

ANTI-DUMPING REGULATIONS UNDER THE WORLD TRADE ORGANISATION

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Abstract

The Article explores anti-dumping regulations set forth by the Agreement on Implementation of Article VI of GATT 1994 commonly known as the Anti-Dumping Agreement, which is an integral part of the Annex 1A to the Agreement Establishing the World Trade Organization. The Article touches upon the background of the Anti-Dumping Agreement and examines regulations imposed thereby on the anti-dumping practices of the WTO member-states on such matters as the conduct of the anti-dumping investigation, determination of dumping and injury to the domestic industry, procedure of application of anti-dumping duties, relationship between the domestic legislation and WTO regulations on anti-dumping, judicial review requirements, conditions of imposition of the anti-dumping duties and duration of anti-dumping measures.

Keywords: *anti-dumping, injury, domestic industry, WTO, GATT, margin of dumping, like product, imports*

Possibility for utilisation of anti-dumping duties pursuant to international regulations was initially provided for under Article VI of the General Agreement on Tariffs and Trade (the "GATT"). However, the provisions of Article VI were to certain extent loose and imprecise. These provisions had general character and were lacking concreteness. This was creating difficulties in interpretation and application of the said regulations, which required further concretization thereof. The first document elaborating on GATT Article VI was the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" which has unofficially been known as the "Anti-dumping Code" appeared as an outcome of the Kennedy Round of negotiations within the GATT framework in 1967. This Agreement was revisited in the Tokyo Round of negotiations resulted in reinforcement of its provisions. However, only 26 GATT contracting parties (member-states) acceded to the document and the provisions of the Anti-dumping Code did not introduce the regulation capable of maintaining acceptable for the GATT Contracting Parties legal regime on matters relating to dumping [1, p.433-450; 23, p.27-44; 24, p.27-52]. In light of general dissatisfaction rooted in incompleteness of regulation and fragmentariness of the Agreement due to the non-accession of all the GATT Contracting Parties, it has been replaced by the Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, which provides further elaboration on the basic principles of regulation of the WTO member-states' anti-dumping practices set forth in Article VI itself. The Anti-Dumping Agreement constituting an integral part of the Annex 1A to the Agreement Establishing the World Trade Organization became an instrument mandatory for all the WTO member-states and established detailed regulation on such matters as the conduct of the anti-dumping investigation, determination of dumping, procedure of application of anti-dumping duties [2, p.203-204].

Both GATT and the Anti-Dumping Agreement formally recognise the possibility of application of anti-dumping measures by a WTO member-state (subjects of public (international) law) against economic actors (subjects of private law) having nationality of another WTO member-state [3, p.239-297; 27, p.149-175]. According to Cappeau and Jyillard this is due to the international public law nature of the WTO documents and is so drafted in order not to create any obligation arising out of the public international law for the subjects of the domestic law within the domestic legal systems [10, p.204].

Under the GATT Article VI dumping is existent when a product generating in one member state is introduced into the commerce of another member-state at less than the normal value of the product (GATT-VI:1). However, a WTO member-state may apply anti-dumping measures only when such product been sold at dumping prices [4, p.45-54; 11, p. 289-295; 14, p.563-575; 7, p.41-64; 41, p.115-119; 42, p.1-37] causes or threatens material injury to an established industry in the territory of a member-state or materially retards the establishment of a domestic industry [5, p.5-31]. The anti-dumping duty may not exceed the margin of dumping defined as a difference between the normal value/price of the product and its price under normal trading conditions either (i) in the exporting country's commerce or (ii) export price to a third country or (iii) a constructed export price, which in its turn is defined as (a) the cost of production plus (b) reasonable selling cost and profit (GATT - Article VI:2). Such additional duty to be levied on product been traded at price levels below the normal ones is the only remedy available to a WTO member-state, meaning that such WTO member is prohibited to apply another protective measure whatsoever (such as, for example, an import quota) when it determines (by way of a proper investigation as described below) that sales of the product in question in its territory is carried out at dumping prices and that this causes an injury. Besides, GATT prohibits application of the anti-dumping and counter-veiling duties at the same time on the same product, i.e. a WTO member is allowed to apply only one of these two measures (GATT - Article VI:5).

Margin of Dumping. One of the main conditions for the application of an anti-dumping duty is the determination of the difference between the the normal value/price and dumping price. Such difference is determined by way of comparison of the price at which the product has been introduced into the commerce in the importing country and sales prices of the like product in the country of production or in a third country. The following criteria may be used for the determination of the normal price: (1) the price applicable, in the ordinary course of trade, for the like product in the country of production (GATT - Article VI:1; ADA -2.1); this criterion is applied under the condition that in case where such price is below level of the weighted average per unit costs (Sum of the fixes and variable costs of production, sales, overhead and general expenses (ADA-2.2)), it may be treated as the price not applied in the ordinary course of trade (some additional conditions are applicable to the determination of the normal price by these means under ADA- 2.2.1 and 2.2.2), (2) the highest comparable export price applied in any third country in the ordinary course of trade, (3) per unit cost of production (with the allowance for reasonable selling cost and profit), although there are additional requirements in respect of the calculation of costs and information to be used for these purposes (ADA- 2.2.1 and 2.2.2), (4) in case no export price is established or the export price is regarded unreliable (because of association or an arrangement between the seller and buyer directly or indirectly), the price of resale to an arms length buyer following the importation (ADA - 2.3), or (5) a reasonable basis as the executive autho-

rity entitled under the local legislation to carry out an anti-dumping investigation may determine (ADA - 2.3) if the resale price cannot be established, and (6) where a product is sold via/from an intermediate country or are merely transshipped through such country, the price in the country of origin or in such intermediate country (ADA - 2.5).

Dumping margin shall be established either by way of comparison of the normal value with the average price of all the comparable export sales or price of each separate export sale.

The comparison of the export prices and normal value shall be carried out on the basis of similar sale conditions at the same time, e.g. on the basis of *ex-works* sales. The comparison shall take account of sales terms and conditions, level and rates of taxes, sale volumes, volumes per compared sales, physical conditions of the merchandise, differences in the costs incurred at times of exportation and importation and other pertaining factors and shall be based on currency exchange rate prevailing as at the date of sale [6].

Application of anti-dumping measures is not allowed where the margin of dumping does not exceed the *de minimis* dumping margin rate or where the volume of dumped imports, actual or potential, or the injury, is considered to be (determined as) negligible. In both cases an anti-dumping investigation shall be promptly terminated (ADA - 5.8). The margin of dumping is at *de minimis* level if this margin is less than 2 % of the export price. The volume of dumped imports is regarded to be negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing WTO member-state, provided, however, that the countries individually accounting for less than 3 per cent of the imports of the like product in the such importing WTO member-state collectively account for less than 7 per cent (inclusive) of imports of the like product in that member-state.

In case where dumped imports of the like products enter the domestic market of the importing member-state from two or more countries and it is established that a dumping margin in each case is more than *de minimis* rate and the volumes of imports in each case are above the negligible levels, the effects of the such imports may be assessed cumulatively, provided that competition conditions between the imported products on one hand and between the imported and locally produced products on the other hand provides sufficient grounds for such cumulative evaluation.

Like product. Anti-dumping measures may be applied on like products only. Under the ADA, the like product is either an identical product [7, p.73-91], i.e a product which is alike in all respects to the product under consideration or where there is no such product to compare with, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration (ADA- 2.6). It is to be noted that by way of limitation of possibility of application of the anti-dumping duties to the like products only as described above, the ADA excludes the possibility of applications of the anti-dumping measures to other competing or substitutable products [2, p.205]

Material Injury. Dumping may only be actionable if it causes material injury to a domestic industry or threatens to cause material injury to a domestic industry [8, p. 91-107] or cause material retardation of the establishment of such an industry (GATT - VI:1). The determination of injury shall be proved by positive evidence and based on examination, on one hand, of the volume of the dumped imports and the increase of in

such volumes and the effect of the increase in such volumes on prices in the domestic market for like products and, on the other hand, the consequent impact of these imports on domestic producers of such products (ADA - 3.1 - 3.4).

An illustrative list of the relevant economic factors and indices having a bearing on the state of the industry includes, but is not limited to (i) actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity, (ii) factors affecting domestic prices, (iii) the magnitude of the margin of dumping, (iv) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments (ADA - 3.4). However, determination on application of anti-dumping duties requires a comprehensive assessment of all relevant factors and indices, given that under the ADA, neither one nor several of these factors brought together may constitute a basis for the determination. Establishment of the the significant rate of increase in volumes of dumped imports either in absolute terms or relative to production or consumption in the importing member-state is a material condition for the determination of injury. Significant reduction of prices by the local producers or significant depressing or suppressing effect on domestic prices may also be assessed as the factors demonstrating the existence of a threat of material injury [9, p.403-413].

There must be a casual link established between the dumped imports and the injury caused or threatened, i.e. a significant injury shall arise as a direct result of the dumped imports. A casual link shall be established by an investigating authority based on all the relevant evidence. All other known factors that may have bearing on the state of the local industry and cause an injury shall be taken into consideration, but without attribution of such injuries caused by these other factors to the dumped imports. Factors not attributable to the alleged dumping include (without limitation) such factors as the volumes and prices of the imported products not sold in the domestic market at dumping prices, contraction in demand or changes in the patterns of consumption, competition between the foreign and domestic producers, technology advances and level of productivity of the domestic industry.

Domestic Industry. The “domestic industry” is defined as all the local producers of the like products or those local producers whose cumulative output constitutes a major part of the total domestic production of the like products concerned (ADA -4.1). The producers who are related to the exporters or importers or themselves are importers of the allegedly dumped products may be disregarded for the purposes of assessment of the domestic industry, provided, however, that there are sufficient grounds to suspect that the relationship concerned would act as an incentive for such related producers not to support actions of non-related producers. The parties are considered to be related when a party directly or indirectly controlled by the other party or both of them are directly or indirectly controlled by a third party or a third party is directly or indirectly controlled by the parties. One shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

Domestic Legislation. Anti-dumping is just one of the possible safeguards of which utilisation is allowed under the GATT (22) subject to certain conditions and like all other remedies against unfair trade practices, anti-dumping measures may be applied only where there is possibility for their application [10, p.148-160]. Existence of such possibility depends greatly on the regulatory framework, i.e. establishment of dumping and application of anti-dumping measures would be impossible if there is no relevant

domestic legislation and procedures governing anti-dumping investigation in place [43, p.19-32]. In countries where there are no regulations on the issue, the relevant regulation would be required to be enacted with introduction of the relevant amendments in the existing legislation [11, p.137-144].

However, the ADA, taking into account the practice of the utilisation of anti-dumping procedures in a capacity of a non-tariff barrier and aiming at the prevention of such use of anti-dumping measures in the future, provides for the harmonisation of domestic anti-dumping regulations and establishes uniform requirements and standards for the organisation and conduct of the anti-dumping investigation mandatory for all the WTO member-states [12, p.297-327]. The WTO member-states shall comply with general rules relating to the initiation and conduct of the anti-dumping investigation and judicial review of the findings and application of the anti-dumping duties.

Initiation of the anti-dumping investigation. An anti-dumping investigation may only be initiated upon a written application by or on behalf of the domestic industry to the relevant authority (ADA – 5.1, 5.2). Filing an application does not constitute on and out of itself a basis for the initiation of an investigation. In case where the application appears to be short of the information/evidence specified in Art. 5.2 of the ADA, a relevant state authority shall be obliged to reject the initiation of an investigation. In addition, the investigation authority shall be obliged to establish whether or not the application filed is supported by domestic producers of the like product representing the “domestic industry” as described above. Only in case where it is determined that an application is duly supported, an investigation may start (ADA – 5.4). In the territory of certain WTO member-states employees of domestic producers of the like product or representatives of those employees (e.g. trade unions) may make or support an application for an anti-dumping investigation. Existence of such right for interested groups is entirely a matter of the domestic law. The application is considered to have been made “by or on behalf of the domestic industry” if it is supported by domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry. When a required support is determined on the basis of sufficient evidence a decision may be given on start of an investigation. Such decision shall be publicly announced.

Anti-dumping procedure. The Investigation shall be conducted in strict compliance with the ADA provisions. Provisional measures such as a provisional duty or a security in the form of cash deposit or bond equal to the amount of the provisionally estimated anti-dumping duty may be applied prior to the completion of the investigation. Such measures may not be greater than the provisionally estimated margin of dumping and may not be applied until the expiry of 60 days from the date of initiation of the investigation (ADA – 5.7).

The investigation shall be completed not later than a year as a rule and in any case may not last more than 18 months (ADA – 5.10). The investigation shall be conducted on contention basis (ADA – 6.2) and parties shall be provided equal unhindered opportunities to present their cases and all the relevant evidence (ADA – 6.1). Users and consumers of the product concerned (businesses or consumer organizations) shall be

entitled to participate in the investigation [For more detailed discussion see: 38, p.111-140] and to provide information/evidence relevant to the dumping, injury and causality (ADA - 6.12). Confidential information may not be disclosed, however, a party presented confidential information may be requested and in this case, will be required to present a non-confidential summary of such confidential information (ADA - 6.5). Information presented by the parties may be verified, if necessary and subject to agreement of the persons concerned, in the territories of other member-states, unless such member-state objects to the investigation following due notification of the member-state conducting the investigation (ADA - 6.7, Annex 1). The investigation authority shall inform all interested parties, before arriving at final decision on application of anti-dumping measures, of the essential findings which will form the basis for the final decision. Such disclosure shall be made in such time so that the parties have sufficient time to defend their cases (ADA - 6.9).

The ADA provides for the possibility of termination of the investigation if the exporter of the products at dumped prices undertakes to revise the prices so that the injurious effect of the dumping is eliminated (ADA - 8). Such undertaking may be accepted by authorities if they find it satisfactory in all material respects from the perspectives of the purposes (i.e. elimination of the injurious effects of dumping or prevent threat of such effect) of the investigation and may be offered and accepted only following a preliminary determination of dumping and injury attributable to it. However, authorities may require the exporter to provide information on the compliance with the undertaking from time to time and shall be in a position to verify such information.

Retroactivity. When an anti-dumping measure is applied it, generally, shall not have retrospective effect, i.e. as a general rule, the anti-dumping duties are applied after the final decision on application of the anti-dumping measures has been delivered and entered into force. However, under Art. 10.2 of the ADA, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied following the final determination of injury. In case of determination of a threat of injury, anti-dumping duties may retroactively be levied only for the period of time specified above, if it is determined that the dumping would, in the absence of the provisional measures, lead to a determination of injury (ADA - 10.2). Anti-dumping duties may be levied retroactively for the period of time not exceeding 90 days prior to the date of application of provisional measures and in any case only up to the date of initiation of the investigation (ADA - 10.8) if it is determined that (i) there was a history of dumping, which caused injury; or (ii) the importer was, or should have been, aware that the exporter practises dumping which would cause injury; or (iii) the injury is caused by a relatively large volume of dumped imports within a short period of time which, given the timing and the volume, is capable to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied.

Duration of a Measure. Application of an anti-dumping duty shall cease immediately when there is no necessity to offset dumping that causes injury. This shall be established by subsequent review to be initiated either by authorities or an interested party, provided that any review may start upon lapse of a reasonable period of time since the imposition of the definitive anti-dumping measure. Any interested party requesting a review with the aim of lifting an anti-dumping duty shall submit sufficient information substantiating its request. The term of an anti-dumping duty is limited to

five years from its imposition or from the date of the most recent review (ADA - 11.3), if not terminated prior to the expiry due to a review as described above, unless authorities determine, in a review to be held (either on initiative of authorities or the domestic industry) and completed before the expiry, that the termination of the duty would likely cause continuation or recurrence of dumping/injury. There is no limit on the number of the reviews meaning that an anti-dumping measure may be kept in force intact or as may be changed (increased or decreased) pursuant to reviews for indefinite period of time by way of multiple renewals, if substantiated. Same rules are applicable to the price undertakings.

Judicial Review. There are two ways in which review of the anti-dumping determinations may be sought. Subjects of domestic legal systems (natural and legal persons) may refer to the local judicial bodies and the WTO members may refer to the DSB. It is one of the most significant requirements of the ADA that the application of the anti-dumping measures be susceptible of an independent judicial review [13, p.97-130]. Local legislation shall provide for procedural rules allowing a quick judicial review of the final determinations on application of anti-dumping measures and price-undertaking [14, p.329-342]. A WTO member-state shall have a legislation in place providing for a procedure of prompt review of administrative actions relating to final determinations and reviews of determinations by an independent judicial, arbitral or administrative tribunal (ADA - 13).

At the same time, in case any WTO member believe that benefit accruing to it under the Anti-Dumping Agreement is impaired or nullified or that the achieving of any goal expected under the ADA is being impeded by one or more other member-states, it may request consultations with such member(s) (ADA - 17.3). If a decision is given by the investigation body on definitive anti-dumping duties and such member is of the opinion that the consultations requested as described above failed, it may refer to the Dispute Settlement Body ("DSB") (ADA - 17.4). Application by the member shall indicate how a benefit accruing to it has been nullified or impaired. Possibility to refer to the DSB prior to the delivery of the final determination exists where a provisional measure having a significant impact is applied which, in the opinion of the affected member, had been taken contrary to the provisions ADA (Article 7.1). Possibility to refer to the DSB is not subject to the exhaustion of local remedies, i.e. delivery of the final determination or of a provisional measure having a significant impact suffice for the referral of a case to the DSB. The DSB shall, in such case, establish a panel to examine the matter [15, p.109-181].

If the procedures applied by the investigation body complied with the above mentioned requirements of the ADA, i.e. the establishment of the dumping and the determination of the anti-dumping duty was proper and in accordance with the ADA and the evaluation was unbiased and objective, the panel may not be overturn either a determination of an investigation body or decision of an independent tribunal, even where the panel reaches a different conclusion (ADA - 17.6(б)). In other words, the DSB shall not be entitled to overturn the anti-dumping measure, if it has been applied by authorities in an unbiased and objective manner. Carreau and Juillard, however, denote that this approach may be considered as reasonable as long as the independent judicial control over the measures applied by the executive authorities is concerned (10, p.209). The fact, however, that the ADA refers not only to the independent judiciary, but to the decisions of government authorities in general, warrants a conclusion on

impossibility for the DSB to overturn decisions of the investigation (executive) bodies as well, if they were unbiased and objective.

In addition, the ADA, admits the possibility of different permissible interpretations of one and the same provision and establishes a presumption of priority of the permissible interpretation chosen by authorities. According to this presumption, provisions of ADA shall be interpreted by the DSB in accordance with the customary rules of interpretation of public international law and in case other interpretations are possible, the panel shall find the authorities' measure to be in conformity with the Agreement even where it has been based on the rules of interpretation accepted in the country but which are in conformity with the interpretation permissible under the rules of public international law [16, p.893-916]. Although not directly referred to in the ADA, permissible rules/means of interpretation shall be understood [9, p.340-345] to be those specified (or implied even if not specified) [9, p.305-306] in 1969 Vienna Convention on the Law of Treaties (Art. 31, 32).

Based on the above, it is apparent that a decision by authorities (be it a decision by an executive or judicial body) may be disputed by the DSB only where:

(1) the determination of dumping and of the anti-dumping measure was wrong and such determination has been accompanied by the breach of the requirements of the ADA;

(2) the determination was not unbiased and objective;

(3) judicial supervision is not by an independent tribunal and a relevant court decision has not been delivered by a court which may be recognised as an independent one;

(4) interpretation by authorities was not in conformity with the rules of interpretation customarily accepted under international law [4, p.277-310].

In conclusion, it is to be stated that under the ADA, any WTO member-state shall undertake necessary measures to bring its laws, regulations and administrative procedures in conformity with the ADA (Article 18.4). By way of this requirement the ADA establishes supremacy of the international law over the domestic law [2, p.203-204].

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