. The tariff was retroactive for 90 days. Many companies hesitated to purchase lumber with 20% surcharge.

Canada fought back by appealing to the North American Free Trade Agreement-arbitrators. Canadian loggers say there is no unfair subsidy. They pay the government for the logs and plant trees to replace those which have been cut.

**Two Advantages**

1. To get the advantage of dumping the exporters sell at an unfairly competitive lower price. A country subsidizes the exporting business to enable them to sell below cost to increase the production and create jobs for its residents.

2. The country is willing to take a loss on the product to increase its market share in that industry. It often uses dumping as an attack on the other country's industry. It hopes to drive importing country's producers out of market and business to become the industry leader.

There is also a temporary advantage to consumers in the country being dumped upon. As long as the subsidy continues, they will have to pay lower prices for that commodity. For example, low-cost Canadian lumber is keeping new home prices low. A 20% additional tariff would raise prices and possibly hurt new home buyers.

**Three Disadvantages**

1. The problem with dumping is that it's expensive to maintain. It can take years of exporting cheap goods to drive the competitors out of business. Meanwhile, the cost of subsidies can add to the export country's sovereign debt.

2. The second disadvantage is retaliation by the trading partner. Countries may impose trade restrictions and tariffs to counteract dumping. That could lead to a trade war.

3. The third is censure by the World Trade Organization and the European Union.

**2.2.1 “The Balance” states about Anti-dumping as under:**
A country prevents dumping through trade agreements. If both partners stick to the agreement, they can compete fairly and avoid it.

Violations of dumping rules can be difficult to prove and expensive to enforce. For example, NAFTA provides a mechanism to review violations of the trade agreement. A NAFTA panel concluded that Canada was dumping lumber. In 2004, it said the United States did not prove the dumping had harmed the American lumber industry.

Trade agreements don't prevent dumping with countries outside of the treaties. That's when countries take more extreme measures. Anti-dumping duties or tariffs remove the main advantage of dumping. A country can add an extra duty, or tax, on imports of goods that it considers to be involved in dumping.

If that country is a member of the WTO or EU, it must prove that dumping existed before slapping on the duties. These organizations want to make sure that countries don't use anti-dumping tariffs as a way to sneak in trade protectionism.

2.2.2. Trade Remedies A TOOL KIT is prepared and published by The International Institute for Trade and Development with support from the Asian Development Bank, provides a description of the remedial measures to take care of the injuries caused by injurious trade practices.

In the last 20 years, Asian countries have developed at a tremendous rate, increasing their economic wealth and standard of living faster than similarly situated countries in other regions of the world. The willingness of Asian countries to liberalize trade is a major reason for the region’s success. At the same time, trade liberalization and its ensuing gains in wealth bring greater exposure to practices such as dumping and subsidization that can cause harm to emerging and established industries alike. It is important for these countries to apply trade remedies effectively to counteract such measures.

An understanding of the rules and procedures applicable to trade remedies is therefore highly necessary for these countries to counteract injurious trade practices. This tool kit, consisting of three modules, seeks to provide the user with a basic understanding of the rules of the World
Trade Organization (WTO) that WTO members must observe while applying trade remedy measures.

At the WTO level, there are three main agreements that deal specifically with the application of trade measures to remedy harm that may result from international trade:

1. The WTO Anti-Dumping Agreement (ADA),
2. The WTO Agreement on Subsidies and Countervailing Measures (ASCM), and
3. The WTO Agreement on Safeguards (ASG).

Collectively, the ADA, ASCM, and ASG authorize remedial action against three kinds of situations harmful to international trade: dumping, subsidies, and unforeseen increased imports.

Binding tariffs and applying them equally to all trading partners (most-favoured-nation treatment, or MFN) is key to the smooth flow of trade in goods. The WTO agreements uphold the principles, but they also allow exceptions — in some circumstances.

Three of such matters are called "trade remedies". According to WTO Guidelines they are:

1. Actions taken against dumping (selling at an unfairly low price):
If a company exports a product at a price lower than the price it normally charges on its own home market, it is "dumping of the product".

The WTO agreement does not pass judgment on whether it is an unfair competition or not.

Its focus is on how any government can or cannot react to dumping — the agreement tries to discipline anti-dumping actions, and it is called the "Anti-dumping Agreement".

2. Subsidies and special "countervailing" duties to offset the subsidies:

The WTO Agreement on Subsidies and Countervailing Measures tries to discipline the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. Under the agreement, a country can use the WTO's dispute-settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the country can launch its own investigation and ultimately charge extra duty ("countervailing duty") on subsidized imports that are found to be hurting domestic producers.

3. Emergency measures to limit imports temporarily, designed to "safeguard" domestic industries.
A WTO member may take a "safeguard" action (i.e., restrict imports of a product temporarily) to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry.

Safeguard measures were always available under the GATT (Article XIX). However, they were infrequently used, and some governments preferred to protect their industries through "grey area" measures ("voluntary" export restraint arrangements on products such as cars, steel and semiconductors).

The WTO Safeguards Agreement broke new ground in prohibiting "grey area" measures and setting time limits ("sunset clause") on all safeguard actions.

Table-1: Characteristics of the Trade Remedies Agreements of the World Trade Organization

<table>
<thead>
<tr>
<th>WTO Agreement</th>
<th>Situation</th>
<th>Remedies</th>
<th>Actor Applying the Remedy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-Dumping Agreement</td>
<td>Dumping</td>
<td>Anti-dumping measures to offset injurious dumping</td>
<td>Importing member with domestic industry suffering injury</td>
</tr>
<tr>
<td>Agreement on Subsidies and Countervailing Measures</td>
<td>Subsidies</td>
<td>(1) Countervailing measures to offset subsidy or injury (2) Withdrawal of subsidy or removal of adverse effects</td>
<td>(1) Importing member with domestic industry suffering injury (2) WTO member conferring subsidy</td>
</tr>
<tr>
<td>Agreement on Safeguards</td>
<td>Unforeseen increased imports</td>
<td>Safeguard measures to the extent necessary to prevent or mitigate serious injury to domestic industry</td>
<td>Importing member with domestic industry suffering serious injury</td>
</tr>
</tbody>
</table>

(Source: Trade Remedies: A Toolkit by Asian Development Bank, 2009)
2.3 International Attitude on Dumping

While the World Trade Organization reserves judgment on whether dumping is an unfair competitive practice, most nations are not in favour of dumping. Dumping is legal under WTO rules unless the foreign country can reliably show the negative effects the exporting firm has caused its domestic producers. To counter dumping and protect their domestic industries from predatory pricing, most nations use tariffs and quotas. Dumping is also prohibited when it causes "material retardation" in the establishment of an industry in the domestic market.

The majority of trade agreements include restrictions on trade dumping. Violations of such agreements may be difficult to prove and can be cost prohibitive to enforce fully. If two countries do not have a trade agreement in place, then there is no specific ban on trade dumping between them.

2.3.1 Real World Example of Dumping Tariffs in International Trade²

In January 2017, the International Trade Association (ITA) decided that the anti-dumping duty levied on silica fabric products from the People’s Republic of China the previous year would remain in effect based on the investigation by the Department of Commerce and International Trade Commission. The ITA based its ruling on the fact that there was a strong likelihood that dumping would repeat if the tariff was removed.

2.3.2 The Role of the WTO in Anti-dumping

Most countries are members of the WTO. Member countries adhere to the principles laid out during negotiations of the General Agreement on Tariffs and Trade. That was a multilateral trade agreement that preceded the WTO. Countries agree that they won't dump and that they won't enforce tariffs on any one industry or country. To install an anti-dumping duty, WTO members must prove that dumping has occurred.

The WTO is specific in its definition of dumping. First, a country must prove that dumping harmed its local industry.

It must also show that the price of the dumped import is much lower than the exporter's domestic price. The WTO asks for three calculations of this price:

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1. The price in the exporter’s domestic market.

2. The price charged by the exporter in another country.

3. A calculation based on the exporter’s production costs, other expenses, and reasonable profit margins.

The disputing country must also be able to demonstrate what the normal price should be. When all these have been put in place, then the disputing country can institute anti-dumping tariffs without violating the GATT multilateral trade agreement.

For example, the Canadian lumber dispute has been ongoing since 1982. In 2004, the WTO ruled that the United States failed to prove Canadian lumber imports harmed the U.S. lumber industry.

### 2.3.3 The WTO Anti-Dumping Agreement: A Commentary by Edwin Vermulst

In his commentary, Edwin Vermulst presents a thorough analysis of one of the most complex and controversial agreements of the WTO system: The Anti-dumping Agreement (the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994). Instead of a provision-by-provision commentary, in this book Vermulst adopts a fresh and thematic approach to the Agreement on Anti-dumping. Accordingly, he divides the book into four chapters covering dumping (chapter 1), injury (chapter 2), and domestic procedure (chapter 3) and dispute settlement proceedings (chapters 4).

Vermulst’s commentary has the virtue of being thorough, accurate, and written in an accessible manner despite the natural complexity of the issues discussed. Although the book was published in 2006 and the case law has increased significantly in the past three years, the book still remains a valid reference for government officials, practitioners, scholars, and business people interested in the area.

### 2.3.4 The EU and Anti-Dumping

The EU enforces anti-dumping measures through its economic arm, the European Commission. If a member country complains about dumping by a non-member country to the EU, then the EC conducts a 15-month investigation. Like the WTO, the EC must find that material harm has occurred to the industry.
Unlike the WTO, the EC doesn't explicitly define dumping by using a formula to determine that the price is lower than in the exporter's market. The EC must find two other conditions before it imposes duties. First, it must find that dumping is the cause of material harm. Second, it must find that the sanctions don't violate the best interests of the EU as a whole.

If found guilty, the exporter can offer to remedy the situation by agreeing to sell at a minimum price. If the EC doesn't accept the offer, it can impose anti-dumping duties. These can be in the form of an ad valorem tax, a product-specific duty, or a minimum price.

### 2.3.5 U.S. Policies

Many American policy makers over the past decade have replaced calls for more free trade with demands for "fair trade." The United States, they say, should keep its markets open to imports, but must also act aggressively against "unfair" trade practices by foreign businesses and governments. One of the pillars of this "fair trade" approach is a set of so-called antidumping and countervailing duty laws. (Both antidumping laws and countervailing duty laws shall hereinafter be referred to simply as antidumping laws, unless otherwise noted.) Antidumping laws seek to prevent products manufactured overseas from being sold by foreign firms in the U.S. at "less than fair value." Countervailing duties seek to offset the subsidies that foreign governments provide for some exporting firms by imposing duties on the goods these firms export to the U.S.

While duties and restrictions designed to achieve so-called fair trade seem reasonable to many Americans, in reality their effect is anything but fair or beneficial to U.S. consumers. The antidumping laws are confusing and arbitrary, and in many instances merely allow American firms to secure punitive tariffs against competing importers where no unfair trade practices are involved. Worse, these laws drive up the costs of imported components used by other American enterprises, making their products less competitive in world markets. As a result, American consumers pay higher prices for both imported and domestically produced goods, and American workers find fewer employment opportunities in less competitive American firms.

Get exclusive insider information from Heritage experts delivered straight to your inbox each week. When an American firm accuses a foreign firm of dumping in the U.S. market, the Commerce Department must compare the price of the good in the home market of the foreign

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3 [https://www.thebalance.com/what-is-trade-dumping-3305835](https://www.thebalance.com/what-is-trade-dumping-3305835), accessed January 10, 2019
firm and the price it is sold for in the U.S. If the U.S. price does not reflect "fair market value," as determined by the Commerce Department, the foreign firm can be found guilty of dumping.

Complex and Arcane Methods: The problem is that the methods the Commerce Department employs are complex, arcane, and plagued with conceptual and technical problems. And because so many aspects of estimating the fair market value are subjective, it is easy for the Commerce Department to "prove" dumping when in fact no dumping has occurred. This can happen for a number of reasons:

When no government subsidy is involved, the definition of an "unfair" price is arbitrary.

The Commerce Department often will compare the prices of different rather than the identical products, so price comparisons are subjective.

The Commerce Department often will subtract expenses from foreign products sold in the U.S. in making its calculation, but not subtract the same expenses incurred in the home market.

The Commerce Department often neglects to take into account exchange rate fluctuations in its comparative price calculations for the home and export markets.

When determining prices in the foreign market, the Commerce Department sometimes will use an "average foreign price" for a product, which does not take into account price fluctuations at the time of the sale. Moreover, Commerce often will neglect to take into account the differences in wholesale and retail prices.

In many cases, the Commerce Department requires accused foreign firms to supply a massive amount of information, including business secrets, to determine foreign production costs. If the information supplied is not satisfactory to Department investigators, they may use production cost estimates by different firms in third countries, even though these costs are not comparable to production costs in the home market.

These practices by the Commerce Department routinely result in inaccurate production cost determinations, causing many companies to be found guilty of dumping, even when no such action occurred. In some cases, these questionable practices are simply the product of overzealous officials. But for the most part, these problems are systemic, rooted in the dumping laws themselves.
To promote free trade and thus to give consumers full access to the products they want, the Bush Administration should seek the support of Congress to end harmful dumping determinations that artificially raise the prices of certain imports. Specifically, it should:


2. Commission a study of the damage done to American business and consumers by antidumping laws.

3. Propose interim legislation that incorporates the initial intent of the Antidumping Act of 1916.

Antidumping laws originally sought to prevent foreign exporters from using predatory pricing to undermine American businesses. The burden of proof was on the government and American businesses. But these laws have evolved into yet another form of trade protection, which American firms can use to keep out competitors, whether or not they are engaged in unfair trade practices. If the U.S. is to be the leading advocate of free trade in the world, and keep its own market open as well, it should eliminate its unfair trade practices.

### 2.4 Evolution of Dumping Laws

Laws related to definition of dumping and imposing anti-dumping measures to curb the practice evolved over a period of time. A summary of the evolution process in various countries has been given below:

#### 2.4.1 The Evolution of Dumping Laws in the U.S.

Bryan T, Johnson (Director | Writer | Cinematographer IMDb, *former Policy Analyst at The Heritage Foundation*) describes how dumping was evolved in U.S.

According to the U.S. Department of Commerce definition, "dumping occurs when a goods is sold for less than its 'fair value,' i.e. it is exported for less than the price at which it is sold in the domestic market or third country markets or it is sold for less than production cost." Since 1897, the U.S. effectively has had antidumping laws on the books, and these laws have enabled the U.S.

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4 Terms of International Trade, United States Department of Commerce, International Trade Administration, Washington, D.C., July 1987, p. 4
government to punish firms in other countries that send subsidized exports to the U.S. (Countervailing Duty Law of 1897, 19 U.S.C. 1303.)

It was not until 1916, however, that U.S. Congress passed a law specifically targeting dumping. According to the Antidumping Act of that year, for dumping to occur, a "predatory intent" by the exporter must be shown. (Antidumping Act of 1916, 15 U.S.C. 71.) In other words, the exporter must intend to sell its products in the U.S. at below production cost in order to cause material injury to an existing U.S. firms. (This act is codified in Section 801 of the Revenue Act of 1916.) This law came in an era in which the federal government also enacted antitrust laws to prevent American enterprises from pursuing similar predatory practices against their domestic competitors.

With the Antidumping Act of 1921, Congress loosened the requirements to permit federal action to keep out foreign products not only if foreign companies engaged in predatory pricing, but merely if their products were deemed to be priced lower than similar American products, regardless of whether predatory pricing was an issue\(^5\). This Act forms the basis for America's current antidumping law. The Antidumping Act was incorporated into the 1930 Tariff Act, and later amended by the 1979 Trade Act, the 1984 Trade Act, and the 1988 Trade Act\(^6\). These revisions made it easier for American companies to initiate dumping complaints, and for the U.S. government to restrict foreign imports that are sold at lower prices than similar American products.

Several multilateral agreements also have addressed the dumping issue. The Kennedy Round of the General Agreement on Tariffs and Trade (GATT), held between 1963 and 1967, resulted in the GATT Antidumping Code. This code sets out guidelines under which countries may act against foreign firms that practice predatory pricing resulting in material injury to an industry based in the importing country\(^7\). GATT itself does not establish specific definitions of what constitutes dumping or act against countries that dump; it simply creates the guidelines on which countries can adopt their own laws to prevent dumping. The code was amended during the

Tokyo Round of GATT, held between 1973 to 1979\(^8\). Of the 103 members of GATT, however, only 25 have signed on to this amended code. (These are: Australia, Austria, Brazil, Canada, Czechoslovakia, the European Community, Egypt, Finland, Hong Kong, Hungary, India, Japan, South Korea, Mexico, New Zealand, Norway, Pakistan, Poland, Romania, Singapore, Spain, Sweden, Switzerland, the United States, and Yugoslavia. The European Community is considered one member, with the exception of Spain, which signed the GATT antidumping code separately.) The Tokyo Round agreement mandates that all antidumping investigations be reported immediately to GATT and that a semiannual report on antidumping cases be forwarded by the signature countries to the GATT Secretariat\(^9\). According to the Code, each signatory can legislate and administer its antidumping code, as long as it conforms to GATT standards. (These standards are explained in Article VI of the GATT Agreement.) As recently as this year, the GATT has found the U.S. violating the intent of international guidelines to which the laws of signatory countries must conform. Specifically, the GATT accused the U.S of making it too easy for American enterprises to obtain punitive tariffs against foreign products. The U.S. so far has ignored the GATT warning, indicating to other countries that the U.S. does not intend to play fair in trade\(^10\).

2.4.2 The growth in Cases:

Recently the number of dumping cases instigated by American businesses using U.S. laws has grown. Many U.S. industries that in the past might have sought trade protection directly from Congress have found this route more difficult as successive GATT rounds have eliminated many forms of direct trade protectionism. U.S. antidumping laws thus have proved to be a more convenient tool to limit competition by denying foreigners access to the U.S. market. The U.S. steel industry, for example, has received trade protection for almost two decades. In 1992, however, the quota system that had protected the U.S. industry expired. As a result, the industry has flooded the Department of Commerce and the International Trade Commission with new dumping complaints.

During the 1980s, 1,456 antidumping cases were reported to the GATT. Australia, the United States, Canada, and the European Community accounted for 95 percent of those cases. The U.S.

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\(^8\) "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," April 12, 1979, GATT, BISD 26th Supp., 1979, p. 171


was responsible for 90 percent of all countervailing duty cases initiated between 1980 and 1986. In 1980, there were only 83 outstanding U.S. antidumping orders on foreign imports. By 1990, outstanding antidumping orders had increased to 197. In that year, the U.S. government considered 27 dumping complaints, and almost 200 separate dumping orders were, in effect, imposing duties and higher prices on one or more products from 42 different countries. This was up from 84 orders on 23 countries in 1980. (From an unpublished forthcoming study by Keith Anderson, Senior Advisor to the Vice Chairman Anne Brunsdale, International Trade Commission, Washington, D.C.) And in the first ten months of 1991, the number of new dumping complaints considered by the U.S. was more than double the 1990 figure. ("GATT: U.S. Bars Cheaper Imports," The Washington Times, March 13, 1992, p. C3.)

2.4.3 How the U.S. Government Determines "Dumping"

The Investigation Process: The U.S. Department of Commerce and the U.S. International Trade Commission (ITC) jointly administer America's cumbersome antidumping law. The steps in a dumping case are as follows:

1) A U.S. company submits a petition to the International Trade Administration at the Department of Commerce, alleging that a foreign company is dumping its product in the U.S.

2) If the Commerce Department determines that sufficient evidence exists, it will proceed with an investigation.

3) The ITC then may start its own investigation to determine whether there is injury to any domestic companies.

4) If the ITC finds there has been material injury to a U.S. company, the Commerce Department will determine whether the product in question is being sold in the U.S. at "less than fair value," or at a lower price than that sold in the home market or a third country market.

5) If the Department issues a preliminary finding that sufficient evidence of such pricing practices exists, it will direct the U.S. Customs Service to suspend the importation of the product, or require U.S. importers of the product to post a deposit. This bond must be paid to the U.S government in the event that a final determination finds that the product is being sold at less than fair value.

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6) The ITC, at this point, must determine if there is any actual material damage to U.S. companies caused by the alleged dumped imports.

7) If the ITC determines that the dumping has caused injury to a U.S. manufacturer, the products then are subjected to " antidumping duties" equal to the amount of the determined dumping margin. The dumping margin is the difference between the price of the " dumped product" and the price the product would sell for if it were being sold at a " fair" price, according to calculations by the ITC. If, however, the ITC finds that there is insufficient evidence, the case is dismissed.

2.4.4 Investigation Methods

When the Commerce Department attempts to determine when a product is being dumped, it compares the "U.S. price" with the product's "foreign market value." The U.S. price is determined by the purchase price when the good enters the U.S., minus packaging costs, import duties, and taxes. In other words, the exporter's sale price will be reduced by the amount of fees paid and other pre-sale costs that result from selling products in the U.S. After this amount is determined, the Commerce Department will then determine if the price reflects a "fair market value" (FMV). The FMV can be determined in three ways, namely:

1) Home Market Price:

(19 U.S.C. Section 1677 b(1)(A).) The Commerce Department tries to determine how much the same product is sold for in the country where it is manufactured. If the price in the home market is more than the U.S. purchase price, the Department normally finds that dumping has occurred.

2) Third Country Price:

(19 U.S.C. Section 1677b(1)(B).) If there are no home market sales of the product, or the sales are so small that it is impossible to determine a market price, the price that the product sells for in a third country may be used. If that price is higher than in the U.S., the Commerce Department normally would find that dumping has occurred.

3) Constructed Value:

(19 U.S.C. Sections 1677b(a)(2), 1677b(b), and 1677b(e).) If the market value of the product cannot be determined either by a home market price or a third country price, the Department will rely on a "constructed value." The constructed value method attempts to establish the exact cost
of production of the product in question by using "best available information," which includes financial statements and documents on the product and companies in question. If this method is used, the U.S. government requires the foreign company under investigation to provide financial statements, production cost documents, and any other kind of document necessary to determine the costs of production.

If the company does not provide the information in a specified period of time, the Commerce Department will then look to a third country of similar "level of industrialization" to determine how much "similar" products in that country cost to produce. This might mean that Commerce will ask the U.S. companies that initiated the case to provide information on the accused foreign companies.

When it constructs value, the Commerce Department adds an 8 percent profit margin to its calculated production cost to estimate a "fair" sale price in the U.S. This effectively means that if a foreign company cannot sell its product in the U.S. for at least an 8 percent profit, it likely will be found guilty of dumping. If a foreign company is willing to accept only a 7 percent profit on a shipment of sweaters, for example, the Commerce Department would find it guilty of dumping those sweaters in the U.S.

**2.4.5 Problems with U.S. Antidumping Laws**

While the federal government claims that antidumping laws help fight unfair trade practices by foreign firms or governments, in reality there are so many problems associated with determining the existence of dumping that the rules themselves turn out to be unfair. Among the difficulties:

1) **Defining Unfair Prices:**

When no government subsidies are involved, there is no economic case for the claim that selling at below cost is an unfair practice. The claim of unfairness usually is based on the fear that a business will use so-called predatory pricing to drive out its U.S. competitors, leaving it to enjoy a monopoly and charge U.S. consumers higher prices. But the world market today is so integrated and competitive that it is virtually impossible for a company to exploit a dominant share of a market for long, if at all. Thanks to freer trade in recent decades, there is little chance of an exporter achieving the power to charge a monopoly price.
Another problem with the concept of unfair dumping is that U.S. firms presumably can cut their prices to "unfair" levels in order to drive their foreign competitors out of the American market. In other words, if the U.S. firm is allowed to "dump" in its own market, the practice is not considered unfair.

Finally, it is a common business practice to sell products at a loss. For example, if a product is not selling well, a business owner might sell below cost in order to recoup at least some of his investment in the product. Yet when a foreign firm sells below cost in the U.S. market, it is considered to be abnormal and unfair.

2) The Problem of Comparing Products:

When a U.S. company charges a foreign company with dumping, the Commerce Department assumes that the products in question are similar. For example, if U.S. farmers charge Colombian farmers with dumping, it is assumed that the American farmers are accusing the Colombians of dumping the identical crop to that produced by the Americans. Yet many U.S. dumping cases against foreign products are initiated by American companies marketing products significantly dissimilar to the products allegedly dumped. In such cases, when the U.S. Commerce Department attempts to determine a "fair market value" for the item in question, it is comparing apples and oranges.

In one 1984 dumping case, for example, an Italian company was found guilty of dumping pads for woodwind musical instruments in the U.S. Yet the smaller, cheaper, and lower quality woodwind pads sold by the Italian firm were meant for the lower lines of instruments in the U.S. market. The firm sold more expensive, higher quality pads for the top-of-the-line woodwind instruments in the Italian home market. When Commerce initiated its investigation, it compared the prices of the two products as though they were identical. This was like a foreign country accusing America's General Motors of dumping its cars by comparing the price of an exported Chevette with the price of a luxury Cadillac sold in the U.S. Not surprisingly, the U.S. government found that the Italian company was dumping woodwind pads in the U.S. In defending its actions, Commerce admitted that it did not compare similar products, but then said that it had the prerogative not to do so.

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3) Calculating the Costs Associated with Selling:

When the Commerce Department attempts to determine the fair market value of a product sold in the U.S., it subtracts various "sales-associated" costs from the price that the import is selling for in the U.S. For example, packaging costs, import duties, and other taxes are removed from the U.S. selling price. Yet when Commerce seeks to determine the home market value price of the same good, many sales-associated costs are not eliminated. This can make the base price of the good in the country of origin appear artificially higher than its base selling price in the U.S. Thus it gives the incorrect perception the foreign good is being dumped.

In 1989, for example, the U.S. initiated a dumping investigation against imported telephone systems. In one step of its investigation, the Commerce Department deducted the cost of inland freight for Korean phone systems sold in the U.S. while neglecting to subtract the same costs for Korean inland freight. The Korean inland freight was higher because, unlike the shipment of telephone systems to the U.S. that went to a large distributor, the systems in Korea went directly to hundreds of different retailers, increasing the cost of distribution. Thus the price of the product sold in Korea appeared higher than it actually was when compared to the U.S. price.

4) Adjusting for Exchange Rates:

When the Commerce Department rules that a product is being dumped, it must determine the dumping margin between the price a product is sold for in the foreign market and the presumed U.S. market price. To be compared, both of these prices must be calculated into U.S. dollars. But this creates a problem. Some business agreements between a foreign company and a U.S. importer use fixed exchange rate contracts. So the selling price in the exporter's home currency will fluctuate according to the current exchange rate, yet production costs remain unchanged. When investigating a dumping case, however, the U.S. government sometimes will use the current exchange rate.

This can give a misleading suggestion of dumping, because in the time between the signing of the contract between the foreign and U.S. companies and the time of actual delivery of goods, the exchange rate between the U.S. dollar and the foreign currency might have changed significantly. Deputy Assistant Secretary Gilbert Kaplan, of the Commerce Department, noted this problem in a 1986 Senate Finance Committee hearing. Explained Kaplan, "If the home market price is 200 yen and the U.S. price is $1.00 and the exchange rate is 200 yen equal $1.00, there is no
dumping. If the yen appreciated against the dollar, however, so that only 150 yen equaled $1.00, unless there was a corresponding change in prices, suddenly the company is dumping by 33 percent, because 200 yen is now worth $1.33.\textsuperscript{13}

5) Determining the Average Price:

When the Commerce Department attempts to determine the price a foreign good is being sold for in its home market, it uses an "average price level," usually calculated over a six-month period. Yet the Department compares this average foreign price with the U.S. price at a specific time, not an average. This can create serious distortions in price comparisons. For example, a product might sell in the U.S. for $100 on a particular date when competition is particularly fierce. But the price of that product in the home market might range from $90 to $150 over a six-month period, for an average of $120. In this situation, the company could be found to be dumping. But the average price in the U.S. over the same six-month period also might be $120, meaning that dumping, as defined by current laws, in fact did not occur.

Another common defect in the Commerce Department price determination is its practice of comparing retail with wholesale prices. A company may export a product to the United States at a large wholesale discount. This is how many American retailers are able to import large quantities of items at cheaper prices than they could obtain from domestic sources that do not sell in similar bulk quantities. Yet the Commerce Department might compare the U.S. wholesale price with the retail foreign price. In a 1985 case involving cellular telephones Commerce compared the price of Toshiba's phones sold to large U.S. wholesale distributors with the price of the same units sold in Japan directly to retailers. Commerce did not adjust for the price difference that resulted from selling in the larger and smaller quantities. As a result, the foreign price appears higher than the U.S. price, allowing a finding of dumping\textsuperscript{14}.

6) Determining Production Costs:

The Commerce Department uses several methods to determine the costs of production of a foreign firm. One method is to require the accused firm to turn over to the U.S. government certain crucial business documents, including trade secrets. A foreign company being investigated by Commerce generally receive a 50 to 100 page, single-spaced request for


\textsuperscript{14} Bovard, op. cit., p. 122
information and be allowed only six to eight weeks to comply with the request. During that time, the company must: translate the request in their language for distribution to relevant company employees;

1. identify sales in U.S. and home market;
2. identify all expenses related to the production and export of the product;
3. assign each expense to a specific purpose;
4. conduct its own investigation on home market and U.S. prices.

Companies competing internationally understandably are not always willing to divulge to the U.S. government their business secrets and other information that could help their U.S. competitors. But even if they are willing to comply, often it is costly, difficult, or impossible for foreign firms to gather such massive amounts of information in the time required. If the Commerce Department does not receive the information in time, it uses alternative methods to calculate production costs. One is to compare production costs of other manufacturers in a third country with a "similar" level of industrialization. This happened in 1986, when a Chinese cookware company accused of dumping its products in the U.S. was unable to comply with Commerce's request for information. In order to determine production costs Commerce compared the company with cookware manufacturers in Thailand. The two countries, however, are hardly on the same level of development. Using purchasing power parity, which takes into account inflation, exchange rates, and other cost of living adjustments, per capita gross domestic product in Thailand is about $3,600, while in China it is $2,600, a $1,000 difference\(^{15}\). Even so, the Commerce Department was unable to persuade Thai companies to reveal detailed business information of their companies. So it then used the prosperous countries of France, Norway, and West Germany for comparing production costs with China. Not surprisingly Commerce came up with rather large dumping margins.

To avoid further dumping charges, some foreign companies found guilty of dumping, will raise prices on their products to exceed the acceptable margins determined by the Commerce Department. Yet in some cases, Commerce will change the country previously used for comparison, and again find the foreign company guilty of dumping.

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This happened in 1990, when the Commerce Department imposed more duties on manhole covers from China. In 1986 China had been found to be dumping manhole covers in the U.S., based on comparisons of costs of producing those items in Belgium, Canada, France, and Japan. In 1990 the case was reviewed again. This time, the Commerce Department decided to use the Philippine manhole cover industry as its basis for comparison even though the Philippine industry did not use pig iron, a primary ingredient in the Chinese product. Thus the products were not similar. But by changing the basis of comparison, a higher dumping margin could be established against the Chinese.\(^{16}\)

Even when a foreign company goes to extraordinary lengths to supply information and cooperate fully with the investigation, the Commerce Department still may say that it is insufficient. In a 1989 case, for instance, SKF of Sweden, a manufacturer of ball bearings, was accused of dumping antifriction bearings into the U.S. market. SKF provided the Department with 150,000 pages of data. Still not satisfied, the Commerce Department gave SKF only one week to make revisions of several clerical mistakes. Then the Department declared several figures in this new material supplied by an SKF subsidiary to be misleading, so it dismissed as erroneous almost all of the material SKF had supplied. Eventually, SKF delivered over twelve tons of information to the U.S. government. But because of the errors the Commerce Department treated SKF as if it had turned over no information at all and imposed a dumping margin of 180 percent on the company's products.\(^{17}\)

### 2.4.6 Recent Dumping Cases

With the increase of American dumping investigations in recent years, there have been a number of particularly disturbing cases that have been plagued by questionable procedures and that in some instances have hurt U.S. businesses and consumers. Several of these recent dumping cases underscore the problems with America's dumping laws.

Example: Flat Panel Display (FPD) Screens. In response to a Commerce Department ruling that flat panel display screens, which are used in laptop computers and related products, were being dumped in the U.S. by Japanese companies, the ITC initiated an investigation in February 1991.

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\(^{16}\) Bovard, op. cit., p. 133-135

\(^{17}\) United States International Trade Commission, investigation numbers 303-TA-19, 303-TA-20, and 731-TA-391-399
The ITC in August 1991 found that there was material damage to American producers and thus recommended a 62.7 percent dumping duty on imported screens. This left the American computer industry unable to acquire affordable flat panel displays for their laptop computer production. The problem with this finding: American manufacturers do not even sell certain types of these screens in the U.S. market.

The investigation focused on two basic types of displays -- electroluminescent FPDs and active matrix FPDs. Electroluminescent displays generally are monochrome with lower resolution. Active matrix displays generally are color with higher resolutions. The U.S. has a large electroluminescent display industry and the Japanese share of the U.S. market, at the time of the investigation in 1990, was just 5 percent and shrinking. During the time of the investigation, the small Japanese portion of the U.S. electroluminescent market remained somewhat steady. But it was clear that the Japanese share of the American market in electroluminescent screens was not a threat to the U.S. domestic industry. Still the Commerce Department saw a dumping problem and levied a 7 percent dumping margin.

More significantly, the Commerce Department imposed a 62.7 percent dumping margin for active matrix displays. Yet there is no commercial U.S. active matrix display industry. There are two U.S. companies manufacturing these screens, OIS Optical Imaging Systems, Inc., and Standish Corporation. But their production lines are small and costly, and the firms for the most part supply these screens only to the U.S. government for military uses. In essence, what the Commerce Department and the ITC did was to say that the U.S. active matrix display industry, made up of two small firms supplying the government, was being materially injured by Japanese firms exporting these displays to large U.S. computer manufacturers who needed them for their laptop computers.

Acting ITC Chairman Anne Brunsdale, who dissented from the opinion, states in the ITC report that, "Apple testified that it considered OIS at the initial stage of its three-part vendor evaluation when deciding which FPD to use in its Macintosh portable. It found that OIS had 'zero high volume manufacturing capability, little customer support experience, zero manufacturing flexibility, zero mass production experience and delivery schedule.' It eliminated OIS at the first stage of consideration." Thus, American computer manufacturers had determined that there was no domestic source for

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the needed display screens. Therefore they bought their screens from the only available source, the Japanese. Not sharing Brunsdale's view, the majority of the ITC claimed there was dumping. But because of the high duties imposed by the federal government on these high-quality color displays, America's largest computer manufacturers, Apple, Compaq, and IBM, were left with no access to affordable components for their laptop manufacturing, prompting U.S. computer manufacturers to move production facilities overseas or drop out of the market altogether.

Because the decision to impose duties on these display screens forced many American computer manufacturers to pay higher prices for imports, the U.S. government action also resulted in the loss of American jobs. Shortly after the decision to impose duties on active matrix displays, for example, Toshiba Corporation, which had a production facility in Irvine, California, announced that it would shut down the plant and move production back to Japan. The dumping duty only applied to the screens, which Toshiba imported from its Japan production facilities to manufacture laptops in California. Thus, the duty forced Toshiba to fire American workers, close the plant, and begin assembly of laptops back in Japan. And because the duty applied only to the flat panel screens, a completed laptop computer that included the screen was not subjected to the duty.

Apple abandoned plans to manufacture laptop computers in Fountain, Colorado, in favor of Cork, Ireland, to avoid paying the duties. IBM also announced that it was considering moving its production facilities abroad\(^\text{19}\).

Example: Antifriction Bearings. U.S. antidumping laws allow even the smallest American firm to initiate a dumping charge, no matter how much the domestic demand might be for the foreign products in question. This allowed a small U.S. manufacturer of ball bearings, the Torrington Company of Torrington, Connecticut, in 1988 to accuse virtually all of the world's bearing manufacturers with dumping in the U.S. The company claimed that firms in nine countries were acting to undermine Torrington's competitiveness.

On October 1988, the ITC initiated an investigation against bearing manufacturers in Britain, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and West Germany. In a May 2, 1989, press release, Torrington Company President Thomas E. Bennett stated, *"There is clear evidence that dumping has caused long-term, fundamental damage across the entire bearing industry, affecting all*

\(^{19}\) "Did Washington Lose Sight of the Big Picture?" Business Week, December 2, 1991, p. 38
product types. We will continue to monitor with great vigilance all bearing imports and will not hesitate to take strong action again to challenge additional unfair trade practices that are identified.\textsuperscript{20}

Yet before the investigation, domestic bearing manufacturers were unable to supply enough bearings to meet domestic demand. In fact, many U.S. manufacturers who use ball bearings in their products testified at ITC hearings that they were unable to find any domestic producers that could fill their orders. Moreover, in the orders that were accepted by domestic ball bearing manufacturers, some companies did not receive shipments in time and in some cases, not at all. Many American users of ball bearings testified in the investigation that Torrington had a long history of failing to supply agreed-upon shipments of bearings. Indeed, the American Manufacturers for Trade in Bearings released a statement during the investigation declaring that "foreign producers and domestic consumers of antifriction bearings emphasized both delivery and reliability problems in their experiences with Torrington."

Despite this, the Commerce Department found dumping margins ranging up to 212 percent with an average rate of about 60 percent. As a result, the Department established duty rates based on the dumping margins, and many American manufacturers that use ball bearings, like the Briggs and Stratton Company, the General Electric Company, Hewlett-Packard, and IBM, were forced to pay higher prices for imported bearings, because domestic suppliers still could not meet the demand. These duties increased the cost of production of such products as electronic motors, household appliances, office equipment, and power tools, which have been passed along to consumers in the form of higher prices. Increased component costs also have made the products of American firms less competitive abroad.

Torrington still was not satisfied. In 1990, it pressed new charges against firms in thirteen additional countries: Argentina, Austria, Brazil, Canada, China, Hungary, South Korea, Mexico, Poland, Spain, Taiwan, Turkey, and Yugoslavia. This time the ITC threw out the case ruling that no material damage was done.

Example: Uranium. Occasionally a U.S. government agency, rather than a private company will request an investigation. In 1992, for instance, two U.S. government-owned uranium mining companies -- one in Ohio and the other in Kentucky -- requested that the Department of Energy

start an action against uranium imports from countries of the former Soviet Union. Until recently, these two companies had a virtual monopoly on uranium production outside the Communist world, allowing them to charge higher prices. The Commerce Department found Kazakhstan, Kirgizstan, Russia, Tajikistan, Ukraine, and Uzbekistan were exporting uranium to the U.S. at a price that was not fair to the U.S. government-owned mining facilities. The Commerce Department attached a 115.82 percent dumping duty on the imports.\(^1\) Unable to obtain information from the republics, the Department used production information supplied by the petitioners, that is, the two government-owned companies and the Department of Energy, and the cost of production in the African country of Namibia to determine the production costs in the former Soviet republics. This is ironic since one justification for American countervailing duty law is to counter government-sponsored or subsidized production and exports from other countries to the U.S.

If the final decision, expected in August, on this dumping case goes against the former Soviet republics, they could be assessed retroactive duties. But the Bush Administration and Congress currently are debating the amount of foreign aid to give to the former Soviet republics. It would be ironic if duties are imposed on these uranium imports, forcing republics to use American foreign aid dollars to pay dumping fines assessed by the U.S. government.

### 2.4.7 The Retaliation Against U.S. Firms

Many American businesses are growing concerned about the enforcement of international antidumping laws. The U.S. has made extensive use of dumping laws to keep out foreign imports, and other countries have begun to learn that this is a way to introduce protectionist policies without running afoul of the GATT rules. American laws have now become the model for dumping legislation. More and more countries have increased dumping charges against U.S. firms. From 1980 to 1988, for instance, Canada initiated 55 investigations against U.S. companies, Australia initiated 52 cases, the European Community 23 cases, Mexico fourteen, and Argentina six cases, most of these in the past few years. Significantly, several countries are using U.S.-style antidumping laws against American products. South Korea, for example, found in 1990 that America's DuPont Chemical Company was dumping plastic resin at prices 30 to 90 percent higher than their home prices. A 40 percent to 50 percent duty was recommended.

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2.5 Antidumping

An anti-dumping duty is a protectionist tariff that a domestic government imposes on foreign imports that it believes are priced below fair market value. Dumping is a process where a company exports a product at a price lower than the price it normally charges in its own home market. To protect local businesses and markets, many countries impose stiff duties on products they believe are being dumped in their national market.

In the United States, the International Trade Commission (ITC), an independent government agency, imposes anti-dumping duties based upon investigations and recommendations from the Department of Commerce. Duties often exceed 100% of the value of the goods. They come into play when a foreign company is selling an item significantly below the price at which it is being produced. Part of the logic behind anti-dumping duties is to save domestic jobs, but they can also lead to higher prices for domestic consumers and reduce the international competition of domestic companies producing similar goods.

2.5.1 The World Trade Organization and Anti-dumping

The World Trade Organization (WTO) operates a set of international trade rules. Part of the organization's mandate is the international regulation of anti-dumping measures. The WTO does not regulate the actions of companies engaged in dumping. Instead, it focuses on how governments can or cannot react to dumping. In general, the WTO agreement allows governments to "act against dumping where there is genuine (material) injury to the competing domestic industry." In other cases, the WTO intervenes to prevent anti-dumping measures.

This intervention is justified to uphold the WTO's free-market principles. Anti-dumping duties distort the market. Governments cannot normally determine what constitutes a fair market price for any good or service.

2.5.2 Practical Examples of Anti-Dumping Measures

In June 2015, American steel companies United States Steel Corp., Nucor Corp., Steel Dynamics Inc., Arcelor Mittal USA, AK Steel Corp., and California Steel Industries filed a complaint with the Department of Commerce and the ITC alleging that China (and other countries) were dumping steel on the U.S. market and keeping prices unfairly low.
A year later, the United States, after a review and much public debate, announced that it would be imposing a 500% import duty on certain steel imported from China. China may bring the debate before the WTO if it feels the tariffs are unfair.

2.5.3 The Five-percent rule in Anti-Dumping Agreement:

According to footnote 2 of the Anti-Dumping Agreement, domestic sales of the like product are sufficient to base normal value provided they account for 5 percent or more of the sales of the product under consideration to the importing country market. This is called the five-percent or home-market-viability test. This test is applied globally by comparing the quantity sold of a like product on the domestic market with the quantity sold to the importing market.

However, normal value cannot be based on the price in the exporter’s domestic market when there are no domestic sales. If the products are only sold on the foreign market, the normal value will have to be determined on some other basis. Additionally, some products may be sold on both markets but the quantity sold on the domestic market may be very small compared to quantity sold on foreign market. This situation is created in countries with small domestic markets like Hong Kong and Singapore, or due to differences in factors like consumer taste and maintenance.

Anti-dumping measures cannot be applied just on the basis of dumping. It is also necessary to prove that the act of dumping is hurting the industry in the importing country. Therefore, a detailed investigation must first be conducted according to specified rules of WTO. The investigation must consider all relevant economic factors that have an impact on the state of the industry in question; if it is proved that dumping is taking place and hurting domestic industry, the exporting company can raise its price to an agreed level in order to avoid anti-dumping import duties.

2.6. News publications about Actions in India:

The current set of anti-dumping laws in India is defined by Section 9A and 9B of Customs and Tariffs Act, 1975 (Amended 1995) and The Anti-dumping rules such as (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of

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22 Anti, Dumping. "Prepared to push up existing capacity to 115%: Shobhan Mittal". *India Infoline*. Retrieved 22 February 2018
Injury) Rules of 1995. Section 9A of customs and tariffs Act 1975 states that “If any article is exported from any country or territory to India at less than its normal value, then, upon the importation of such article into India, the central government may by notification in the official gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.” As of November 28, 2016, 353 anti-dumping cases have been initiated by Directorate General of Anti-Dumping and Allied Duties (DGAD) out of which in one hundred and thirty cases, anti-dumping measures are in force. In January 2017, the Indian government imposed anti-dumping duty on colour coated steel products imported from the European Union and China for 6 months.\(^{23}\)

Though, the move was applauded by Essar Steel India Commercial Director, H Shivram Krishnan but, importers expressed their concern regarding protective measures like minimum import price and ant-dumping duty especially when domestic sales is narrowing and imports are falling.\(^{24}\)

On July, 2015, the government imposed anti-dumping duty on fibreboard imported from Indonesia and Vietnam.\(^{25}\)

This came after CEO and joint-Managing Director of Greenply Industries, Shobhan Mittal filed an application for anti-dumping probe initiation.\(^{26}\) The primary reason behind the probe was that the price differential between domestic and imported MDF stood at 5-6 percent and net MDF imports was at around 30-35 percent, majority of which came from Indonesia and Vietnam.

On 8\(^{th}\) March 2017, Government of India imposed anti-dumping duty ranging from USD 6.30 to USD 351.72 per tonne on imports of jute and its products from Bangladesh and Nepal. Later the government of India withdrew the anti-dumping duty in case of Nepal.\(^{27}\)


\(^{24}\) India Times, Economic Times. "India has initiated 353 anti-dumping cases as on November 28". Economic Times. Economic Times. Retrieved 8 March 2017


\(^{26}\) The Telegraph. "Shobhan Mittal, Joint MD and CEO of Greenply Industries, Expects Eight to Ten Percent Growth in Financial Year 2017". Telegraph

\(^{27}\) PTI, News. "Anti-dumping duty imposed on jute from Bangladesh, Nepal". PTI NEWS. PTI. Retrieved 8\(^{th}\) March 2017
2.6.1 Abuse of Anti-dumping Measures

In Harvard International Law Journal / Vol. 53, Number 1, Winter 2012, Wu, Mark discusses/analyses AD measures in Asia’s Emerging Giants as under:

Although anti-dumping measure has been provided as a vital instrument in preventing protectionism and promote free trade, many instances of anti-dumping practices suggest that anti-dumping measures have been used as a tool of protectionism. India and China have been allegedly using Anti-dumping Duty (ADD) as a form of “safety valves” – to ease competitive pressure in domestic market. Anti-dumping measures have also been used as a form of “retaliation” against products of countries that impose ADDs against the products of the host country. The USA has been consistently alleged to have abused anti-dumping measures with its practice of Zeroing. Similarly, in only around 2% cases the EU has been found to have imposed ADDs to offset dumping. In the remaining 98% cases of anti-dumping it has been used for purposes other than offsetting dumping.

2.7 Dumping as per the GATT/WTO

2.7.1 What is dumping?

Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases it is necessary to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (known as the “normal value”) and the appropriate price in the market of the importing country (known as the “export price”) so as to be able to undertake an appropriate comparison.

2.7.2 Article VI of GATT and the Anti-Dumping Agreement

The GATT 1994 sets forth a number of basic principles applicable in trade between Members of the WTO, including the “most favoured nation” principle. It also requires that imported products not be subject to internal taxes or other changes in excess of those imposed on domestic goods, and that imported goods in other respects be accorded treatment no less favourable than domestic
goods under domestic laws and regulations, and establishes rules regarding quantitative restrictions, fees and formalities related to importation, and customs valuation. Members of the WTO also agreed to the establishment of schedules of bound tariff rates. Article VI of GATT 1994, on the other hand, explicitly authorizes the imposition of a specific anti-dumping duty on imports from a particular source, in excess of bound rates, in cases where dumping causes or threatens injury to a domestic industry, or materially retards the establishment of a domestic industry.

The Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, provides further elaboration on the basic principles set forth in Article VI itself, to govern the investigation, determination, and application, of anti-dumping duties.

### 2.7.3 Previous Agreements

As tariff rates were lowered over time following the original GATT agreement, anti-dumping duties were increasingly imposed, and the inadequacy of Article VI to govern their imposition became ever more apparent. For instance, Article VI requires a determination of material injury, but does not contain any guidance as to criteria for determining whether such injury exists, and addresses the methodology for establishing the existence of dumping in only the most general fashion. Consequently, contracting parties to GATT negotiated more detailed Codes relating to anti-dumping. The first such Code, the Agreement on Anti-Dumping Practices, entered into force in 1967 as a result of the Kennedy Round. However, the United States never signed the Kennedy Round Code, and as a result the Code had little practical significance.

The Tokyo Round Code, which entered into force in 1980, represented a quantum leap forward. Substantively, it provided enormously more guidance about the determination of dumping and of injury than did Article VI. Equally important, it set out in substantial detail certain procedural and due process requirements that must be fulfilled in the conduct of investigations. Nevertheless, the Code still represented no more than a general framework for countries to follow in conducting investigations and imposing duties. It was also marked by ambiguities on numerous controversial points, and was limited by the fact that only the 27 Parties to the Code were bound by its requirements.
2.7.4 The UR Agreement

Basic principles

Dumping is defined in the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement) as the introduction of a product into the commerce of another country at less than its normal value. Under Article VI of GATT 1994, and the Anti-Dumping Agreement, WTO Members can impose anti-dumping measures, if, after investigation in accordance with the Agreement, a determination is made (a) that dumping is occurring, (b) that the domestic industry producing the like product in the importing country is suffering material injury, and (c) that there is a causal link between the two. In addition to substantive rules governing the determination ofdumping, injury, and causal link, the Agreement sets forth detailed procedural rules for the initiation and conduct of investigations, the imposition of measures, and the duration and review of measures.

Committee on Anti-Dumping Practices

The Committee, which meets at least twice a year, provides Members of the WTO the opportunity to discuss any matters relating to the Anti-Dumping Agreement (Article 16). The Committee has undertaken the review of national legislations notified to the WTO. This offers the opportunity to raise questions concerning the operation of national anti-dumping laws and regulations, and also questions concerning the consistency of national practice with the Anti-Dumping Agreement. The Committee also reviews notifications of anti-dumping actions taken by Members, providing the opportunity to discuss issues raised regarding particular cases. The Committee has created a separate body, the Ad Hoc Group on Implementation, which is open to all Members of the WTO, and which is expected to focus on technical issues of implementation: that is, the “how to” questions that frequently arise in the administration of anti-dumping laws.

Dispute settlement

Disputes in the anti-dumping area are subject to binding dispute settlement before the Dispute Settlement Body of the WTO, in accordance with the provisions of the Dispute Settlement Understanding (“DSU”) (Article 17). Members may challenge the imposition of anti-dumping measures, in some cases may challenge the imposition of preliminary anti-dumping measures,
and can raise all issues of compliance with the requirements of the Agreement, before a panel established under the DSU. In disputes under the Anti-Dumping Agreement, a special standard of review is applicable to a panel's review of the determination of the national authorities imposing the measure. The standard provides for a certain amount of deference to national authorities in their establishment of facts and interpretation of law, and is intended to prevent dispute settlement panels from making decisions based purely on their own views. The standard of review is only for anti-dumping disputes, and a Ministerial Decision provides that it shall be reviewed after three years to determine whether it is capable of general application.

Notifications

All WTO Members are required to bring their anti-dumping legislation into conformity with the Anti-Dumping Agreement, and to notify that legislation to the Committee on Anti-Dumping Practices. While the Committee does not “approve” or “disapprove” any Members' legislation, the legislations are reviewed in the Committee, with questions posed by Members, and discussions about the consistency of a particular Member's implementation in national legislation of the requirements of the Agreement.

In addition, Members are required to notify the Committee twice a year about all anti-dumping investigations, measures, and actions taken. The Committee has adopted a standard format for these notifications, which are subject to review in the Committee. Finally, Members are required to promptly notify the Committee of preliminary and final anti-dumping actions taken, including in their notification certain minimum information required by Guidelines agreed to by the Committee. These notifications are also subject to review in the Committee.

2.7.5 Determination of dumping

Determination of normal value

General rule

The normal value is generally the price of the product at issue, in the ordinary course of trade, when destined for consumption in the exporting country market. In certain circumstances, for example when there are no sales in the domestic market, it may not be possible to determine
normal value on this basis. The Agreement provides alternative methods for the determination of normal value in such cases.

Sales in the ordinary course of trade

One of the most complicated questions in anti-dumping investigations is the determination whether sales in the exporting country market are made in the “ordinary course of trade” or not. One of the bases on which countries may determine that sales are not made in the ordinary course of trade is if sales in the domestic market of the exporter are made below cost. The Agreement defines the specific circumstances in which home market sales at prices below the cost of production may be considered as not made in the ordinary course of trade", and thus may be disregarded in the determination of normal value (Article 2). Those sales must be made at prices that are below per unit fixed and variable costs plus administrative, selling and general costs, they must be made within an extended period of time (normally one year, but in no case less than six months), and they must be made in substantial quantities. Sales are made in substantial quantities when (a) the weighted average selling price is below the weighted average cost; of (b) 20% of the sales by volume were below cost. Finally, sales made below costs may only be disregarded in the determination of normal value where they do not allow for recovery of costs within a reasonable period of time. If sales are below cost when made but are above the weighted average cost over the period of the investigation, the Agreement provides that they allow for recovery of costs within a reasonable period of time.

Insufficient volume of sales

If there are sales below cost that meet the criteria set out in the Agreement, they can simply be ignored in the calculation of normal value, and normal value will be determined based on the remaining sales. However, exclusion of these below-cost sales may result in a level of sales insufficient to determine normal value based on home market prices. It is obvious that, in the case where there are no sales in the exporting country of the product under investigation, it is not possible to base normal value on such sales, and the Agreement recognizes this. However, it is also possible that, while there are some sales in the exporting country's market, the level of such sales is so low that its significance is questionable. Thus, the Agreement recognizes that in some cases sales in the home market may be so low in volume that they do not permit a proper comparison of home market and export prices. It provides that the level of home market sales is
sufficient if home market sales constitute 5 per cent or more of the export sales in the country conducting the investigation, provided that a lower ratio “should” be accepted if the volume of domestic sales nevertheless is “of sufficient magnitude” to provide for a fair comparison.

**Alternative bases for calculating normal value**

Two alternatives are provided for the determination of normal value if sales in the exporting country market are not an appropriate basis. These are:

(a) the price at which the product is sold to a third country; and

(b) the “constructed value” of the product, which is calculated on the basis of the cost of production, plus selling, general, and administrative expenses, and profits.

The Agreement contains detailed and specific rules for the determination of a constructed value, governing the information to be used in determining the amounts for costs, expenses, and profits, the allocation of these elements of constructed value to the specific product in question, and adjustments for particular situations such as start-up costs and non-recurring cost items.

**Constructed normal value**

The determination of normal value based on cost of production, selling, general and administrative expenses, and profits is referred to as the “constructed normal value” The rules for determining whether sales are made below cost also apply to performing a constructed normal value calculation. The principal difference is the inclusion of a “reasonable amount for profits” in the constructed value.

**Third country price as normal value**

The other alternative method for determining normal value is to look at the comparable price of the like product when exported to an appropriate third country, provided that price is representative. The Agreement does not specify any criteria for determining what third country is appropriate.

**Indirect exports**

In the situation where products are not imported directly from the country of manufacture, but are exported from an intermediate country, the Agreement provides that the normal value shall be determined on the basis of sales in the market of the exporting country. However, the
Agreement recognizes that this may result in an inappropriate or impossible comparison, for instance if the product is not produced in the exporting country, there is no comparable price for the product in the exporting country, or the product is merely transshipped through the exporting country. In such cases, the normal value may be determined on the basis of the price of the product in the country of origin, and not the price in the exporting country.

**Non-market economies**

In the particular situation of economies where the government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, GATT 1994 and the Agreement recognize that a strict comparison with home market prices may not be appropriate. Importing countries have thus exercised significant discretion in the calculation of normal value of products exported from non-market economies.

**2.7.6 Determination of export price**

**General rule**

The export price will normally be based on the transaction price at which the foreign producer sells the product to an importer in the importing country. However, as is the case with normal value, the Agreement recognizes that this transaction price may not be appropriate for purposes of comparison.

**Exceptions**

There may be no export price for a given product, for instance, if the export transaction is an internal transfer, or if the product is exchanged in a barter transaction. In addition, the transaction price at which the exporter sells the product to the importing country may be unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party. In such a case, the transaction price may not be an arms-length market price, but may be manipulated, for instance for tax purposes. The Agreement recognizes that, in such cases, an alternative method of determining an appropriate export price for comparison is needed.

**Alternative method of calculation**

The Agreement provides that in circumstances where there is no export price, or where the export price is unreliable due to an association or compensatory arrangement between the exporter and the importer or a third party, an alternative method may be used to determine the
export price. This results in a “constructed export price”, and is calculated on the basis of the price at which the imported products are first resold in an independent buyer. If the imported product is not resold to an independent buyer, or is not resold as imported, the authorities may determine a reasonable basis on which to calculate the export price.

2.7.7 Fair comparison of normal value and export price

Basic requirements

The Agreement requires that a fair comparison of the export price and the normal value be made. The basic requirements for a fair comparison are that the prices being compared are those of sales made at the same level of trade, normally the ex-factory level, and of sales made at as nearly as possible the same time.

As part of the Agreement's requirements regarding transparency and participation, the investigating authorities are required to inform parties of the information needed to ensure a fair comparison, for instance, information regarding adjustments, allowances, and currency conversion, and may not impose an “unreasonable burden of proof” on parties.

Allowance

To ensure that prices are comparable, the Agreement requires that adjustments be made to either the normal value, or the export price, or both, to account for differences in the product, or in the circumstances of sale, in the importing and exporting markets. These allowances must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other differences demonstrated to affect price comparability.

Adjustments in case of constructed export price

The Agreement also provides specific rules on the adjustment to be made if the comparison of normal value is to a constructed export price. In those circumstances, allowance must be made for costs, including duties and taxes, incurred between the importation of the product and the resale to the first independent purchaser, as well as for profits accruing. If price comparability has been affected, the Agreement requires either that the normal value be established at a level of trade equivalent to that of the constructed export price, which is likely to require an adjustment, or allowance must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other matters demonstrated to affect price comparability.
Conversion of currency

Where the comparison of normal value and export price requires conversion of currency, the Agreement provides specific rules governing that conversion (Article 2.4.1). Thus, the exchange rate used should be that in effect on the date of sale (date of contract, invoice, purchase order or order confirmation, whichever establishes material terms of sale). If a forward currency sale is directly linked to export sale, the exchange rate of forward currency sale must be used. Moreover, the Agreement requires that exchange rate fluctuations be ignored, and that exporters be allowed at least 60 days to adjust export prices for sustained exchange rate movements.

2.7.8 Calculation of dumping margins and duty assessment

Calculation of dumping margins

The Agreement contains rules governing the calculation of dumping margins. In the usual case, the Agreement requires either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a transaction-to-transaction comparison of normal value and export price (Article 2.4.2). A different basis of comparison can be used if there is “targeted dumping”: that is, if a pattern exists of export prices differing significantly among different purchasers, regions or time periods. In this situation, if the investigating authorities provide an explanation as to why such differences cannot be taken into account in weighted average-to-weighted average or transaction-to-transaction comparisons, the weighted average normal value can be compared to the export prices on individual transactions.

Refund or reimbursement

The Agreement requires Members to collect duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except with respect to sources from which a price undertaking has been accepted. Moreover, the amount of the duty collected may not exceed the dumping margin, although it may be a lesser amount. The Agreement specifies two mechanisms to ensure that excessive duties are not collected. The choice of mechanism depends on the nature of the duty collection process. If a Member allows importation and collects an estimated anti-dumping duty, and only later calculates the specific amount of anti-
dumping duty to be paid, the Agreement requires that the final determination of the amount must take place as soon as possible, upon request for a final assessment. In both cases, the Agreement provides that the final decision of the authorities must normally be made within 12 months of a request for refund or final assessment, and that any refund should be made within 90 days.

**Individual exporter dumping margins**

The Agreement requires that, when anti-dumping duties are imposed, a dumping margin be calculated for each exporter. However, it is recognized that this may not be possible in all cases, and thus the Agreement allows investigating authorities to limit the number of exporters, importers, or products individually considered, and impose an anti-dumping duty on uninvestigated sources on the basis of the weighted average dumping margin actually established for the exporters or producers actually examined. The investigating authorities are precluded from including in the calculation of that weighted average dumping margin any dumping margins that are de minimis, zero, or based on the facts available rather than a full investigation, and must calculate an individual margin for any exporter or producer who provides the necessary information during the course of the investigation.

**New shippers**

The Agreement makes provision for the assessment of anti-dumping duties on exports from producers or exporters who were not sources of imports considered during the period of investigation. In this circumstance, the investigating authorities are required to conduct an expedited review to determine a specific margin of dumping attributable to the exports of such a “new shipper”. While that review is in progress, the authorities may request guarantees or withhold appraisement on imports, but may not actually collect anti-dumping duties on those imports.

**2.7.9 Determination of injury and casual link**

**Like product**

*Definition (Article 2.6)*

An important decision must be made early in each investigation to determine the domestic “like product”. Like product is defined in the Agreement 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”. The determination involves first examining the imported product or products that are alleged to be dumped, and then establishing what domestically produced product or products are the appropriate “like product”. The decision regarding the like product is important because it is the basis of determining which companies constitute the domestic industry, and that determination in turn governs the scope of the investigation and determination of injury and causal link.

2.7.10 Domestic industry

Definition (Article 4)

The Agreement defines the term “domestic industry” to mean “the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products”.

Related domestic producers

The Agreement recognizes that in certain circumstances, it may not be appropriate to include all producers of the like product in the domestic industry. Thus, Members are permitted to exclude from the domestic industry producers related to the exporters or importers under investigation, and producers who are themselves importers of the allegedly dumped product. The Agreement provides that a producer can be deemed “related” to an exporter or importer of the allegedly dumped product if there is a relationship of control between them, and if there is reason to believe that the relationship causes the domestic producer to behave differently from non-related producers.

Regional domestic industry

The Agreement contains special rules that allow in exceptional circumstances, consideration of injury to producers comprising a “regional industry”. A regional industry may be found to exist in a separate competitive market if producers within that market sell all or almost all of their production of the like product in that market, and demand for the like product in that market is not to any substantial degree supplied by producers of the like product located outside that market. If this is the case, investigating authorities may find that injury exists, even if a major proportion of the entire domestic industry, including producers outside the region, is not materially injured. However, a finding of injury to the regional industry is only allowed if
(1) there is a concentration of dumped imports into the market served by the regional industry, and
(2) dumped imports are causing injury to the producers of all or almost all of the production within that market.

**Imposition of duties in regional industry cases**

If an affirmative determination is based on injury to a regional industry, the Agreement requires investigating authorities to limit the duties to products consigned for final consumption in the region in question, if constitutionally possible. If the Constitutional law of a Member precludes the collection of duties on imports to the region, the investigating authorities may levy duties on all imports of the product, without limitation, if anti-dumping duties cannot be limited to the imports from specific producers supplying the region. However, before imposing those duties, the investigating authorities must offer exporters an opportunity to cease dumping in the region or enter a price undertaking.

**2.7.11 Injury**

**Types of injury**

The Agreement provides that, in order to impose anti-dumping measures, the investigating authorities of the importing Member must make a determination of injury. The Agreement defines the term “injury” to mean either (i) material injury to a domestic industry, (ii) threat of material injury to a domestic industry, or (iii) material retardation of the establishment of a domestic industry, but is silent on the evaluation of material retardation of the establishment of a domestic industry.

**Basic requirements for determination of material injury**

The Agreement does not define the notion of “material”. However, it does require that a determination of injury must be based on positive evidence and involve an objective examination of

(i) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and
(ii) the consequent impact of the dumped imports on domestic producers of the like product. Article 3 contains some specific additional factors to be considered in the evaluation of these two basic elements, but does not provide detailed guidance on how these factors are to be evaluated or weighed, or on how the determination of causal link is to be made.

**Basic requirements for determination of threat of material injury**

The Agreement sets forth factors to be considered in the evaluation of threat of material injury. These include the rate of increase of dumped imports, the capacity of the exporter(s), the likely effects of prices of dumped imports, and inventories. There is no further elaboration on these factors, or on how they are to be evaluated. The Agreement does, however, specify that a determination of threat of material injury shall be based on facts, and not merely on allegation, conjecture, or remote possibility, and moreover, that the change in circumstances which would create a situation where dumped imports caused material injury must be clearly foreseen and imminent.

2.7.12 Elements of analysis

**Consideration of volume effects of dumped imports**

The Agreement requires investigating authorities to consider whether there has been a significant increase in the dumped imports, either in absolute terms or relative to production or consumption in the domestic industry.

**Consideration of price effects of dumped imports**

In addition, the Agreement requires investigating authorities to consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member. Investigating authorities are also required to consider whether the effect of dumped imports is “otherwise” to depress prices to a significant degree, or to prevent price increases, which otherwise would have occurred, to a significant degree.

**Evaluation of volume and price effects of dumped imports**

The Agreement provides that no one or several of these factors can necessarily give decisive guidance. It does not specify how the investigating authorities are to evaluate the volume and price effects of dumped imports: merely that consideration of these effects is required. Thus,
investigating authorities have to develop analytical methods for undertaking the consideration of these factors. Moreover, since no single factor or combination of factors will necessarily result in either an affirmative or negative determination, in each case investigating authorities have to evaluate which factors are relevant, and which are important, in light of the circumstances of the particular case at issue.

**Examination of impact of dumped imports on the domestic industry**

The Agreement provides that, in examining the impact of dumped imports on the domestic industry, the authorities are to evaluate all relevant economic factors bearing upon the state of the domestic industry. The Agreement lists a number of factors which must be considered, including actual or potential declines in sales, profits, output, market share, productivity, return on investments, utilization of capacity, actual or potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and the magnitude of the margin of dumping. However, the list is not exhaustive, and other factors may be deemed relevant. In addition, the Agreement again specifies that no single factor or combination of factors will necessarily lead to either an affirmative or negative determination.

**Demonstration of causal link**

The Agreement requires a demonstration that there is a causal relationship between the dumped imports and the injury to the domestic industry. This demonstration must be based on an examination of all relevant evidence. The Agreement does not specify particular factors or give guidance in how relevant evidence is to be evaluated. Article 3.5 does require, however, that known factors other than dumped imports which may be causing injury must be examined, gives examples of factors (such as changes in the pattern of demand, and developments in technology) which may be relevant, and specifies that injury caused by such “other factors” must not be attributed to dumped imports. Thus, the investigating authorities must develop analytical methods for determining what evidence is or may be relevant in a particular case, and for evaluating that evidence, taking account of other factors which may be causing injury.

**Cumulative analysis**

Cumulative analysis refers to the consideration of dumped imports from more than one country on a combined basis in assessing whether dumped imports cause injury to the domestic industry. Obviously, since such analysis will increase the volume of imports whose impact is being
considered, there is a greater possibility of an affirmative determination in a case involving cumulative analysis. The practice of cumulative analysis was the subject of much controversy under the Tokyo Round Code, and in the negotiations for the Agreement. Article 3.3 of the Agreement establishes the conditions in which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. The authorities must determine that the margin of dumping from each country is not de minimis, that the volume of imports from each country is not negligible, and that a cumulative assessment is appropriate in light of the conditions of competition among the imports and between the imports and the domestic like product. De minimis dumping margins and negligible import volumes are defined in the Agreement.

2.7.13 Procedural requirements

Initiation

Agreement Article 5 of the Agreement establishes the requirements for the initiation of investigations. The Agreement specifies that investigations should generally be initiated on the basis of written request submitted “by or on behalf of” a domestic industry. This “standing” requirement includes numerical limits for determining whether there is sufficient support by domestic producers to conclude that the request is made by or on behalf of the domestic industry, and thereby warrants initiation. The Agreement establishes requirements for evidence of dumping, injury, and causality, as well as other information regarding the product, industry, importers, exporters, and other matters, in written applications for anti-dumping relief, and specifies that, in special circumstances when authorities initiate without a written application from a domestic industry, they shall proceed only if they have sufficient evidence of dumping, injury, and causality. In order to ensure that investigations without merit are not continued, potentially disrupting legitimate trade, Article 5.8 provides for immediate termination of investigations in the event the volume of imports is negligible or the margin of dumping is de minimis, and establishes numeric thresholds for these determinations. In order to minimize the trade-disruptive effect of investigations, Article 5.10 specifies that investigations should be completed within one year and in no case more than 18 months, after initiation.


**Conduct**

Article 6 of the Agreement sets forth detailed rules on the process of investigation, including the collection of evidence and the use of sampling techniques. It requires authorities to guarantee the confidentiality of sensitive information and verify the information on which determinations are based. In addition, to ensure the transparency of proceedings, authorities are required to disclose the information on which determinations are to be based to interested parties and provide them with adequate opportunity to comment. The Agreement establishes the rights of parties to participate in the investigation, including the right to meet with parties with adverse interests, for instance in a public hearing. Further guidance on the conduct of investigations is contained in two Annexes to the Agreement, which set forth rules for the on-the-spot investigations to verify information obtained from foreign parties, as well as rules for the use of best information available in the event a party refuses access to, or does not provide, requested information, or significantly impedes the investigation.

**2.7.14 Provisional measures and price undertakings**

**Imposition of provisional measures**

Article 7 of the Agreement provides rules relating to the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping. The Agreement also contains time limits for the imposition of provisional measures—generally four months, with a possible extension to six months at the request of exporters. If a Member, in its administration of anti-dumping duties, imposes duties lower than the margin of dumping when these are sufficient to remove injury, the period of provisional measures is generally six months, with a possible extension to nine months at the request of exporters.
Price undertakings

Article 8 of the Agreement contains rules on the offering and acceptance of price undertakings, in lieu of the imposition of anti-dumping duties. It establishes the principle that undertakings between any exporter and the importing Member, to revise prices, or cease exports at dumped prices, may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury and causality has been made. It also establishes that undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the investigation be continued after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.

2.7.15 Collection of duties

Imposition and collection of duties

Article 9 of the Agreement establishes the general principle that imposition of anti-dumping duties is optional, even if all the requirements for imposition have been met. It also states the desirability of application of a “lesser duty” rule. Under a lesser duty rule, authorities impose duties at a level lower than the margin of dumping if this level is adequate to remove injury. In addition, the Agreement contains rules intended to ensure that duties in excess of the dumping margin are not collected, and rules for applying duties to new shippers.

Retroactive application of duties

The Agreement sets forth the general principle that both provisional and final anti-dumping duties may be applied only as of the date on which the determinations of dumping, injury and causality have been made. However, recognizing that injury may have occurred during the period of investigation, or that exporters may have taken actions to avoid the imposition of an anti-dumping duty, Article 10 contains rules for the retroactive imposition of dumping duties in specified circumstances. If the imposition of anti-dumping duties is based on a finding of material injury, as opposed to threat of material injury or material retardation of the establishment of a domestic industry, anti-dumping duties may be collected as of the date provisional measures were imposed. If provisional duties were collected in an amount greater
than the amount of the final duty, or if the imposition of duties is based on a finding of threat of material injury or material retardation, a refund of provisional duties is required. Article 10.6 provides for retroactive application of final duties to a date not more than 90 days prior to the application of provisional measures in certain exceptional circumstances involving a history of dumping, massive dumped imports, and potential undermining of the remedial effects of the final duty.

2.7.16 Review and public notice

Duration, termination, and review of anti-dumping measures

Article 11 of the Agreement establishes rules for the duration of anti-dumping duties, and requirements for periodic review of the continuing need, if any, for the imposition of anti-dumping duties or price undertakings. These requirements respond to the concern raised by the practice of some countries of leaving anti-dumping duties in place indefinitely. The “sunset” requirement establishes that dumping duties shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This five year “sunset” provision also applies to price undertakings. The Agreement requires authorities to review the need for the continued imposition of a duty upon request of an interested party.

Public notice

Article 12 sets forth detailed requirements for public notice by investigating authorities of the initiation of investigations, preliminary and final determinations, and undertakings. The public notice must disclose non-confidential information concerning the parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers. These public notice requirements are intended to increase the transparency of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning.
2.8 Some Research Studies

This section is devoted to specific studies conducted by the researchers / law practitioners related to dumping, antidumping measures and related topic.

Xiaohua Bao and Larry D. Qiu (2011) observe that antidumping (AD) investigations have been growing rapidly since the inception of the WTO. According to the WTO Report (2007), from 1995 to 2005, there were 42 countries that launched a total number of 3044 AD investigations against 98 countries. AD filings/investigations have two main features. First, the pattern of AD users has changed significantly. Developing countries accounted for only about 20% of the total AD filing cases in the early 1990s, but since 1995 they have initiated over half of the total number of AD investigations. India, together with Argentina, Brazil, and China, are the heaviest AD users from developing countries. Today, AD is a major trade issue between various countries of the world. Second, there exists a severe asymmetry for a country as a plaintiff and as a defendant. For example, India has been the heaviest AD user in the world, having 457 AD investigations. China was subject to 536 (the largest number) AD investigations while it launched 133 AD investigations. During the same period, the US faced 175 AD investigations and initiated 373 AD investigations. It is commonly believed that the widespread and rapid increase in the use of AD measures, including AD filings and positive AD decisions, is a result of the WTO. First AD measures are used by importing countries to substitute tariffs that have been reduced continuously during various rounds of GATT/WTO negotiations (Deardorff and Stern, 2005; Feinberg and Reynolds, 2007). For this reason AD is regarded as one of the most important protectionism measures nowadays. Second, AD measures are used by countries as a safety-valve because the WTO does not provide sufficient mechanisms to safeguard domestic import competing-industries (Moore and Zanardi, 2009). Third, AD is abused by many countries because the WTO does not have strong control on the use of AD measures (Hansen and Prusa, 1995). For whatever reasons, the increased use of AD investigations and AD duties has already had serious impacts on global trade flows.

Raj Krishna, Former Legal Advisor, International Trade, World Bank, in the publication “Antidumping in Law and Practice” has expressed his views as under28:

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The alarming increase in the number of antidumping actions pursued by the developed and developing countries has caused considerable concern among economists and trade reformers. These concerns have led to the suggestions of substituting antitrust principles for antidumping laws and regulations or for using safeguard measures under Article XIX of GATT 1994. At the current stage of the development of international trade law neither proposal appears feasible. Moreover, antidumping actions have become a fact of life and the international community recognizes such actions as the only legitimate tool to combat dumping as defined by and determined in accordance with law. Despite the urgings in some quarters neither municipal legal systems nor international agreements have mandated an “economy-wide” cost-benefit analysis of proposed antidumping actions. Due to political, technical and other implications, the acceptance of such a methodology in the near future is unlikely. The URAA (The Uruguay Round Agreements Act) has enhanced the discipline and made a number of improvements, although it cannot claim to have plugged all loopholes for the misuse of antidumping. In those matters where URAA is silent, ambiguous or provides room for flexibility in adopting a rule, national authorities should adopt a less trade restrictive rule or practice. It is worth noting that the U.S. practice relating to voting in the ITC. A 3-3 vote in AD and CVD investigations constitutes an affirmative decision. It will be preferable to require a clear majority rather than to treat an evenly divided vote as sufficient to establish a finding of injury. The URAA in conjunction with the Dispute Settlement Mechanism of the WTO is expected to further curb the proliferation and misuse of antidumping. Thus, a U.S. business executive, Intel’s Maibach, is quoted as observing:

“Almost every step of the procedure is going to be more difficult for United States petitioners... Higher requirements for information will make it more difficult to file complaints... Proving injury will be harder because of changes in standards that relate to proof of injury... Proving the actual size of dumping margins will also be more difficult because of technical changes affecting how profits are calculated and other factors... Cases will also be likely to end up before a 149 Article 17.6. 150 19 U.S.C. 1677 (11). - 35 - World Trade Organization panel, which may have judges that are less sympathetic, and possibly less objective, in interpreting dumping laws...”

Xiaohua Bao and Larry D. Qiu have observed that Antidumping (AD) investigations are widespread. China and the US are two big users and targets of AD investigations. They, respectively, represent developing and developed countries on one hand, and new AD users and traditional AD users on the other. Using AD filing data of these two countries from 1991 to 2005, Xiaohua Bao and Larry D. Qiu explore whether China's AD is more retaliatory than that of the US. Their results obtained from negative binomial models with maximum likelihood
techniques show that although both countries have some degree of retaliatory incentives in their AD filings, China is not more (or may even be less) retaliatory than the US. They also compare the two countries' similarities and differences in their AD responses to other factors such as macroeconomic conditions, contagions, and geographical distance.

*Gunner Niels and Adriaan Ten Kate*, in their study of “Antidumping Protection in a Liberalizing Country: Mexico’s Antidumping Policy and Practice” by an Oxford Publication also conforms the safety valve argument. It contains following data.


<table>
<thead>
<tr>
<th>Industry</th>
<th>Number of investigations</th>
<th>Share of Investigations Over Share in Imports (Index)</th>
<th>Success Rate (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Steel and steel products</td>
<td>52</td>
<td>570</td>
<td>82.7</td>
</tr>
<tr>
<td>Chemicals</td>
<td>39</td>
<td>731</td>
<td>64.1</td>
</tr>
<tr>
<td>Textiles and textile products</td>
<td>17</td>
<td>186</td>
<td>47.1</td>
</tr>
<tr>
<td>Plastics and plastic products</td>
<td>12</td>
<td>120</td>
<td>58.3</td>
</tr>
<tr>
<td>Electrical equipment</td>
<td>9</td>
<td>24</td>
<td>55.6</td>
</tr>
<tr>
<td>Processed food</td>
<td>9</td>
<td>201</td>
<td>66.7</td>
</tr>
<tr>
<td>Machinery and non-electrical equipment</td>
<td>8</td>
<td>32</td>
<td>62.5</td>
</tr>
<tr>
<td>Wood and paper products</td>
<td>5</td>
<td>88</td>
<td>40</td>
</tr>
<tr>
<td>Rubber and rubber products</td>
<td>5</td>
<td>208</td>
<td>80</td>
</tr>
<tr>
<td>Other manufactures</td>
<td>10</td>
<td>n.a.</td>
<td>60</td>
</tr>
<tr>
<td>Miscellaneous1</td>
<td>6</td>
<td>n.a.</td>
<td>83.3</td>
</tr>
<tr>
<td>Total</td>
<td>172</td>
<td>100</td>
<td>67.4</td>
</tr>
</tbody>
</table>

(Source: Gunnar Niels and Adriaan Ten Kate)

The overall success ratio in Mexico is found 67.4 % as against worldwide ratio of 56% during 1981 to 2001.

*Chad P. Bown (2008)*, in his study “The WTO and Antidumping in Developing Countries” observes: Since the 1995 inception of the World Trade Organization (WTO), developing countries have become some of the most frequent users of the WTO-sanctioned antidumping
(AD) trade policy instrument. He has used newly available data to examine sector-level use of nine of the major “new user” developing countries, matching data on production in 28 different three-digit ISIC industries to data on AD investigations, outcomes, and imports at the six-digit Harmonized System product level. He present economically significant evidence consistent with theory that developing-country industries that seek and receive AD import protection are responding to macroeconomic shocks, exhibit characteristics consistent with endogenous trade policy formation, and face some changing market conditions consistent with requirements of the WTO Antidumping Agreement. However, the evidence also suggests substantial heterogeneity in determinants of AD use across developing countries, which highlights the flexibility of this policy as a protectionist tool responsive to many different types of political-economic shocks.

Sagnik Bagchi, in this study “Threat of Anti-dumping Duty and Determinants of Anti-dumping Initiations in Case of Indian Manufacturing Industries” describes two issues:

Firstly he described the phenomenon of dumping through a price-leadership (within a duopolistic market structure) model involving the domestic firm and a foreign firm, both producing homogeneous goods, and thereby calculated the optimal level of an ad-valorem anti-dumping (AD) duty required to enforce a threat upon the exporting firm such that it changes the price strategy and exports above the “normal value”. He assumed that The technologically superior foreign firm is the price leader and can dump in the home country. The foreign firm exports amount of output to the home country. On the other hand, in autarky the domestic firm produces amount of output and is assumed to be the single producer of the product in its home country. There is no information asymmetry among the market participants. He concluded that a credible threat in terms of an AD duty restricts dumping and thereby leads to a win-win situation for both the (foreign) exporting firm and (domestic) import competing firms. He covered three cases:

Case I: Dumping With No AD Protection
Case II: Dumping With AD Protection
Case III: Exports Above Normal Value With Counterfeit AD Case

However the theoretical argument is not backed by an empirical model.

He picked up data from WTO Reports on Anti-dumping Initiations and Measures; DGCI&S, India, as under
### Table 3: Anti-dumping Cases By India Against Other Countries, 1995-2012

<table>
<thead>
<tr>
<th>Countries</th>
<th>No. of AD Initiations (Measures)</th>
<th>AD Measures to Initiations (%)</th>
<th>Share in AD Initiations by India (%)</th>
<th>Avg. Share of Imports by India (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>154 (126)</td>
<td>81.81</td>
<td>22.74</td>
<td>6.77</td>
</tr>
<tr>
<td>EU</td>
<td>50 (38)</td>
<td>76</td>
<td>7.38</td>
<td>5.42</td>
</tr>
<tr>
<td>South Korea</td>
<td>50 (38)</td>
<td>76</td>
<td>7.38</td>
<td>2.66</td>
</tr>
<tr>
<td>Taiwan</td>
<td>49 (40)</td>
<td>81.63</td>
<td>7.23</td>
<td>0.97</td>
</tr>
<tr>
<td>Thailand</td>
<td>39 (27)</td>
<td>69.23</td>
<td>5.76</td>
<td>0.81</td>
</tr>
<tr>
<td>United States</td>
<td>35 (24)</td>
<td>68.57</td>
<td>5.16</td>
<td>6.23</td>
</tr>
<tr>
<td>Japan</td>
<td>32 (25)</td>
<td>78.12</td>
<td>4.72</td>
<td>3.45</td>
</tr>
<tr>
<td>Indonesia</td>
<td>27 (20)</td>
<td>74.07</td>
<td>3.98</td>
<td>2.25</td>
</tr>
<tr>
<td>Malaysia</td>
<td>24 (15)</td>
<td>62.5</td>
<td>3.54</td>
<td>2.45</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>460 (353)</strong></td>
<td><strong>76.73</strong></td>
<td><strong>67.94</strong></td>
<td><strong>31.01</strong></td>
</tr>
</tbody>
</table>

(Source: WTO Reports on Anti-dumping Initiations and Measures; DGCI&S, India)

Secondly, he studied about what factors led India to be a frontrunner in terms of anti-dumping initiations. He empirically inquired some of the possible factors that triggered anti-dumping initiations among top five Indian manufacturing industries (Chemical and Allied industries, Rubber and Plastics industry, Textiles, Base Metals, and Machinery and Mechanical Appliances) over the period 1997-2011. The results revealed that number of anti-dumping initiations is dependent on the value of imports, the presence of a dominant industry lobby and retaliatory behaviour, among others. He found that in determining the number of anti-dumping initiations conventional economic and foreign affairs policies play a very little role! For this purpose he has used Poisson Regression Model and Negative Binomial Model.

He covered five major industries which are as under:

1. CHEM: Chemical;
2. RPR: Resins, Plastics and Rubber;
3. BM: Base Metals;
4. MEE: Mechanical and Electrical Equipment;
5. TEXT: Textiles.
To streamline the empirical research he highlighted two important findings:

1. First, these select five industries initiate around 91% of total cases for average share of imports of around 35%.

2. Second, these industries have a high rate of retaliation. For every 10 cases initiated against them these industries retaliate back with around 46 cases; see Table-4.

**Table 4: Anti-dumping Cases By Major Indian Manufacturing Industries, 1995-2012**

<table>
<thead>
<tr>
<th>Industry</th>
<th>No. of Initiations (Measures)</th>
<th>Measures to Initiations (%)</th>
<th>Share to AD Initiations by India</th>
<th>Initiations Faced (%)</th>
<th>Retaliation Rate</th>
<th>Avg. Share of Imports by India (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHEM</td>
<td>287 (230)</td>
<td>80.13</td>
<td>42.39</td>
<td>42 (25.30)</td>
<td>6.83</td>
<td>9.19</td>
</tr>
<tr>
<td>RPR</td>
<td>96 (81)</td>
<td>84.37</td>
<td>14.18</td>
<td>26 (15.66)</td>
<td>3.69</td>
<td>2.29</td>
</tr>
<tr>
<td>BM</td>
<td>86 (46)</td>
<td>53.48</td>
<td>12.70</td>
<td>51 (30.72)</td>
<td>1.68</td>
<td>6.01</td>
</tr>
<tr>
<td>MEE</td>
<td>81 (58)</td>
<td>71.60</td>
<td>11.96</td>
<td>12 (7.22)</td>
<td>6.75</td>
<td>15.73</td>
</tr>
<tr>
<td>TEXT</td>
<td>65 (61)</td>
<td>93.84</td>
<td>9.60</td>
<td>19 (11.44)</td>
<td>3.42</td>
<td>1.86</td>
</tr>
<tr>
<td>Total</td>
<td>615 (476)</td>
<td>77.39</td>
<td>90.84</td>
<td>131 (78.91)</td>
<td>4.69</td>
<td>35.08</td>
</tr>
</tbody>
</table>

(Source: WTO Reports on Anti-dumping Initiations and Measures; DGCI&S (The Directorate General of Commercial Intelligence and Statistics (DGCI&S), Kolkata, under the Ministry of Commerce, Government of India), India)

He extracted data on the number of AD initiations of the select Indian manufacturing industries and also faced by them from the “Global Antidumping Database”, World Bank at the ITC HS 2 digit classification level for the period 1997-2011. He collected time series data on import and export of these five industries from DGCI&S (The Directorate General of Commercial Intelligence & Statistics), India at the ITC HS 2 digit classification level to examine the plausible factors that determine the AD initiations.

Econometric Method and the estimation techniques used there have been earlier used by Krupp (1994) and Aggarwal (2007).

Following four factors have been investigated in detail:
a. **Retaliatory behaviour (ADA)** of the select Indian manufacturing industries (when these industries are themselves charged with an AD case(s)) that are initiating an AD case against the dumping industries of the foreign countries has been found to be *positively* significant in both the model specifications. It has a stronger coefficient value in the Poisson Model specification than its Negative Binomial counterpart. Not only its impact weakens, the statistical significance changes from 1% (in case of Poisson estimation) to 10% significance level (in Negative Binomial Model).

b. **Lobbying by these affected manufacturing industries** invoke the number of anti-dumping initiations. Compared with the Poisson model estimation the coefficient value of number of firms (NF) improves when estimated with the Negative Binomial model specification. The statistical significance remains the same at 1% level. This finding can be argued as the government has a nepotistic attitude towards these industries. Finger (1993) demonstrates that anti-dumping as practiced today comprises largely of *bad economics* and *power politics*; see, Bekker (2006) for similar arguments. One can argue that an Indian anti-dumping case protects its competitive industries.

c. **One-period lagged imports (IM)** positively determine the number of anti-dumping initiations at current period for the select industries. The coefficient value is exactly the same in both the model estimations, although its impact is weak.

d. **Unit Value (UV)** *positively* determines the number of anti-dumping initiations which goes *against* our hypothesis. Under both of our estimated models we find UV to be statistically significant at 1% level. This might occur as filing an anti-dumping case does not depend upon the per unit price of imports. However, we have argued earlier in Section 4 that around 77% of the AD initiations by these select Indian manufacturing industries are converted into measures. Couple of reasons can be put together for such an occurrence. Firstly, „new” users tend to use various accounting techniques to prove that one is “materially injured” and thereby could convert anti-dumping initiations into measures; Finger (1993). Secondly, home government is affected by lobbying power (pressure groups) of the industry. Thus, even if imports are not *below* the “normal value”, initiations are made and thereby suffice the malicious accounting strategy of the industries.

Bagchi concluded as follows:
In first part, i.e. theoretical deliberations, he focused upon elaborating the point that threat of an optimal *ad-valorem* anti-dumping duty can possibly force exports by the foreign firm to be above the “normal value” and thereby cater to fair trade. In this regard, he dealt with a price-leadership model where the foreign firm is assumed to be technologically superior to the domestic firm. He compared and analyzed various possible trade-offs pertaining to selling below or above the “normal value” by the foreign firm and corresponding actions by the domestic firm. He found that imposition of an anti-dumping duty beyond the profit maximizing price of the foreign firm would decrease its profit.

Empirical investigation into the determinants of the number of anti-dumping initiations for these select Indian manufacturing industries reveals that anti-dumping initiations do not necessarily depend on the typical trade related variables. Rather it depends on the possible *retaliatory behaviour* and to a great deal on the *number of firms filing petition to the government for initiating an anti-dumping case*. The government functionary is affected by lobbying power (pressure groups) of the industry. Thus, even if imports are not below the “normal value”, AD initiations are made. It seems imperative from the policy point of view to ensure that an anti-dumping duty exerts credible threat to the (foreign) dumping firms. A strategic import tariff would be to push up the import price above the “normal value” leaving some ground for the domestic players to be able to engage in a price war with the foreign firm(s). The major limitation of this work is that the empirical study is restricted at the 2-digit industry classification. Since, AD cases are case specific such form of an aggregation gives just a preliminary idea.


This book was published by MIT Press, in 1989. It first sets forth the policies and practical considerations underlying the current international and national trading regimes. In addition, the book describes the procedures and practices of dispute resolution. The international focus of the book is largely on the GATT, with the bulk of the book devoted to a discussion of a number of important substantive topics pertaining to the GATT. As the book points out, while a primary purpose of that international agreement was to lower tariffs, which has largely been achieved. Over and above high there are many obstacle to trade between nations. The GATT also imposes
a number of other obligations, including the most favored nation principle, the obligation of nondiscriminatory or national treatment for imports, the permitting of actions against unfair trading (primarily dumping and subsidies), and the regulation of non-tariff barriers to trade. He has also covered concerns with national security, protection of health and welfare, and protection of the environment. He has also discussed special issues pertaining to developing countries and non-market economy countries. Professor Jackson has suggested some corrective measures to ease problems in the international trade regime. Of course Professor Jackson has focused on the U.S. perspective.

Brink Lindsey and Daniel J. Ikenson have observed that: The U.S. antidumping law enjoys broad political support in part because so few people understand how the law actually works. Its rhetoric of “fairness” and “level playing fields” sounds appealing, and its convoluted technical complexities prevent all but a few insiders and experts from understanding the reality that underlies that rhetoric.

In their study they seek to penetrate the cloud of complexity that protects the antidumping law from the scrutiny it deserves. They offer a detailed, step-by-step guide to how dumping is defined and measured under current rules. In addition, they identify the many methodological quirks and biases that allow normal, healthy competition to be proved as “unfair” and punished with high antidumping duties. Their conclusion is that the antidumping law, as it currently stands, has nothing to do with maintaining a “level playing field.” Instead, primary function of anti-dumping is to provide an elaborate excuse for old-fashioned protectionism. They illustrate the antidumping law’s serious methodological loopholes in different ways. First, they use simplified examples to demonstrate how particular steps in the dumping calculation operate to generate phantom dumping findings. Next, they use actual case records from 18 different dumping determinations to quantify the effects of methodological distortions in specific, real-life cases. Finally, they present a detailed hypothetical case study in which each step in the dumping calculation is explained and recreated. In that case study, they show how a foreign producer that sells widgets in the United States at net prices 13.95 percent higher than in its home market nonetheless winds up with a dumping margin of 7.37 percent.

The antidumping law is notoriously complicated, and its inner workings are known only to a select handful of users, targets, bureaucrats, and lawyers.
To conduct its dumping investigation, the DOC (Department of Commerce) issues detailed questionnaires to the primary foreign producers of the subject merchandise. The first step in comparing U.S. and foreign-market prices consists of determining which prices to compare to each other. Dumping calculations are never made on the basis of comparing actual sales prices. Instead, the DOC subjects actual sales prices to a dizzying variety of adjustments.

When sales are made to disparate customer classes, any price differences may simply reflect the different nature of the customers’ businesses. After defining the products in both markets, the DOC filters out some (or maybe even all) home-market sales with two separate tests: the arm’s length test and the cost test. Given the differences in tastes and customer requirements that often exist between markets, identical merchandise is not always sold in each market.

In a depressingly wide variety of circumstances, a foreign producer can charge prices in the United States that are identical to or even higher than its home-market prices and still be found guilty of dumping. The asymmetry in the current arm’s-length test was found to be inconsistent with the WTO Antidumping Agreement.

One of the most egregious methodological distortions in contemporary antidumping practice is the so-called cost test. The existence of below-cost sales in the home market is actually affirmative evidence of the absence of a sanctuary market. A comparison of U.S. prices to constructed value cannot indicate anything about the possible existence of price discrimination caused by a sanctuary market because constructed value is not based on price data.

Random chance and unavoidably arbitrary distinctions can thus play a major role in determining the final outcome of a dumping determination. The assumption that price differences exactly mirror cost differences is totally artificial. By ignoring “negative” dumping margins, the DOC employs a “heads I win, tails you lose” strategy for maximizing dumping margins.

Zeroing has been found to violate the WTO Antidumping Agreement.

To put all the methodological issues in context and to show how they interact in practice, they have constructed a detailed, hypothetical case study.

The DOC’s antidumping procedures are not designed to reach reasonable conclusions.

Together, the arm’s-length test and the cost test make a mockery of the presumption that dumping margin calculations reflect a true comparison of U.S. and home-market prices.
Under U.S. antidumping rules, EP and CEP sales are treated differently in the process of calculating net prices.

The law systematically discriminates against foreign goods with skewed rules that generate dumping margins out of thin air. The antidumping law, while pretending to secure a “level playing field,” in fact indulges in old-fashioned protectionism.


China has made great efforts to form its trade remedy system through changes in legal and organizational arrangements. Through these changes, China has clarified the meanings of WTO antidumping provisions. Moreover, procedural system on reviews was also strengthened in Chinese anti-dumping system. However, definitions of several key legal terms, including the concept of “related producers”, the negligible import standard, and adjustment factors for a fair comparison between normal values and export prices are still absent, and some legal problems relating to price undertakings and the countermeasure system are yet to be solved. China should continue to proceed in this direction and improve its trade remedy system.

The principal law governing foreign trade relations of China is the “Foreign Trade Law of the People’s Republic of China”. For detailing these rules on the trade remedies, the State Council of China formulated rules and procedures on anti-dumping and countervailing duties in 1997, which is the “Anti-Dumping and Anti-Subsidy Regulations of the People’s Republic of China” (called the “old Regulations”). When the Regulations were drafted, the only experience China had in regard to anti-dumping regulations was defending its firms in anti-dumping investigations conducted by other WTO members. China started initiating its first anti-dumping investigation in 1997. Therefore, even though the regulations had been drafted by referring to the WTO Anti-Dumping, Anti-Subsidy and Countervailing Measures (SCM) Agreements, many of its provisions were rather general, providing little guidance on how to apply the rules in practice. Also, some provisions were different from those of the WTO agreements. During China’s negotiations with the WTO, some WTO Members raised concerns that as a result of applying these provisions, trade remedy investigations by Chinese authorities would be inconsistent with WTO rules if China were a Member of the WTO.
As part of its accession package, China committed to make its trade laws and regulations compatible with the WTO agreements. Thereafter, China repealed the old regulations and enacted two new Regulations, which are the “Anti-Dumping Regulations” and the “Anti-Subsidy Regulations”. These Regulations became effective on 1 January 2002, shortly after China ratified its accession to the WTO. The new Anti-Dumping Regulations covers detailed and comprehensive rules on anti-dumping with 59 articles over six chapters. These rules were elaborated by many provisional rules promulgated by the then MOFTEC (The Ministry of Commerce of the People's Republic of China) and the State Economics and Trade Commission (SETC).

Pursuant to the National People’s Congress Decision on the Institutional Reform of the State Council and State Council’s Notice on Institutional Organization, the central government of China went through a major restructuring in March 2003. Consequently, the Ministry of Commerce (MOFCOM) was established to take over some of the responsibilities of the MOFTEC and SETC. In light of this organizational change, the Anti-Dumping and Anti-Subsidy Regulations were revised in March 2004 and made effective on 1 June 2004. The Anti-Dumping Regulations of 2004 encompasses a wide variety of subjects including the determination of dumping, calculation of margins of dumping, injury determinations, investigation procedure, anti-dumping duty, price undertaking, sunset review and notifications.

Anti-Dumping Regulations of China are discussed as under:

1. WTO consistency of anti-dumping investigation and determination procedure
2. Petition for investigation, and determination of the scope of domestic industry
3. Initiation of investigation
4. Determination of dumping margin
5. Price undertaking
6. WTO consistency of post-anti-dumping measure Procedure
   a. Interim review
   b. Sunset review

From their study, Won-Mog Choi and Henry S. Gao have concluded as follows:

Trade remedy regulations of China merely dates back to the establishment of the WTO in 1995. During this short period of time, China made huge efforts to formulate its trade remedy system
with new changes in legal and organizational arrangements. However, definitions of several key legal terms are absent, and some legal problems and issues remain to be solved and clarified.

These does not lead to violations of WTO obligations. But in many parts of the Chinese laws and regulations, such as Article 142 of the General Principles of the Civil Law of the People’s Republic of China and Article 9 of Rules on Administrative Cases on International Trade, it is declared that the domestic laws of China must be interpreted in a way that is most compatible with its international obligations. In addition, the Chinese government has frequently shown its willingness to observe WTO rules wherever there are no corresponding provisions in its domestic laws. Beyond this declaration of the principle of interpretation of domestic laws and expression of political will, China should continue to proceed with the task of clarifications and improvement of its trade rules.

It seems that with the establishment of MOFCOM (Ministry of Commerce People’s Republic of China), organizational reforms in the Chinese trade remedy system have been completed. The Ministry, as a new organization in charge of trade remedy matters, will adopt many procedural rules replacing temporary rules made by MOFTEC (Ministry of Foreign Trade and Economic Co-operation) and SETC (State Economic and Trade Commission). In this process, such problems and issues as identified in this article must be duly dealt with in order to make the Chinese system more transparent and consistent with WTO norms.

As the size of Chinese economy is one of the leading economy of the world and the influence of Chinese trade remedy policies on the world economy is sizable, this issue is vital and pressing not only to Chinese domestic enterprises and consumers, but also to most of the trading communities in the world.

Navin Chugh, in his paper titled “Antidumping and Competition law: Indian Perspective” has suggested some measures as under:

The political economy argument is the leading argument in explaining India’s current antidumping actions. Such actions have given protection to highly concentrated industries, and Dominant producers lobby in litigating antidumping cases. In the process, such industrees incur huge expenditure sacrificing economic efficiency. Moreover, as most cases are in the intermediate products’ markets, the higher prices due to additional duty, may have adverse effects on the whole economy. The antidumping policy of India designed to ensure fair
competition and improve economic efficiency may in fact have the adverse effect. To minimize 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 clarified and the procedure of determining dumping should be made more transparent.

It should be noted, that further fine-tuning and refining of the antidumping policy is not the answer to prevent its misuse. It is proposed to substitute anti-dumping law through Competition Law, which will remove the problem by its roots and will not distort the production through protection of noncompetitive domestic producers. The tension between competition and trade policy can be described as a conflict between two ideologically similar concepts with differing views as to means of achieving the same goal. The enforcement of competition law in trade cases is of particular importance since it limits the risk that domestic producers may use the threat of initiating action under domestic trade remedies law or otherwise lobbying protection in order to induce foreign exporters to enter into unlawful restrictive agreements. Efforts should be made in the direction of integrating antidumping policy with the Competition law. The competitive merits of antidumping initiatives in that case will be evaluated by the Competition authorities, i.e. the Competition Commission of India, with the 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 behavioural effect on the competitive structure of the industry as a whole, rather than the material injury it causes to domestic firms. This however requires the implementation of comprehensive Competition policies and credible enforcement agencies. This has not been the case in India.

Sourafel Girma, David Greenaway and Katherine Wakelin, in their study titled “Does Anti-dumping stimulate FDI? Evidences from Japanese Firms in the U.K.” have investigated the factors (the role of trade policy and AD actions, a measure of comparative advantage, locational advantage of U.K. along with others) which influence the number of Japanese firms in U.K. and their level of employment and investment. They have made the detailed analysis aggregating firm-level data rather than using public data source. Japanese investment in U.K. is measured in terms of both employment and fixed assets. They have covered expansion by existing Japanese firms and also new Japanese firms arrived. The results support the hypothesis that trade barrier
has acted as an incentive for Japanese Direct Investment in U.K. It has been mainly due to AD cases filed against Japanese firms.

**Tania Voon**, in her study titled “Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements” takes the view as follows:

As the global financial crisis is manifested in enhanced protectionism, the economic evils of dumping, countervailing, and global safeguard measures (‘trade remedies’) should be of increased concern to the Members of the World Trade Organization (‘WTO’). Long tolerated under the WTO agreements and perhaps a necessary evil to facilitate multilateral trade liberalization, elimination of trade remedies is far from the agenda of WTO negotiators. However, a small number of regional trade agreements offer a model for reducing the use of trade remedies among WTO Members in the longer term, consistent with WTO rules and broader public international law.

This paper contributes towards a reduction in the use of trade remedies among WTO Members for the benefit of all WTO Members and the global economy as a whole. The multiplicity of RTA (Regional Trade Agreement) and their capacity to influence trade-related conduct and beliefs can be helpful in this direction.

A few existing RTAs as identified in this paper demonstrate that some WTO Members may be willing to restrict various forms of trade remedies amongst members, and believe that this is a feasible and realistic approach, even in the absence of deep integration between the RTA members. The analysis of WTO rules concerning trade remedies in RTAs shows that RTA partners are permitted to exclude the application of anti-dumping, countervailing and safeguard measures among themselves, provided that they continue to limit negative trade impacts on non RTA WTO Members in accordance with Article XXIV: 5 of the GATT 1994, Article 41(1)(b) (i) of the VCLT (*Vienna Convention* on the Law of Treaties. 1969), and paragraph 3(a) and 3(b) of the Enabling Clause. It will further the underlying objectives of allowing RTAs in the WTO and increase intra-RTA trade liberalization in accordance with GATT Article XXIV: 8, VCLT Article 41(1) (b) (ii), and Enabling Clause paragraph 3(a). This increases certainty about the interaction between RTAs and trade remedies with the goal of encouraging existing RTA members to amend their agreements and future RTA entrants to abolish or at least restrict trade remedies among themselves. This would be one step towards limiting trade remedies among
WTO Members and, ultimately, replacing anti-dumping measures with competition disciplines, countervailing measures with WTO dispute settlement, and safeguards with a reformed regime.

**Peggy A. Clarke and Gary N. Horlick**, in their study titles “Injury Determinations In Antidumping And Countervailing Duty Investigations” explains as under:

Article 3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“ADA”) and Article 15 of the Agreement on Subsidies and Countervailing Measures (“ASCM”) address the injury determination that an importing country must make before imposing antidumping or countervailing duty measures, while Articles 4.1(ii) of the ADA and 16.2 of the ASCM deal with the special situation of injury to regional industries. The language in the two Agreements is virtually identical. Panel and Appellate Body decisions interpreting the provisions in one Agreement obviously have direct relevance to the other. In addition, much of the language is similar or identical to the injury provisions in the WTO Agreement on Safeguards. Moreover, some of the language in Article 3 of the ADA and Article 15 of the ASCM reflect, with changes, the language concerning injury found in the 1979 Antidumping and Subsidies Codes. Panel and Appellate Body decisions interpreting the injury requirements in the Safeguards Agreement and the 1979 Codes can therefore provide some guidance in interpreting the ADA and ASCM injury provisions.

The footnote of Article 3 of the ADA and Article 15 of the ASCM defining injury as encompassing not only material injury, but also threat of material injury to a domestic industry or material retardation of the establishment of a domestic industry. At this time, it is not clear whether the injury requirement *may* be met by a finding of *any one or more* of the three forms, or if it *must* be based on a finding of *only one* of the three forms. In a decision interpreting a similar injury requirement in the 1979 Antidumping Code, a GATT Panel found that the three types of injury were mutually exclusive and that a finding must be based on a finding of one of the three forms.3 In a recent decision, interpreting similar, but not identical, language in the WTO Safeguards Agreement, however, the Appellate Body reversed a parallel finding by a Panel, noting that the use of the conjunction, “or,” does not exclude the finding of both serious injury and threat of serious injury at the same time. However, unlike the injury requirements in the ADA and the ASCM which define different factors to be considered in making a present injury determination compared to a threat of injury determination, the Safeguards Agreement does not
establish different factors. Therefore, it may be that the language of the Safeguards Agreement is too dissimilar to provide guidance on the injury requirement of the ADA and the ASCM.

The authors have concluded that the injury analysis in an antidumping or countervailing duty action is complex and fact dependent. The WTO Agreement sought to clarify the most contentious issues arising from this analysis. Nevertheless, there are numerous complaints in cases around the world concerning whether the investigating authorities have favored the domestic industry in making their injury determination. This will likely continue to be an area of dispute in future cases as well because of its complexity and fact-specific nature.

The Government of India has announced latest trade policy - **India New Foreign Trade Policy 2015 – 2020**, which was earlier known as EXIM Policy.

The Government of India, Ministry of Commerce and Industry announced New Foreign Trade Policy on 01st April 2015 for the period 2015-2020, earlier this policy known as Export Import (Exim) Policy. After five years foreign trade policy needs amendments in general, aims at developing export potential, improving export performance, encouraging foreign trade and creating favorable balance of payments position. The Export Import Policy (EXIM Policy) or Foreign Trade Policy is updated every year on the 31st of March and the modifications, improvements and new schemes becomes effective from April month of each year.

**Aradhna Aggarwal (2002),** in her working paper titled “Anti Dumping Law and Practice: An Indian Perspective”, *Indian Council For Research On International Economic Relations, Working Paper No. 85*, is a part of a capacity building exercise at ICRIER (Indian Council for Research on International Economic Relations.) 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.

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

This paper also addresses 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. 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.

The analysis is organized 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:

1. What are the different forms that dumping may take?
2. Under what conditions might dumping be harmful?
3. What indicators could help determine whether these conditions will be met in practice?
4. 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 analyzing 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.
She has concluded as under:

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 minimize 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 requires 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.

Sagnik Bagchi has published a paper on “Threat of Anti-dumping Duty and Determinants of Anti-dumping Initiations in Case of Indian Manufacturing Industries”, where he has described the phenomenon of dumping through a price-leadership model and thereby calculated the optimal level of an ad-valorem anti-dumping (AD) duty required to enforce a threat upon the exporting firm such that it exports above the normal value.

He found that a credible threat in terms of an AD duty can potentially alter the pricing strategy of the exporting firm from “below” to “above” normal value, restricts dumping and thereby leads to a win-win situation for both the (foreign) exporting and (domestic) import competing firms.

He empirically inquired some of the possible factors that triggered anti-dumping initiations among five Indian manufacturing industries (Chemical and Allied industries, Rubber and Plastics industry, Textiles, Base Metals, and Machinery and Mechanical Appliances) over the period 1997-2011. His results indicate that number of anti-dumping initiations is dependent on the value of imports, the presence of a dominant industry lobby and retaliatory behaviour, among others.

Thus, a credible threat of a strategically chosen optimal AD duty can potentially alter the pricing strategy of the exporting firm from „below” to „above” normal value and create a win-win situation for both the firms.

Brink Lindsey and Daniel J. Ikenson, in their study titled “Antidumping 101 The Devilish Details of “Unfair Trade” Law” Trade Policy Analysis no. 2, state that the antidumping law is notoriously complicated, and its inner workings are known only to a select handful of users, targets, bureaucrats, and lawyers. Finally they have concluded as under:

The antidumping law, while pretending to secure a “level playing field,” in fact indulges in old-fashioned protectionism.

Edwin Vermulst and Daniel Ikenson, in their study titled “Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?” studied disputes notified by Dispute Settlement Body of WTO. According to them, 60 of the 357 disputes notified to the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) in its 12-year history have involved
antidumping issues. That figure places anti-dumping at the top in terms of issues most often requiring formal dispute resolution. The dumping margin calculation technique known as ‘zeroing’ has been an issue in several of those 60 disputes. On 9 January 2007, the Appellate Body (AB) issued its report in United States – Measures Relating to Zeroing and Sunset Reviews (Japan), which was the fifth AB report in which some aspect of zeroing was adjudicated.2 Thus, zeroing is among the most litigated issues of the most contentious subject under the WTO’s purview. Zeroing refers to the practice, conducted in some jurisdictions, of replacing the actual amount of dumping calculated for model or sales comparisons that yield negative dumping margins (i.e., models or export transactions for which the export price exceeds the calculated normal value) with a value of zero prior to the final calculation of a weighted-average margin of dumping for the product under investigation. Zeroing, thus, has the effect of overstating dumping margins by denying the full impact of non-dumped or negatively dumped models/export sales on the dumping margin for the product as a whole. Dispute settlement panels and the AB have ruled often – but remarkably, not exhaustively – on the question of whether or not zeroing is a permissible practice. Despite AB rulings that zeroing in conjunction with certain comparison methodologies violates provisions of the WTO Anti-Dumping Agreement (ADA),3 ambiguity still prevails with respect to zeroing in conjunction with other comparison methodologies. Technically, from a legal standpoint, each of the various comparison methodologies expressly or implicitly sanctioned under the ADA carries its own arguments regarding the propriety or impropriety of zeroing. And each may require its day in court, so to speak, to achieve finality on this issue. Edwin Vermulst4 presents a framework for contemplating the propriety and impact of zeroing, as well as summaries of findings of the critical GATT/WTO decisions (through May 2005) on the subject. Since that publication, new panel decisions and AB reports have been issued, which clarify (and some may say complicate) understanding of the jurisprudence surrounding the issue. This article borrows from Vermulst, updates the state of play regarding zeroing, and asks whether zeroing can ever be deemed permissible in light of the obligations under the ADA.

They concluded that the Appellate Body has issued five reports in which it has addressed various aspects of the practice of zeroing. The AB offered a hybrid methodology that seemingly allows authorities to address targeted dumping, while simultaneously preserving the sanctity of the fair comparison language in Article 2.4. It remains to be seen whether a case concerning zeroing
under the exception arises in dispute settlement, and whether such a case makes it to the AB. In the meantime, the AB’s most recent indictment of zeroing more broadly is likely to produce more controversy, as the United States appears to be questioning the legitimacy and efficacy of that decision.

2.9 Summary of Literature Review and Research Gap

The extensive review of literature carried out as above hints at the complexity of the issues related to dumping, antidumping measures and related regulatory framework.

As far as trend of antidumping investigations are concerned, Xiaohua Bao and Larry D. Qiu (2011) observe that antidumping (AD) investigations have been growing rapidly since the inception of the WTO. According to the WTO Report (2007), from 1995 to 2005, there were 42 countries that launched a total number of 3044 AD investigations against 98 countries. It shows that developing countries have initiated over half of the total number of AD investigations after 1995. For this reason AD is regarded as one of the most important protectionism measures nowadays. Second, AD measures are used by countries as a safety-valve because the WTO does not provide sufficient mechanisms to safeguard domestic import competing-industries (Moore and Zanardi, 2009). Gunner Niels and Adriaan Ten Kate, in their study of “Antidumping Protection in a Liberalizing Country: Mexico’s Antidumping Policy and Practice” by an Oxford Publication also conforms the safety valve argument. Third, AD is abused by many countries because the WTO does not have strong control on the use of AD measures (Hansen and Prusa, 1995). For whatever reasons, the increased use of AD investigations and AD duties has already had serious impacts on global trade flows.

Bryan T, Johnson discussed the U.S. procedural and legal framework and rules and regulations of AD system in detail with analysis of some practical cases and suggested some measures for improvement. He has also covered the Retaliation against U.S. Firms, which can be helpful to any other country like India.

Won-Mog Choi and Henry S. Gao observed that China has made great efforts to form its trade remedy system through changes in legal and organizational arrangements and added that the problems and issues identified in their study must be dealt with properly in order to make the Chinese system more transparent and consistent with WTO norms.
Chad P. Bown (2008) investigated the determinants of industry pursuit of AD across nine major developing countries for the period 1995–2002 and provided evidence that this use is consistent with industry characteristics predicted by the WTO’s evidentiary requirements. According to him, industries like chemicals and steel are major users of AD mechanism across countries.

Finger and Nogue’s (2005), contains arguments that AD in many of the Latin American countries in their sample helped provided an escape valve to manage an overall program of trade liberalization. The theory is that AD may positively affect the sustainability of the overall liberalization commitment and/or increase a country’s ex ante willingness to take on more extensive liberalization commitments than it would take on without such an option. (Chad P. Bown, 2008).

Based on the literature review, several research questions arise as listed below:

1. The past study showed that there was an increase in AD activities post 1995. Is it still continued? Is this true in case of India being a developing nation? Which countries of the world make maximum use of AD initiations? Which countries of the world face maximum AD initiations?

2. The studies have revealed that chemical industry and steel industry are the two major users of AD mechanism globally. Which industries / sectors are most affected and major users of AD initiation in Indian context?

3. What is the success ratio of initiations and measures in India?

4. Is there any relationship between AD cases initiated by a country, AD cases faced by a country, country’s merchandise imports and country’s merchandise exports?

5. What are the views, perceptions and understanding of various stakeholders regarding dumping, antidumping, antidumping initiations and prevalent regulatory framework in India?

In order to address the research questions as above, the researcher decided to study AD cases recorded during the period 1-1-1995 to 31-12-2016 in order to make some important inferences. Moreover, the researcher has also attempted to analyze the incidences of antidumping initiations and measures with the help of graphical analysis to glean any major trend.