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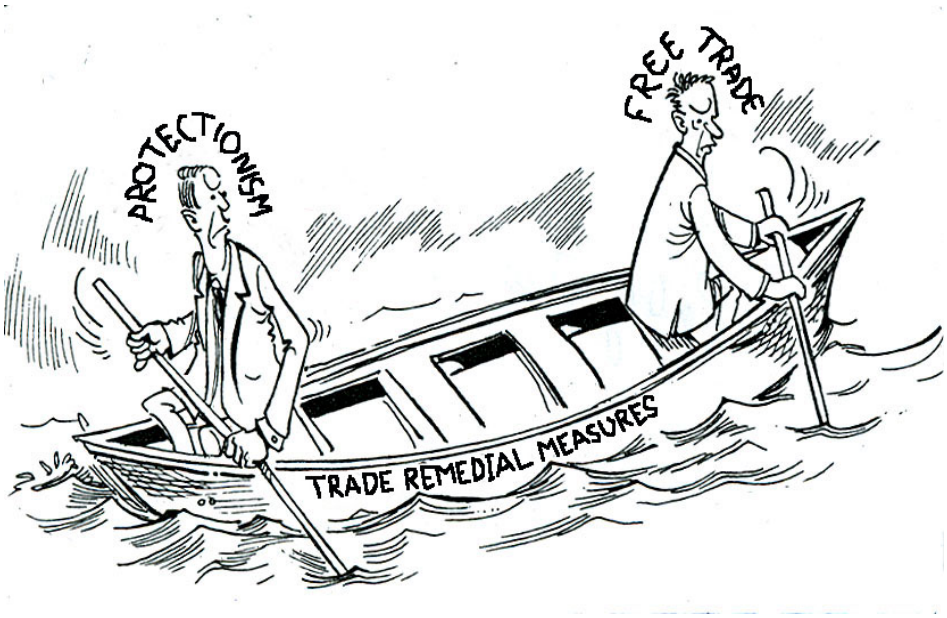
Protectionism and Trade Remedial Measures



CUTS Centre for International Trade, Economics & Environment

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Twenty Years of Social Change
1984 to 2003

Protectionism and Trade Remedial Measures

कट्स CUTS

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This paper was researched and written by Prof N.L. Mitra, Vice Chancellor National Law University Jodhpur and Prabhash Ranjan, Legal Researcher CUTS Centre for International Trade, Economics & Environment. Comments on the draft were received from Peter Homes,University of Sussex, Gary N. Horlick, Wilmer, Cutler & Pickering, Matthias Oesch, Instittute of European & International Economic Law which have been suitably incorporated.

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Email: citee@cuts-international.org
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Preface

Many have argued that there is no economic rationale behind the use of trade remedial measures and therefore, they should be scrapped. According to this school of thought, the use of trade remedial measures is often guided by protectionist tendencies and causes more harm than good to the country imposing such a measure. The other school of thought argues that the use of trade remedial measures is warranted in order to protect the domestic industry from unfair trading practices.

But, whether we like it or not, trade remedial measures (such as anti-dumping) are realities of the global trading system and we have to live with this basic fact. Therefore, pragmatism demands that our discussions about trade remedial measures should focus on how best could we reduce the friction caused to trade by their use rather than adopting an unrealistic approach of scrapping it altogether.

In the WTO acquis, three types of trade remedial measures are recognised. These are anti-dumping, countervailing and safeguard measures. They do not constitute a homogenous group. A careful examination of these three measures reveals that the use of anti-dumping (AD) measures is more frequent as compared to the remaining two. In fact, looking at the trend of imposition of anti-dumping measures, it can safely be said that such measures have become synonymous with trade remedial measures. Their use over the years has increased exponentially. Developed and developing countries alike are imposing more and more anti-dumping measures.

One significant development that merits attention and gives a glimmer of hope *vis-à-vis* anti-dumping is the reported decline in the total number of initiations from 1st July to 31st December 2003, from the corresponding period of 2002. However, this decline does not signify much as countries continue to impose AD measures for protectionist purposes. The recent attempts by the US to impose AD duties on frozen and canned warm water shrimp imports from India, Vietnam, China, Brazil and Thailand is a case in point.

It was estimated that in this case AD duties in the range of 100 to 130 per cent would be imposed. Apart from the high AD duties, the legal cost of fighting this dispute, for the affected parties in these countries, would also be phenomenal.

This paper examines how protectionism has influenced the use of trade remedial measures. It examines the trends of imposition of trade remedial measures. This trend clearly shows that countries have found anti-dumping measures a safe haven for extending protection to domestic industries. In order to highlight the protectionist nature of anti-dumping measures, the paper looks at the manner in which the countries have interpreted the WTO agreement on anti-dumping.

The paper also makes a comparison between anti-dumping measures and safeguard measures. It demonstrates that countries have preferred using anti-dumping measures over safeguard measures because the former can be easily used for extending protection to domestic industry for a longer time.

In this respect, some jurisprudential developments are examined. The rulings of the WTO Appellate Body have made some significant contribution in developing the case law of trade remedial measures. Some rulings, for instance the ruling on zeroing, have restricted the abusive use of calculating the margin of dumping. Some of the rulings have rounded off the blurred edges that exist in the agreements on trade remedial measures.

Finally, the use of trade remedial measures is not going to stop. Therefore, the pragmatic approach is to argue for changes that would make the use of these measures less trade distorted and serve their original purpose of providing legitimate protection to the domestic industry.

Jaipur, India **Bipul Chatterjee**
Director

Chapter 1

Introduction

Trade remedial measures are measures adopted by a country to deal with the effects of trade actions by others. It is a terminology for a measure applied under trade law to deal with the effects of perceived unfair trade practices by other countries or injuries caused by rapidly increasing imports. The protection given by a trade remedial measure is not perpetual but remedial. A trade remedial measure acts like a protective shield for the domestic industry but only for a limited period. The mainstay of a trade remedial measure is its remedial or corrective characteristic. A trade remedy is supposed to rectify the problem caused because of an unfair trade practice being followed by another country. However, the fact of the matter is that trade remedial measures are used for purposes other than combating unfair trade practices like extending illegitimate protection to the domestic industry. This abuse, rather than use, has generated a lot of interest in trade remedial measures.

Trade remedial measures are measures adopted by a country to deal with the effects of trade actions by others. It is a terminology for a measure applied under trade law to deal with the effects of perceived unfair trade practices by other countries or injuries caused by rapidly increasing imports

The General Agreement on Tariffs and Trade (GATT) comprises of three types of trade remedial measures. These trade remedial measures are anti-dumping, countervailing duties and safeguard actions. Article VI of GATT deals with dumping and subsidisation and states that dumping or subsidisation, which causes or threatens to cause material injury, could be offset by imposition of anti-dumping or countervailing duties. Article XIX of the GATT deals with the imposition of safeguard measures, in case of a sudden surge of imports.

Until the Tokyo Round[1] (TR) there was no substantive explanatory or procedural law on these three trade remedial measures. Member-countries used to tackle these three issues under domestic law. There was no platform for management of litigation in the international forum on these three issues. TR first lay down detail procedural rules, but on a non-obligatory soft legal form, enforceable only against the member countries specifically ratifying the code.

The General Agreement on Tariffs and Trade (GATT) comprises of three types of trade remedial measures. These trade remedial measures are anti-dumping, countervailing duties and safeguard actions

It was soon understood that there was an immediate need for definite and uniform procedural rules and for an effective dispute resolution mechanism. Finally, in the Uruguay Round, the procedural law was codified in the form of Anti-Dumping Agreement[2] (ADA), Agreements on Subsidies and Countervailing Measures (ASCM) and Agreement on Safeguards.

Ever since the establishment of the WTO in 1995, the number of trade remedial measures that have been initiated or imposed has increased. For instance, during 1995 to the first half of 2003 the total number of anti-dumping initiations by reporting countries

were 2284[3]. Similarly, for the same period, the total number of countervailing initiations were 161. From 1995 to 2000, the total number of safeguard initiations were 61.

These figures point out two noteworthy features:

1. There has been a major surge in the initiation of trade remedial measures after the WTO was established.
2. The surge has been much more in the case of anti-dumping duties, as compared to the other two trade remedial measures.

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This paper looks at two trade remedial measures i.e., anti-dumping and countervailing measures. The fundamental aim of this paper is to show that the imposition of trade remedial measures is triggered mainly because of protectionist purposes, especially the imposition of anti-dumping measures. It is being increasingly seen that anti-dumping measures have been imposed to shield the domestic industries and give them an unending protection against imported goods. To substantiate this argument, the paper analyses the history of anti-dumping measures and the trends in imposition of anti-dumping measures, both by developed and developing countries. The paper also looks at the legal text of the ADAand how the provisions of the legal text have been interpretated by the member countries to pursue their respective protectionist agendas.

The paper will also analyse how the imposition of anti-dumping measures is devoid of public interest issues. Ignoring public interest issues implies that only the evidence furnished by the industry or industrial and business associations is taken into account. The paper briefly deals with safeguards and draws a comparison between anti-dumping and safeguard measures in order to understand why more anti-dumping measures are being imposed as compared to safeguard measures.

The paper also looks at subsidies and countervailing measures. Here, the aim is to look at the definition of the term “subsidy” as given in the ASCM and the types of subsidies provided in the agreement. The trends in imposition of countervailing measures are also examined. The chief purpose of examining the trends of subsidies and countervailing measures is to find out the difference between the trends in countervailing measures and anti-dumping measures.

It is being increasingly seen that anti-dumping measures have been imposed to shield the domestic industries and give them an unending protection against imported goods

The paper also analyses some of the jurisprudential developments related to both the ADA and the ASCM. The paper does not claim to discuss all jurisprudential developments associated with these two agreements. It only talks of a few jurisprudential developments associated with these two agreements. The fundamental aim behind analyzing such developments is to see the interpretations through the prism of protectionism.

Chapter 2

Anti-dumping Measures

The term "dumping" suggests that an exporting country exports goods to a foreign market at a price that is less than its domestic price. This can be done for different economic reasons. Old goods or goods manufactured with old technology may be dumped in another market

The term "dumping" suggests that an exporting country exports goods to a foreign market at a price that is less than its domestic price. This can be done for different economic reasons. Old goods or goods manufactured with old technology may be dumped in another market. The industrial producer may want to capture an international market or create demand for his products in such a market. Dumping could be used to clear the stockpile of goods in a foreign market. A large producer of an exporting country may use the technique of dumping to oust the domestic producers, temporarily or permanently, out of the market.

In international trade, dumping is primarily a pricing technique, as discussed above. One would argue that such price differentiation provides benefits to both industrial users and consumers and thus has positive welfare impacts on the whole economy. It is precisely because of this reason that dumping does not come within the direct purview of multilateral disciplines. In other words, an importing country cannot impose anti-dumping duties simply on the ground that dumping is taking place.

History of Anti-dumping Measures

In international trade, dumping is primarily a pricing technique, as discussed above. One would argue that such price differentiation provides benefits to both industrial users and consumers and thus has positive welfare impacts on the whole economy

Only in a few countries like US or Canada[4], there were anti-dumping laws at the beginning of the twentieth century. In a market economy there are players who indulge in acts like dumping in order to derive different advantages. One advantage of dumping could be to oust all competitors in the domestic market to achieve monopoly. This could be in the form of predatory dumping. It is the responsibility of the state to deal with such unfair trade practices. The US Anti-dumping Act of 1916 was an endeavour in this direction. It aimed to protect the US industries from such foul and unfair play. This was a criminal statute and focused on predatory pricing. In other words, under this Act, the complainant was required to prove that the foreign supplier had resorted to predatory dumping[5]. The Act was challenged in the Dispute Settlement Body (DSB) of the WTO. The Appellate Body (AB) found this act to be inconsistent with the obligations that the US has to meet under the ADA[6]. US failed to bring its Act of 1916 in conformity with the ADA within the stipulated time period given by the DSB. The refusal of US to comply with the ruling of the DSB has led to a spate of arbitration proceedings that still continue.

In 1M921[7], US amended the anti-dumping Act, and the new anti-dumping law resembled the Canadian anti-dumping law. This law was a civil statute, unlike the 1916 Act, and its primary purpose

was to assess price differentials and impose duties to compensate for the differences in the prices of domestic goods and imported goods.

The anti-dumping law was not regulated under international law until the adoption of the GATT 1947. Article VI of GATT 1947, for the first time, at the multilateral trading level, gave the substantive definition of dumping. It also states when a country can impose anti-dumping duties. The formation of the WTO witnessed the institutionalisation of the procedural anti-dumping law at the multilateral trading level. Article VI of the GATT or the ADA does not link dumping to intention. In other words, in order to prove that dumping is taking place there is no need to prove predatory intention. There is also no link of such an act with any penal offence.

The anti-dumping law was not regulated under international law until the adoption of the GATT 1947. Article VI of GATT 1947, for the first time, at the multilateral trading level, gave the substantive definition of dumping. It also states when a country can impose anti-dumping duties

The Tokyo Round was pivotal in the anti-dumping debate. The culmination of the Tokyo Round in 1979 witnessed an exponential increase in the imposition of anti-dumping measures. In the first three years, following the completion of the Tokyo Round in 1979, a greater number of anti-dumping measures were imposed than in the entire decade of 1970s. In the 1980s, 1600 anti-dumping cases were filed worldwide, which were double the number of cases that were filed in the 1970s. During the period of 1980 – 1985, US, EU, Canada and Australia accounted for more than 99 percent of filings in anti-dumping cases and more than 95 percent during the entire decade of the 80s. By 1999, out of the total number of trade remedial cases that were initiated, anti-dumping cases accounted for 86 percent.

Dumping in GATT

According to GATT[8], a product is said to be dumped in a country when it is introduced in the commerce of that country at a price that is less than the normal value of the product. A product is to be considered as being introduced into the commerce of an importing country at less than the normal value, if the price of the product exported from one country to another country

(a) is less than the comparable price, in the ordinary course of trade, for a like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Article VI of the GATT further states that dumping is to be condemned if it causes or threatens material injury to an established industry in the importing country. In other words, dumping is to be condemned i.e. is actionable only if it causes material injury to the domestic industry of the importing country

Article VI of the GATT further states that dumping is to be condemned if it causes or threatens material injury to an established industry in the importing country. In other words, dumping is to be condemned i.e. is actionable only if it causes material injury to the domestic industry of the importing country. To counter dumping that causes injury to the domestic industry, anti – dumping duty, equivalent to the margin of dumping, can be imposed.

The main problem in this definition and in the imposition of anti-dumping duty is that the provision can be a happy hunting ground for the protectionists. Anti-dumping, instead of becoming an economic instrument, has been exploited as a political instrument by countries being pressurised by the industrial lobby that might be exploiting the people with utter inefficiency. The industrial lobby, always intends to use anti-dumping measures for protectionism. An author very rightly observes that the AD law can be used for protectionist objectives for four reasons, namely, (a) domestic producers can form pressure groups and use pressure tactics even when they are inefficient; (b) domestic producers may manipulate the definition of 'domestic industry'; (c) import may comprise a small percentage compared to the growth of total imports and (d) 'loss of profit' may be pleaded as 'injury'.

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The interpretation of the ADA, the trend in the use of anti-dumping measures over the years and the non-incorporation of public interest issues in anti-dumping investigations is ample testimony to the fact that anti-dumping measures have been used for protectionist purposes. The next section would demonstrate this fact.

Protectionism and Anti-dumping

Anti-dumping is used by many countries as a tool to protect their domestic industries. This is evident from the manner in which the provisions of the ADA have been interpreted, the global trends in imposition of anti-dumping measures both by developed and developing countries and non-incorporation of public interest issues in investigations related to imposition of anti-dumping duties.

Interpreting ADA Agreement

Three examples stand out in exhibiting the interpretation of the ADA for protectionist purposes. These examples are the principles of 'zeroing' in calculating the dumping margins, the violation of 'lesser duty' rule and the 'sunset clause' in imposition of anti-dumping duty.

Anti-dumping is used by many countries as a tool to protect their domestic industries. This is evident from the manner in which the provisions of the ADA have been interpreted, the global trends in imposition of anti-dumping measures both by developed and developing countries and non-incorporation of public interest issues in investigations related to imposition of anti-dumping duties

Zeroing

The use of the principle of "zeroing" in calculating the weighted average dumping margin[9] has led to an unfair practice of calculating dumping margins.

'Zeroing' is a calculation methodology where weighted averages are calculated by assigning the negative figures a value equivalent to zero. Thus, negative figures are not allowed to offset the positive figures. For example, if we have three numbers -1, 2 and 4, and if it is assumed that each has a weight of 1, the weighted average will be 1/3 {(-1*1)+(-2 *1) +4*1 = 1}. In zeroing methodology, -1 and -2 will be given a value equal to zero and thus the weighted average will be 4/3, which is greater than 1/3. Zeroing methodology always results in an inflated and erroneous weighted average.

It is important to understand how the method of "zeroing" is linked to the protectionist argument. This can be understood with the help of the above example. If an importing country ignores the negative dumping margin by assigning a value of zero to it,

artificial inflation of the dumping margin takes place, as only the positive dumping margin is included. Through this inflated and unfair figure, the country endeavours to prove that dumping is taking place and that this dumping is causing serious injury to the importing country's domestic industry. Stated differently, 'zeroing' ensures that the exporting country's products would be categorised as being dumped even in those situations where the product is being sold at non-dumping prices. This is an example that demonstrates how ADA is being used for protectionist purposes.

Many countries use the principle of 'zeroing' in calculating the dumping margins. EC after the denouncement by the AB of the practice of 'zeroing' in the cotton type bed linen case, has stopped using this methodology. But US still continues to use the methodology of zeroing

It is pertinent that the negative dumping margins must be accounted for in calculating the weighted average dumping margin. Thus, the correct methodology should be that the dumping margins be based on a summation of all the import transactions so that they reflect the totality of trade from a specific exporter. This would bring it in conformity with the principle laid down in Article 2.4.2 of the ADA, which does not provide for 'zeroing'.

Many countries use the principle of 'zeroing' in calculating the dumping margins. EC after the denouncement by the AB of the practice of 'zeroing' in the *cotton type bed linen case*, has stopped using this methodology. But US still continues to use the methodology of zeroing. Recently US blocked EC's request to establish a panel to look into the claims made by EC against the use of zeroing methodology by US. This is a clear pointer to the fact that US persists with the use of zeroing methodology for calculation of dumping margins. How various panels and the AB have dealt with the issue of 'zeroing' has been discussed later in the paper.

Many countries[12], in the proposal on prohibition of zeroing to the Negotiating Group on Rules, have submitted that there is an urgent need to prohibit the practice of "zeroing" in the calculation of dumping margins in all anti-dumping proceedings.[13] The countries have argued that all positive and negative margins of dumping, found on imports from an exporter or producer of the product, subject to investigation or review, must be added up.[14]

Lesser duty rule

The lesser duty rule in anti-dumping law embodies the cardinal principle that injurious dumping must be counterbalanced, but only with that duty that would be sufficient to counter such injurious dumping

The lesser duty rule in anti-dumping law embodies the cardinal principle that injurious dumping must be counterbalanced, but only with that duty that would be sufficient to counter such injurious dumping. In other words, the importing country has every right to protect its domestic industry from injurious dumping, but not by imposing a duty that is more than what is required to offset the injury.

Imposition of this minimum required anti-dumping duty to counter the injurious effect of dumping is called the lesser duty rule. The rationale is that injurious dumping should be countered by imposing an anti-dumping duty that is not protective in nature.

It has been seen on numerous occasions that even when imposition of lesser duty would be sufficient to remedy the injury being suffered

by the domestic industry, countries impose duty equivalent to the full margin of dumping. The reason behind imposing such duty is not to counter the injurious impact of dumping but to extend undue and prolonged protection to domestic industry.

The ADA does not make imposition of lesser duty mandatory under Article 9.1. It gives the discretion to countries in following the lesser duty rule or imposing duty equivalent to full margin. It has been seen that countries prefer to impose duty equivalent to full margin of dumping. The Indian law in this regard is given in the Customs Tariff Act, as amended in 1999. The law in India is that the anti-dumping duty may be imposed up to the margin of dumping i.e. the difference between the export price and the normal value.[15] Although the Indian law states that dumping duty could be imposed up to the margin of dumping, in practice, India has followed the lesser duty rule.

The ADA does not make imposition of lesser duty mandatory under Article 9.1. It gives the discretion to countries in following the lesser duty rule or imposing duty equivalent to full margin. It has been seen that countries prefer to impose duty equivalent to full margin of dumping

Many countries, in their proposals to the Negotiating Group on Rules have argued that anti-dumping measures are not intended to provide an open and unending protection to domestic industries.[16] The purpose of imposing anti-dumping duty is to ensure that serious injury to the domestic industry is mitigated by the imposition of a corresponding duty equivalent to the level of injury. Logical extension of this argument is that an institutionalized mechanism should be developed, where the amount of anti-dumping duty does not exceed the amount necessary to offset the injury.

Sunset clause

The 'sunset clause'[17] in the ADA signifies the automatic termination of the anti-dumping measure after a certain period of time. Article 11.3 of the ADA Agreement states that any definitive anti-dumping duty shall be continued for not more than five years from the date of imposition. But, if the authorities are convinced that the removal of the anti-dumping duty would be likely to lead to a continuation or recurrence of dumping and injury, then, anti-dumping duty could be extended beyond the period of five years. In other words, this Article gives the mandate to the domestic authorities to continue with the anti-dumping duty for successive terms of five years, if they determine that the removal of the duty would be likely to lead to a continuation or recurrence of dumping and injury.

The purpose of imposing anti-dumping duty is to ensure that serious injury to the domestic industry is mitigated by the imposition of a corresponding duty equivalent to the level of injury

This particular provision has been misinterpreted and misused by many countries and they have continued with the imposition of anti-dumping duties even after the expiry of five years. The imposition of anti-dumping duties beyond the stipulated norm of five years is mainly for protectionist purposes.

The language of Article 11.3 is also responsible for this. According to Article 11.3, in reviewing the imposition of anti-dumping duties after the expiry of the five-year term, the domestic authorities are required to investigate only the likeliness or recurrence of dumping. They are not required to undertake a complete investigation of dumping, serious injury and causality of this injury with dumping.

Countries in the "proposal on sunset"[18] to the Negotiating Group on Rules have argued that a five-year term is sufficient to enable a domestic industry to become competitive, and thus, there should not be any re-imposition of anti-dumping duty after the expiry of five years. The other pragmatic argument in this regard is that extended measures should be imposed only in exceptional circumstances, after a complete investigation of dumping, serious injury and causality of this injury with dumping is made out. In other words, after the expiry of the five-year term, the domestic industry or the domestic authorities seeking to continue the imposition of the anti-dumping duties would have to make out a fresh case, satisfying all the legal requirements for the imposition of anti-dumping duties, as if they were initiating a fresh application. The investigation should be made afresh and should not focus just on the likeliness or the recurrence part of Article 11.3.

Countries in the "proposal on sunset" to the Negotiating Group on Rules have argued that a five-year term is sufficient to enable a domestic industry to become competitive, and thus, there should not be any re-imposition of anti-dumping duty after the expiry of five years

Article 11.3 gives the member countries an opportunity to impose anti-dumping duties for successive terms. This results in overprotection of the domestic industry, loss in consumer welfare, and unduly hinders the market access opportunities of the exporting country.

Trends in imposition of Anti-dumping Measures

In order to understand how anti-dumping measures have been used for protectionist purposes, it would be pertinent to examine the global trends in imposition of anti-dumping measures. In US, the first anti-dumping law was enacted in 1916, as has been discussed above. Between 1934 and 1974, in US, less than 250 cases on anti-dumping were initiated. However, the US Trade Act of 1974 greatly expanded the scope of what constituted dumping, and thus led to a sharp expansion of anti-dumping investigations by the Department of Commerce and the US International Trade Commission. Between 1980 and 1990, US firms initiated more than 500 anti-dumping cases.

In order to understand how anti-dumping measures have been used for protectionist purposes, it would be pertinent to examine the global trends in imposition of anti-dumping measures

Traditionally, the developed countries have been imposing anti-dumping measures. Prior to 1997, the traditional users of anti-dumping like US, EC, Canada and Australia accounted for almost 60 percent of all investigations and 66 per cent of all definite measures imposed. However, of late, this trend has changed. The share of these traditional users has decreased after 1997, and now they constitute for a little more than 50 percent of all investigations.

Notwithstanding the reduced share of the traditional users in imposing anti-dumping duties or launching anti-dumping investigations, the vulnerability of developing and least developed countries, as being targets of anti-dumping measures, is still on the rise. The developing countries that have been most vulnerable to anti-dumping measures are Philippines, Mexico, Hungary, Malaysia, and Thailand. In all these five countries the imposition of anti-dumping measures has increased.

US is one of the largest users of anti-dumping measures and its industries are also one of the largest sufferers of anti-dumping

investigations. EC also resorts to a large number of investigations and initiations of anti-dumping actions.

But, this should not lead us to the conclusion that only developed countries impose anti-dumping measures and developing countries are at the receiving end. After 1997, developing countries have also started to impose anti-dumping duties. There are some interesting trends regarding anti-dumping investigations launched and definitive anti-dumping measures imposed by developing countries. After 1997, the traditional users account for just a little more than 50 percent of all investigations. The new users like India[20], Argentina, Mexico, South Africa, and Brazil account for about 30 percent of all investigations and 31 percent of all definitive measures.

After 1997, developing countries have also started to impose anti-dumping duties. There are some interesting trends regarding anti-dumping investigations launched and definitive anti-dumping measures imposed by developing countries

Examining the trend of affirmative outcomes[21] in anti-dumping measures would be an important yardstick to evaluate how anti-dumping measures are being used for protectionist purposes. It is important to understand that investigations for imposition of anti-dumping measures are initiated, in the majority of cases, on the request of the domestic industry. The domestic industrial lobby is always keen on protectionism.

Thus, the primary motive behind seeking the imposition of anti-dumping duties by the domestic industrial lobby is protectionism. If the rate of conversion of the requests made for anti-dumping investigation to actual or affirmative imposition of anti-dumping measures is high, it indicates that most of the affirmative measures are imposed for protectionist purposes. Such protectionism would encourage inefficiency[22] and shall be against public interest.

After understanding the perspective in which affirmative actions[23] are undertaken, it would be pertinent to examine the trends in the proportion of affirmative outcomes. The proportion of affirmative outcomes by a reporting country is highest for Canada followed by the US and India. If we take the case of US, the proportion of affirmative outcomes is 62 percent. Stated differently, out of 100 requests made for anti-dumping investigations, 62 times anti-dumping duties are imposed.

Examining the trend of affirmative outcomes[21] in anti-dumping measures would be an important yardstick to evaluate how anti-dumping measures are being used for protectionist purposes

Similarly, the proportion of affirmative outcomes is also high for countries like Romania, Japan, Poland and China. The number of anti-dumping actions being initiated by EC against India has increased and so have the number of anti-dumping actions being taken by India against EC. In this context, it would be interesting to note that Indian goods are most often affected by duties imposed by EC, and similarly, out of all anti-dumping duties that have been imposed on the goods of EC from 1995 - 2002, majority of them have been imposed by India.

According to a press release issued by the WTO on 20th April 2004, US had the second highest number of antidumping initiations (21), after India, in the second semester of 2003. This figure is up from 13 in the corresponding period of 2002. In this context it is interesting to note that during the second semester of 2003, there

has been a significant decline in antidumping initiations. In this period, 115 antidumping initiations were reported vis-à-vis 161 initiations in the corresponding period in 2002.

These trends would reveal a very significant pattern in imposition of anti-dumping measures. Now, the anti-dumping measures are not being imposed only by developed countries but also by developing countries. The sum and substance of the entire argument is that protectionism is behind the imposition of anti-dumping measures both by developed and developing countries.

South–South Anti-dumping Measures

An interesting development that has taken place in the imposition of anti-dumping measures is the increase in the number of anti-dumping measures being imposed by developing countries on other developing countries

An interesting development that has taken place in the imposition of anti-dumping measures is the increase in the number of anti-dumping measures being imposed by developing countries on other developing countries. It is interesting to note that the developing countries have been advocating for reforms in the ADA Agreement so that it cannot be used for protectionist purposes, but at the same time they are also becoming increasing users of the ADA for their own protectionist purposes.

In the case of countries like China, Brazil, Chinese Taipei, Russia, Ukraine and India, out of all the anti-dumping measures imposed, the countries of the South have imposed majority of these measures. If we take the case of China[24], out of almost 200 measures that have been imposed, the Southern countries have imposed more than 120. This increasing use of anti-dumping measures amongst the developing countries is a cause of concern. A very recent instance of an anti-dumping dispute is between India and Bangladesh over lead acid batteries.[25]

Anti-dumping and Public interest

An important criticism leveled against anti-dumping law is that it does not take into account public interest issues. The law of anti-dumping, both at the domestic and multilateral level, is concerned with injury to domestic industry. It does not take into account the impact of dumping or the impact of imposing anti-dumping measures on consumer interests or on other factors like competitiveness or competition in the economy.

An important criticism leveled against anti-dumping law is that it does not take into account public interest issues. The law of anti-dumping, both at the domestic and multilateral level, is concerned with injury to domestic industry

It is pertinent to understand that non-linkage of anti-dumping regime with public interest issues is purely because of protectionist reasons. Linking the anti-dumping regime with public interest issues means looking at anti-dumping through the prism of consumer welfare and industrial users.[26] Anyone seeking to use anti-dumping measures for protectionist purposes would never want the inclusion of the interests of consumers and industrial users in the anti-dumping investigations.

In understanding the dynamic nature of anti-dumping and public interest, it would be pertinent to look at the provisions of the ADA.[27] Some of the provisions in the ADA incorporate the issues of public interest, though in a limited manner. Article 6 partly reflects the procedural considerations of public interest issues in

the ADA, as it talks of providing opportunities to the consumer organisations and industrial users to furnish evidence to the investigating authorities.

Article 6 of the ADA talks of providing evidence to the investigating authorities regarding dumping, injury and causality. Article 6.1 of the ADA states that the investigating authorities shall give notice to all interested parties of the information required by them. Investigation authorities will also give them ample opportunity to present all relevant evidence, in writing, about the investigation in question. An important question that may arise on reading this Article is that who are the "interested parties"? The significance of being "interested parties", as could be gathered from Article 6.1 is that they have the right to be notified and also enjoy other procedural rights including access to the full text of the application. For the purposes of the ADA, interested parties include[28]:

Article 6 of the ADA talks of providing evidence to the investigating authorities regarding dumping, injury and causality. Article 6.1 of the ADA states that the investigating authorities shall give notice to all interested parties of the information required by them

(a) An exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association, a majority of the members of which are producers, exporters or importers of such a product[29];
(b) The government of the exporting member[30];
(c) A producer of the like product in the importing member country or a trade and business association, a majority of the members of which produce the like product in the territory of the importing member[31].

This list includes only the business or industrial groups and not the consumer organisations or the industrial users. The inclusion of only business or industrial groups in the list of interested parties points to the dominance of protectionist agenda in the imposition of anti-dumping measures.

The important point to note is that if only the affected business or industrial groups are allowed to furnish evidence, only one side of the story would be revealed. In an anti-dumping investigation, the role of consumers or industrial users is pivotal. Even if the criterion of imposing anti-dumping measures is not changed i.e. even if, before imposing anti-dumping duties the impact of dumping on consumers is not taken in account and the focus is only on injury to domestic industry, still consumers and industrial users are significant in investigating the alleged dumping. Thus, it would be pertinent to empower the consumers and the industrial users to furnish evidence regarding dumping, its injurious impact and causality. Thus, the issue is how can consumer or industrial users become "interested parties" in an anti-dumping investigation.

The important point to note is that if only the affected business or industrial groups are allowed to furnish evidence, only one side of the story would be revealed. In an anti-dumping investigation, the role of consumers or industrial users is pivotal

The list of "interested parties" given in Article 6.11 of the ADA is inclusive. In other words, the list of interested parties given in this Article is not exhaustive and thus there could be more interested parties for the purposes of an anti-dumping investigation. In fact, Article 6.11 states that member countries can include domestic or foreign parties other than those mentioned in the list of interested parties for the purposes of the Agreement. Thus, a member country has the discretion and can include a consumer

organisation or industrial users as interested parties. If chosen as "interested parties", they would have a right to be notified by the investigating authority and also enjoy other procedural rights like having access to the full text of the application.[32]

If consumer organisations or industrial users were allowed to furnish evidence it would unveil the protectionist agenda. Considering the fact that governments are pressurised to impose anti-dumping duties because of hard-core industrial lobbying, it is extremely unlikely that governments would take into account the evidence furnished by the consumer organisations or industrial users

However, it is not mandatory for countries to look for interested parties outside the list given in Article 6.11. The complaining domestic industry, if it is looking for protectionism, would never want any consumer organisation or industrial user to furnish evidence regarding the alleged dumping, as it could weaken its case for imposition of anti-dumping duties. If consumer organisations or industrial users were allowed to furnish evidence it would unveil the protectionist agenda. Considering the fact that governments are pressurised to impose anti-dumping duties because of hard-core industrial lobbying, it is extremely unlikely that governments would take into account the evidence furnished by the consumer organisations or industrial users.

As said earlier, the interested parties enjoy certain rights. The rights that interested parties enjoy are given in Article 6.4. According to Article 6.4, the authorities shall provide information to the interested parties about all relevant non-confidential[33] information that they have used in the anti-dumping investigation, for the presentation of their cases, if the following conditions are satisfied:

1. It should be practicable for the investigating authorities to make the relevant information available. Article 6.4 qualifies supplying timely information by the expression "whenever practicable". In other words, if it is not practicable for the investigating authority to supply timely information, then they can deny information to the interested parties. When the situations would be practicable and when the situations will not be practicable is nowhere explained in the Agreement. Thus, the expression "whenever practicable" could be subjected to many interpretations.
2. The information should not be confidential. In other words, if the information were confidential the investigating authority would not disclose it to the interested parties.

According to the ADA, any information that is confidential in nature or which is provided on a confidential basis by parties to an investigation, upon showing good cause, would be construed as confidential information

According to the ADA, any information that is confidential in nature or which is provided on a confidential basis by parties to an investigation, upon showing good cause, would be construed as confidential information.[34] Such information can be disclosed only with the specific permission of the particular party. The ADA also provides that parties providing confidential[35] information would have to provide non-confidential summaries of the confidential information. These non-confidential summaries must be in sufficient detail to permit a reasonable understanding of the substance of the confidential information submitted.[36] In exceptional circumstances, if a party providing confidential information indicates that such information is not susceptible to non-confidential summary, it would have to give reasons for that.[37]

These provisions in the ADA have ensured that even in those cases where the salient information is being provided in the confidential part of the record, access to information is not denied

to the interested parties and if it is denied there are substantial reasons behind it.

Therefore, if consumer organisations and industrial users were made interested parties, they would have access to not only the relevant non-confidential information but also to the summaries of the confidential information. This would help them to build their case and provide all relevant evidence to the investigating authorities.

One of the most important amendments required in the ADA is to include consumer organisations and industrial users in the list of interested parties in Article 6.11. In other words, it should not be left to the discretion of the countries to make consumer organisations or industrial users interested parties

One of the most important amendments required in the ADA is to include consumer organisations and industrial users in the list of interested parties in Article 6.11. In other words, it should not be left to the discretion of the countries to make consumer organisations or industrial users interested parties. The Agreement should make it mandatory for all the governments to include consumer organisations and industrial users as interested parties. The above discussion should not lead us to the conclusion that there is no provision in ADA that provides opportunities to the consumer organisations and industrial users to supply information related to dumping, injury and causality.

Article 6.12 states that authorities investigating the imposition of anti-dumping duties should provide opportunity to industrial users and consumer organisations to provide information regarding dumping, injury and causality. In other words, the ADA gives opportunities to the consumer organisations and industrial users to provide evidence regarding the alleged dumping. But, this Article does not enunciate that whether it is mandatory for the member countries to accept this evidence provided by consumer organisations and industrial users or not. Thus, the member countries could refuse to accept this evidence and just go with the evidence that has been produced by the domestic industry or business groups or industrial organisations.

A part from giving the opportunity to consumer organisations and industrial users to furnish evidence, ADA does not look at the impact of dumping on consumers or industrial users. It does not take into account factors like "restrictive business practices" or predatory pricing or whether imposition of duty equivalent to the full margin of dumping would restore the profitability of domestic industry or not

A part from giving the opportunity to consumer organisations and industrial users to furnish evidence, ADA does not look at the impact of dumping on consumers or industrial users. It does not take into account factors like "restrictive business practices"[38] or predatory pricing or whether imposition of duty equivalent to the full margin of dumping would restore the profitability of domestic industry or not. Even in the imposition of anti-dumping duty it gives the option to the member countries to impose duty equivalent to the full margin of dumping.

In the ADA, the substantive consideration for public interest issues is reflected in Article 9.1, called the 'lesser duty rule'. This rule has been discussed at other places in the paper. Similarly, the sunset clause, given in Article 11.3, also reflects the public interest issue, though in a limited manner.

Anti-dumping and Safeguards

It has often been argued that safeguards are a better trade remedial measure than anti-dumping duties. It would be pertinent to examine the safeguard provisions as given in GATT.

Article XIX of GATT provides for imposition of safeguard measures. This Article is popularly known as the "escape clause"[39]. This Article allows the countries to take certain measures to restrict imports if the following conditions are satisfied:

1. the product in question is being imported in large quantities.
2. the increase in the imports must be a result of "unforeseen developments"[40] and because of the "obligations incurred by a contracting party under this Agreement including tariff concessions".
3. the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products[41].

The maximum period for the application of a safeguard measure is 4 years. It can be extended if it is determined by competent authorities that their continuation is necessary to prevent or remedy serious injury or that there is evidence that the industry is still in the process of adjusting

However, the suspension of an obligation or the withdrawal of a concession has to be limited to the extent and the time necessary to prevent or remedy the injury caused or threatened. In other words, the safeguard measures are temporary in nature. The maximum period for the application of a safeguard measure is 4 years.[42] It can be extended if it is determined by competent authorities that their continuation is necessary to prevent or remedy serious injury or that there is evidence that the industry is still in the process of adjusting.

Safeguard measures are more comprehensive than anti-dumping measures as they target all imports of a particular commodity unlike anti-dumping investigations, which target only source specific imports. In imposing safeguard measures the injury standard is higher as compared to anti-dumping investigation. Before safeguard measures can be imposed, it is essential to prove that 'serious injury' has taken place to the domestic industry, unlike 'material injury' for the imposition of anti-dumping duties. Every 'serious injury' is a 'material injury' but every 'material injury' is not a 'serious injury'. Examining the global trends would reveal that anti-dumping measures have been used much more than safeguard measures. Thus, it would be interesting to see why anti-dumping measures are used more than safeguards.

Why do countries impose more anti-dumping duties and fewer safeguard measures?

Three reasons are principally responsible for this:

1. The recommendation to impose safeguard duty is subject to domestic industry improving itself and becoming competitive.
2. Members imposing safeguard duties or other safeguard measures are obliged to offer compensation in terms of tariff concessions on other items of export interest to countries whose exports will be affected by safeguard duties.
3. The degree of injury to be proved for the imposition of a safeguard measure is more stringent than that required for the imposition of anti-dumping duties.

Safeguard measures are more comprehensive than anti-dumping measures as they target all imports of a particular commodity unlike anti-dumping investigations, which target only source specific imports

These three factors minimise the chances of protectionism and ensure, at least to some extent, that if a country imposes safeguard measures, it would be because of legitimate reasons to safeguard the interests of domestic industry. The protectionist agenda has

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always dominated the imposition of trade remedial measures. Since imposition of safeguard measures would not help in fulfilling this agenda, the countries prefer to impose anti-dumping measures. In anti-dumping measures, the domestic industry is not bound to become competitive and neither is there any obligation on the country imposing anti-dumping duty to offer compensation in terms of tariff concessions to the country on whose products anti-dumping duties have been imposed.

Chapter 3

Agreement on Subsidies and Countervailing Measures

Historically, the governments of all nation states have always made endeavours to support domestic industries by providing them subsidies. Subsidies are government interventions, which could be in the form of grants, tax exemptions, low interest financing, investments or export credits made to suppliers of goods and services. A government could be providing subsidies because of a host of reasons. A subsidy may be intended to keep prices down, or to maintain the incomes of producers.

One of the principal reasons behind providing subsidies to domestic industries is to empower them to become competitive over time. But, it has been witnessed over the years that government subsidies often end up extending excessive protection to domestic industries and act as barrier to trade by distorting the competitive relationships that develop naturally in a free trading system

One of the principal reasons behind providing subsidies to domestic industries is to empower them to become competitive over time. But, it has been witnessed over the years that government subsidies often end up extending excessive protection to domestic industries and act as barrier to trade by distorting the competitive relationships that develop naturally in a free trading system. It is important to note that while in anti-dumping it is the firm that alone is responsible for the dumping of products, in the case of subsidisation it is the government of a country that provides subsidies to the firm and thus empowers it to export its products at cheap rates. Exports of subsidised products may injure the domestic industry of the importing country producing the same product. It is at this stage that subsidies become injurious and a legal framework is needed to tackle them.

GATT and Subsidy Provisions

The legal framework related to subsidies in GATT is given in Article VI and XVI. Article VI.6 of GATT 94 states that an importing country can impose countervailing duties to offset the subsidies provided by an exporting country to its exported products. The fundamental basis of countervailing measures under the Article is that the subsidy is causing or threatens to cause material injury to the industry or is such as to retard materially the establishment of a domestic industry.

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The duty to countervail subsidy cannot exceed the estimated bounty or subsidy.[43] Article XVI, GATT 94 stipulates two other fundamental obligations on the members.[44] First, the Government of all member-countries shall notify all subsidies incentive to export and /or reducing import and must be ready to discuss limiting the subsidy causing serious prejudice to the interest of another country. Second, a member-country is not to extend export subsidy in the event of its share in the total export of that product being more than equitable percentage.

Countervailing measures

It is interesting to note that notwithstanding the presence of subsidy provisions in GATT and a Subsidy code of 1979, the subsidy provisions at the multilateral trading level were not strong. Neither Article VI nor Article XVI defined the term 'subsidy'. The Uruguay Round (UR) for the first time expanded and strengthened the subsidy disciplines at the multilateral trading level. The institutionalisation and the adoption of different Agreements, along with the Subsidies Agreement, was an integral outcome of the UR. The Subsidies Agreement, for the first time, came out with the definition of "subsidy". Article 1 of the Agreement defines what is 'subsidy'?

The Uruguay Round (UR) for the first time expanded and strengthened the subsidy disciplines at the multilateral trading level. The institutionalisation and the adoption of different Agreements, along with the Subsidies Agreement, was an integral outcome of the UR

Article 1 of the ASCM states that 'subsidy' shall be deemed to exist if:

1. There is a financial contribution by a government or any public body[45], or there is income or price support, as it is understood in Article XVI of GATT.[46]
2. A benefit is conferred as a result of this financial contribution.[47]

Stated differently, for a subsidy to exist there has to be a financial contribution and this financial contribution should confer a benefit. A financial contribution alone would not qualify as a subsidy until a benefit is conferred. The concept of "financial contribution" needs to be examined in some detail. It is important to understand that "financial contribution" means there is a charge on the public account. If no charge accrues on the public account, there is no financial contribution. Thus those government interventions, which do not burden the government with any expenditure, but may be adversely affecting competition, would not qualify as a subsidy under the ASCM[48].

After understanding the concept of "subsidy", the next issue is to understand what is meant by a prohibited subsidy.

According to Article 1.2 of the ASCM, a subsidy to be called a prohibited subsidy or actionable subsidy or subsidy on which countervailing duties could be imposed has to be specific in accordance with the provisions of Article 2. The fundamental behind a specific subsidy being subject to ASCM derives from the premise that their imposition necessarily distorts the allocation of resources. Specificity may be to an enterprise, to a particular sector or to a region. According to Article 2 of the ASCM, specificity shall exist:

According to Article 1.2 of the ASCM, a subsidy to be called a prohibited subsidy or actionable subsidy or subsidy on which countervailing duties could be imposed has to be specific in accordance with the provisions of Article 2

1. Where the granting authority provides such subsidy to certain enterprises.
2. Where the granting authority establishes conditions for eligibility for a subsidy.
3. Where it is difficult to assess whether a subsidy is specific or not, other factors such as the use of subsidy programme by a limited number of enterprises, predominant use by certain enterprises would be considered.
4. Where the granting authority limits the subsidy to certain enterprises within a designated geographical region
5. Where prohibited subsidies are given.

If a subsidy is not specific, then even if it is a financial contribution that confers benefit, it would neither be prohibited, nor actionable nor could countervailing duties be imposed on them.

Structure

Structurally ASCM Agreement can be divided into four divisions. Parts I, II, III, IV, and V comprise the first division. The first division provides for definitions as that of subsidy discussed above and categorisation of subsidies into three types, and procedure to be adopted by a government to apply countervailing measures against subsidised imports. Subsidies are classified into three categories: permissible, actionable and prohibitive (mentioned in traffic light system as GREEN, AMBER or YELLOW and RED).

Green subsidies are neither prohibited nor subject to countervailing measures. They are not prohibited nor subject to countervailing measures because they are unlikely to lead to trade distortion. To get the benefit of green light status of a subsidy, a government is to notify the program "in advance of its implementation"

Green subsidies are neither prohibited nor subject to countervailing measures. They are not prohibited nor subject to countervailing measures because they are unlikely to lead to trade distortion. To get the benefit of green light status of a subsidy, a government is to notify the program "in advance of its implementation". Amber or yellow light subsidies are not prohibited per se but may be subject to countervailing duties if they cause adverse effects. Adverse effect could exist in three forms[49]: injury to domestic industry, nullification or impairment of benefits accruing directly or indirectly to a member and serious prejudice.

Red light subsidies are prohibited subsidies as defined by Article 3 of the ASCM Agreement. If a country is providing a red light subsidy, it may be subject to remedies.[50] The second division comprising Part VI and VII is concerned with procedural law on establishment of institutions, notification and surveillance. The third division comprising Part VIII and IX provides for special treatment for developing, transitional and Least Developed Countries and the last division, Part X and XI deals with dispute settlement.

Prohibited Subsidy

Prohibited subsidies or red light subsidies are defined in Article 3 of the ASCM. These subsidies are by definition specific and therefore countervailing duties could be imposed on them. Article 3 singles out two types of subsidies: export subsidies and import substitution subsidies.

Export subsidies

Red light subsidies are prohibited subsidies as defined by Article 3 of the ASCM Agreement. If a country is providing a red light subsidy, it may be subject to remedies

Export subsidies are subsidies contingent, in law or in fact, whether solely or as one of several conditions, upon export performance. In other words, prohibition for export subsidies applies whether export performance is the only condition or one of several conditions for the subsidy and it covers any measure that, although not legally contingent on export performance, is demonstrated to be "in fact tied to actual or anticipated exportation or export earnings".

The ASCM provides in one of its Annexures[51], an illustrative list of subsidies that are export subsidies and are thus prohibitive.

This list is illustrative, which means that this list is non exclusive and not exhaustive. In other words, any subsidy that can be brought within the ambit of Article 3 would be a prohibited subsidy.

In understanding export subsidies a distinction is often drawn between *de jure* export subsides and *de facto* export subsidies. It is not difficult to identify *de jure* export subsidies; though identifying *de facto* export subsides could be difficult.

Import substitution subsidies are defined as subsides contingent whether solely or as one of several other conditions, upon the use of domestic over imported goods

Footnote 4 to Article 3.1(a) provides that de facto export subsides exist when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. Simply because a subsidy is granted to enterprises which export it cannot be considered to be an export subsidy.

Import substitution subsidies

Import substitution subsidies are defined as subsides contingent whether solely or as one of several other conditions, upon the use of domestic over imported goods[52]. Thus, if any subsidy were being provided to domestic industry for using domestic goods instead of imported goods, it would be a prohibited subsidy. This provision includes both *de jure* and *de facto* subsidies.

Trends in imposing Countervailing duties

The use of countervailing duties by governments has been decreasing between 1995 and the first half of 2003. The total number of countervailing duty initiations by exporting countries from 1995 and first half of 2003 have been 161.[53] In 1995 the number of initiations were just 10. This figure increased to 41 in 1999, but decreased to 7 in the first half of 2003.[54] Traditionally, the US and EC have been the largest users of countervailing duties. US has continued to be the predominant user though India is also not lagging behind. As an exporting county up to 30th June 2003, India has initiated 36 countervailing duty initiations.[55]

Decreasing use of countervailing duties

The use of countervailing duties by governments has been decreasing between 1995 and the first half of 2003. The total number of countervailing duty initiations by exporting countries from 1995 and first half of 2003 have been 161. In 1995 the number of initiations were just 10

It is interesting to note that unlike anti-dumping measures the use of countervailing measures has not increased over the years. In fact, the trends above show that the use of these measures has actually reduced over the years. This trend amply demonstrates that the use of countervailing measures, as one of the trade remedial tools, is not that popular amongst the member countries. One of the possible reasons behind countervailing measures not being used as frequently as anti-dumping measures is that subsidy calculation methodologies are less established than anti-dumping calculations and are also more complicated. Anti-dumping methodologies are well established and thus countries prefer to use them instead of imposing countervailing duties. The other important reason for less use of countervailing measures is that under the ASCM, there is a time – bound schedule of phasing out the prohibited subsidies. If the countries do not phase out these subsidies, they would be violating their commitments and these

violations would more likely be challenged under the DSB mechanism than via an action for imposition of countervailing duties.

The figures related to imposition of countervailing duties amply demonstrates that the use of anti-dumping measures is much more than that of countervailing measures because of protectionist purposes.

Chapter 4

Analysis of Jurisprudential Developments

The discussions in the earlier chapters have amply demonstrated that the use of trade remedial measures, especially anti-dumping, for protectionist purposes has witnessed a remarkable surge. The number of cases related to anti-dumping and countervailing measures going to the DSB has, thus, witnessed an exponential increase in the last few years.

Excessive use of anti-dumping and countervailing measures endangers the trade interests of other countries by denying them market access and thus resulting in condensed export earnings

Excessive use of anti-dumping and countervailing measures endangers the trade interests of other countries by denying them market access and thus resulting in condensed export earnings. Therefore, in the multilateral trading regime established under the umbrella of the WTO, the significance of the ADA and the ASCM for member countries is mammoth.

It is in this context that we need to examine the case law that has developed on these two Agreements and its possible ramifications for the member countries.

This chapter is an attempt to understand a few jurisprudential developments that have evolved relating to these two agreements over the years. The fundamental aim is to look at the interpretations developed by the AB and the Panel through the prism of protectionism. This would be done by taking each agreement separately.

Case Law on the ADA

Legally speaking, before an anti-dumping duty can be levied, it is necessary to prove that:[56]

1. Dumping of goods has taken place.
2. There was an injury to the domestic industry.
3. There exists a causal link between dumping and injury.

This chapter is an attempt to understand a few jurisprudential developments that have evolved relating to these two agreements over the years

Zeroing

In the *Cotton-type bed-linen case* the use of the principle of 'zeroing' for the calculation of anti-dumping margins was found to be inconsistent with Article 2.4.2 of the ADA. The AB upheld the decision of the Panel.

The issue of 'Zeroing' has been the bone of contention between developed and developing countries. The developed countries have often used the principle of 'Zeroing' as a pretext for employing the tool of anti-dumping. In the *Cotton-type bed linen* case the

Panel and the AB removed the ambiguity surrounding the interpretation of Article 2.4 of the AD Agreement. The practice of 'Zeroing' very unfairly ignores all import prices from an exporter that are not dumped. By using only those import prices calculated to be dumped this method results in an unfair increase of the dumping liability of exporters. The correct methodology should be that the dumping margins should be based on summation of all the import transactions so that it reflects the totality of trade from a specific exporter. This would bring it in conformity with the principle laid down in Article 2.4.2 of the ADA.

The issue of 'Zeroing' has been the bone of contention between developed and developing countries. The developed countries have often used the principle of 'Zeroing' as a pretext for employing the tool of anti-dumpingdumped

By holding that 'zeroing' as an absolute term is inconsistent, the AB has discouraged the practice of considering negative dumping margin as zero margin for the purpose of calculating the weighted average dumping margin. This interpretation would serve the interests of member countries as it would be difficult to slap arbitrarily determined excessive anti-dumping duties on their products by employing the weapon of 'zeroing' principle.

Volume of dumped imports

In the *cotton type bed linen case*, Article 3[57] of ADA was the subject matter of enquiry. The issue involved pertained to the interpretation of paragraph 1 and 2 of Article 3 of the ADA.

By holding that 'zeroing' as an absolute term is inconsistent, the AB has discouraged the practice of considering negative dumping margin as zero margin for the purpose of calculating the weighted average dumping margin

Article 3.1[58] of the ADA states that a determination of injury to the domestic industry due to dumping should be based on "positive evidence" and "objective examination" of

1. the volume of imports that have been dumped and its impact on the prices of the like products in the domestic market.
2. the impact of the dumped imports on the domestic producers of the products affected.

The two key words in this Article are "positive evidence" and "objective examination" and they hold the key to the interpretation of this Article.

In this case, the conclusion reached by the European Communities was that all imports from Indian exporters and producers for which no individual dumping margin was calculated were being dumped along with those producers or exporters who were examined individually and found to be dumping. In other words, even those imports against which there was no evidence of dumping were also deemed to be dumped. Thus, in their determination of injury, contrary to the provisions of Article 3.1, the EC also included those imports that were not being dumped. This conclusion was contested by India as a violation of paragraphs 1 and 2 of Article 3 of the ADA.

In this case, the conclusion reached by the European Communities was that all imports from Indian exporters and producers for which no individual dumping margin was calculated were being dumped along with those producers or exporters who were examined individually and found to be dumping

The Panel in this case had held that there is no indication in Articles 3.1 and 3.2[59] regarding how to determine the volume of dumped imports. The Panel, therefore, took the help of Article 9.4[60] of the ADA to interpret these Articles and found no inconsistency in the measure adopted by the European Communities.

The AB overruled this decision of the Panel. It was held that injury determination to the domestic industry was to be made on the basis of "positive evidence" and involve "objective examination" of the dumped imports and not those imports that have not been dumped. It was further held that Article 3.1 does not specify any methodology that investigating authorities are required to follow when calculating the volume of dumped imports, but this does not imply that the investigating authorities have absolute freedom in determining their own methodology or adopting any methodology that they may please to determine the volume and effects of dumped imports.

It was held that injury determination to the domestic industry was to be made on the basis of "positive evidence" and involve "objective examination" of the dumped imports and not those imports that have not been dumped

This interpretation is of interest for developing countries. The AB, through its interpretation of Articles 3.1 and 3.2 has nullified the prospects of adopting arbitrary methodologies to determine the volume of imports that have been dumped.

The other important issue in this case was regarding the interpretation of Article 9.4 vis-à-vis Articles 3.1 and 3.2. It is important to note that the European Communities used Article 9.4 to develop their methodologies to determine the volume of dumped imports for Articles 3.1 and 3.2.

The AB then examined Article 9.4. Article 9.4 authorises the imposition of a certain maximum anti-dumping duty on imports from non- examined producers. The AB held that it is difficult to understand how Article 9.4 could be used to interpret Articles 3.1 and 3.2. Article 9, which talks of imposition and collection of anti-dumping duties, would come into picture only after determination of injury on the basis of volume of dumped imports under Article 3 has been made. It cannot be taken recourse to in determining injury to the domestic industry by finding out the volume of dumped imports.

On this issue the AB finally concluded by saying that European Communities had failed to determine the "volume of dumped imports" on the basis of "positive evidence" and an "objective examination" as explicitly required by the text of Articles 3.1 and 3.2 of the ADA.

Constructive remedies

Article 15 of the ADA clearly articulates that while imposing anti-dumping measures against developing countries the special situation of developing countries should be taken into account

Article 15[61] of the ADA clearly articulates that while imposing anti-dumping measures against developing countries the special situation of developing countries should be taken into account. It further enunciates that the possibilities of constructive remedies shall be explored before applying the anti-dumping duties on the products of develoing countries. This particular Article apart from recognising the special and differential treatment principle also connotes that anti-dumping measures are to be used only as a last resort after having exhausted all the possible constructive remedies.

The Panel on *Cotton type bed line case* had said that Article 15 does not require that constructive remedies must be explored, but

rather it states that possibilities of such remedies must be explored. The Panel further went on to state that in light of object and purpose of Article 15 exploration of possibilities must be actively considered by the developed country authorities with a willingness to reach positive outcome. According to the Panel Article 15 only imposes an obligation to actively consider only the possibility of a constructive remedy prior to the imposition of an anti-dumping measure.

The ruling of the Panel indicates the non-mandatory nature of Article 15. The S&D provision enshrined in Article 15 is just an obligation of good faith

Mandatory evaluation

It has been said by the AB in the *Thailand-H beams case* that Article 3.4 of the ADA[62] requires a mandatory evaluation of all the factors listed in the provision, which can be reviewed under Article 17.6(ii) of the ADA.[63]

Article 3.4[64] of the ADA states that the examination of the impact of dumped imports on the domestic industry shall be based on the evaluation of all the relevant economic factors and indices mentioned in that particular Article. In the *Thailand-H beams case* related to dumping of Angles, Shapes and Sections of Iron or Non-Alloy steel, the Panel decided that Article 3.4 requires a mandatory evaluation of all the 15 factors given in the provision. Such detailed investigation would reduce arbitrariness and enhance transparency, as it would be a broad based investigation.

While interpreting Article 3.4, the panel had held that this Article does not permit of any other interpretation then the one they gave and thus the question of accepting the "permissible" interpretation advanced by the investigating authority, as per Article 17.6(ii)[65] does not arise.

In this particular case the application of Article 17.6(ii) was not put to test. In other words, if Article 3.4 had more than one "permissible" interpretations then the interpretation that was being advanced by the investigating or the importing country would have been accepted. It is pertinent to note that this particular Article is not in line with the true spirit of the dispute resolution mechanism. It is difficult to understand why a dispute resolving authority would accept the interpretation of an Article given by one of the parties simply because it is one of the "permissible" interpretations. A "permissible" interpretation may not be legally the most acceptable interpretation.

In this particular case the application of Article 17.6(ii) was not put to test. In other words, if Article 3.4 had more than one "permissible" interpretations then the interpretation that was being advanced by the investigating or the importing country would have been accepted

This interpretation is in favour of member countries, as it would ensure a comprehensive and detailed investigation in the importing country before it could impose anti-dumping duties on the products of the exporting country.

The panel in EC - Bed Linen case, and in Mexico-Corn Syrup case also stated the mandatory evaluation of the 15 factors given in article 3.4 of the ADA before imposing anti-dumping duties.

Complete Review

In the *Thailand –H beams case* the Panel observed that assessment in the review could only be done on the factual basis provided in

the documents available with both the parties and/or their counsel. The AB reversed the interpretation.

An important jurisprudential development has been that in determination of injury to the domestic industry the panel has to take into cognisance all the factors and evidence and it cannot rely only on the non-confidential information that has been disclosed to the opposing party as the only piece of evidence. The panel, in determining whether injury to the domestic industry has been caused or not, has to take into account the totality of evidence i.e. both the confidential and the non-confidential information.

An important jurisprudential development has been that in determination of injury to the domestic industry the panel has to take into cognisance all the factors and evidence and it cannot rely only on the non-confidential information that has been disclosed to the opposing party as the only piece of evidence

In the *Thailand – H beams case the* Panel had held that in determining an injury, only those facts that have been formally and explicitly mentioned in the documents to which the interested parties had access would be considered. The ABoverruled this decision stating that the Panel had erred in interpreting the provisions "positive evidence" and "objective examination" given in Article 3.1 of the ADA.

The AB held that the meaning given by the Panel to the phrase 'positive evidence' is too narrow and not in consonance with the other provisions of the Agreement. Lone reliance on non-confidential information for determining the correctness of the proposed anti-dumping measures is not the right approach.

According to the AB 'positive evidence' cannot be limited just to the evidence that has been disclosed to the parties or which is apparent to them. 'Positive evidence' also includes the confidential information that is not supplied to the other party. Thus it was held that an injury determination conducted pursuant to the provisions of Article 3 of the ADA must be based on the totality of evidence and not just on the non confidential information that is disclosed to the defending party.

The AB held that a careful perusal of Articles 6 and 12 amply demonstrates that the final determination should contain all relevant information on matters of fact and law and reasons, which have led to the imposition of the final measure. Thus the AB concluded that in determining the injury under Article 3.1 based on 'positive evidence' and 'objective examination', the need is to take cognisance of all relevant reasoning and facts that are before the Panel.

According to the AB 'positive evidence' cannot be limited just to the evidence that has been disclosed to the parties or which is apparent to them. 'Positive evidence' also includes the confidential information that is not supplied to the other party

The AB then went on to interpret Articles 17.5[66] and 17.6, which are invariably linked to the issue of determination of injury, to further drive home the point regarding injury determination. Articles 17.5 and 17.6 gives power to the Panel to review the investigating authority's final determination.

Interpreting Article 17.5, the AB held that anti–dumping investigations frequently involve both confidential and non-confidential information. Article 17.5(ii) clearly enunciates that the Panel, constituted on the request of the complaining party, would look into the facts that have been made available by the

domestic producers to the domestic authorities of the importing country. The facts made available to the importing country's authorities include both confidential and non-confidential information. This Article nowhere states that only the non-confidential information provided to the importing country's authorities would be the subject matter of the panel's investigation.

The AB further held that careful perusal of Article 17.6(i) also shows that "facts" referred to in this Article embrace all confidential and non-confidential facts, and thus there is no logic in arguing that the Panel should take cognisance only of non-confidential information.

This interpretation is a crucial one, as it would make the entire anti-dumping investigation more broad based and relatively more transparent. The Panel's interpretation of basing the injury determination only on the non-confidential information would have meant that the reasons that were not disclosed would never undergo any judicial scrutiny

This interpretation is a crucial one, as it would make the entire anti-dumping investigation more broad based and relatively more transparent. The Panel's interpretation of basing the injury determination only on the non-confidential information would have meant that the reasons that were not disclosed would never undergo any judicial scrutiny. Such an interpretation could give birth to the possibility of misusing the provisions of the ADA by classifying all relevant information as "confidential" and supplying only trivial information as "non-confidential" information. In such cases the defending parties would never get any opportunity to defend their interests in an appropriate manner. The distinction between "confidential" and "non confidential" information is often used to further the protectionist agenda.

Dispute Settlement under ADA and DSU

In the case of Guatemala alleging dumping of 'Portland cement' from Mexico,[67] the complaint of Mexico to DSB did not identify the measures that it was complaining against. So the AB reversed the decision of the panel-exercising jurisdiction. The application was not laid according to Article 6.2 of the DSU but the AB stressed that its decision was without prejudice to Mexico's right to pursue fresh disputes.

In the *Guatemala – Mexico Portland cement case* the AB clarified the relationship between Article 17 of the ADA and the rules and procedures of the DSU. It was held that the ADA is a covered agreement listed in Appendix 1[68] of the DSU and therefore the rules and procedures of the DSU would apply to those disputes that are brought in accordance with the consultation and dispute settlement provisions contained in Article 17 of ADA.

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The relationship was further explored in this case by linking Article 17 of ADA with different Articles of DSU. The Panel in this case had said that since Article 17 of the ADA provides rules for consultation and dispute settlement specific to anti-dumping cases, it would replace the provisions given in the DSU.

As a first step it would be important to nullify this argument. An understanding of Article 1.2[69] of the DSU is warranted to dispel the argument given by the Panel. Article 1.2 of the DSU states that the application of rules and procedures of the DSU shall be subject to those special or additional rules and procedures on

dispute settlement contained in those agreements that are listed in Appendix 2[70] of the DSU. It further states that these special or additional rules and procedures would prevail only to the extent that there is a difference between them and the provisions given in the DSU. Thus, if there is no difference between the rules of the DSU and the special or additional rules and procedures contained in Appendix 2, then both would be applied together.

Article 1.2 of the DSU states that the application of rules and procedures of the DSU shall be subject to those special or additional rules and procedures on dispute settlement contained in those agreements that are listed in Appendix 2 of the DSU

Thus, the panel's conclusion that Article 17 of the ADA provides a complete set of rules for dispute settlement specific to anti–dumping cases and replaces the more general approach of the DSU is flawed.

Taking this argument forward, the AB examined the relationship of Article 17.5 of the ADA and Article 6.2 of the DSU. The AB held that Article 17.5 of the ADA and the provisions of Article 6.2 of the DSU are complimentary to each other. Simply because Article 17.5 is mentioned in Appendix 2 of the DSU does not mean that it could override the provisions of the DSU. In this case the AB held that a request made to a Panel concerning a dispute brought under the ADA must comply with the relevant dispute settlement provisions given in that Agreement and in the DSU.

This is a classic case of treaty conflicts. However, the interpretation adopted by the AB was an apposite interpretation. In the process of interpretation of legal text, the first step should always be to harmoniously construe all the relevant provisions of all the relevant agreements, as no provision could be rendered redundant. The interrelationship established between the dispute settlement provisions of ADA and DSU is very important, as a complete overlooking of the DSU in all disputes pertaining to anti-dumping would negate the provisions of the Undertaking on Dispute Settlement.

Case law on the ASCM

According to Article 1 of ASCM a subsidy exists when there is a financial contribution by a government or any public body within the territory of a member thereby conferring a benefit. Further, a subsidy, before it is deemed prohibited, actionable or subjected to countervailing measures must be proved to be "specific" as defined in Article 2 of the ASCM.

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Before countervailing duties (CVDs) are levied it needs to be proved that-

1. There has been subsidisation of imports,
2. Injury was caused to the domestic industry, and
3. There was a causal link between the subsidised imports and the domestic injury.

Interpretation of "subsidy" in ASCM

As has been discussed in the earlier chapter, the definition of "subsidy" given in ASCM contains two discrete elements. The most important element in this definition is regarding the "benefit"

conferred by the "financial contribution" provided by the government. An important question to be answered is what is meant by the term "benefit" occurring in Article 1.1(b).

One of the most cardinal elements involved in the interpretation of the term "benefit" is to understand that "benefit" does not exist in the abstract. In *Canada – Aircraft* case it was held that a "benefit" must be received and enjoyed by a beneficiary or a recipient. In order to support the argument that a "benefit" must be received by a beneficiary or a recipient it would be pertinent to look at Article 14 of the ASCM for contextual support. Article 14 of the ASCM states that every member country's national legislation shall provide for the method of calculating the benefit conferred to a recipient pursuant to paragraph 1 of Article 1of the ASCM. The mention of Article 1.1 in Article 14 is a clear pointer to the fact that "benefit" is used in Article 14 in the same sense as it is in Article 1.1. Therefore the word "benefit" in Article 1.1 is concerned with "benefit to the recipient".

As has been discussed in the earlier chapter, the definition of "subsidy" given in ASCM contains two discrete elements. The most important element in this definition is regarding the "benefit" conferred by the "financial contribution" provided by the government. An important question to be answered is what is meant by the term "benefit" occurring in Article 1.1(b)

The AB held that for a "financial contribution" to confer "benefit" it is necessary that the recipient must be better off than before. In determining whether "benefit" has been conferred or not, marketplace would provide an appropriate basis. The AB held that a "benefit" arises in the case where a recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. Simply because a cost has accrued to the government or there is a charge on the public account, it does not mean that a "benefit" is conferred as required under Article 1.1(b) of the ASCM.

The AB held that for a "financial contribution" to confer "benefit" it is necessary that the recipient must be better off than before. In determining whether "benefit" has been conferred or not, marketplace would provide an appropriate basis

In *United States – Leaded Bars*[71] case the AB further clarified the meaning of a "benefit" in Article 1.1(b). In this case the AB further held that "benefit to the recipient" means that such a recipient must be a natural or legal person, and does not include a benefit to a company's productive operations. In this particular case it was once again reiterated that whether a financial contribution confers a "benefit" in terms of Article 1.1 (b) depends on whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.

In *US – tax treatment of foreign sales of the corporations*, US argued that the use of the present tense of the verb "is conferred" in Article 1.1 of the ASCM shows that an investigating authority must demonstrate the existence of "benefit" only at the time "financial contribution" was made. However, this argument was overruled and it was held that Article 1.1 does not address the time at which the "financial contribution" and/or benefit must be shown to exist.

In US – tax treatment for foreign sales of the corporations case and Canada – Autos case, the AB had the opportunity to interpret Article 1.1(a)(1)(ii) of the ASCM. This Article states that if government revenue that is otherwise due is forgone or not collected it would be construed as "subsidy" under ASCM

In *US – tax treatment for foreign sales of the corporations* case and *Canada – Autos* case, the AB had the opportunity to interpret Article 1.1(a)(1)(ii) of the ASCM. This Article states that if government revenue that is otherwise due is forgone or not collected it would be construed as "subsidy" under ASCM. In *US – tax treatment for foreign sales corporations* case, the AB stated that

revenue forgone implies that that less revenue has been raised than otherwise would have been raised. The government by forgoing revenue has given up an entitlement to raise revenue that it would have otherwise raised. The AB further held that in order to find out the actual revenue forgone it is essential to develop a benchmark against which a comparison could be made.

In theUS-Australia Automotive case the Panel held that only Grants and not Advances made by the Government would fall under the purview of Article 3.1(a) of the ASCM

The AB held that revenue that would have been otherwise "raised" *i.e.* the total amount of revenue that would have been collected had no revenue been forgone would be the benchmark to compare with the revenue that has been actually raised. This point of AB could be understood with the help of an example. If we assume that according to the fiscal target of particular country 10 units of revenue is to be generated, but that country generates only 8 units of revenue because it gave a tax concession to a particular entity, then in this case the country has forgone 2 units of revenue. In this case 10 units is the benchmark and 8 units is the actual revenue that has been raised. If the actual revenue has decreased because revenue due from a particular enterprise or industry was not collected, it would be revenue forgone which was otherwise due. Such a case would fall under Article 1.1(a)(ii) of the ASCM.

In *Canada – Autos* case the AB gave a ruling on exemption of import duties. It was held that providing import duty exemptions means that the government has "given up an entitlement to raise revenue that it could 'otherwise' have raised". Thus, providing import duty exemptions would be forgoing or not collecting government revenue that was otherwise due in the sense in which it is understood in Article 1.1(a)(1)(ii).

Interpretation of "in-fact" part of Article 3.1(a)

The Panel, while interpreting the "in fact" part of Article 3.1(a) of the ASCM held that all the facts concerning the grant or maintenance of the challenged subsidy, including the nature of the subsidy, its structure and operation and the circumstances in which it was provided needs to be examined to decide whether a particular subsidy is "contingent...in fact" upon export performance or not

In the*US-Australia Automotive case*[72] the Panel held that only Grants and not Advances made by the Government would fall under the purview of Article 3.1(a)[73] of the ASCM. In this case Advances in the form of a loan contract amounting to $A25 million was made available by the Australian Government to an Australian company, which was an exporter of automotive leather, on extremely beneficial terms. The Australian Government also provided $A30 million of Grant to this company. These financial measures constituted one single economic package that was made available to this particular company. The issue was whether these financial measures were subsidies as understood in Article 3.1(a) of the ASCM or not.

The Panel, while interpreting the "in fact" part of Article 3.1(a) of the ASCM held that all the facts concerning the grant or maintenance of the challenged subsidy, including the nature of the subsidy, its structure and operation and the circumstances in which it was provided needs to be examined to decide whether a particular subsidy is "contingent…in fact" upon export performance or not. In other words, the facts considered, collectively, must demonstrate that the grant or maintenance of the subsidy is conditioned upon actual or anticipated exportation or export earnings.

This interpretation is a correct interpretation as it talks of evolving a broad based approach in determining the pith and substance or the true nature and character of the subsidy in question. This interpretation assumes much significance in today's trading world where subsidies by developed countries has played a major role in distorting international trade.

Developed countries, because of their huge resource base, have continuously provided gigantic subsidies by somehow managing to find loopholes in the existing agreement. It is very important to understand the true nature and character of these subsidies so as to be able to appreciate the real purpose behind these subsidies. For this to happen it is of utmost importance that the law related to subsidies in the existing agreements should be broadly construed. Narrowly construing the provisions of subsidies could undermine the potential benefits, which these Agreements have to offer to developing countries.

After these broad and forward-looking interpretations, the Panel committed the mistake of wrongly applying these interpretations to the facts on hand. The Panel concluded that the subsidy elements of the economic package need to be examined separately and therefore the Grant contract would have a separate legal character as compared to the Advance contract. Therefore, the Panel construed the Advance Loan contract, separately, in a strict pedantic manner and held that since there is not a sufficiently close tie between the loan and anticipated exportation or export earnings, it is not an export subsidy.

The substantive law regarding Article 3.1(a) of the ASCM was also reiterated in the Canada-Aircraft case. It was observed that for a subsidy to be prohibited under Article 3.1(a) it has to be conditional or dependent for its existence on export performance. But this test of relationship of conditionality or dependence cannot and should not be too narrowly construed

This is in contravention to the principle that the Panel evolved through interpretative jurisprudence. The Advance loan contract should have been construed as an integral part of the "assistance package" that the Australian government was providing to this domestic industry and therefore should have been analysed in totality of all the subsidy measures being provided. By segregating the subsidy measures the Panel has given sanction to structure the subsidy programme in such a way that the provisions of the Agreement could be avoided.

Reiterating the substantive law on Article 3.1(a)

The substantive law regarding Article 3.1(a) of the ASCM was also reiterated in the *Canada-Aircraft case*[74]. It was observed that for a subsidy to be prohibited under Article 3.1(a) it has to be conditional or dependent for its existence on export performance. But this test of relationship of conditionality or dependence cannot and should not be too narrowly construed. The need is to examine a whole lot of factors in determining whether a subsidy is conditional or dependent upon export performance.

The test of conditionality or dependence could at times become very subjective and could be interpreted in many different ways. While interpreting or applying this test it should always be remembered that fairness in international trade demands that export subsidies be denounced.

If this test is not applied properly, as was done in the *US-Australia Automotive case*, it could seriously hinder the case law development on this front. Such interpretations or applications have to be understood in the background of increasing abuse of subsidies by developed countries that have serious consequences on the exports of developing countries. The picture on this front would get clearer as the case law further develops.

In the Canada-Aircraft case it was held that the key word in Article 3.1(a) is "contingent" and the construction of this Article hinges on the interpretation of this particular word

In the *Canada-Aircraft case*[75] it was held that the key word in Article 3.1(a) is "contingent" and the construction of this Article hinges on the interpretation of this particular word. The plain grammatical meaning of this word is "conditional" or "dependent for its existence on something else". Reading this Article along with footnote 4 of the ASCM, it means that for a subsidy to qualify as an export subsidy it must be conditional or dependent upon export performance. So the logical question that arises is when would a subsidy be described conditional or dependent upon export performance?

Interpretation of "in-law" part of Article 3.1(a)

In the Canada-Autos case it was held that a subsidy is contingent "in law" upon export performance when the existence of that condition can be demonstrated on the basis of the very words that exist in that particular legislation

In the *Canada-Autos case*[76] it was held that a subsidy is contingent "in law" upon export performance when the existence of that condition can be demonstrated on the basis of the very words that exist in that particular legislation. Such an existence can also be demonstrated by understanding the important implications of the language used in these legal instruments. In other words it is not necessary that the particular legislation should have a clear-cut provision for a subsidy to be export contingent. Even an indirect provision or an ingeniously drafted subsidy provision could be export contingent if it satisfies the basic test of being conditional or dependent upon export performance.

This interpretation suggests that a member country cannot eschew its subsidy obligation by employing skillful legislative drafting as a smokescreen. This interpretation is in the interest of developing countries, as it would curb the instances of ingenious legislations being drafted by developed countries with the sole aim of legalising and institutionalising otherwise illegal export subsidies.

Thus in the US-tax treatment for Foreign Sales Corporation case both the Panel and the AB held that the subsidy for property produced within US and held for use outside the US is an export contingent subsidy irrespective of the nature of subsidy that is given to property that is produced outside US and destined for use outside US

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Article 3.1(b) – "Contingent upon the Use of Domestic Goods"

In *Canada – Autos* case the AB while examining the Canadian value added requirements, stated that Article 3.1(b) of the ASCM contains both the provisions of contingent "in law" and contingent "in fact". In other words, a subsidy whether contingent in law or in fact upon the use of domestic over imported goods is prohibited.

Chapter 5

Conclusion

The discussion in the above chapters reveals the trends in imposition of all three trade remedial measures. These trends show an insignificant use of countervailing and safeguards measures and a significant increase in the use of anti-dumping measures. In other words, the trends show that out of the three trade remedial measures, anti-dumping has been used the most. The figures in terms of number of initiations for anti-dumping cases are ample testimony to the fact that anti-dumping is the most frequently employed trade remedial measure.

The discussion on anti-dumping measures has exposed the protectionist nature of anti-dumping provisions. Countries have been imposing anti-dumping duties to extend illegitimate protection to their domestic industries. The paper took three criteria to look at the protectionist nature of anti-dumping duties

The discussion on anti-dumping measures has exposed the protectionist nature of anti-dumping provisions. Countries have been imposing anti-dumping duties to extend illegitimate protection to their domestic industries. The paper took three criteria to look at the protectionist nature of anti-dumping duties. The criteria taken in the paper are the manner in which the legal provisions of the agreement have been interpretated, the trends in imposition of anti-dumping measures and the relationship of anti-dumping law vis-à-vis public interest.

The paper took three specific provisions of the ADA and demonstrated that these provisions have been interpreted with the objective of pursuing the protectionist agenda. Similarly, the discussion on anti-dumping and public interest has shown that though the incorporation of public interest issues in the ADA is a significant improvement over what existed in the 1979 and 1969 anti-dumping codes, public interest issues are still not considered to the extent that they should be considered, in anti-dumping investigations.

This inadequate non-incorporation of public interest issues in anti-dumping investigations is also because of protectionist purposes. There is a mammoth difference in the number of anti-dumping initiations over safeguard measures

This inadequate non-incorporation of public interest issues in anti-dumping investigations is also because of protectionist purposes. There is a mammoth difference in the number of anti-dumping initiations over safeguard measures and is a clear pointer to the fact that it is the protectionist propensities of countries and not genuine concern for domestic industries that propels them to impose anti-dumping measures.

The chapter on subsidies and countervailing measures, apart from describing the definition of subsidies and the type of subsidies given in the ASCM, also looked at the trends in imposition of countervailing duties. These trends show that there has been a decrease in imposition of countervailing duties. The number of countervailing actions initiated worldwide has been much less

than the number of anti-dumping actions initiated. The primary reason behind this has been that the nature of countervailing duties does not allow the imposition of these duties for protectionist purposes and thus countries find it preferable to use anti-dumping duties.

Some of these interpretations, both for the ADA and ASCM, have rounded the blurred edges at some places. In other words, some of the interpretations given by the AB, like the one on 'zeroing', have been instrumental in developing a jurisprudence which discards a protectionist type of interpretation of the provisions

The chapter on jurisprudential developments has shown that the interpretations developed by the Panel and the AB have been significant. Some of these interpretations, both for the ADA and ASCM, have rounded the blurred edges at some places. In other words, some of the interpretations given by the AB, like the one on 'zeroing', have been instrumental in developing a jurisprudence which discards a protectionist type of interpretation of the provisions. At the same time, some of the interpretations have added to the existing perplexity, which one could associate with a WTO Agreement because of its ambiguous and open-ended language.

Endnotes

1 Tokyo Round was the seventh of GATT multilateral trade negotiations, which took place between 1973 and 1979. 102 countries participated in this round.

2 In WTO, this agreement is called Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

3 See Rules Division Anti-dumping duty, www.wto.org

4 Canada passed the first anti-dumping law in 1904 and the real motive behind this law was to protect Canadian steel firms from steel imports coming from the US.

5 Predatory dumping is defined as dumping, which is done with a predatory intent, i.e., the intention to eliminate or reduce competition.

6 See WT/DS136/AB/R and WT/DS162/AB/R, AB report on US – Anti-dumping Act of 1916.

7 In this year UK also adopted its first anti-dumping law and countries like Canada, Australia and New Zealand amended their respective anti-dumping legislations.

8 See Article VI of GATT and Article 2 of the Agreement on Implementation of Article VI of GATT.

9 Article 2.4.2 of the ADA requires the calculation of weighted average dumping margin on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of a normal value and export prices on a transaction-to-transaction basis.

10 Report of the AB on EC – Anti-dumping Duties on Imports of cotton type bed linen from India, WT/DS141/AB/RW.

11 EC has complained that the US – laws, regulations and methodology for calculating dumping margins ("zeroing") is inconsistent with various provisions of the ADA, WT/DS294/7/Rev.1.

12 Brazil, Chile, Columbia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, the separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Singapore, Switzerland, and Thailand.

13 See TN/RL/W/113 at http: //docsonline.wto.org/.

14 Ibid.

15 See Section 9A of the Customs Tariffs Act, 1975 as amended in 1999.

16 See TN/RL/W/119 at http: //docsonline.wto.org/.

17 Sunset clause is a provision in an agreement under which a measure taken by a government expires automatically once a certain time has elapsed, or unless some specified action has been taken.

18 See TN/RL/W/76 at http: //docsonline.wto.org.

19 In all these countries anti-dumping measures imposed in the year 2000 have shown considerable increase over what existed in year 1999.

20 India tops the WTO list in the imposition of anti-dumping duties, initiating 331 actions between 1995 and the end of 2002. During the same period, the US and the EU, traditionally the most prolific instigators of anti-dumping actions, started 292 and 267 cases respectively.

21 Affirmative outcomes refer to the percentage of definitive measures imposed with respect to the number of investigations initiated.

22 While many people consider dumping an arcane subject, dumping penalties have forced Americans to pay more for photo albums, pears, mirrors, ethanol, cement, shock absorbers, roof shingles, codfish, televisions, paint brushes, cookware, motorcycle batteries, bicycles, martial art uniforms, computers and computer disks, telephone systems, forklifts, radio, flowers, aspirin, staplers and staples, paving equipment, and fireplace mesh panels.

23 Affirmative outcomes refer to the percentage of definitive measures imposed with respect to the number of investigations initiated.

24 China has been the affected party in nearly 56 percent anti-dumping cases that have been initiated by developing countries and 25 percent of all cases that have been initiated by India.

25 India – Anti-dumping Measures on batteries from Bangladesh, Request for Consultations by Bangladesh, WT/DS306/1.

26 See Paul I.A. Moen (1998), Public Interest Issues in International and Domestic Anti-dumping Law: The WTO, European Communities and Canada.

27 The 1967 and 1979 GATT Anti-dumping codes also talked of public interest issues, though in a limited manner. The ADA is a

28 See Article 6.11 of the Anti-dumping Agreement.

29 Article 6.11(i).

30 Article 6.11(ii).

31 Article 6.11(iii).

32 Application means the application made for the anti-dumping investigation.

33 The 1967 and 1979 Anti-dumping codes also provided the right to access non-confidential information, but limited this right to complainants, concerned importers and exporters, and governments of the exporting countries.

34 See Article 6.5 of the Anti-dumping Agreement.

35 Providing confidential information under the ADA is an improvement over the provisions that existed in the 1979 Anti-dumping code.

36 See Article 6.5.1 of the Anti-dumping Agreement.

37 Ibid.

38 The 1967 GATT Anti-dumping code made a reference to "restrictive business practices", as one of the factors in the list of factors to be examined in assessing injury to domestic industry.

39 Escape clause is a provision in a trade agreement originally permitting a signatory nation to suspend tariff or other concessions when imports threaten serious harm to the producers of similar domestic goods.

40 The Indian law with regard to imposition of safeguard duty is given in Section 8 B of the Customs Tariff Act, 1975. Section 8 B (1) does not talk of "unforeseen developments" for the imposition of safeguard measures. This section talks of "such conditions".

41 Also see Article 2 of the Agreement on Safeguards.

42 The Indian law given in section 8 B (1) of the Customs Tariff Act also talks of a maximum period of four years for the imposition of safeguard duty. This period is subject to a proviso and if the central government is of the opinion that the domestic industry has taken measures to adjust to such injury or threat thereof and it is necessary that safeguard duty should continue to be imposed, it may extend the period of such imposition.

43 Article VI.3 provides for "No countervailing duty...in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation..."

44 Article XVI provides in Section A on subsidies in general and in Section B on additional provisions on export subsidies.

45 See Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures.

46 See Article 1.1(a)(2) of the Agreement on Subsidies and Countervailing Measures.

47 See Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures.

48 See M Jean Anderson and Gregory Husisian, The Subsidies Agreement, in World Trade Organisation: The Multilateral Trade Framework for the 21st century and US Implementing Legislation, Ed Terence P. Stewart.

49 See Article 5 and 7.1 of the Agreement on Subsidies and Countervailing Measures.

50 See Article 4 of the Agreement on Subsidies and Countervailing Measures.

51 See Annexure 1, "illustrative list of Subsidies" to the Agreement on Subsidies and Countervailing Measures.

52 See Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures.

53 See Rules Division Countervailing Duty Database, www.wto.org

54 ibid.

55 ibid.

56 See Article VI of GATT 1994.

57 Article 3 of ADA talks of injury determination to the domestic industry.

58 See Article 3.1 of the ADA.

59 See Article 3.2 of the ADA.

60 See Article 9.4 of the ADA.

61 Article 15 talks of the special situation of developing countries and thus the need of having special provisions for them.

62 Article 3.4 stipulates the contour of investigation as "all relevant economic factors and indices having a bearing on the state of the industry including actual and potential decline in sales, profits, output, market share, productivity, returns on investment, or utilisation of capacity, factors affecting domestic prices, the magnitude of the margin of the dumping, actual and potential negative effect on cash flow, inventories, employment, wages, growth, ability to raise capital or investment."

63 Article 17.6 of AOA stipulates the contour of review in "facts were proper' and "evaluation of those facts was unbiased and objective". The relevant provisions shall be interpreted "in accordance with customary rules of interpretation of public international law.

64 See Article 3.4 of the ADA.

65 See Article 17.6(ii) of the ADA that talks of interpreting the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law and also to accept the interpretation of any provision being advanced by the investigating authority if it is one of the permissible interpretations.

66 See Article 17.5 of the ADA that talks of standard of review.

67 Anti-dumping investigation regarding imports of Portland cement from Mexico, complaint by Mexico (WT/DS60) dated October 15, 1996.

68 Appendix 1 to the DSU lists those agreements that are covered by the Understanding on Rules and Procedures Governing the Settlement of Disputes.

69 See Article 1.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

70 Appendix 2 to Understanding on Dispute Settlement identifies those Articles of certain Agreements that are to prevail over the rules and procedures of the DSU to the extent of their difference with the rules of DSU. ADA is one of the agreements given in this appendix.

71 WT/DS138/AB/R, Report of the AB on US - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom.

72 Report of the Panel, Australia - Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/R.

73 See Article 3.1 (a) of the ASCM

74 WT/DS70/AB/R, Report of the AB, Canada - Measures Affecting the Export of Civilian Aircraft.

75 ibid.

76 Report of the AB, Canada - Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R.

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CUTS' PUBLICATIONS
TRADE, ECONOMICS AND ENVIRONMENT

STUDIES

1. **Policy Shift in Indian Economy**
   A survey on the public perceptions of the New Economic Policy in the states of Maharashtra, Rajasthan, Tamil Nadu and West Bengal in India conducted during June/July 1995 and recommendations to the government which were discussed at the above mentioned India-Nepal Training Seminar.
   (100pp, #9512, Rs.100/US$25)

2. **Policy Shift in Nepal Economy**
   A survey on the public perceptions of New Economic Policy in Nepal conducted during June/July 1995 and recommendations to the government which were discussed at the above mentioned India-Nepal Training Seminar. *(80pp, #9513, Rs.30/US$15)*

3. **Environmental Conditions in International Trade**
   A study on the impact on India's exports in the area of Textiles and Garments including Carpets, Leather and Leather Goods, Agricultural and Food Products including Tea and Packaging, for the Central Pollution Control Board, Ministry of Environment & Forests, Government of India. *(39pp, #9508, Rs.200/US$50)*

4. **Costs on Consumers due to Non-Co-operation Among SAARC Countries**
   A study by noted scholars on the costs on consumers of the countries in South Asia due to economic non-co-operation among them. *(#9605, Rs.50/US$25)*

5. **Tariff Escalation — A Tax on Sustainability**
   The study finds that the existence of escalating tariff structure, particularly in developed countries, results in "third-best" allocation of resources. It also harms both environment and development, and crucially the balance of trade.
   (Rs.100/US$25, ISBN 81-87222-00-X)

6. **Trade, Labour, Global Competition and the Social Clause**
   The social clause issue has remained one of the most heated areas of international debate for a number of years. The study says that the quality of that debate has not met its volume and the real issues underlying the issue have rarely been analysed as a whole. It attempts to string the various debates together.
   (Rs.100/US$25) ISBN 81-87222-01-8

7. **TRIPs, Biotechnology and Global Competition**
   The study shows, with some evidence, that the provisions in the TRIPs agreement concerning biotechnology are of great concern to the developing world. According to the new GATT agreement, all bio-technology products may be patented. Nearly 80 percent of all biotechnology patents are currently held by large multinationals.
   (Rs.100/US$25, ISBN 81-87222-02-6)

8. **Eradicating Child Labour While Saving the Child**
   In the scenario of a growing interest in banning child labour this research report argues that trade restricting measures have every potential of eliminating the child itself. The report provides logical arguments and a case study for those groups who are against the use of trade bans for the solution of this social malaise. It also makes certain recommendations for the *effective* solution of the problem. *(Rs.100/US$25, ISBN 81-87222-23-9)*

9. **Non-trade Concerns in the WTO Agreement on Agriculture**
   This research report written by Dr. Biswajit Dhar and Dr. Sachin Chaturvedi of the Research and Information System for the Non-aligned and Other Developing Countries, New Delhi, provides a detailed analysis of non-trade concerns, covering the various dimensions indicated by the Agreement on Agriculture of the World Trade Organisation.
   (Rs.50/US$10, ISBN 81-87222-30-1)

10. **Liberalisation and Poverty: Is There a Virtuous Circle?**
    This is the report of a project: "Conditions Necessary for the Liberalisation of Trade and Investment to Reduce Poverty", which was carried out by the Consumer Unity & Trust Society in association with the Indira Gandhi Institute for Development Research, Mumbai; the Sustainable Development Policy Institute, Islamabad, Pakistan; and the Centre for Policy Dialogue, Dhaka, Bangladesh, with the support of the Department for International Development, Government of the UK.
    (Rs.100/US$25, ISBN 81-87222-29-8)

11. **The Functioning of Patent Monopoly Rights in Developing Economies: In Whose Interest?**
    Advocates of strong international protection for patents argue that developing countries would gain from increased flows of trade, investment and technology transfer. The paper questions this view by examining both the functioning of patents in developing economies in the past and current structural trends in the world economy in these areas. The historical research revealed no positive links between a strong patent

regime and FDI and technology transfer. Current trends are largely limited to exchanges amongst the industrialised countries and to some extent, the newly industrialising countries. While increased North/South trade flows are expected, negative consequences are possible. *(Rs.100/US$25, ISBN 81-87222-36-0)*

12. Negotiating the TRIPs Agreement: India's Experience and Some Domestic Policy Issues

This report shows particularities about the subject that distinguished the TRIPs (Trade Related Aspects of Intellectual Property Rights) negotiations from other agreements that make up the Uruguay Round results. It also analyses the way in which the TRIPs Agreement was actually negotiated and handled.

The author finds that many of the lessons that can be drawn from India's experience with the TRIPs negotiations are the same as those that can be drawn from the negotiations more generally and true for many other countries. It goes beyond a narrow analysis of events relating strictly to the negotiations during the Uruguay Round and looks at the negotiating context in which these negotiations took place.

The research findings draw lessons from what actually happened and suggest how policy processes can be reformed and reorganised to address the negotiating requirements in dealing with such issues in the future. *(Rs.100/US$25, ISBN 81-87222-50-6*)

13. Multilateral Environmental Agreements, Trade and Development: Issues and Policy Options Concerning Compliance and Enforcement

The latest report of CUTS on Multilateral Environmental Agreement, Trade and Development, examines the role of provisions for technology and financial transfer as well as capacity building as an alternative to trade measures for improving compliance and enforcement. It acquires specific significance in the light of the fact that the WTO members for the first time, in the trade body's history, agreed to negotiate on environmental issues at the Fourth Ministerial Conference of the WTO at Doha.

This study also examines pros and cons of Carrots and Sticks approaches, and analyses incorporation of these approaches in three major MEAs, the Montreal Protocol, The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Basel Convention, to find out which approach has been more successful in ensuring enforcement and compliance.

A must read for different stakeholders involved in this process, as this study would provide useful inputs towards trade and environment negotiations.
(Rs. 100/US$25, ISBN 81-87222-58-1)

14. Market Access Implications of SPS and TBT: Bangladesh Perspective

As both tariffs and other traditional trade barriers are being progressively lowered, there are growing concerns about the fact that new technical non-tariff barriers are taking their place, such as sanitary and phytosanitary measures (SPS) and technical regulations and standards.

The poor countries have been denied market access on quite a number of occasions when they failed to comply with a developed country's SPS or TBT requirements or both. The seriousness of this denial of market access is often not realised unless their impact on exports, income and employment is quantified.
In this paper, the author focuses on the findings of a 1998 case study into the European Commission's ban of fishery products from Bangladesh into the EU, imposed in July 1997.

This research report intends to increase awareness in the North about the ground-level situation in poor and developing countries. At the same time, it makes some useful suggestions on how the concerns of LDCs can be addressed best within the multilateral framework. The suggestions are equally applicable to the developing countries.
(Rs. 100/US$10, ISBN 81-87222-69-7)

15. Voluntary Self-regulation versus Mandatory Legislative Schemes for Implementing Labour Standards

Since the early 1990s, globally there has been a proliferation of corporate codes of conduct and an increased emphasis on corporate responsibility. The idea is that companies voluntarily adopt codes of conduct to fulfil their social obligations and although these companies are responsible only for a fraction of the total labour force, they set the standards that can potentially lead to an overall improvement in the working conditions of labour.

These voluntary approaches are seen as a way forward in a situation where state institutions are weakened with the rise to dominance of the policies of neo-liberalism, and failure of the state-based and international regulatory initiatives.

Given this background, this paper examines how the failure of 1980s codes, regulated by international bodies, resulted in the proliferation of corporate codes of conduct and an increased emphasis on corporate social responsibility.

This paper further tries to explore whether voluntary codes of conduct can ensure workers' rights in a developing country like India.
(Rs.100/US$25, ISBN 81-87222-76-X)

16. Child Labour in South Asia: Are Trade Sanctions the Answer?

South Asian Countries have the highest rates of child labour practices in the world. As a result of the advocacy by powerful political lobbying groups supported by Europe and the US, the trade sanction approach to encounter the issue of child labour has gained influence, since the nineties.

These sanctions were exercised to alleviate the problem of child labour by US policy-makers and also by some countries in the EU. But, the question arises – have the trade sanctions imposed by these countries in any way helped eliminate this problem? This research report of CUTS Centre for International Trade, Economics & Environment tries to address this question.

It has explored the impact of these trade sanctions and finds that these sanctions resulted in the contradiction of the basic objective, i.e., elimination of child labour. By banning the import of those goods in the production process of which child labour was used wholly or partly, the developed countries have aggravated the sufferings of child labour and their families.

Besides highlighting the causes of child labour, the report makes some very useful recommendations on how the issue of child labour can be addressed best at the domestic as well as international level.
(Rs.100/US$25, ISBN 81-87222-82-4)

17. TRIPs and Public Health: Ways Forward for South Asia

Trade Related Aspects of Intellectual Property Rights — or TRIPs — has always been one of the most contentious issues in the WTO. Several studies have been conducted on the political economy of TRIPS *vis-à-vis* WTO, the outcome of which are crucial to the policymakers of the developing economies more than those in the rich countries. Increasing realisation of the poor countries' suffering at the hands of the patent holders is yet another cause of worry in the developing and poor countries.

This research document tries to find an answer to one specific question: what genuine choices do policymakers in South Asian developing nations now have, more so after the linkage between the trade regime and pharmaceuticals? Starting with a brief overview of the key features of the corporate model of pharmaceuticals, the paper provides some insight into the challenges faced by the governments in South Asian countries. The aim is to anchor the present discussion of public health and the impact of TRIPs in the socio-cultural environment of this region.
(Rs.100/US$25, ISBN 81-87222-83-2)

18. Bridging the Differences: Analyses of Five Issues of the WTO Agenda

This book is a product of the project, EU-India Network on Trade and Development (EINTAD), launched about a year back at Brussels. CUTS and University of Sussex are the lead partners in this project, implemented with financial support from the European Commission (EC). The CUTS-Sussex University study has been jointly edited by Prof. L. Alan Winters of the University of Sussex and Pradeep S. Mehta, Secretary-General of CUTS, India.

The five issues discussed in the book are Investment, Competition Policy, Anti-dumping, Textiles & Clothing, and Movement of Natural Persons. Each of these papers has been co-authored by eminent researchers from Europe and India.
(Rs.350/US$50, ISBN 81-87222-92-1)

19. Dealing with Protectionist Standard Setting: *Effectiveness of WTO Agreements on TBT and SPS*

Sanitary and Phytosanitary Safeguards (SPS) and Technical Barriers to Trade (TBT) Agreements — enshrined in the WTO — are meant to keep undesirable trade practices at bay. These Agreements try to ensure adherence to standards, certification and testing procedures, apart from technical protection to the people, by countries while trading in the international arena.

This research report is a sincere attempt to fathom the relevance of SPS and TBT Agreements, their necessity in the present global economic scenario and, of course, the development of case law related to the Agreements, along with a brief description of the impact of this case law on developing countries.
(Rs.100/US$25, ISBN 81-87222-68-9)

20. Competitiveness of Service Sectors in South Asia: Role and Implications of GATS

This research report attempts to emphasise on the relevance of GATS for developing economies, particularly in South Asia. It also examines the potential gains from trade liberalisation in services, with a specific focus on hospital services, and raises legitimate concerns about increases in exports affecting adversely the domestic availability of such services. It highlights how the ongoing GATS negotiations can be used to generate a stronger liberalising momentum in the health sector. *(Rs.100/US$25, ISBN 81-8257-000-X)*

21. Demystifying Agriculture Market Access Formula: *A Developing Country Perspective After Cancun Setback*

At the Cancún meeting, a draft ministerial text on agriculture emerged, known as the Derbez Text. It was not surprising that at Cancún the WTO members failed to accept a ministerial text on agriculture. The Derbez Text had made the framework very complex, which the paper, "Demystifying Agriculture Market Access Formula" tries to demystify.
(#0417, Rs. 100/US$25, ISBN 81-8257-033-6)

22. Trade-Labour Debate: The State of Affairs

The purpose of the study is not to rehearse the never-ending story on the pros and cons of the trade-labour linkage. It not only seeks to assess the current and possible future direction of the debate from the developing countries' perspective. It is hoped that this approach will provide developing countries with concrete policy suggestions in terms of the way forward.
(#0410, Rs. 100/US$25, ISBN81-8257-025-5)

23. Liberalising Trade in Environmental Goods and Services: *In Search of 'Win-Win-Win' Outcomes*

Trade in environmental goods and services has assumed a centre-stage position. The excellent analysis of this issue involved in environmental trade concludes with soundly reasoned policy recommendations which show the direction that future negotiations must take if the originally envisaged 'win-win-win' situation is to be achieved.

(#0402,Rs. 100/US$25, ISBN 81-8257-019-0)

24. FDI in South Asia: Do Incentives Work? *A Survey of the Literature*

Over the last two decades or so, along with trade barriers, countries around the world have progressively dismantled restrictions on foreign direct investment (FDI). Apart from the main objective of increasing investment through inflow of foreign capital, the positive externalities of FDI to the host country are the other important reason for countries competing against each other for foreign direct investment.

The present paper has looked at the understudied issues of FDI policies in South Asia, particularly from the point of view of the effectiveness of performance requirements imposed by host countries and the costs of accompanying incentives. The survey of theoretical literature on performance requirements indicates that a case can be made for imposing such requirements in South Asia, particularly from the welfare point of view. As regards the costs of incentives, which a country offers to foreign firms, so far, only a few studies have tried to quantify them. These incentives are normally given as *quid pro quo* with performance requirements. But, in the bargain, it has been found, these incentives tend to be particularly costly over a period of time.

(#0403,Rs. 100/US$25, ISBN 81-8257-037-9)

DISCUSSION PAPERS

1. Existing Inequities in Trade - A Challenge to GATT

A much appreciated paper written by Pradeep S Mehta and presented at the GATT Symposium on Trade, Environment & Sustainable Development, Geneva, 10-11 June, 1994 which highlights the inconsistencies in the contentious debates around trade and environment. *(10pp, #9406, Rs 30/US$5)*

2. Ratchetting Market Access

Bipul Chatterjee and Raghav Narsalay analyse the impact of the GATT Agreements on developing countries. The analyses takes stock of what has happened at the WTO until now, and flags issues for comments. *(#9810, Rs.100/US$25)*

3. Domestically Prohibited Goods, Trade in Toxic Waste and Technology Transfer: Issues and Developments

This study by CUTS Centre for International Trade, Economics & Environment attempts to highlight concerns about the industrialised countries exporting domestically prohibited goods (DPGs) and technologies to the developing countries that are not capable of disposing off these substances safely, and protecting their people from health and environmental hazards.*(ISBN 81-87222-40-9)*

EVENT REPORTS

1. Challenges in Implementing a Competition Policy and Law: An Agenda for Action

This report is an outcome of the symposium held in Geneva on "Competition Policy and Consumer Interest in the Global Economy" on 12-13 October, 2001. The one-and-a-half-day event was organised by CUTS and supported by the International Development Research Centre (IDRC), Canada. The symposium was addressed by international experts and practitioners representing different stakeholder groups viz. consumer organisations, NGOs, media, academia, etc. and the audience comprised of participants from all over the world, including representatives of Geneva trade missions, UNCTAD, WTO, EC, etc. This publication will assist people in understanding the domestic as well as international challenges in respect of competition law and policy.

(48pp, #0202, Rs.100/US$25)

2. Analyses of the Interaction between Trade and Competition Policy

This not only provides information about the views of different countries on various issues being discussed at the working group on competition, but also informs them about the views of experts on competition concerns being discussed on the WTO platform and the possible direction these discussions would take place in near future. It also contains an analyses on the country's presentations by CUTS.

(Rs.100/US$25, ISBN 81-87222-33-6)

MONOGRAPHS

1. Role and the Impact of Advertising in Promoting Sustainable Consumption in India

Economic liberalisation in India witnessed the arrival of marketing and advertisement gimmicks, which had not existed before. This monograph traces the the impact of advertising on consumption in India since 1991. *(25pp, #9803, Rs.50/US$10)*

2. Social Clause as an Element of the WTO Process

The central question is whether poor labour standards result in comparative advantage for a country or not. The document analyses the political economy of the debate on trade and labour standards.

(14pp, #9804, Rs.50/US$10)

3. **Is Trade Liberalisation Sustainable Over Time?**
Economic policy is not an easy area for either the laity or social activist to comprehend. To understand the process of reforms, Dr. Kalyan Raipuria, Adviser, Ministry of Commerce, Government of India, wrote a reader-friendly guide by using question-answer format. *(29pp, #9805, Rs. 50/US$10)*

4. **Impact of the Economic Reforms in India on the Poor**
The question is whether benefits of the reforms are reaching the poor or not. This study aims to draw attention to this factor by taking into account inter-state investment pattern, employment and income generation, the social and human development indicators, the state of specific poverty alleviation programmes as well as the impact on the poor in selected occupations where they are concentrated. *(15pp, #9806, Rs. 50/US$10)*

5. **Regulation: Why and How**
From consumer's viewpoint, markets and regulators are complementary instruments. The role of the latter is to compensate in some way the failings of the former. The goal of this monograph is to provide a general picture of the why's of regulation in a market economy. *(34pp, #9814, Rs.50/US$10)*

6. **Snapshots from the Sustainability Route — A Sample Profile from India**
Consumption is an indicator of both economic development and also social habits. The disparity in consumption pattern has always been explained in the context of the rural urban divide in India. The monograph analyses the consumption patter of India from the point of view of the global trend towards sustainable consumption. *(16pp, #9903, Rs.50/US$10)*

7. **Consumer Protection in the Global Economy**
This monograph outlines the goals of a consumer protection policy and also speaks about the interaction between consumer protection laws and competition laws. It also highlights the new dimensions about delivering consumer redress in a globalising world economy, which raises jurisdictional issues and the sheer size of the market. *(38pp, #0101, Rs.50/US$10).*

8. **Globalisation and India – Myths and Realities**
This monograph is an attempt to examine the myths and realities so as to address some common fallacies about globalisation and raise peoples' awareness on the potential benefits globalisation has to offer.
(40pp, #0105, Rs.50/US$10)

9. **ABC of the WTO**
This monograph is about the World Trade Organisation (WTO) which has become the tool for globalisation. This monograph is an attempt to inform the layperson about the WTO in a simple question-answer format. It is the first in our series of monographs covering WTO-related issues and their implications for India. Its aim is to create an informed society through better public knowledge, and thus enhance transparency and accountability in the system of economic governance. *(36pp, #0213, Rs.50/US$10)*

10. **ABC of FDI**
FDI — a term heard by many but understood by few. In the present times of liberalisation and integration of world economy, the phenomenon of Foreign Direct Investment or FDI is rapidly becoming a favourite jargon, though without much knowledge about it. That is why CUTS decided to come out with a handy, yet easy-to-afford monograph, dwelling upon the how's and why's of FDI. This monograph is third in the series of "Globalisation and India – Myths and Realities", launched by CUTS in September 2001. "How is FDI defined?" "What does it constitute?" "Does it increase jobs, exports and economic growth?" Or, "Does it drive out domestic investment or enhance it?" are only some of the topics addressed to in a lay man's language in this monograph. *(48pp, #0306, Rs.50/US$10)*

11. **WTO Agreement on Agriculture: Frequently Asked Questions**
As a befitting reply to the overwhelming response to our earlier three monographs, we decided to come out with a monograph on *WTO Agreement on Agriculture* in a simple Q&A format. This is the fourth one in our series of monographs on *Globalisation and India – Myths and Realities*, started in September 2001.

This monograph of CUTS Centre for International Trade, Economics & Environment (CUTS-CITEE) is meant to inform people on the basics of the WTO Agreement on Agriculture and its likely impact on India. *(48pp, #0314, Rs.50/US$10)*

12. **Globalisation, Economic Liberalisation and the Indian Informal Sector – A Roadmap for Advocacy**
India had embarked upon the path of economic liberalisation in the early nineties in a major way. The process of economic liberalisation and the pursuit of market-driven economic policies are having a significant impact to the economic landscape of the country. The striking characteristic of this process has been a constant shift in the role of the state in economic activities. The role of the state is undergoing a paradigm shift from being a producer to a regulator and a facilitator. A constant removal of restrictions on economic activities and fostering private participation is becoming the order of the day.

Keeping these issues in mind, CUTS with the support of Oxfam GB in India, had undertaken a project on globalisation and the Indian Informal sector. The selected sectors were non-timber forest products, handloom and handicraft. The rationale was based on the premise that globalisation and economic

liberalisation can result in potential gains, even for the poor, but there is the need for safety measures as well. This is mainly because unhindered globalisation can lead to lopsided growth, where some sectors may prosper, leaving the vulnerable ones lagging behind. *(ISBN 81-8257-017-4)*

13. ABC of TRIPs

This booklet intends to explain in a simple language, the Trade-Related Intellectual Property Rights Agreement (TRIPs), which came along with the WTO in 1995. TRIPs deals with patents, copyrights, trademarks, GIs, etc. and countinues to be one of the most controversial issues in the international trading system. The agreement makes the protection of IPRs a fundamental part of the WTO. This monograph gives a brief history of the agreement and addresses important issues such as life patenting, traditional knowledge and transfer of technology among others.
(38pp, Rs. 50/US$10, #0407) ISBN 81-8257-026-3

14. Trade Policy Making in India – *The reality below the water line*

This paper discusses and concludes the issues, in broad terms, that India struggles with trade policy making, essentially because domestic and international thinking on development and economic growth is seriously out of alignment, and that there are few immediate prospects of this changing, for a variety of entirely domestic political reasons.
(#0415, Rs. 100/US$10, ISBN 81-8257-031-X)

15. ABC of GATS

The aim of the GATS agreement is to gradually remove barriers to trade in services and open up services to international competition. This monograph is an attempt to educate the reader with the basic issues concerning trade in services, as under GATS. The aim of this monograph is to explain in simple language the structure and implications of the GATS agreement, especially for developing countries.
(#0416, Rs. 50/US$10, ISBN 81-8257-032-8)

16. WTO Agreement on Textiles and Clothing – *Frequently Asked Questions*

This monograph attempts to address some of the basic questions and concerns relating to he textiles and clothing. The aim is to equip the reader to understand the fundamentals of and underlying issues pertaining to trade in textiles and clothing.
(#0419, Rs. 50/US$10, ISBN 81-8257-035-2)

GUIDES

1. Unpacking the GATT

This book provides an easy guide to the main aspects of the Uruguay Round agreements in a way that is understandable for non-trade experts, and also contains enough detail to make it a working document for academics and activists. *(US$5, Rs.60)*

2. Consumer Agenda and the WTO — An Indian Viewpoint

Analyses of strategic and WTO-related issues under two broad heads, international agenda and domestic agenda. *(#9907)*

NEWSLETTERS

Economiquity

A quarterly newsletter of the CUTS Centre for International Trade, Economics & Environment for private circulation among interested persons/networks. Contributions are welcome: Rs.100/US$20 p.a.

BRIEFING PAPERS

Our Briefing Papers inform the layperson and raise issues for further debate. These have been written by several persons, with comments from others. Re-publication, circulation etc. are encouraged for wider education. Contributions towards postage (Rs.20/US$5) are welcome.

1995

1. GATT, Patent Laws and Implications for India
2. Social Clause in the GATT - A Boon or Bane for India
3. Greening Consumer Choice? - Environmental Labelling and the Consumer
4. Trade & Environment: the Inequitable Connection
5. Anti-Dumping Measures under GATT and Indian Law
6. Rational Drug Policy in South Asia - The Way Ahead
7. No Patents on Life Forms!
8. Legislative Reforms in a Liberalising Economy

1996

1. The Freezing Effect - Lack of Coherence in the New World Trade Order
2. Competition Policy in a Globalising and Liberalising World Economy
3. Curbing Inflation and Rising Prices - The Need for Price Monitoring
4. Globalising Liberalisation Without Regulations! - Or, How to Regulate Foreign Investment and TNCs
5. The Circle of Poison - Unholy Trade in Domestically Prohibited Goods
6. Swim Together or Sink – Costs of Economic Non-Co-operation in South Asia (revised in Sept. 1998)
7. Carrying the SAARC Flag-Moving towards Regional Economic Co-operation (Revised in Oct. 1998)
8. DPGs, Toxic Waste and Dirty Industries — Partners in Flight
9. WTO: Beyond Singapore - The Need for Equity and Coherence

1997

1. The Uruguay Round, and Going Beyond Singapore
2. Non-Tariff Barriers or Disguised Protectionism
3. Anti-Dumping Under the GATT - The Need for Vigilance by Exporters
4. Subsidies & Countervailing Measures
5. Textiles & Clothing - Who Gains, Who Loses and Why?
6. Trade in Agriculture — Quest for Equality
7. Trade in Services-Cul de Sac or the Road Ahead!
8. TRIPs and Pharmaceuticals: Implications for India
9. Movement of Natural Persons Under GATS: Problems and Prospects

1998

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3. Trade Liberalisation, Market Access and Non-tariff Barriers
4. Trade, Labour, Global Competition and the Social Clause
5. Trade Liberalisation and Food Security

1999

1. The Linkages: Will it Escalate?
2. Trade and Environment — An Agenda for Developing Countries
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