

Evolution of Anti-Dumping Measures

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This paper is in four sections. The first section looks at how the term 'dumping' is understood by the economists, trade and trade officials and multilateral bodies like the WTO. The second section traces the origin and evolution of antidumping measures over time. In the next section, evolution of international antidumping rules is traced. The final section takes stock of the use of antidumping measures by various countries over a period of two decades.

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I Dumping

Though it is difficult to define 'dumping' in a way that is universally acceptable, it is often taken to mean sale of a commodity in a foreign market at a price below marginal cost [Bannock, Baxter and Rees, 1978]. Early literature on dumping defined it as "price discrimination between national markets" [Viner, 1923]. More recent literature recognizes dumping to occur either when "similar products are sold by a firm in an export market for less than what is charged in the home market" or when "the export price of the product is less than total average costs or marginal costs" [Hoekman and Leidy, 1989]. These two business practices (i.e., price discrimination and pricing below costs) have also been identified by Baldwin (1998) to constitute dumping: "sales in international markets by foreign producers either at prices less than they charge in their home markets or at prices below their costs of production."

Finger (1993) is of the opinion that "there is nothing particularly interesting in the economic definitions of dumping" as they "do not provide a sound basis for determining when it is or when it is not in the national interest to restrict trade." He highlights the fact that instead of being the criterion for taking action against imports, dumping has become the rhetoric justifying such action:

When the politics of the matter compel action against imports, the legal definition of dumping can be stretched to accommodate it. In a practical sense, the word dumping has no meaning other than the one implicit in antidumping regulations. The pragmatic definition of dumping is the following: dumping is whatever you can get the government to act against under the antidumping law.

The use of the term 'dumping' is also being increasingly extended to connote unfair trade practices of different kinds. As pointed out by Cass and Boltuck (1996), "Originally confined to international price differences thought to reflect predatory strategies, the term dumping has taken on a protean quality. Virtually all unfair acts now are said to result in some form of dumping." For example, the term 'social dumping' is being used to refer to trade in products of countries with low wages, and low health and other benefits. Similarly, the term 'environmental dumping' refers to trade in products from less protected environments. Cass and Boltuck (1996) have also pointed out the emphasis the lawyers put on fairness in addressing international trade issues including

fair administration of international trade laws whereas economists are more concerned with 'efficiency' of international trade laws. In the context of dumping determination, both these aspects assume particular significance.

Notwithstanding the fact that the term dumping was originally meant to denote predatory pricing strategies and now it is being given the widest connotation to encompass all unfair trade practices including social and environmental dumping, what is relevant to our consideration here is the implicit meaning it is assigned in the legal texts that govern international trade including the national legislations patterned on such texts. Article VI of the General Agreement on Tariffs and Trade, 1994 (GATT) contains the following provision: -

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards establishment of a domestic industry.

Thus the implicit definition of 'dumping' contained in the GATT is devoid of any reference to predatory intent or strategy or to any labour or environmental standards. No such reference is also contained in the WTO Agreement on Implementation of Article VI of the GATT 1994 (commonly known as the "AD Agreement"). Article 2.1 of the AD Agreement reads as follows: -

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

Article 2 of the AD Agreement which deals with 'Determination of Dumping' also provides detailed provisions to deal with situations where there are no sales of like product in the exporting country and also where there are either no export prices or no reliable export prices to independent buyers. Despite such detailed provisions in the AD Agreement which are required to be incorporated in the national laws of the WTO Member Countries, in a given situation the actual implementation may not result in dumping determination in a unique manner to the satisfaction of all the major stakeholders including the domestic industry in the importing country, the exporters and the importers apart from the national governments in the exporting and importing countries. Computation of 'normal value' and 'export price' in particular depends on the national legislation of a particular country and the way its administration implements it. A good part of the negotiations on the antidumping (AD) code during the Kennedy Round (1967), the Tokyo Round (1979) and the Uruguay Round of Multilateral Trade Negotiations (1994) was devoted to the manner of dumping determination. To the extent the results of these negotiations have modified the way dumping is to be determined, one can say that the implicit definition of 'dumping' has also undergone some change from one Round to the next. Yet there appears to be no finality in this regard as several review proposals were put forth in the pre-Seattle discussions at the WTO suggesting further modifications to Article 2 of the AD Agreement [Satapathy, 1999]. These proposals have gathered momentum in the next Round of negotiations initiated at Doha in 2001.

Finger (1993) identifies Viner (1923) as the first scholar to have traced the earliest instances of dumping. Viner "notes a 16th century English writer charging the foreigners

with selling paper at a loss to smother the infant paper industry in England". He notes a second instance of the Dutch "selling in the Baltic regions at ruinously low prices to drive out French merchants" in the 17th century. Finger also cites Alexander Hamilton's 'Report on Manufactures' of 1791 who used same arguments against English manufacturers exporting to America though Hamilton argued for "a high and protective American tariff" rather than specific action against foreign dumping.

II

Origin of Anti Dumping Measures

The origin of antidumping (AD) measures as deliberate instruments of trade policy have their roots in the Canadian and US laws framed about a century ago. The Canadian AD law of 1904 was not only the first of its kind but was a unique innovation that was followed later on by New Zealand (1905), Australia (1906), South Africa (1914) and the US (1916). The first paragraph of the proposed 1904 AD law of Canada outlines its main purpose:

"Whenever it appears to the satisfaction of the minister of customs....that the export price....is less than the fair market value thereof, as determined according to the basis of value for duty provided in the Customs Act...such articles shall, in addition to the duty otherwise established, be subject to a special duty of customs equal to the difference between such fair market value and such selling price" (quoted in U.S. Tariff Commission, 1919).

The proposal to levy a special AD duty broke new ground and was a major departure from earlier techniques of protecting domestic trade such as increasing tariff or adopting artificially high values for customs duty purposes. The new instrument of special AD duty had the advantage of targeting specific imports without having to increase the tariff across the board. Secondly, increasing the tariff or the value for customs increased the duty only to the extent of a percentage of the value, whereas the special AD duty increased the duty liability by 100 per cent of the value difference. The rationale behind the proposed AD duty was explained by the Canadian Minister of Finance W.S. Fielding as follows:

"We find today that the high tariff countries have adopted that method of trade which has now come to be known as slaughtering, or perhaps the word more frequently used is dumping; that is to say, that the trust or combine, having obtained command and control of its own market and finding that it will have a surplus of goods, sets out to obtain command of a neighbouring market, and for the purpose of obtaining control of a neighbouring market will put aside all reasonable considerations with regard to the cost or fair price of the goods; the only principle recognized is that the goods must be sold and the market obtained...This dumping then, is an evil and we propose to deal with it" (quoted in U.S. Tariff Commission, 1919).

As has been explained in detail by Finger (1993), Canada was able to resist the demand from Canadian steel makers to increase the tariff on steel rails (which in turn would have encouraged similar demands in other sectors) through the newly introduced AD measure. There were low priced imports of steel rails into Canada from the US Steel Corporation, who increased the price to the required extent as soon as the AD law was enacted.

The AD legislation in the US evolved somewhat differently. Initially, anticompetitive practices including predation by both domestic and foreign firms were sought to be proscribed under the Sherman Antitrust Act of 1890 and Section 73 of the Wilson Tariff Act of 1894. However, court rulings greatly limited the scope of application of both these enactments to foreign firms [Cass and Boltuck, 1996]. Viner reports use of these legislations only once till 1923 to limit Brazilian coffee exports to US (Finger, 1993). Subsequently, in 1897, countervailing duty provisions were included in the Tariff Act of 1897 against export bounty or grant, the immediate provocation being foreign subsidization of sugar exports to US [Baldwin, 1998]. However, as far as action against dumping is concerned, two separate laws were enacted - the AD law of 1916 and the AD Act of 1921. Both the laws have remained in effect till date, though the latter was carried forward as Title VII of the Tariff Act of 1930 (the Smoot-Hawley Tariff Act), which was again replaced by the Trade Agreements Act of 1979, by a new Title VII to the Tariff Act of 1930.

The first AD legislation of the US in the form of the Revenue Act of 1916 was mainly enacted to protect domestic industry against German cartels. It enabled victims of predatory dumping to approach US courts for civil damages, penal action and restriction on imports. However, it also required the complainant to prove predatory intent on the part of the foreign supplier of destroying or injuring an industry or of preventing the establishment of an industry. Such stringent requirement did not encourage its use in the past. Till 1991, only one serious case was instituted in 1970 which was also dismissed as the complainant failed to prove predatory dumping [Finger, 1993]. Geneva Steel and Wheeling-Pittsburgh Steel, two US Steel companies had filed cases under the 1916 AD law in the US courts in 1996 and 1999 against steel imports alleging dumping. Subsequently, the Disputes Settlement Body of the WTO has ruled that the 1916 AD law violates the AD Agreement [Satapathy, 2000].

The AD Act of 1921, on the other hand, evolved out of the US Tariff Commission's recommendations for an AD law for the US on the pattern of the 1904 Canadian AD law. Baldwin (1998) points out four important ways in which the AD Act of 1921 differs from the AD law of 1916:

- (i) The Secretary of Treasury determines whether injurious dumping has occurred rather than a Court following strict rules of evidence and due process of law.
- (ii) Dumping is defined more precisely as selling at a price less than its foreign market value or in the absence of such value, less than its cost of production.
- (iii) There is no requirement that the dumper intends to destroy a domestic industry. It is sufficient if there is a finding that dumping is injuring or likely to injure an industry or prevent its establishment.
- (iv) Instead of triple damages on importers, it provides for only a special duty equal to the margin of dumping.

Initially, the Treasury Department was administering the AD Act of 1921, but the Customs Simplification Act of 1954 transferred the work of determination of injury to the Tariff Commission, since changed to the International Trade Commission (ITC). In 1958, an amendment was made to stipulate that evenly divided votes in the ITC would mean affirmative injury findings. The Trade Act of 1979 transferred the remaining work

of dumping determination from the Treasury Department to the Commerce Department. Baldwin (1998) notes that this change entrusted the work to an agency that favoured more trade protection compared to the Treasury Department, which traditionally favoured liberal trade. The AD Act of 1921 is significant on two main counts. Firstly, by doing away with the requirement of proving predatory intent it allowed AD action on international price disparity and therefore, it was increasingly used by the domestic industry. Secondly, many of its provisions as also provisions of its successor Title VII of the Tariff Act 1930 have provided the basis for the AD legislations of other countries as well as for the GATT/WTO AD code.

After the Second World War till the mid-1960s, the US faced hardly any competition from foreign producers and hence action against unfair trade remained more or less a dormant issue. Baldwin (1998) notes that the late 1960s saw increased competition from countries like Japan and there was a surge of imports of footwear, radios, televisions, motor vehicles, tyres and tubes, semiconductors, table and kitchenware, and many items of steel affecting domestic industry in the US. As a result, there were demands for action against imports on grounds of unfair trade. Around this time, the Kennedy round of Multilateral Negotiations concluded in 1967 when an international AD Code was negotiated. There were parallel changes made in the US law at this time as also later on, in 1974, changes were made through the Trade Agreements Act of 1974, which also provided sweeping powers under Section 301 to the US President to take action against unfair trade practices. Before dealing in detail with the development of international AD rules in the next section, it is noted that while Canada is credited with the invention of antidumping as an instrument to protect domestic industry against unfair imports, most authors on the subject agree that it is the US AD law that has provided the basis for the international AD rules and that the role of the US negotiators has been the most dominant in formulating such rules.

III International Anti Dumping Rules

Corr (1997) very succinctly summarizes formulation of the AD Rules at the international level in a short paragraph. The first step was taken at Bretton Woods in 1947 when Article VI of the original GATT was drafted to deal with antidumping. Twenty years later, in 1967, the contracting parties to GATT formulated a detailed AD Code at the Kennedy Round of Multilateral Negotiations. The same was amended and a more detailed Code was formulated in 1979 at the Tokyo Round. The WTO AD Agreement has subsequently replaced the Tokyo Round Code in 1995. The full title of the WTO AD Agreement is 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. Article VI of GATT 1994 is essentially the same as Article VI of GATT 1947. In view of the General Interpretative Note to Annex 1A to the Agreement establishing the WTO, the provisions of WTO AD Agreement will prevail over the provisions of Article VI of GATT 1994 in the event of a conflict.

Though the reading of Finger (1993) is that no country delegation strongly insisted for AD provision to be included in GATT 1947, Baldwin (1998) notes that the US officials were instrumental in ensuring that the AD (and CVD) provisions in GATT were patterned closely on US law. According to him, the reasons were two-fold. Firstly,

the US Congress would not have accepted GATT without inclusion of provisions similar to US law. Secondly, US negotiators wanted to make it certain that other countries did not adopt less transparent AD laws than that of the US. Kufuor (1998) also mentions that during the post-2nd World War negotiations to establish an International Trade Organization, US had published a pamphlet on world trade and employment, which contained proposals for application of AD (and CVD) on imported products. He also notes that the wording of Article VI of GATT 1947 was vague which led to inconsistent application and interpretation. The provision was seen as protectionist apart from the fact that the definition of dumping was as put forward by the developed countries.

During the Kennedy Round (1964-67), there were extensive discussions leading to negotiations of an international AD Code on implementation of Article VI of GATT 1947. Kufuor (1998) notes that negotiations on AD Code was entrusted to a Group on Antidumping Policies (GAP), the main participants were members of the Organization for Economic Cooperation and Development (OECD) controlled by the developed countries. He is of the view that contribution of the developing countries in the formulation of the Kennedy Round AD Code was minimal. The US negotiators were able to get new provisions introduced to ensure openness in the process of AD determination and tightening of material injury clause. This required Canada to introduce a material injury provision in its AD law. At the same time, a time limit of 90 days was established for withholding duty appraisal and provisions were made that such withholding would be subject to preliminary finding of dumping and sufficient evidence of injury. These latter changes were made to address the concerns of other countries against the prevalent US practice (Baldwin, 1998).

As a result of Tokyo Round negotiations during 1973-79, the AD Code was again changed in 1979. The developing countries in particular argued that the normal value of their exports should be based on international prices instead of home market prices or production costs. However, this was not accepted by the developed countries [Kufuor, 1998]. On the other hand, the US was successful in weakening the language of the 1976 code relating to injury determination [Baldwin, 1998]. The main reason for Tokyo Round revision of the 1967 AD Code was to bring it in line with the new subsidies code. It now spelt in greater detail as to how dumping and injury determinations are to be made [Croome, 1999]. The 1979 AD Agreement in its Articles 13 and 14 provided two concessions for the developing countries. Under Article 13, developed countries were required to give special regard to developing countries while applying AD measures and Article 14 allowed non-signatories to participate as observers in the deliberations of the GATT Committee on AD practices. These were not, however, major concessions to developing countries, and in the final analysis, it is the developed countries which were actually the main negotiators in the Tokyo Round [Kufuor, 1998].

By the time the Uruguay Round negotiations began, as Croome (1999) notes, AD issues had become the most divisive and difficult. Many more developing countries took part in the deliberations. From one point of view, dumping was seen as unfair trade practice while from the other, antidumping action was seen as unfair protectionist measure to prevent fair competition. Many believed that the 1979 AD Agreement could be interpreted in a way to produce positive findings of dumping and injury in most cases. Even unsuccessful cases entailed trade disruption by way of uncertainty and heavy legal costs.

The objectives of the US negotiators were primarily to have an AD Agreement that would conform to the US AD law and practice. They were successful in several ways. Cumulation of imports from all sources was permitted. As far as anti-circumvention measures are concerned, though no agreement could be reached, yet the US and other countries continue to apply anti-circumvention provisions existing in their domestic laws. The standard of review by the Dispute Settlement Body of the WTO was diluted in respect of AD cases making it very difficult to rule against AD action taken by a Member country. From the point of view of the developing countries, some of the welcome changes - were establishing a 2 per cent de minimis dumping margin and abolishing minimum percentages in constructed value calculations in respect of general and administrative expenses as well as profit margins. Detailed procedures were provided for determining material injury. Provision was also made to ensure that the petitioners asking for AD action represent majority of the domestic industry. The salient features of the AD Agreement agreed upon on conclusion of the Uruguay Round have been summarized by Corr (1997), Krishna (1997) and Stevenson (1999) covering both its substantive part and its procedural aspects. The AD Agreement has been found wanting in several respects not only by many academics but also by WTO Member countries, as evident from various proposals made before the Seattle Ministerial Conference in 1999 and subsequently during the Doha Ministerial Conference in 2001. Kufuor (1998) in particular has highlighted several issues from the point of view of developing countries which are likely to figure in future negotiations. By and large, the proposals for change in the AD agreement have emanated from the developing countries. A notable exception is understandably Japan, which has been subjected to some severe AD action in the past years and has, therefore, joined the developing countries in demanding a review of the AD Agreement.

IV Use of Anti Dumping Measures

The four traditional users of AD measures were the US, the EC, Canada and Australia. Table 1 adapted from Stevenson (1999) shows that they accounted for 90 per cent of the AD measures initiated during 1985-89 (the percentage was 99 per cent in the first half of 1980s), which came down to 70 per cent during 1990-94 and to 42 per cent during 1995-97. A detailed study by 3 WTO officials Miranda, Torres and Ruiz (1998) shows that the number of countries using AD measures has increased in subsequent years and many developing countries including India have become prominent users. Year-wise data compiled by them clearly shows that the AD measures initiated by the new users started overtaking the AD measures initiated by the traditional users from the year 1993. Table 2 adapted from Miranda, Torres and Ruiz (1998) shows that during the 5 years from 1988 to 1992, the traditional users initiated 765 cases (81 per cent) as against 174 cases (19 per cent) initiated by the new users. However, during the next 5 years from 1993 to 1997, the traditional users initiated 515 cases (45 per cent), whereas 622 cases (55 per cent) were initiated by the new users during the same period. The change in the pattern is very significant as the new users, which accounted for only 1/5th of the AD measures initiated during the five-year period from 1988 to 1992 accounted for more than half the cases during the next five-year period from 1993 to 1997. In terms of absolute

numbers too, while the number of cases dropped by a third in the case of traditional users, it increased 3 1/2 times in the case of the new users. The use of AD measures, which was earlier confined to a few developed countries, has since become more widespread and many developing countries have started using it. In 1987, only 7 countries used AD measures, which included the 4 traditional users, Mexico, Korea and Finland. During the next 10 years (1988-1997), the number has increased to 29 countries.

Table 1: Antidumping Measures Initiated by the Four Traditional Users (per cent)

	1985-1989	1990-1994	1995-1997
US	21	15	17
EC	24	23	11
Canada	30	24	9
Australia	15	8	5
Total	90	70	42

Source: Stevenson (1999)

Table 2: Antidumping Measures Initiated by Traditional and New Users

	1988-1992 (No. of cases)	per cent	1993-1997 (No. of cases)	per cent
Traditional Users	765	81	515	45
New Users	174	19	622	55
Total	939	100	1137	100

Source: Miranda, Torres and Ruiz (1998)

In 1987, the number of countries affected by AD measures was 31. This increased to 99 during the next 10-year period (1988-1997). The most affected countries in terms of number of AD investigations against them during 1988-1997 include China, the US, Korea, Japan, Brazil, Taiwan, Germany, Thailand, India and the UK. It is to be noted that while the EC initiates AD measures on behalf of all the EC Member countries, usually other countries initiate AD measures against individual EC Member countries and not against the EC as a whole. Miranda, Torres and Ruiz (1998) have reported that during 1988-1997, only in 5 instances AD measures were initiated against the EC as a whole.

Table 3 indicates that some of the commodity sectors have been subjected to greater AD action than others. During the 10-year period 1988 to 1997, 5 commodity sectors namely base metals (mainly steel), chemicals, machinery and electrical equipments, plastics, and textiles accounted for 74 per cent of all the AD measures initiated. Certain countries have also been found to take greater number of AD measures in respect of specific commodities [Miranda et al, 1998].

Table 3: Antidumping Measures Initiated by the Commodity Sectors

Commodity Sectors	No of cases initiated during 1988-1997	per cent
Base Metals	532	26
Chemicals	335	16
Machinery & Electrical Equipment	271	13
Plastics	243	12
Textiles	144	7
Others	536	26
Total	2061	100

Source: Miranda, Torres and Ruiz (1998)

The EC has dispensed with AD measures in respect of trade between its Member countries. Australia and New Zealand have also a similar arrangement in respect of their internal trade. However, the EC, Australia and New Zealand continue to use AD measures in respect of trade with other countries. Some of the countries such as the EC, Australia, India, Mexico and New Zealand apply what is known as 'lesser duty' rule while taking AD action under which the duty imposed is equal to the extent of injury rather than the full margin of dumping. However, countries like the US continue to impose AD measures to fully neutralize the margin of dumping. This divergence in use of AD measures continues, as the 'lesser duty' rule provided for in Article 9.1 of the AD Agreement is merely recommendatory and not mandatory.

It is not mandatory for a country to have AD legislation in place, but those WTO Member countries that have such a law have to conform to the AD Agreement. Citing the 2002 Report of the WTO Committee of on AD Practices, Stewart (2003) states that as of 25 October 2002, 72 Member countries (taking the EC as one Member) have notified AD legislation, 31 Member countries have notified that they have no AD legislation and 27 Member countries have made no notification in this regard. His computations show that the Member countries that have national AD legislations in place account for 87.55 per cent of the world export trade.

Under Article 16.4 of the AD Agreement, Member countries are also required to notify AD action taken by them. Stewart (2003) has made a country-wise tabulation of 2160 AD cases initiated during the period 1995 to 2002 which shows the major AD users to be India (331 cases), the US (292 cases), the EC (267 cases), Argentina (180 cases), South Africa (160 cases), Australia (155 cases), Canada (107 cases), and Brazil (105 cases). Clearly the developing countries (1274 cases) as AD users have overtaken the developed countries (886 cases) in the post-WTO era. As against 2160 AD cases initiated during 1995-2002, 1258 AD measures were imposed which include 212 against China, 189 against the EC and its Member countries, 83 against South Korea, 69 against Taiwan, 67 against the USA, 64 against Japan, 55 against Russia, 51 against Brazil, 48 against Thailand and 44 against India. India has made 219 AD impositions during this period compared to 192 by the US, 164 by the EC, 120 by Argentina and 107 by South Africa. China in contrast has imposed AD measures only in 5 cases in the same period. A more detailed study of the use of AD measures during the first decade of WTO (1995-2004) is now available [see Satapathy, 2005], which indicates that with 400 initiations and 302

impositions during this 10-year period, India has become the highest user of AD measures. It also figures in the list of top ten target countries facing AD action with China topping the list.

[The views expressed are personal.]

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