A Critique of Anti-Dumping Laws

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Dedicated to

World Peace and Harmony

To all those who have suffered and are still suffering
in conflicts and wars

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—Owais Hasan Khan

PREFACE

Anti-dumping laws are the most debatable provisions of the WTO which though legally permitted have a significant trade distorting effect. And they are more often than not used as a non-tariff barrier to trade in form of regulatory protectionism. It is alleged that anti-dumping laws are the 'chemical weapon' of the new age trade war.

This book critically analyses the present anti-dumping law regime on three broad levels. Firstly on a conceptual level by evaluating the edifice on which anti-dumping laws are based and examining it on the anvil of economics, economic efficiency argument and distributional justice. Secondly on the empirical level to find out whether anti-dumping laws have been used as a disguised form of regulatory protectionism, a neo-protectionist barrier to trade. And finally, it discusses the procedural flaws of the anti-dumping law regime which make it vulnerable to procedural abuse and manipulations.

Thus a case against the anti-dumping laws is established in the present work. An argument has been put forth to repeal anti-dumping laws under the WTO and substitute them with international competition laws. International competition laws answer all the legitimate expectations of anti-dumping without having its trade distorting ramifications.

Anti-dumping law concerns only the protection of domestic producers against the predatory practices of the foreign industrialist. Whereas, the main purpose of competition law is to protect the interest of the general public by protecting healthy competition in the market and prohibiting any action which hampers competition.

LIST OF ABBREVIATIONS

AD	Anti-dumping
AML	Anti Monopoly Act
APEC	Asia Pacific Economic Cooperation
CCI	Competition Commission of India
CD	Countervailing Duty
CEGAT	Customs Excise Gold (Control) Appellate Tribunal
CER	Australian- New Zealand Closer Economic Relations Trade Agreement
CV	Constructed Value
DA	Designated Authority
DDR	Doha Development Round
DGAD	Directorate General of Anti dumping & Allied duties
DOC	Department of Commerce
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Commission
EU	European Union
EV	Export Value
FICCI	Federation of Indian Chamber of Commerce and Industry
GATS	General Agreement in Trade in Services
GATT	General Agreement on Tariff and Trade
GE	General Electrics
HTS	Harmonized Tariff Schedule
ILD	Long-Distance Services
ITC	International Trade Commission
ITO	International Trade Organisation
MNC	Multinational Corporations
MTN	Multilateral Trade Negotiation
NGO	Non Governmental Organisation
No.	Number
NTBs	Non-Tariff Barriers
NV	Normal Value
OECD	Organisation for Economic Cooperation and Development
Para	Paragraph
PRC	People's Republic of China

Ref.	Reference
TBT	Technical Barriers to Trade
TNC	Transnational Corporations
TOT	Transfer of Technology
TRIMS	Trade Related Investment Measures
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organisation

CHAPTER I

INTRODUCTION

> "Anti-dumping suits are emerging as the chemical weapons of the world's trade wars."
>
> —The Economist[1]

1.1 Introduction

Dumping, under the GATT, refers to the sale of goods in an export market at a price lower than the price at which it is sold in the domestic market by the exporting firm. In other words, dumping occurs when the price at which the company exports its product is lower than the price it charges in its home market. Thus the difference between the normal value of a product in the domestic market and the export price would be the 'dumping margin.'

The provisions relating to anti-dumping laws are the most ironic provisions of the WTO which are legally permitted, and have significant adverse effects on international trade and healthy competition. Michael Finger opines that "anti-dumping is a trouble-making diplomacy, stupid economics and unprincipled law."[2]

Anti-dumping and countervailing duties are by nature a contingent safeguard measure which permits the member nations to withdraw from the normal trade obligation under certain specified situations and to impose prescribed restriction/s on the imports from the concerned foreign market player.

When in 1923 Jacob Viner wrote the book "Dumping: A Problem in International Trade", he probably did not imagine that the system put in

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[1] 'The Anti-Dumping Dodge', *The Economist*, Sept. 2010, 1988, p. 77.

[2] J. M. Finger, "The Origins and Evolution of Antidumping Regulations," in J. M. Finger (ed.), "Antidumping: How It Works and Who Gets Hurt", University of Michigan Press (1993).

place to eliminate the effects of dumping (i.e. anti-dumping) would come to be a problem in itself.[3]

Now, anti-dumping has become an area which has led to more disputes and actions under the DSB than any other matter. Since 1995, around 100 cases are annually filed with the WTO DSB, and more than 3,500 anti-dumping investigations are launched. Anti-dumping complaints rose from 157 in 1995 to 366 in 2001, then after a period of significant decline, rose to around 280 in 2013, and came down to 240 in 2014. Although developed countries conventionally used anti-dumping, developing countries such as India, South Africa, Argentina and China now account for the majority of anti-dumping actions.[4]

The political tension stems from the debate over the recent rise in anti-dumping suits. The WTO saw a record high of 328 suits in 2001, sparking concern that while negotiations dismantle transparent and stable tariff barriers, members are substituting discriminatory, unpredictable anti-dumping suits.[5]

The legal framework of anti-dumping legislature is provided under Article VI of the GATT, 1947 which says,

> 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 the establishment of a domestic industry...

The whole international legal regime relating to anti-dumping is formulated based on Article VI of the GATT, 1947. However, from the very beginning, the concept of anti-dumping has been criticised and opposed as the neo-protectionist measure which tends to frustrate the very mandate of multilateral trade negotiations. More often than not, anti-dumping suits have been found to obstruct efforts to creating free trade worldwide.

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[3] Maurizio Zanardi, "Anti dumping: A problem in International Trade" Tilburg University & Cent (June 2004).

[4] See anti dumping statistics at 'Anti dumping Publishing House' http://www.antidumpingpublishing.com accessed on 25-05-2017.

[5] "Anti-Dumping Summary" Global Trade Negotiation: Centre for International Trade development at Harvard University, Jan 2003.

The objectives of the present work are three-fold. Firstly, the work attempts to bring forth the philosophical, conceptual and practical flaws of the international anti-dumping law. Secondly, it establishes a case for the repeal of the anti-dumping law from the WTO framework. And lastly, it proposes the replacement of the anti-dumping law with the international competition law.

In this process, it also demonstrated the ascendancy of the international competition law over the anti-dumping law. The present work is based on the hypothesis that the anti-dumping law is the most ironical provision of the WTO which is legally permitted and has significant adverse effects on international trade and healthy competition. There is a sound basis for the replacement of the anti-dumping law from the international framework with the international competition law.

The present work also intends to answer the following research questions:

i. Feasibility of keeping the anti-dumping law in the international framework in the face of growing concern about its conceptual, philosophical and practical flaws?
ii. Whether there exists any congruity between the anti-dumping law and concepts of economics, economic efficiency and distributional justice?
iii. Whether there is any suitable substitute for the anti-dumping law in a case where it is repealed from the WTO framework?
iv. Whether the international competition law can be an appropriate substitute for the anti-dumping laws?
v. Whether there is a sufficient basis for an international competition law agreement to come into existence?

As per the objectives of the present work and its research questions, it is divided into eight chapters demonstrating three broad themes. These three themes are a conceptual analysis of anti-dumping law, a critique of anti-dumping and substitution of the anti-dumping law with the international competition law.

A brief overview of the eight chapters of the present work is as follows:

Chapter 1 introduces the topic under consideration. In this chapter, the researcher has given a brief outline and background relating to the anti-dumping law. It demonstrates how the anti-dumping law has become an

area which is now labelled as one of the most problematic areas of international trade law.

Chapter 2 provides a conceptual overview of the anti-dumping law at the international level. It also explains in detail key concepts like dumping and anti-dumping, market situations for dumping, dumping margin calculations etc. The chapter further points out the prerequisites for imposing anti-dumping duty along with its philosophical foundation and rationale.

Chapter 3 deals with the law governing anti-dumping and the evolution of the anti-dumping law. It showcases how the anti-dumping law was developed and became part of the multilateral trade negotiation. The law combating dumping has been in existence for a long time, and it's not just the result of multilateral agreements like the GATT. Discussions start with the birth of the anti-dumping law as a part of the domestic jurisprudence in countries like Canada, Australia, the United States of America etc. and their gradual inclusion in the international framework.

Chapter 4 along with chapter 5 and chapter 6, constitute the core area of the research. Chapter 4 deals with the critique of anti-dumping laws on the following three broad levels:

Firstly, on a conceptual level where discussion focuses on certain philosophical and theoretical flaws of the anti-dumping law. It exhibits how the rationale behind anti-dumping is itself imperfect and faulty.

Secondly, on an empirical level, with the support of some data analyses. The main aim of data analysis is to reveal the real face of the anti-dumping law which is becoming a neo-protectionist barrier to international trade.

Lastly, the discussion focuses on the procedural critique of the anti-dumping law. It illustrates how at the procedural level, anti-dumping is vulnerable to manipulation by protectionist abusers. Further, failure of the anti-dumping law in practice is also examined.

Chapter 5 highlights the interface between the anti-dumping law and the international competition law. It shows that the competition law and the anti-dumping law come from the same family tree, but that the two diverge widely. The purpose of this chapter is to demonstrate how the international competition law has an extra edge over the anti-dumping law.

Chapter 6 deals with the possibility of substituting the anti-dumping law with the international competition law. It discusses the need for, and basis of, securing the international competition law agreement along with finding out the prospect of incorporating the international competition law under the WTO framework.

Chapter 7 deals with the anti-dumping law and its application in India. This chapter covers the incorporation of the anti-dumping law in the domestic jurisprudence of India through legislation like the Customs Tariff Act 1975 etc.

Chapter 8 is the final chapter of the present work, and it deals with the conclusion and suggestions. Through the present research work, the author concluded by proving the hypothesis and has also made some suggestions for making international trade a fair, free and beneficial enterprise.

The present research work has a considerably broad scope regarding the anti-dumping movement. It attempts to cover all aspects of anti-dumping legislature under the international framework. Further, it also brings forth the historical evolution of anti-dumping legislature from being a part of domestic jurisprudence, to its incorporation into the multilateral trade negotiation framework. Further, the present research work explored a suitable substitute for anti-dumping in case it is taken off the international set-up.

Nonetheless, the present work suffers from certain limitations which are as follows:

i. All the data collection has been done through secondary sources; no primary source could be employed.
ii. Many aspects of the anti-dumping law could not be dealt with in depth.
iii. Views of the government departments, private entrepreneurs, consumers and other stakeholders regarding repeal or retention of the anti-dumping law could not be empirically collected and analysed.
iv. Anti-dumping laws as existing in countries other than the USA and India are not examined in depth.

CHAPTER II

ANTI-DUMPING LEGISLATURE: A CONCEPTUAL OVERVIEW

> "Dumping is one of the inhibiting factors undermining competitiveness ... It has done and is still doing serious harm to manufacturers."
>
> —Muda Yusuf[1]

2.1 Introduction

Dumping is an unfair trade practice whereby goods are exported and introduced into the economy of another country at a price lower than the normal price of the goods. This unfair trade practice has a significant distorting effect on international trade and healthy competition in the market. Therefore to neutralise the adversarial impact of the dumping, anti-dumping duties are imposed.

The purpose of anti-dumping is to rectify the trade-distorting effect of the dumping in order to establish fair trade in the market, and it should not be used in the form of penalty or as a protectionist barrier to trade.[2]

Anti-dumping legislation has a long history. The government of Canada adopted the first recorded anti-dumping law in 1904.[3] Similar legislation soon followed in most developed industrialised nations of the world at that time. Subsequently, anti-dumping provision was incorporated into the General Agreement on Tariffs and Trade (GATT, 1947).

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[1] Director-General, Lagos Chamber of Commerce and Industry (LCCI), Nigeria

[2] Article VI: 2 provides that "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

[3] An Act to Amend the Customs Tariff 1897, 4 Edw VIII, 1 Canada Statutes 111, (1904).

At present, across the globe, practically all nations, whether developed or developing, have adopted anti-dumping legislation in their domestic jurisprudence. This chapter offers a conceptual overview of anti-dumping legislature along with a discussion of a few of its key concepts.

2.2 Dumping and Anti-dumping

Dumping refers to the sale of goods in the export market at a price lower than that at which the same goods were sold in the domestic market. Through dumping, goods are introduced into the domestic market at a price lower than their price in the original market.

The act of dumping makes domestically produced goods comparatively more expensive to buy, which adversely affects the local economy. That is why dumping is considered an unfair trade practice in the international trade regime. The Oxford English Dictionary defines dumping as "the selling to a foreign market at a low price."

V. G. Haberler, giving a more nuanced description of dumping, defined it as "the sale of goods abroad at a price which is lower than the selling price of the same goods at the same time in the same circumstances at home, taking account of differences in transport costs".[4]

The concept and the problem associated with 'dumping' have a long history. Jacob Viner in his work "Dumping: A Problem in International Trade"[5] has mentioned some of the earliest instances of dumping. He gave an example of the 16th century English writer who was alleged to have charged foreigners with selling paper at a loss to overpower the infant paper industry in England. And in the 17th century, a complaint was made in which Dutch businessmen were accused of selling at low prices in the Baltic regions to drive out French merchants. He further quoted Alexander Hamilton (1791) who defined dumping as the unfair practice "to introduce a business into another by temporary sacrifices, recompensed, perhaps by extraordinary indemnifications of the government of such country…"[6]

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[4] Gottifried Von Haberler, "The Theory of International Trade with its Application to Commercial Policy." Translated by Alfred Stonier and Frederic Benham. P. 300, New York: Macmillan, (1937).
[5] Jacob Viner, "Dumping: A Problem in International Trade", University Press, (1923).
[6] Ibid

Nations resort to dumping in two situations: (a) In the case of bumper production of certain merchandise where the domestic demand for that merchandise has completely been exhausted and (b) in the form of predatory practice to drive out competitors from the targeted market. There are four types of dumping at the international level. These are as follows:

i. Price dumping,
ii. Service dumping,
iii. Exchange dumping and
iv. Social dumping.

'Price dumping' is the most common form of dumping where a price, set for the export market, is lower than the normal value of the merchandise in the domestic market. 'Service dumping' also referred to as 'freight dumping' occurs when subsidies or minimum freight rates are provided by the government to enable the exporters to sell their products at a lower price in foreign markets. 'Exchange dumping' refers to the manipulation of exchange rates to achieve a competitive advantage for the exports. 'Social dumping' relates to the use of low-cost labour in an exploitative manner (prison labour or sweat labour[7]) to produce merchandise at a low cost of production.[8]

However, in the GATT drafting debates, 'price dumping' was taken as the only situation which may attract imposition of anti-dumping duties.[9]

The above classification has been made on the basis of the market situation which leads to dumping, for example, dumping emanating from the labour market situation (social dumping) or dumping resulting from the international price discrimination (price discrimination). Other than the above classification of dumping, another kind of classification is made on the basis of the trade-distorting effect of dumping. By 'trade-distorting effect', dumping could be classified as follows:

i. Red Light Dumping

[7] Sweat labour refers to the use of labourers who are employed for long hours, at low pay and under poor working conditions.
[8] John H. Jackson, "World Trade and the Law of GATT" Edition 1969 The Bobbs Merrill Company Publication.
[9] New York Report, UN Doc. EPCT/34, at 13 (1947); Havana Reports, UN Doc ICITO/1/8, p. 74, (1948). See John H. Jackson, "World Trade and The Law of GATT" Ed. 1969, The Bobbs Merrill Company publication.

ii. Yellow Light Dumping
iii. Green Light Dumping

These dumping classifications got their nomenclature from the traffic light system where red implies complete halt of passage, yellow means 'wait and watch' and green indicates a clear route. 'Red light dumping' has the most severe impact on the home market and leads to a substantial trade-distorting effect. In this kind of dumping, the difference between the normal value of the merchandise and its export value is very high. The price of the merchandise is set way below its average total cost and the average variable cost.[10] Under 'red light dumping', the chances are higher than the defaulting foreign industry is planning to engage in with predatory pricing.

In yellow light dumping, the price of the impugned merchandise subject to dumping investigation is fixed below its average total cost, but above its average variable cost. In the strict sense of the terms, such price fixing does not constitute dumping, but has a potential predatory impact in case the exporter engages in such behaviour for a long period. In the case where such kind of yellow light dumping is carried on for a substantial period, actions under the anti-dumping law can be taken.

Finally, in green light dumping, merchandise is introduced into the foreign market at a price which is equal to or above its minimum average total cost of production. This kind of export does not constitute dumping. This sort of price-fixing may be low-cost export but will not constitute the act of dumping. The only remedy available to the domestic producers in such a case is to reduce their cost structure to match that of the respondent.[11]

To neutralise the trade-distorting effect caused by dumping, an anti-dumping duty is imposed. Anti-dumping duty is a non-tariff measure which is levied at a value equal to the difference between the goods' export price and their normal value. This difference between the export price and its normal price is called the 'dumping margin'.

Thus, the formula for calculating the dumping margin would be:[12]

Dumping Margin = Normal Value – Export Price

[10] For discussion on Classification of Cost Structure see Chapter 4.2.2 Figure 1.
[11] See Raj Bhala, 'Rethinking Antidumping Law', Vol. 29 Geo. Wash. J I L & Econ. 1 (1995-1999). p. 138.
[12] Supra note no.11 on p. 871.