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# *Normative Obsolescence of the WTO Anti-Dumping Agreement—Topography of the Global Use and Misuse of Initiations and Measures*

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**Abstract**
The Anti-Dumping (AD) mechanism is susceptible to potential misuse for protectionist purposes, and the current explosion of AD disputes indicate a massive problem in the way international trade rules are implemented. The current World Trade Organisation (WTO) negotiations have identified areas within the Anti-Dumping Agreement (ADA) for possible reform; accordingly, the present analysis discusses these areas of concern relating to the AD provision. First, recent trends in AD practice will be analyzed both quantitatively and qualitatively to show the growing role of Asian economies. In particular, the traditional targets of AD activism, China and India, have initiated a number of AD investigations over the last decade, while imposing final measures on several occasions. Second, the ADA will be examined alongside a discussion of the potential risks of misinterpretation. Third, the paper will analyze all the complaints lodged at the WTO Dispute Settlement Body (DSB) on ADA to date.

Despite two decades having passed since the inception of the WTO, the goal of freeing world trade from trade barriers has yet to be fulfilled. While gradual tariff reforms have been made since 1995, several other trade barriers have simultaneously emerged; a major concern being AD actions. The incidence of dumping in the international trade arena is not counter-intuitive, and may occur from the classic co-existence of an imperfectly competitive home market and a highly competitive

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world market.[1] Alternatively, technical dumping might occur where a firm attempts to adjust prices to fight exchange rate volatility.[2] Yet keeping these theoretical possibilities in mind, dumping per se is not considered to be WTO-incompatible as per the ADA. However, dumping of products below the critical margin of two percent *ad valorem* is not considered mere coincidence but rather linked with predatory pricing strategies and unfair trade practices. Such circumstances offer a compelling argument in favour of interventions to be undertaken by importing countries, in order to protect the interest of their local players.

Another aspect of the AD framework which deserves particular attention is the AD mechanism's susceptibility to potential misuse for protectionist purposes such as, for example, lobbying by domestic players.[3] Given that only industry segments accounting for the majority of domestic production (i.e. more than fifty percent) can approach the government for initiating AD investigations, highly concentrated scale-intensive large industries with exposure to foreign competition generally furnish a greater degree of activism in this regard.[4] Therefore, the role of competition is immensely important, and the probability of relatively less efficient producers lobbying for contingency protections against increased inflow of cheaper imports is quite frequent. This phenomenon has been observed in both the primary and manufacturing industries; in the former sphere, the experience of Indian shrimp exporters are instructive,[5] while the US supercomputer case[6] represents a classic example of the latter. However, exposure to tough import competition may also motivate even less-concentrated industries to seek relief through the AD mechanism.[7]

The misuse of the AD provision with protectionist interest can impose yet another threat to the international trade architecture. An equivalent of the classic "beggar-thy-neighbour-policy" can emerge with time in this sphere, where the countries perceiving "undue AD activism" by select partner countries may attempt to reciprocate

1. Mark WU, "Antidumping in Asia's Emerging Giants" (2012) 53 Harvard International Law Journal 102.
2. Michael LEIDY and Bernard HOEKMAN, "Production Effects of Price- and Cost-Based Anti-dumping Laws under Flexible Exchange Rates" (1990) 23 Canadian Journal of Economics 873.
3. Michael J. FINGER, "The Industry-Country Incidence of Less-than-Fair-Value Cases in US Import Trade" (1981) 21 Quarterly Review of Economics and Business 260; Michael J. FINGER, H. Keith HALL, and Douglas NELSON, "The Political Economy of Administered Protection" (1982) 72 American Economic Review 452; Mark HERANDER and J. Brad SCHWARTZ, "An Empirical Test of the Impact of the Threat of US Trade Policy: The Case of Antidumping Duties" (1984) 51 Southern Economic Journal 59; Leonard K. CHENG, Larry D. QIU, and KIT Pong Wong, "Anti-Dumping Measures as a Tool of Protectionism: A Mechanism Design Approach" (2001) 34 Canadian Journal of Economics 639; Douglas NELSON, "The Political Economy of Anti-Dumping: A Survey" (2006) 22 European Journal of Political Economy 554.
4. Chad P. BOWN, "The World Trade Organization and Anti-Dumping in Developing Countries", World Bank Policy Research Working Paper No. 4014, September 2006.
5. B. BHATTARCHARYYA, "The Indian Shrimp Industry Organizes to Fight the Threat of Anti-Dumping Action", WTO Case Study No. 17 (undated), online: WTO <http://www.wto.org/english/res_e/booksp_e/casestudies_e/case17_e.htm>.
6. Jean-Christophe MAUR and Patrick A. MESSERLIN, "Antidumping in Supercomputers or Supercomputing in Antidumping? The Cray-NEC Case", SSRN (3 August 2006), online: SSRN <http://dx.doi.org/10.2139/ssrn.920990>.
7. Nandana BARUAH, "Anti-Dumping Duty as a Measure of Contingent Protection: An Analysis of Indian Experience", CDS Working Paper No. 377, Thiruvananthapuram, 2005.

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the same. Maur has termed this phenomenon as "echoing protection",[8] and has reported the prevalence of such competitive AD activism in several countries (e.g. Canada, the EU, and the US). On the other hand, given the recent rising trend in AD investigations originating from developing countries,[9] it can be argued that a "learning-by-suffering" phenomenon is becoming increasingly evident. For instance, the low-cost developing countries like India, Argentina, South Africa, and Turkey were at the receiving end of AD activism during the 1990s, but have slowly emerged as major users of this provision over the last decade.[10] In particular, China and India, the traditional targets of AD activism, have initiated a significant number of AD investigations during the last decade, and imposed final measures on several occasions.[11] Moore and Zanardi have signalled that increasing AD activism in developing countries often does not facilitate the ongoing sectoral tariff reform process, thereby leading to double protectionism.[12] These developments have led to the conclusion that the "trend of active use of antidumping tools has shifted from the developed countries towards the developing countries".[13]

Irrespective of the underlying motivations, the AD cases generally lead to trade diversion for the exporting countries.[14] However, the beneficiary of the AD action generally differs. An empirical analysis by Prusa reports that the imposition of AD duties leads to considerable trade diversion from named to non-named countries (in the investigation), and the magnitude of the same is directly proportional to the estimated duty.[15] For instance, the recent US AD duties against

8. Jean-Christophe MAUR, "Echoing Anti-Dumping Cases: Regulatory Competitors, Imitation and Cascading Protection" (1998) 21 World Competition 51.

9. I.N. NEUFELD, "Anti-dumping and Countervailing Procedures—Use or Abuse? Implications for Developing Countries", UNCTAD Policy Issues in International Trade and Commodities Study Series No. 9, Geneva 2001; N.M. THERON, "Anti-Dumping Procedures: Lessons for Developing Countries with Special Emphasis on the South African Experience" in Bibek DEBROY and Debashis CHAKRABORTY, eds., *Anti-Dumping: Global Abuse of a Trade Policy Instrument* (New Delhi: Academic Foundation, 2007), at 67–84.

10. Rachel JAFTA, "Anti-dumping and Market Access: The Nature of the Beast in the New Millennium", ECONEX Research Note 2, South Africa, 2006; Cengiz BAHCEKAPILI and Murat COKGEZEN, "Calculating Normal Value as a Way of Protection: Some Evidence from Turkish Dumping Investigations" in Debroy and Chakraborty, *supra* note 9 at 49–66; Michael J. FINGER and Julio J. NOGUES, "Safeguards and Antidumping in Latin American Trade Liberalization", World Bank Policy Research Working Paper No. 4680, Washington, DC, 2008; Michael O. MOORE, "Argentina: There and Back Again?", Institute for International Economic Policy Working Paper, The George Washington University, 2011.

11. Mark WU, "Antidumping in Asia's Emerging Giants" (2012) 53 Harvard International Law Journal 102.

12. Michael O. MOORE and Maurizio ZANARDI, "Does Antidumping Use Contribute to Trade Liberalization in Developing Countries?", Institute for International Economic Policy Working Paper, George Washington University, 2008.

13. Dan WEI, "Antidumping in Emerging Countries in the Post-crisis Era: A Case Study on Brazil and China" (2013) 16 Journal of International Economic Law 921–58.

14. Paul BRENTON, "Anti-dumping Policies in the EU and Trade Diversion" (2001) 17 European Journal of Political Economy 593 at 607; Ludo CUYVERS and Michel DUMONT, "The Impact of Anti-dumping Measures of the EU Against ASEAN Countries on Trade Flows", Centre for ASEAN Studies Discussion Paper No. 45, University of Antwerp, 2004; PARK Soonchan, "The Trade Depressing and Trade Diversion Effects of Antidumping Actions: The Case of China" (2009) 20 China Economic Review 542 at 548.

15. Thomas J. PRUSA, "The Trade Effects of U.S. Antidumping Actions" in Robert C. FEENSTRA, ed., *The Effects of US Trade Protection and Promotion Policies* (Chicago: University of Chicago Press, 1997), 191–213.

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Vietnamese catfish exports adversely affected the sector in the exporting country, leading to a substantial exit of workers.[16] Conversely, Khatibi noted that the EU AD actions benefited the EU domestic players more, vis-à-vis the non-named countries.[17]

The increasing (mis)use of this provision helped it to emerge as a focus area at the Doha Ministerial, and subsequently the Doha Ministerial Declaration (paragraph 28) agreed to "negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI".[18] However, the negotiations never achieved the desired progress, which caused the Cancun Ministerial Declaration (paragraph 7) to "instruct the Negotiating Group on Rules to accelerate its work on anti-dumping" measures.[19] The Hong Kong Ministerial Declaration took note of the concerns and the state of negotiations, and AD provisions have been mentioned separately in an annex (Annex D.I on rules). The Members have agreed to negotiate towards the clarification or improvement of the ADA rules involving various provisions including determinations of dumping, injury and causation, and the application of measures. Under the Doha Round Negotiations, the Rules Committee of the WTO tried to identify areas within the AD Agreement which deserve attention.[20] In this context, the present analysis contributes to the literature by attempting to identify these major concern areas relating to AD provisions, and thus it is arranged along the following lines. In Section I the ADA is analyzed, and in Section II the potential risks of misinterpretation of the agreement are discussed. Section III looks into the present scenario regarding the ADA violations, as emerging from the complaints lodged at the WTO DSB. On the basis of the findings, Section IV draws the policy conclusions.

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16. Irene BRAMBILLA, Guido PORTO, and Alessandro TAROZZI, "Adjusting to Trade-Policy Changes in Export Markets: Evidence from US Antidumping Duties on Vietnamese Catfish", World Bank Policy Research Working Paper No. 4990, 2009.
17. Arastou KHATIBI, "The Trade Effects of European Anti-dumping Policy", ECIPE Working Paper No. 7, 2009.
18. "Doha WTO Ministerial 2001: Ministerial Declaration", World Trade Organization (14 November 2001), online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.
19. "Cancun WTO Ministerial 2003: Ministerial Declaration", World Trade Organization (14 September 2003), online WTO <https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm>.
20. For instance, the US basically considers that the "provision of Article 17.6(h) of the Anti-dumping Agreement (which stipulates in part that 'Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations') should lead to the conclusion that countries' calculation of dumping margin based on the zeroing method should be found inconsistent with the agreement". But the Appellate Body adopted opposite views, not accepting the legitimacy of zeroing practice under the Anti-dumping Agreement in a number of cases, including *DS 294 (United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing))*, *DS 322 (United States-Measures Relating to Zeroing and Sunset Reviews)*, and *DS 350 (United States-Continued Existence and Application of Zeroing Methodology)*. This is part of the reasons that in the Doha Round, the US proposed to negotiate and adopt clearer and more precise rules under the Anti-dumping Agreement to permit the use of zeroing in both investigations and administrative reviews in anti-dumping procedures [FN22]. This is a clear example showing that the quasi-judicial activities of the DSM under the WTO can trigger multilateral negotiations so as to restrict the exercise of the quasi-judicial power of the Appellate Body. Chang-fa LO, "The Role of Dispute Settlement Mechanism in Facilitating Multilateral Trade Negotiations" (2014) 9 Asian Journal of WTO and International Health Law and Policy 407 at 410.

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## I. CATEGORIZING THE POST-CRISIS PRACTICE OF ANTI-DUMPING

During the 1980s, the developed countries were the major users of this provision, although some Latin American countries were not far behind.[21] However, in recent years, developing countries from other regions (notably Asia)[22] have increasingly taken recourse under this provision as a protectionist measure, causing a rise in the number of intra-developing country AD disputes. Rather than being a weapon for the exclusive use of rich countries, the provision is increasingly being used against them instead.[23] This phenomenon has raised the urgent need to tackle the "globalization" of AD measures.[24]

### A. *Emergence of a Reverse Protection*

Figure 1 shows the annual movements in the AD investigations and final measures over the period 1995–2014. The rise in AD protectionism during the period 1995–2001 coincided with the decline in average tariff barrier as a part of multilateral discussions.

During the period 2001–07, with the progress of the Doha Round Negotiations, the AD activism was contained to some extent. However, the recession in 2008 created a "reverse protectionism" wave across countries with a rise in tariff barriers,[25] and a simultaneous rise in the cases of AD measures was also noticed. A similar trend was noticed after the 2011 crisis as well. A significant proportion of the AD measures during 2008–10 had adverse implications for intra-developing country trade.[26] The saving grace perhaps is that the final AD measures expressed as a percentage of annual initiations have reached a plateau over the last decade, barring limited fluctuations.

Table 1 summarizes the top ten players involved in the AD actions over the period 1995–2013. The first three columns show the major countries which suffer from cumulative use of this provision.

21. Up to the 1980s, the "anti-dumping club" initiated almost all cases.
22. For instance, among the five cases filed by China since September 2008, four (*U.S.-Anti-Dumping and Countervailing Duties; EU-Steel Fasteners; U.S.-Tyres;* and *EU-Footwear*) were aimed at changing the rules, especially the provisions in China's Accession Protocol. For example, in the *U.S.-Anti-Dumping and Countervailing Duties* case, China challenged the decision by the US authorities to impose both anti-dumping and countervailing duties against several products imported from China. In addition to the usual claims under the GATT, the Anti-dumping Agreement, and the SCM Agreement, two claims made by China are particularly interesting, and are described in more detail in Henry GAO, "Elephant in the Room: Challenges of Integrating China into the WTO System" (2014) Asian Journal of WTO and International Health Law and Policy 137 at 141–3.
23. K.D. RAJU, "WTO Anti-dumping Protectionism: 2005 and Beyond" in J.K. MITTAL and K.D. RAJU, eds., *World Trade Organisation and India: A Critical Study of Its First Decade* (Delhi: New Era Law Publications 2005), at 204.
24. The question of to whom this is a "problem" is open to interpretation. Most authors argue that anti-dumping measures are an impediment to free trade.
25. See Julien CHAISSE and Debashis CHAKRABORTY, "The Evolving and Multi-layered Investment Regulatory Framework between the European Union and India" (2014) 20 European Law Journal 385.
26. Chad P. BOWN, "The Global Resort to Antidumping, Safeguards, and other Trade Remedies Amidst the Economic Crisis", World Bank Policy Research Working Paper No. 5051, 2009.

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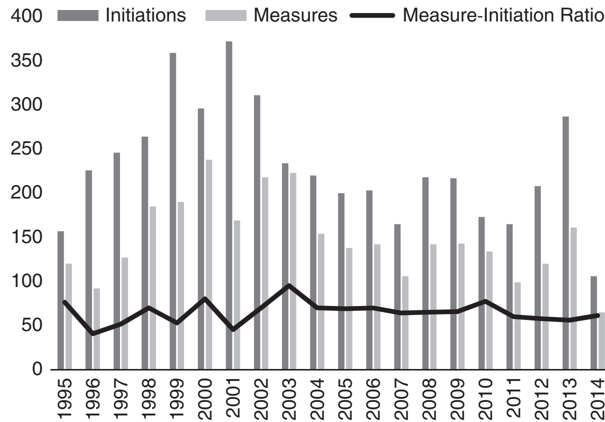


**Figure 1:** Anti-dumping investigations, worldwide
SOURCE: Constructed by the authors from the WTO ADA database (01/01/1995–16/02/2015).

**Table 1.** Major players in the anti-dumping arena

| **Major exporters suffering from anti-dumping actions** | | | **Major imposers of anti-dumping actions** | | |
|---|---|---|---|---|---|
| **Sl. No.** | **Country** | **Number and percentage share in total number of cases imposed on exporters** | **Sl. No.** | **Country** | **Number and percentage share in total number of cases imposed by importers** |
| 1 | China | 1022 (22.09) | 1 | India | 715 (15.45) |
| 2 | Republic of Korea | 341 (7.37) | 2 | United States | 521 (11.26) |
| 3 | Chinese Taipei | 258 (5.58) | 3 | European Union | 457 (9.88) |
| 4 | United States | 257 (5.55) | 4 | Brazil | 363 (7.85) |
| 5 | Thailand | 189 (4.08) | 5 | Argentina | 314 (6.79) |
| 6 | Japan | 185 (4.00) | 6 | Australia | 278 (6.01) |
| 7 | India | 181 (3.91) | 7 | South Africa | 228 (4.93) |
| 8 | Indonesia | 181 (3.91) | 8 | China | 215 (4.65) |
| 9 | Russian Federation | 133 (2.87) | 9 | Canada | 186 (4.02) |
| 10 | Brazil | 122 (2.64) | 10 | Turkey | 170 (3.67) |
| | Sum total | 2869 (62.01) | | | 3447 (74.50) |

SOURCE: Constructed by the authors from the WTO ADA database (01/01/1995–16/02/2015).
NOTE: The numbers in the parentheses denote the percentage figures.

It can be observed that while a number of low-cost developing country exporters (e.g. Thailand, India, and Brazil) are affected by AD investigations, China, South Korea, and the US suffer the most. The last three columns, on the other hand, show the relative incidence of the AD cases among major initiators of AD actions. As noted earlier, it is seen that cumulatively AD actions by India have bypassed the same imposed by the traditional users like the EU and the US. Brazil and Argentina are among other developing countries who have heavily taken recourse to AD actions since WTO inception. The considerable presence of several developing countries under both columns indicates the growing incidence of developing-developing country AD actions.

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**Table 2.** Major products in the anti-dumping arena

| HS section | Product group description | Anti-dumping initiations | Anti-dumping measures | Measures expressed as a percentage of initiations |
|---|---|---|---|---|
| I | Live animals and products | 58 | 28 | 48.28 |
| II | Vegetable products | 56 | 37 | 66.07 |
| III | Animal and vegetable fats and oils | 14 | 2 | 14.29 |
| IV | Prepared foodstuffs; beverages and tobacco | 65 | 35 | 53.85 |
| V | Mineral products | 75 | 50 | 66.67 |
| VI | Products of the chemical and allied industries | 928 | 624 | 67.24 |
| VII | Articles of plastic and rubber | 614 | 379 | 61.73 |
| VIII | Hides, skins, and articles | 5 | 2 | 40.00 |
| IX | Wood, cork, and articles; basketware | 98 | 51 | 52.04 |
| X | Paper, paperboard, and articles | 228 | 125 | 54.82 |
| XI | Textiles and articles | 343 | 250 | 72.89 |
| XII | Footwear, headgear, etc. | 32 | 23 | 71.88 |
| XIII | Articles of stone, ceramic, and glass | 192 | 108 | 56.25 |
| XIV | Gems and jewellery | 1 | | 0.00 |
| XV | Base metals and articles | 1328 | 881 | 66.34 |
| XVI | Machinery and electrical equipment | 400 | 244 | 61.00 |
| XVII | Vehicles, aircraft, and vessels | 48 | 29 | 60.42 |
| XVIII | Instruments, clocks, recorders, etc. | 51 | 34 | 66.67 |
| XX | Miscellaneous manufactured articles | 91 | 64 | 70.33 |
| | Total number of cases | 4627 | 2966 | 64.10 |

SOURCE: Constructed by the authors from the WTO ADA database (01/01/1995–16/02/2015).

Table 2 looks into the Harmonized System (HS) section-wise AD initiations as well as final measures over the period 1995–2014.

Three important observations may be drawn in the light of the facts emerging from Table 2. First, the industry with the greatest number of AD initiations to date is the base metal and chemical products sector, which features in the export interests of both developed and developing countries. Interestingly, both of these sectors can be characterized by high concentration, thereby enabling a handful of players to influence governmental decisions, which may explain the higher degree of AD activism. The other major sectors attracting AD actions include plastic, rubber, machinery, equipment, and textiles, all of which appear extensively in the export basket of developing countries. Second, the rightmost column indicates that the AD initiations have most often been converted into final measures in the case of low-tech manufacturing product groups, such as textile and clothing products, footwear and headgear, miscellaneous manufactured articles, and primary commodities such as vegetable products. This observation underlines the potential threat for developing country exporters in no uncertain terms. Third, although the initiation-to-final measure ratio is lower for the primary commodities sector, developing country interventions have on numerous occasions been vindicated by WTO DSB.[27]

27. WTO Panel Report, *United States-Anti-Dumping Measures on Shrimp and Diamond Sawblades from China*, WT/DS422/R/Add.1, 8 June 2012; *United States-Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, 25 March 2011.

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### B. *Echoing Effect of Anti-Dumping Protectionism*

Table 3 attempts to analyze the "echoing effect" of AD protectionism, in respect of select major users of this provision. The horizontal rows of the table depict the exporting countries, while the vertical columns show the imposers of the AD investigations/measures.

From Table 3, it can be observed that a strong regional AD "echo" pattern is emerging. For instance, within MERCOSUR (Mercado Común del Sur), Argentina and Brazil have imposed several measures on each other. This phenomenon is also observed in East Asia for South Korea-China trade pair. A similar but weaker effect is also observed within NAFTA (North American Free Trade Agreement), involving Canada, Mexico, and the US. On the other hand, a strong developed-to-developing country "echo" can be noticed too (e.g. EU-India, US-China). In that comparison, the developing-to-developing country "echo" is found to be weaker. For instance, the India-China or India-South Korea initiations are much higher when compared to the China-India or the South Korea-India initiations and measures.

Table 4 shows the sector-wise pattern of major imposers of AD provisions, indicating that the actions of developed countries may have been influenced by domestic economic compulsions.

It is observed that, while in general the AD actions of Australia, the EU, and the US have focused on chemical products, plastic, rubber, and base metals, individual focus areas (e.g. wood products in Australia; textiles in the EU; base metals and machinery in the EU and the US) are no less important. Canadian actions have concentrated primarily on the base metal sector. Displaying a similar trend, major developing countries like Brazil, China, and India have also intervened significantly on chemical products, plastic and rubber products, textiles, base metals, and machineries.

Table 5, which summarizes the sector-wise list of major countries affected by AD imposition, displays the other side of such contingency activism.

Though developed countries like Japan and the US also suffer from the AD initiations/measures, adverse implications are more profound for China, Thailand, India, and other low-cost producer countries. In addition, the similarity in the sectors where AD intervention is taking place across development levels (e.g. chemical products, base metals, and machineries, further underlines the importance of industrial concentration in influencing AD actions.

## II. REGULATING ANTI-DUMPING MEASURES

AD, one of the core GATT (General Agreement on Tariffs and Trade)/WTO provisions, has recently emerged as a significant trade barrier[28] owing to its growing misuse by both developed and developing countries. The philosophy underlying AD laws is structurally uncertain. Essentially, all AD laws are intended to "protect"

28. Gary HORLICK and Edwin VERMULST, "The 10 Major Problems With the Anti-dumping Instrument: An Attempt at Synthesis" (2005) 39 Journal of World Trade 67 at 67–70.

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**Table** 3. Global anti-dumping usage matrix—initiations and final measures

| Exporting country | Imposing country | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Argentina | Brazil | Canada | China | European Union | India | Indonesia | Japan | Korea, Republic of | Malaysia | Mexico | Russian Federation | Singapore | South Africa | Chinese Taipei | Thailand | Turkey | Ukraine | United States | Total |
| Argentina | – | 12 (5) | 1 (0) | | 1 (1) | | | | 1 (0) | | | | | 1 (0) | | 1 (1) | | | 5 (6) | 43 (21) |
| Brazil | 53 (37) | – | 8 (5) | 1 (1) | 4 (5) | 7 (8) | | | 1 (0) | | 6 (10) | 1 (1) | | 10 (5) | | | 1 (1) | 1 (0) | 10 (9) | 122 (88) |
| Canada | 1 (1) | 3 (1) | – | 2 (2) | 1 (0) | 5 (3) | 1 (0) | | 3 (2) | 1 (1) | 1 (2) | | | | | | 1 (1) | | 15 (6) | 41 (20) |
| China | 91 (68) | 82 (50) | 35 (25) | – | 115 (85) | 165 (132) | 19 (11) | 2 (1) | 25 (21) | 7 (5) | 42 (24) | 9 (6) | | 39 (20) | 10 (6) | 17 (14) | 65 (60) | 9 (8) | 121 (97) | 1022 (740) |
| European Union | 1 (0) | 8 (3) | | 24 (20) | – | 54 (41) | 2 (1) | | | 3 (2) | 1 (1) | | | | | 1 (1) | 1 (0) | | | 104 (73) |
| India | 12 (9) | 17 (7) | 6 (4) | 7 (5) | 34 (20) | – | 13 (8) | | 5 (3) | 1 (0) | 1 (1) | 1 (1) | | 22 (12) | 2 (1) | 2 (1) | 12 (10) | | 26 (13) | 181 (104) |
| Indonesia | 6 (5) | 5 (3) | 4 (3) | 5 (3) | 16 (13) | 27 (22) | – | 1 (0) | 7 (4) | 12 (8) | 1 (1) | | | 9 (5) | 2 (0) | 5 (3) | 9 (9) | | 19 (11) | 181 (111) |
| Japan | 3 (5) | 3 (1) | 3 (3) | 37 (29) | 9 (7) | 32 (25) | 4 (2) | – | 20 (14) | 3 (1) | 1 (2) | | | 1 (1) | 5 (2) | 4 (2) | 2 (0) | | 37 (22) | 185 (128) |
| Republic of Korea | 15 (11) | 21 (8) | 13 (9) | 32 (27) | 28 (12) | 54 (39) | 16 (6) | 1 (1) | – | 11 (7) | 3 (2) | 1 (1) | | 16 (16) | 8 (4) | 8 (5) | 7 (7) | 1 (1) | 36 (17) | 341 (207) |
| Malaysia | 3 (2) | 2 (0) | 2 (0) | 4 (3) | 17 (11) | 24 (16) | 8 (4) | | 7 (4) | – | | | 0 (1) | 8 (3) | 1 (0) | 2 (2) | 8 (7) | | 7 (3) | 119 (69) |
| Mexico | 3 (3) | 10 (4) | 3 (3) | 1 (1) | 2 (3) | 5 (3) | | | | | – | | | | | | | | 24 (15) | 66 (39) |
| Russian Federation | 4 (2) | 7 (3) | 5 (3) | 11 (9) | 20 (18) | 22 (16) | 3 (3) | | 3 (3) | | 6 (6) | – | | 2 (2) | 1 (1) | 2 (2) | 3 (5) | 10 (9) | 13 (7) | 133 (105) |
| Singapore | | 1 (1) | | 6 (5) | 2 (1) | 23 (17) | 4 (1) | | 4 (4) | 1 (0) | | | – | 1 (0) | | | | | 1 (0) | 48 (33) |
| South Africa | 10 (6) | 7 (3) | 5 (3) | 1 (0) | 4 (4) | 10 (8) | | 1 (1) | | | | 1 (1) | | – | | 1 (1) | | | 16 (9) | 66 (43) |
| Chinese Taipei | 11 (11) | 17 (8) | 10 (5) | 16 (14) | 26 (11) | 52 (41) | 13 (5) | 1 (1) | 5 (4) | 7 (4) | 4 (3) | 4 (3) | | 11 (6) | – | 6 (5) | 10 (10) | | 28 (18) | 258 (166) |
| Thailand | 7 (4) | 10 (8) | 3 (2) | 4 (4) | 21 (19) | 40 (28) | 7 (3) | | 6 (2) | 9 (5) | | | | 5 (4) | 1 (0) | – | 12 (11) | | 14 (9) | 189 (124) |
| Turkey | 2 (2) | 3 (1) | 5 (3) | | 15 (3) | 8 (6) | 2 (1) | | | 1 (0) | 1 (0) | 1 (1) | 0 (1) | 4 (2) | | | – | 2 (2) | 11 (4) | 68 (33) |
| Ukraine | 2 (2) | 4 (3) | 4 (4) | 1 (1) | 14 (11) | 12 (6) | 2 (2) | | | | 6 (6) | 5 (4) | | 1 (1) | | 2 (1) | 2 (4) | – | 8 (6) | 76 (60) |
| United States | 15 (6) | 42 (18) | 17 (11) | 40 (33) | 15 (8) | 37 (26) | 2 (1) | | 14 (7) | 1 (1) | 27 (21) | | | 10 (6) | | | 2 (2) | 2 (0) | – | 257 (157) |
| Total | 314 (221) | 363 (174) | 186 (119) | 215 (174) | 457 (298) | 715 (529) | 110 (54) | 8 (7) | 125 (77) | 68 (38) | 117 (95) | 34 (28 | 0 (2) | 228 (132) | 36 (17) | 61 (47) | 170 (158) | 43 (37) | 521 (326) | 4627 (2966) |

SOURCE: Constructed by the authors from the WTO ADA database (01/01/1995–16/02/2015).
NOTE: The numbers in the table represents the AD initiations of an importing member/initiations faced by a particular exporting member, while the same in the parentheses denote the final measures.

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**Table 4.** Major players undertaking anti-dumping actions—by sector

| HS section | Description | Anti-dumping investigations/measures | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Argentina | Australia | Brazil | Canada | China | EU | India | South Africa | Turkey | US | Total |
| I | Live animals; animal products | 2 (1) | | 5 (4) | | 1 (1) | 8 (4) | | 6 (1) | | 15 (11) | 58 (28) |
| II | Vegetable products | | 5 (3) | 1 (2) | 7 (5) | 1 (1) | 2 (2) | | 2 (1) | | 13 (10) | 56 (37) |
| III | Animal or vegetable fats and oils, prepared edible fats, etc. | | 2 (0) | | | | | 1 (0) | 2 (0) | | | 14 (2) |
| IV | Prepared foodstuffs; beverages, spirits; tobacco, etc. | 3 (0) | 11 (7) | 1 (1) | 9 (6) | 2 (0) | 2 (1) | | 2 (0) | | 9 (8) | 65 (35) |
| V | Mineral products | 1 (1) | 6 (1) | 7 (5) | | 4 (4) | 6 (6) | 9 (5) | | | 8 (4) | 75 (50) |
| VI | Products of the chemical or allied industries | 37 (10) | 27 (10) | 67 (29) | 7 (4) | 119 (94) | 85 (61) | 310 (242) | 32 (21) | 10 (11) | 70 (44) | 928 (624) |
| VII | Plastics and articles thereof; rubber and articles thereof | 30 (23) | 63 (17) | 117 (35) | 2 (0) | 39 (36) | 35 (19) | 98 (83) | 37 (26) | 45 (48) | 39 (23) | 614 (379) |
| VIII | Raw hides and skins, leather products, etc. | | | | | | 4 (2) | | | | | 5 (2) |
| IX | Wood and articles of wood; wood charcoal; cork and articles of cork | 10 (3) | 15 (1) | 1 (0) | 9 (4) | | 9 (9) | 9 (8) | 2 (0) | 7 (6) | 3 (3) | 98 (51) |
| X | Pulp of wood; paper and paperboard and articles thereof | 13 (9) | 29 (19) | 13 (12) | 5 (1) | 16 (13) | 1 (1) | 14 (9) | 19 (10) | | 15 (10) | 228 (125) |
| XI | Textiles and textile articles | 24 (21) | 7 (5) | 24 (20) | | 4 (3) | 43 (23) | 66 (61) | 11 (11) | 49 (39) | 14 (12) | 343 (250) |
| XII | Footwear, headgear; prepared feathers and articles made therewith | 1 (1) | | 1 (1) | 7 (2) | | 9 (7) | 1 (1) | 1 (0) | | | 32 (23) |
| XIII | Articles of stone, plaster, cement, ceramic products; glass and glassware | 16 (10) | 17 (6) | 20 (7) | 4 (2) | 2 (0) | 11 (7) | 21 (11) | 27 (15) | 9 (7) | 5 (4) | 192 (108) |
| XIV | Gems and jewellery | | | | | | | | | | | 1 (0) |
| XV | Base metals and articles of base metal | 83 (65) | 73 (38) | 78 (43) | 129 (90) | 16 (15) | 162 (111) | 89 (46) | 60 (34) | 26 (27) | 285 (171) | 1328 (881) |

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Table 4. *(Continued)*

| HS section | Description | Anti-dumping investigations/measures | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Argentina | Australia | Brazil | Canada | China | EU | India | South Africa | Turkey | US | Total |
| XVI | Machinery and mechanical appliances; electrical equipment; parts thereof, etc. | 66 (47) | 15 (3) | 10 (8) | 4 (3) | 1 (1) | 58 (32) | 86 (57) | 15 (5) | 14 (10) | 34 (20) | 400 (244) |
| XVII | Vehicles, aircraft, vessels and associated transport equipment | 6 (8) | 5 (1) | | | 2 (2) | 9 (8) | 6 (2) | 3 (0) | 1 (1) | 7 (2) | 48 (29) |
| XVIII | Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments, etc. | 11 (7) | 1 (0) | 4 (2) | | 8 (4) | 1 (2) | 3 (2) | 8 (8) | 1 (1) | | 51 (34) |
| XIX | Arms and ammunition; parts and accessories thereof, etc. | | | | | | | | | | | |
| XX | Miscellaneous manufactured articles | 11 (15) | 2 (0) | 14 (5) | 3 (2) | | 12 (3) | 2 (2) | 1 (0) | 8 (8) | 4 (4) | 91 (64) |
| XXI | Works of art, collectors' pieces and antiques, etc. | | | | | | | | | | | |
| | Total | 314 (221) | 278 (111) | 363 (174) | 186 (119) | 215 (174) | 457 (298) | 715 (529) | 228 (132) | 170 (158) | 521 (326) | 4627 (2966) |

SOURCE: Constructed by the authors from the WTO ADA database (01/01/1995–16/02/2015).
NOTES: The numbers in the table represent the AD initiations of an importing Member, while the same in the parentheses denote the final measures.



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**Table 5.** Major players facing anti-dumping actions—by sector

| HS section | Description | Anti-dumping investigations/measures | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Brazil | China | India | Indonesia | Japan | Republic of Korea | Malaysia | Russian Federation | Chinese Taipei | Thailand | US |
| I | Live animals; animal products | 5 (2) | 2 (3) | 1 (1) | | | | | 1 (0) | | 1 (2) | 9 (6) |
| II | Vegetable products | | 10 (11) | 3 (2) | 3 (1) | | | | | | 1 (1) | 6 (3) |
| III | Animal or vegetable fats and oils, prepared edible fats, etc. | 3 (0) | | | | | | | | | | 2 (1) |
| IV | Prepared foodstuffs; beverages, spirits; tobacco, etc. | 2 (1) | 5 (4) | | 2 (0) | | 2 (0) | | | | 5 (5) | 5 (3) |
| V | Mineral products | 2 (2) | 14 (8) | | 4 (3) | 4 (1) | 2 (2) | 1 (0) | 2 (2) | 1 (1) | 5 (2) | 6 (5) |
| VI | Products of the chemical or allied industries | 10 (8) | 200 (157) | 43 (25) | 23 (18) | 54 (39) | 56 (38) | 11 (7) | 30 (22) | 44 (34) | 25 (16) | 110 (67) |
| VII | Plastics and articles thereof; rubber and articles thereof | 12 (10) | 75 (57) | 30 (21) | 28 (16) | 24 (19) | 75 (42) | 16 (10) | 12 (10) | 44 (30) | 43 (31) | 52 (29) |
| VIII | Raw hides and skins, leather products, etc. | | 5 (2) | | | | | | | | | |
| IX | Wood and articles of wood; wood charcoal; cork and articles of cork | 5 (1) | 20 (15) | | 5 (2) | | | 8 (5) | 2 (2) | | 4 (2) | 5 (3) |
| X | Pulp of wood; paper and paperboard and articles thereof | 9 (6) | 26 (14) | 3 (2) | 28 (14) | 15 (8) | 21 (10) | 4 (4) | 3 (1) | 7 (4) | 7 (1) | 17 (9) |
| XI | Textiles and textile articles | 8 (4) | 84 (69) | 23 (13) | 24 (18) | 1 (1) | 39 (29) | 19 (12) | 1 (1) | 35 (24) | 25 (20) | 5 (4) |
| XII | Footwear, headgear; prepared feathers and articles made therewith | | 19 (16) | 2 (0) | 3 (3) | | | | | 1 (1) | 1 (1) | |
| XIII | Articles of stone, plaster, cement, ceramic products; glass and glassware | 4 (2) | 69 (43) | 5 (2) | 20 (12) | 2 (1) | | 4 (2) | 4 (4) | 7 (1) | 12 (8) | 5 (2) |
| XIV | Gems and jewellery | | | | | | | | | | | |
| XV | Base metals and articles of base metal | 38 (39) | 274 (194) | 55 (29) | 25 (15) | 57 (43) | 98 (62) | 37 (18) | 77 (63) | 85 (47) | 37 (22) | 17 (14) |

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Table 5. *(Continued)*

| | | Anti-dumping investigations/measures | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| HS section | Description | Brazil | China | India | Indonesia | Japan | Republic of Korea | Malaysia | Russian Federation | Chinese Taipei | Thailand | US |
| XVI | Machinery and mechanical appliances; electrical equipment; parts thereof, etc. | 21 (12) | 129 (82) | 13 (7) | 9 (5) | 23 (12) | 42 (22) | 17 (9) | 1 (0) | 21 (15) | 18 (10) | 10 (8) |
| XVII | Vehicles, aircraft, vessels, and associated transport equipment | 1 (0) | 23 (12) | | 1 (2) | 2 (1) | 2 (0) | 1 (2) | | 5 (3) | 1 (1) | 2 (2) |
| XVIII | Optical, photographic, cinematographic, measuring, checking, precision, medical, or surgical instruments, etc. | 2 (1) | 17 (13) | 1 (0) | | 3 (2) | 3 (1) | | | 1 (0) | 1 (1) | 3 (0) |
| XIX | Arms and ammunition; parts and accessories thereof, etc. | | | | | | | | | | | |
| XX | Miscellaneous manufactured articles | | 50 (40) | 2 (2) | 6 (2) | 0 (1) | 1 (1) | 1 (0) | | 7 (6) | 3 (1) | 3 (1) |
| XXI | Works of art, collectors' pieces and antiques, etc. | | | | | | | | | | | |
| | Total | 122 (88) | 1022 (740) | 181 (104) | 181 (111) | 185 (128) | 341 (207) | 119 (69) | 133 (105) | 258 (166) | 189 (124) | 257 (157) |

Source: Constructed by the authors from the WTO ADA database (01/01/1995–16/02/2015).
Notes: The numbers in the table represent the AD initiations against an exporting Member, while the same in the parentheses denote the final measures.

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consumers and local producers from low prices.[29] In the WTO context, AD laws serve as safety valve for protectionist pressure (3.A). Thus, the purpose of the WTO ADA is to ensure that the provision is used only as a contingency measure judged upon merit, and not as a veiled protectionist mechanism (3.B).

## A. *Basic Principles*

The legal framework of AD in the WTO regime consists of Article VI of the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement).[30] The latter is the successor of the plurilateral Tokyo Round Code and it implements the general provision of Article VI of the GATT 1994.[31]

Pursuant to Article VI, three cumulative requirements need to be met in order to establish the existence of dumping: (i) the export price of a product must be lower than the price of that product in the domestic market of the exporting country;[32] (ii) exports of such products must cause or threaten to cause material injury to a domestic industry or materially retard the establishment of a domestic industry;[33] and (iii) there must be a causal relationship between dumping and the injury or retardation.[34]

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29. See Philip MARSDEN, ed., *A Competition Policy for the WTO* (London: Cameron May, 2003), arguing that the discussion of competition rules at the WTO should focus on whether competition authorities tolerate business practices that may exclude business competitors; Arie REICH, "The WTO as a Law-Harmonizing Institution" (2004) 25 University of Pennsylvania Law School Journal of International Economic Law 321 at 355–6 (acknowledging "a common criticism that [the WTO] only caters to the interests of business and multinationals and not to 'plain people'"); Bill BUTCHER and Mary IP, "Are Chinese Consumers Winners or Losers Under WTO Membership?" (2007) 4 Macquarie Journal of Business Law 71 at 72 (arguing that the primary focus of the WTO is not on the consumers of products and services but rather in trade itself); cf. Joshua D. WRIGHT, "The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other" (2012) 121 Yale Law Journal 2216 (arguing that the link between antitrust and consumer protection has been clearly established in the literature regarding domestic law).
30. Art 2.4.2, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, 15 April 1994; Annex 1A, *Marrakesh Agreement Establishing the World Trade Organisation*, 1868 U.N.T.S. 201.
31. J.H. JACKSON, "Introduction: Perspectives on Antidumping Law and Policy" (1979) 1 Michigan Yearbook of International Legal Studies 1–10; Gary N. HORLICK and Eleanor C. SHEA, "The World Trade Organization Antidumping Agreement" (1995) 29 Journal of World Trade 5 at 5; Marco C.E.J. BRONCKERS and N. MCNELIS, "Rethinking the 'Like Product' Definition in WTO Anti-Dumping Law" (1999) 33 Journal of World Trade 73 at 73.
32. The export price is the price at which it is designated to be sold. For a presentation of the substantive rules for dumping calculations, see John H. JACKSON, William J. DAVEY, and Alan O. SYKES, *Cases, Materials and Text on Legal Problems of International Economic* Relations, 5th ed. (Eagan, MN: West, 2008) at 770–82.
33. See Richard DIAMOND, "A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law" (1989–1990) 21 Law and Policy in International Business 507 at 533–4.
34. See art. XXI, *General Agreement on Tariffs and Trade*, 30 October 1947, 61 Stat. A-11, 55 U.N.T.S. 194 at art. VI. Note that dumping itself is not per se incompatible with the WTO. The causal link is critical. Also, this third and additional requirement can "constrain the ability of countries to impose duties against the exporter. However, the failure of art. VI or the ADA to provide a definition of what constitutes material injury limits the usefulness of that provision as a shield. While the Appellate Body has held that injury determinations can only be based on "an 'objective examination' of 'positive evidence'" (Appellate Body Report, *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, P 192, WT/DS184/AB/R (July 24 2001)) and verifiable evidence, these terms still give much leeway to the examining agencies for determining how to interpret evidence and do not even

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In order to prevent the abuse of AD duty proceedings it is crucial that national AD authorities conduct objective and unbiased investigations, and accordingly determine the injury to a domestic industry. Therefore, the agreement sets forth detailed provisions on the proper establishment and evaluation of the facts and of evidentiary issues. In the following case, the question arose whether confidential business information can be taken into account for the determination of injury even if it is not discernible in the final determination or the disclosures pertaining to the final determination.[35]

## B. *Anti-Dumping Litigation on the Upswing*

The panel and AB of the Dispute Settlement Understanding (DSU) have considered many issues pertaining to international trade in the ADA-related disputes.[36] Article 2 dealing with the calculation of a dumping margin was invoked in almost all cases. The reason is that WTO Members generally use different methodologies for the calculation of dumping margin and the "complex pricing policies and adjustment for indirect cost factors leave a degree of arbitrariness in the calculation of dumping margins".[37] For instance, the EU methodology has been questioned in many cases. Most recently, Indonesia has notified the WTO Secretariat of a request for consultations with the European Union concerning anti-dumping measures imposed on imports of biodiesel into the EU; in that case, the key legal issue revolved around the calculation of dumping margin.[38] It has been a rather frequent debate before the DSB. For example, the asymmetry in the calculation methodology

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require the importing country to disclose all of the factors it considered in reaching its conclusion." See Reid M. BOLTON, "Anti-Dumping and Distrust: Reducing Anti-Dumping Duties Under the WTO Through Heightened Scrutiny" (2011) 29 Berkeley Journal of International Law 66 at 75.

35. WTO Appellate Body Report, *Thailand-Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (*Thailand-H-Beams*), WT/DS122/AB/R, 12 March 2001.

36. The DSU largely contributes to ensuring the conformity of domestic anti-dumping measures with international rules. In this respect, the Appellate Body stated that: "Article XVI:4 of the WTO Agreement provides that '[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements', which include the Anti-Dumping Agreement and the SCM Agreement." Appellate Body Report, United States-Continued Dumping and Subsidy Offset Act of 2000, para. 301, WT/DS217/AB/R, WT/DS234/AB/R (16 January 2003). On the very issue of compliance with WTO law, see Julien CHAISSE, "Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process" (2015) 38 Fordham International Law Journal 57 at 64.

37. See William ASCHER, "Expanding the 'Geography' of Policy Options to Reduce Greenhouse Gas Emissions: A Commentary on Hari Osofsky's The Geography of Solving Global Environmental Problems" (2013–14) 58 New York Law School Law Review 859 at 866. The Agreement contains rules governing the calculation of dumping margins. In the usual case, the Agreement requires either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a transaction-to-transaction comparison of normal value and export price (art. 2.4.2). A different basis of comparison can be used if there is "targeted dumping": that is, if a pattern exists of export prices differing significantly among different purchasers, regions, or time periods. In this situation, if the investigating authorities provide an explanation as to why such differences cannot be taken into account in weighted average-to-weighted average or transaction-to-transaction comparisons, the weighted average normal value can be compared to the export prices on individual transactions.

38. *European Union-Anti-Dumping Measures on Biodiesel from Indonesia-Request for Consultations by Indonesia*, G/ADP/D104/1; G/L/1071; WT/DS480/1, 17 June 2014.

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was criticized by the panel in *EC-Anti-dumping Proceedings against Audio Tapes in Cassettes from Japan,*[39] which requires some further analysis to identify the recurring issues in this area.

In the *EU-India Bed Linen* case,[40] the AB held that the "zeroing" methodology used by the EU for calculating the dumping margin is incompatible with the ADA provisions. The EU and the US commonly take recourse to the said "zeroing" methodology, which eliminates the negative dumping margin from the calculation of the "dumping margin". In order to obtain the dumping margin of each exporter concerned, the EU makes a calculation, whereby the export selling price and the "normal" value (or domestic selling price) are compared per category of product. Whenever this comparison results in an export price which is higher than the normal value, thereby yielding a negative value for dumping, the figure is taken to be zero rather than the lower, negative value. As a consequence, the investigation always leads to the calculation of a positive dumping margin. Therefore, this methodology automatically results in a higher margin of dumping than that which would have been established if any negative values for dumping were taken into account. If there are only positive dumping margins, this would have no impact on calculations, but the zeroing of negative dumping margins, as practised by these countries, is a problematic issue.

In the *Softwood Lumber* dispute brought by Canada, the DSB ruled against the US and set a clear precedent against the use of the "zeroing" methodology.[41] However, even after an adverse decision against "zeroing", the misuse of this provision in individual cases continued for some time.[42] This is mainly due to the ambiguity in Article 2.4.2 of the ADA, which is misused more often than not.[43] The AB ruled in the *Bed Linen* case that zeroing prevents average-to-average comparisons, while the ADA permits individual-to-average comparisons in certain circumstances. Therefore, if dumping is otherwise calculated like average-to-individual comparisons, there is every possibility of proving the incidence of dumping in a completely ADA-consistent manner. This means, even after the adverse ruling against zeroing, that the ambiguity remains, leaving room for future disputes.

The procedure for initiation, criteria for filing, and subsequent investigation of an AD case is provided in Article 5 of the ADA. This is the provision which has often been invoked in the dispute settlement system (see Figures 2 and 3). Article 5.2

39. GATT Penal Report, *EC-Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan (EC-Audio Cassettes)*, ADP/136, 13 April 1995.

40. WTO Appellate Body Report, *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (*EC-Bed Linen*), WT/DS141/AB/R, 1 March 2001.

41. WTO Panel Report, *United States-Final Dumping Determination on Softwood Lumber from Canada (US-Softwood Lumber V)*, WT/DS264/R, para. 128, 13 April 2004.

42. Request for Consultations by the European Communities, *United States-Continued Existence and Application of Zeroing Methodology (US-Continued Zeroing)*, WT/DS350/1, 3 November 2006.

43. Summing up the findings for *United States-Anti-Dumping Measure on Shrimp from Ecuador*, the panel noted that, "USDOC acted inconsistently with Article 2.4.2 in its final and amended final affirmative determinations of sales at less than fair value (dumping) with respect to certain frozen warm water shrimp from Ecuador, and in its final anti-dumping duty order". WTO Panel Report, *United States-Anti-Dumping Measure on Shrimp from Ecuador (US-Shrimp Ecuador)*, WT/DS335/R, para. 23, 30 January 2007.

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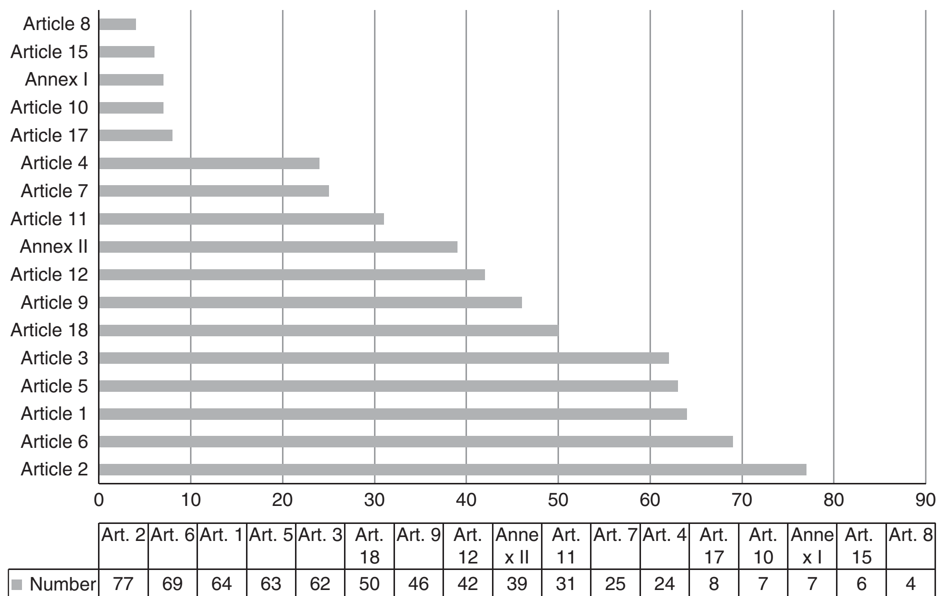
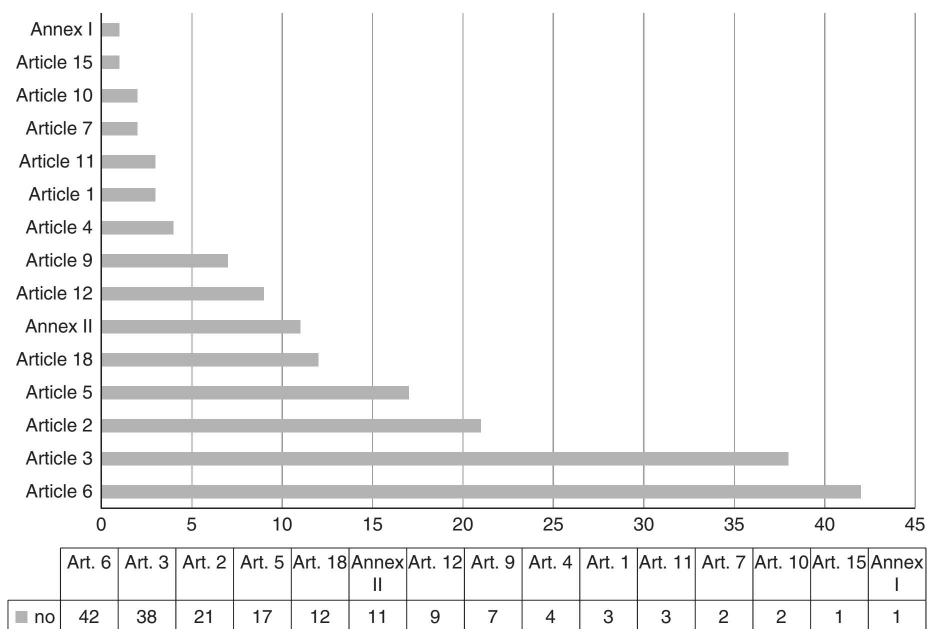



| | Art. 2 | Art. 6 | Art. 1 | Art. 5 | Art. 3 | Art. 18 | Art. 9 | Art. 12 | Annex II | Art. 11 | Art. 7 | Art. 4 | Art. 17 | Art. 10 | Annex I | Art. 15 | Art. 8 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Number | 77 | 69 | 64 | 63 | 62 | 50 | 46 | 42 | 39 | 31 | 25 | 24 | 8 | 7 | 7 | 6 | 4 |

**Figure 2:** Alleged violation of WTO ADA, by Article
SOURCE: Constructed by the authors from the WTO ADA related disputes (01/01/1995–16/02/2015).




| | Art. 6 | Art. 3 | Art. 2 | Art. 5 | Art. 18 | Annex II | Art. 12 | Art. 9 | Art. 4 | Art. 1 | Art. 11 | Art. 7 | Art. 10 | Art. 15 | Annex I |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| no | 42 | 38 | 21 | 17 | 12 | 11 | 9 | 7 | 4 | 3 | 3 | 2 | 2 | 1 | 1 |

**Figure 3:** Actual violations of WTO ADA, by Article (DSB rulings)
SOURCE: Constructed by the authors from the WTO ADA related disputes (01/01/1995–16/02/2015).

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stipulates the three conditions for starting an investigation. These are (i) dumping; (ii) injury; and (iii) a causal link between injury to the domestic industry and dumping. In a number of cases, the determination of dumping was not based on actual injury to the industry, and moreover it does not necessarily have a causal link between injury and dumping. Often, only a section of the industry asks for protection and there is insufficient support from the domestic industry for the complaint prescribed under the ADA. Support manipulation is another concern area in many complaints. In the *CDSOA*,[44] the panel concluded that the *CDSOA* provides a financial incentive for domestic producers to file or support applications for the initiation of AD or countervailing duty investigations. This financial incentive for filing a complaint is against the principle of free trade in general and WTO rules in particular. However, the US is reluctant to change its domestic laws to ensure compliance with the WTO DSB ruling.

The same provision stipulates that investigating authorities must ascertain both the accuracy and adequacy of the evidence of dumping produced by the complainants. This obligation has been undermined on several occasions; investigations were initiated on the basis of political considerations.

The injury determination has frequently been debated in disputes. The steel industry is one of the most protected industries worldwide. In the *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* dispute,[45] the panel held that exclusion of "captive production"[46] from the total domestic production for the purpose of injury calculation is against the ADA. US domestic law excludes captive production from the purview of the dumping margin. The decision of the panel in favour of the US was reversed by the AB, and it was held that an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of that domestic industry as a whole; therefore, it does not satisfy the requirements of "objectivity" in Article 3.1 of the ADA. The conflicting interpretation of the panel and the AB emphasizes the need for a clear and objective provision prohibiting selective examination of one part of the domestic industry in injury determinations.

In addition, it has been observed that Members have frequently included non-dumped imports for the calculation of injury to the domestic industry. In *Argentina-Definitive Anti-dumping Duties on Poultry from Brazil*,[47] the panel held that if a particular producer/exporter has been found not to be dumping, then there is no basis for including that particular producer/exporter's imports in the category of "dumped imports". While the allegation of dumping must be proved with "positive evidence", the "objective examination" of such "positive evidence" remains controversial.

44. WTO Appellate Body Report, *United States-Continued Dumping and Subsidy Offset Act of 2000 (US-Offset Act)*, WT/DS217/AB/R, WT/DS234/AB/R, 16 January 2003.

45. WTO Panel Report, *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US-Hot-Rolled Steel)*, WT/DS184/R, 28 February 2001.

46. If you are excluding the use of a product by another unit of the same company, or consumption by the same company is excluded, the total production will always be less in the books.

47. WTO Panel Report, *Argentina-Definitive Anti-Dumping Duties on Poultry from Brazil (Argentina-Poultry Anti-Dumping Duties)*, WT/DS241/R, 22 April 2003.

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Sometimes, the investigating authorities become "subjective" by helping their domestic industries.

The "cumulative" calculation of dumping from different countries is another way to establish the occurrence of dumping. If more than one country is involved in dumping, all the imports are calculated cumulatively for the purpose of calculating the dumping margin. The production conditions and pricing are different in all exporting locations. In the *European Communities-Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* case,[48] the panel concluded that a country-by-country analysis of volume and prices under Article 3.2 of the ADA is not a precondition for the cumulative assessment of the effects of dumped imports under Article 3.3.[49]

A number of economic factors affect the calculation of the dumping margin. In the *EU-India Bed Linen* dispute,[50] the panel considered whether the list of factors in Article 3.4 is illustrative or mandatory. The panel held that before imposing an AD duty, it is mandatory to consider all economic factors to see whether they are influencing pricing. Later, in the *Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey* dispute,[51] the panel confirmed this position. However, Members often do not keep this point in mind while calculating the injury to the domestic industry, finding inflated injury and dumping margins as a result.

Notwithstanding this, the causation analysis remains controversial. The link between dumping and injury is missing in many cases; dumping is not necessarily the cause of problems with the domestic industry. It is not necessary for actual dumping to occur in order to impose an Anti-Dumping Duty (ADD). A threat of material injury constitutes sufficient grounds to impose an ADD. However, it is difficult to prove a threat to the domestic industry, and sometimes the threat of injury is overstated.

The use of the "facts available" provision[52] is another weapon in the hands of investigating countries for extracting trade data from the countries facing investigation. If the respondents fail to respond, this provision can be used against them. In most cases, the data submitted is rejected on the basis that it is non-viable or not presented in accordance with the requested format. This was the case in the *India Steel Plate* dispute initiated by the US. India submitted all the requested data within the stipulated time. However, the United States International Trade Commission (US-ITC) rejected it on the ground that it had been submitted one day late. In most cases the data used for the calculation of the dumping margin is from the complaint itself that will ultimately lead to the finding of dumping. When countries use this

48. WTO Appellate Body Report, *European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC-Tube or Pipe Fittings)*, WT/DS219/AB/R, 22 July 2003.

49. WTO Panel Report, *European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC-Tube or Pipe Fittings)*, WT/DS219/R, 7 March 2003.

50. WTO Panel Report, *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC-Bed Linen)*, WT/DS141/R, 30 March 2000.

51. WTO Panel Report, *Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey (Egypt-Steel Rebar)*, WT/DS211/R, 8 August 2002.

52. Art. VI(8) permits the investigating authorities to use the available data if the respondent refuses or if the submitted data is non-viable.

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particular methodology to calculate the dumping margin, the basic objective of the agreement to curb price discrimination is unfulfilled. There is no price comparison between the markets when this methodology is applied.

The non-market economy (NME)[53] clause is yet another weapon used by the developed countries against the developing countries. If the countries under investigation are considered as NMEs, the constructed method available under Article 2 is not used for the calculation of the dumping margin. Instead, "surrogate" country prices are considered for this purpose. China is a major victim of the abuse of this particular provision, as it is still considered by most of the WTO Members as an NME. For calculations relating to Chinese "dumping", the prices from India or other countries are used. Usually, there will be no connection between the production cost or domestic price in China and that in the countries selected. Clearly, in this case, the AD provisions are misused for protectionism at the domestic level.

Another recent and disturbing trend towards non-compliance with the rulings of the panel and the AB deserves particular mention. In the *US Anti-dumping Act 1916* case, the DSB held that the penal provision in the Act is against the ADA. Dumping is not considered as a criminal activity under the ADA. The DSB asked the US to bring its domestic law into conformity with the ADA, but to date the US has not complied with this ruling. Following this case, the US practice of providing incentives to those domestic industries which support the anti-dumping application was questioned in the *Continued Dumping and Subsidy Offset Act (CDSOA) 2000.*[54] The panel and the AB again held that the Act goes against the principles of ADA and asked the US to bring its law into line with the ADA. Due to the domestic political compulsion, however, more than eighty-six US Senators remained firm against any kind of amendment to the US law. This means that the law will not be passed in the US Congress before the next presidential election is over. The non-compliance issue is a serious concern, and will affect the credibility of the trading system. The non-compliance complaint has met with retaliatory measures from the EU. The AD cases have led to a tough time for the US, which is now actively promoting bilateral and regional trade agreements against the backdrop of the current WTO negotiations.

It can be concluded that, in its first two decades of working, the DSB has proved to be highly successful in the settlement of AD disputes in the WTO. However, the panels and AB have acted with caution and have sometimes shied away from legal analysis, without going on to examine the political implications of their findings. Yet the panels and AB are a unique forum for Members to seek redress for grievances related to international trade, and it is not their duty to look into the political implications rather than legal interpretations.

Both developed and developing countries have been major users of the AD measures over the years, and WTO Members such as India have, in recent times, used it widely against developed as well as developing trade partners. This indicates

53. It is pertinent that no clear-cut definition is available for a "non-market economy". Usually, economies that do not work on market principles are considered as NMEs, for example, China, Vietnam, and Russia.

54. This Act is popularly known as the "Byrd Amendment".

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the presence of protectionist traits in developing countries as well. The AD "menace" can be reduced only when this domestic industry protectionism ends.

## III. ASSESSING THE MISUSE OF ANTI-DUMPING MEASURES

Jacob Viner, an orthodox classical theoretician, supported the use of AD as a tool to protect local welfare. His analysis, however, focused less on the effects of dumping than on international welfare. His ultimate justification for AD was that dumping prices were "presumptive evidence of abnormal and temporary cheapness".[55] Viner's classic work was done against a background of war and tensions. While the international trading architecture has undergone a paradigm shift, protectionism survives and thrives in certain sectors. The rationale for AD seems to have been misplaced in the first working decade of the international trading system.[56] As discussions have proven, the present investigative procedures favour domestic protectionist bias, declaring the whole regime as a non-tariff barrier (NTB). The ADA has provided numerous loopholes and leeway for manipulation at both the substantial and procedural levels.

Given the current scenario, there is a need to understand whether existing provisions in the ADA are susceptible to potential misuse and, if so, to identify the specific provisions which have already been subject to such practices. This inquiry is increasingly relevant in today's world, where lobbying attempts from a concentrated industry in a recession-hit economy can achieve considerable success in diverting cheaper imports from efficient competitors abroad. These findings are particularly important in the context of the ongoing negotiations of WTO Rules under the Doha Round. We first provide a methodology (III.A) to analyze the complaints filed before the DSB (III.B), which allows us to further refine the analysis by looking at the DSB rulings (III.C).

### A. *Methodology*

In the current framework, Table 6 has been constructed by adopting the framework developed in Chaisse and Chakraborty[57] for analyzing the nature of the AD-related complaints lodged at the DSB.

Using this methodology and looking from a complainant's perspective, the AD complaints lodged at the DSB are classified under seven different categories. The first two columns represent "victory" and "defeat" in a particular case. "Victory" by a complainant is defined as determination of WTO-inconsistency in the respondent's alleged policy (at any stage, e.g. initiation of investigation and the process followed

55. Jacob VINER, *Dumping: A Problem in International Trade* (Chicago: University of Chicago Press, 1923) at 147.

56. Indiscriminate recourse to AD actions has caused alarm among researchers, analysts, and administrators about its efficacy and its misuse as a protectionist measure. The current AD practice has created a paradoxical situation in which it is out of line with the spirit and philosophy of the WTO.

57. See Julien CHAISSE and Debashis CHAKRABORTY, "Implementing WTO Rules Through Negotiations and Sanction: The Role of Trade Policy Review Mechanism and Dispute Settlement System" (2007) 28 University of Pennsylvania Journal of International Economic Law 153–85. See also Julien CHAISSE and Mitsuo MATSUSHITA, "Maintaining the WTO's Supremacy in the International Trade Order—A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism" (2013) 16 Journal of International Economic Law 9.

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**Table 6.** Analysis of DSB complaints on Anti-Dumping Agreement related disputes

| Year | A | B | C | D | E | F | G | Total |
|---|---|---|---|---|---|---|---|---|
| 1995 | – | – | – | – | – | – | – | 0 |
| 1996 | 1 | – | – | – | 1 | 1 | 1 | 4 |
| 1997 | 1 | – | – | – | 1 | – | 1 | 3 |
| 1998 | 4 | – | – | – | 1 | – | – | 5 |
| 1999 | 4 | – | – | – | 4 | – | – | 8 |
| 2000 | 3 | – | – | – | 4 | – | – | 7 |
| 2001 | 4 | 1 | – | – | 4 | – | – | 9 |
| 2002 | 2 | 1 | – | – | 3 | – | – | 6 |
| 2003 | 3 | 1 | – | 1 | 2 | – | – | 7 |
| 2004 | 2 | – | – | – | 4 | 1 | 1 | 8 |
| 2005 | 2 | – | – | – | 1 | 1 | – | 4 |
| 2006 | 5 | – | – | – | 3 | – | – | 8 |
| 2007 | – | – | – | – | 1 | – | – | 1 |
| 2008 | 3 | – | – | – | 1 | 1 | – | 5 |
| 2009 | 2 | – | – | – | 1 | – | – | 3 |
| 2010 | 3 | – | – | – | 2 | – | – | 5 |
| 2011 | 3 | – | – | – | 2 | – | – | 5 |
| 2012 | 1 | 1 | 2 | – | 2 | – | – | 6 |
| 2013 | – | – | 5 | – | 1 | – | – | 6 |
| 2014 | – | – | – | – | 3 | – | – | 3 |
| Total | 43 | 4 | 7 | 1 | 41 | 4 | 3 | 103 |

SOURCE: Constructed by the authors from the WTO Dispute Settlement documents (updated on 16 February 2015).
NOTES: A = win for complainant; B = loss for complainant; C = continuing/result expected soon/case with Appellate Body/not officially closed; D = request to suspend panel proceeding; E = panel not formed/formed but not composed; F = amicably settled; G = discontinuation of the alleged measure by the respondent.

thereof, determination of dumping margin, and collection of duty) at the panel level, which remains unchanged even if the AB later reverses certain legal interpretations of the verdict, since the existence of a WTO-incompatible policy has been effectively established. However, the rejection of the complainant's claims, initially at panel stage and subsequently affirmed at the appellate body level, is defined as "defeat". The cases classified under the third column encompass several possibilities—cases at consultation stage, disputes currently for consideration at the appellate body stage, cases where a panel verdict is expected within a specified time, or cases which have never been officially closed, etc. The fourth column signifies the scenario where the complainant and the respondent jointly request DSB for suspension of the proceedings after panel formation. This clearly indicates traces of flexibility in the respondent country to negotiate the alleged measures in force.

The fifth column shows the cases where no panel had yet been formed, potentially implying mutual discussion, probably leading the respondent to guarantee the desired market access for the complainant to resolve the dispute. However, two other possibilities cannot be ruled out in this case. First, a (developed country) complaint might have been raised for harassing the respondent as a trade policy instrument, and second, a (developing country) complainant might have lacked the necessary technical expertise to support their claim, and decided to opt out before the formation of the panel.

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The sixth column notes the cases where a mutually agreeable solution has been notified to the DSB. In the seventh column are placed the cases where the alleged measure was promptly discontinued after the initial notification at DSB. The last column on the one hand indicates the existence of WTO-incompatible measures in force, and highlights the effectiveness of the dispute settlement mechanism on the other. Clearly, while column A (victory) and B (defeat) enable one to understand the AD cases in black-and-white, the last four columns offer deeper underlying political economic insights.

Table 6 summarizes the global AD actions over the period 1995–2014. It is observed from the table that among the 103 cases lodged at the WTO on AD provision during the period under consideration, on 43 occasions (41.75 percent of the cases) the WTO-incompatibility of the alleged measure has been proved.[58] However, only on four occasions has an AD-related complaint been rejected.[59] On 41 occasions (39.81 percent of the cases), the parties did not persist in the dispute, as a result of which these cases are still not officially closed.[60] Amicable settlement between the parties[61] and a discontinuation of the alleged measure by respondent[62] has been observed four and three times, respectively.

The top and the bottom panels of Table 7 represent the AD disputes involving two leading developed entities, namely the US and the EU, respectively. The US scenario deserves particular attention as it has faced a maximum number of complaints on AD grounds for violating its obligations from partner countries. Although the number of cases faced by the EU has been much smaller by comparison, they are equally important given the wider repercussions caused by the verdicts for AD administration.

It is observed from the top panel that the US has lost 24 out of the 47 cases (51.06 percent) faced as respondent, providing justification for the claims lodged by the trade partners. On the other hand, the US has been the only country which has managed to win four disputes as respondent.[63] However, no panel has been

58. In Debashis CHAKRABORTY, Julien CHAISSE, and Animesh KUMAR, "Doha Round Negotiations on Subsidy and Countervailing Measures: Potential Implications on Trade Flows in Fishery Sector" (2011) 6 Asian Journal of WTO and International Health Law and Policy 201–34, it was estimated that the comparable figure for SCM related cases stands at 36.14 percent, which underlines the greater intensity in potential abuse of AD provisions; as noted in Julien CHAISSE, Debashis CHAKRABORTY, and Animesh KUMAR, "Mastering a Two-edged Sword: Lessons from the Practice and WTO Litigation on Safeguards" (2015) Richmond Journal of Global Law and Business 563; the figure for Safeguard actions is, however, 48.84 percent.

59. For instance, in *DS 221* involving Section 129(c)(1) of the *Uruguay Round Agreements Act*, the dispute settlement body noted that Canada had failed to establish that the US actions were inconsistent with arts. VI:2, VI:3, and VI:6(a) of the GATT 1994; arts. 1, 9.3, 11.1, 18.1, and 18.4 of the ADA, and arts. 10, 19.4, 21.1, 32.1, and 32.5 of the ASCM, among other provisions.

60. The comparable figure for SCM-related cases stands at 42.17 percent, which raises questions on the harassment quotient of the "violation" claimed. Chakraborty *et al.*, *supra* note 58.

61. This has been observed in *DS 374* involving a complaint by Indonesia on *South Africa-Anti-Dumping Measures on Uncoated Woodfree Paper.*

62. This has been observed in *DS 89* involving a complaint by South Korea on *United States-Anti-Dumping Duties on Imports of Colour Television Receivers from Korea.*

63. The cases include, *DS 282*, involving a complaint by Mexico on *United States-Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*; *DS 244*, involving a complaint by Mexico on *United States-Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*; and *DS 221*, involving a complaint by Canada on *United States*-Section 129(c)(1) *of the Uruguay Round Agreements Act*.

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**Table 7.** Analysis of DSB complaints on Anti-Dumping Agreement related disputes involving the EC and the US as respondent

US

| **Year** | **A** | **B** | **C** | **D** | **E** | **F** | **G** | **Total** |
|---|---|---|---|---|---|---|---|---|
| 1996 | – | – | – | – | 1 | 1 | – | 2 |
| 1997 | 1 | – | – | – | – | – | 1 | 2 |
| 1998 | 1 | – | – | – | – | – | – | 1 |
| 1999 | 3 | – | – | – | – | – | – | 3 |
| 2000 | 1 | – | – | – | – | – | – | 1 |
| 2001 | 2 | 1 | – | – | 2 | – | – | 5 |
| 2002 | 2 | 1 | – | – | 2 | – | – | 5 |
| 2003 | 2 | 1 | – | 1 | – | – | – | 4 |
| 2004 | 1 | – | – | – | 3 | – | – | 4 |
| 2005 | 1 | – | – | – | 1 | – | – | 2 |
| 2006 | 4 | – | – | – | 1 | – | – | 5 |
| 2007 | – | – | – | – | 1 | – | – | 1 |
| 2008 | 3 | – | – | – | – | – | – | 3 |
| 2009 | 1 | – | – | – | – | – | – | 1 |
| 2010 | 1 | – | – | – | – | – | – | 1 |
| 2011 | 1 | – | – | – | 2 | – | – | 3 |
| 2012 | – | 1 | 1 | – | – | – | – | 2 |
| 2013 | – | – | 2 | – | – | – | – | 2 |
| Total | 24 | 4 | 3 | 1 | 13 | 1 | 1 | 47 |

EU

| Year | A | B | C | D | E | F | G | Total |
|---|---|---|---|---|---|---|---|---|
| 1998 | 1 | – | – | – | – | – | – | 1 |
| 2001 | 1 | – | – | – | – | – | – | 1 |
| 2004 | – | – | – | – | – | – | 1 | 1 |
| 2006 | 1 | – | – | – | – | – | – | 1 |
| 2008 | – | – | – | – | 1 | – | – | 1 |
| 2009 | 1 | – | – | – | – | – | – | 1 |
| 2010 | 1 | – | – | – | 1 | – | – | 2 |
| 2012 | – | – | – | – | 1 | – | – | 1 |
| 2013 | – | – | 1 | – | 1 | – | – | 2 |
| 2014 | – | – | – | – | 1 | – | – | 1 |
| Total | 5 | 0 | 1 | 0 | 5 | 0 | 1 | 12 |

SOURCE: Constructed by the authors from the WTO Dispute Settlement documents (updated on 16 February 2015).
NOTES: A = win for complainant; B = loss for complainant; C = continuing/result expected soon/case with Appellate Body/not officially closed; D = request to suspend panel proceeding; E = panel not formed/formed but not composed; F = amicably settled; G = discontinuation of the alleged measure by the respondent.

formed on 13 occasions.[64] On one occasion each, the case has been amicably settled and a request for suspending the panel proceedings has been submitted to the WTO.

64. For these cases, a panel has been formed which involves both developed and developing countries. The examples include *DS 239*, involving a complaint by Brazil on *United States-Anti-Dumping Duties on Silicon Metal from Brazil*; and *DS 319*, involving a complaint by the EC on *United States*-Section 776 *of the Tariff Act of 1930*.

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The lower panel shows the involvement of the EC as a respondent at the DSB, and the bloc has lost 5 out of the 12 cases (41.67 percent). On five occasions, no panel has been formed,[65] while there is one instance of discontinuation of the alleged measure.[66] The findings underline the proven WTO-incompatibilities in AD administration in both economies.

## B. *Analysis of the Complaints*

To understand the potential misuse of an ADA provision, each dispute in this area is studied at length. First, analyzing the alleged Article-level violations in the submissions made by the appellant in the AD cases lodged at the DSB, an attempt is made to identify the perceptions on the misuse of various provisions. This analysis reveals that nearly every important Article of the ADA has, over the past two decades, been potentially susceptible to protectionist policies. The findings are summarized in Figure 2, where the number of times violations occur in a particular ADA provision are reported in ascending order.

It is interesting to observe that the maximum number of disputes lodged at the WTO highlights violation of the investigation procedures and dumping determination process, namely, under Article 2 (determination of dumping), followed by Article 6 (concerning evidence), Article 1 (conformity of applied procedures with the ADA), Article 5 (concerning initiation procedures and subsequent investigation), and Article 3 (determination of injury to domestic industry). Each of these provisions has been quoted in the submissions of complainant countries across more than fifty cases, implying their potential vulnerability to protectionist abuse. Cases lodged with these alleged violations have collectively accounted for 53.69 percent of the total number of lodged disputes.

The other provisions where alleged misuse has been considerable include AD duty determination, notification, determination procedure, and collection-related Articles. More than thirty-one but up to fifty violations have been reported in the case of Article 18 (procedures relating to final provisions), Article 9 (imposition and collection of ADD), Article 12 (public notification of the procedures and explanation of the determinations), Annex II (determination on the basis of best information available when collecting direct evidence is a problem), and Article 11 (duration and review of ADD and price undertakings). Citations of these alleged violations have collectively accounted for 33.33 percent of the total number of lodged complaints.

AD Articles where the number of alleged violation lie between ten and thirty-one times concern procedural mismanagement; namely, in Article 7 (provisional measures) and Article 4 (definition of domestic industry). In other words, in addition to the imposition of provisional measures, as well as the duration and review of the duty, the very basis of the initiation, i.e. harm to a significant section of "industry" (Article 4), has also been subject to dispute fairly often. Cases lodged by

65. For instance, *DS 385*, involving a complaint by India on *European Communities-Expiry Reviews of Anti-dumping and Countervailing Duties Imposed on Imports of PET from India*.

66. This has been observed in *DS 313*, involving a complaint by India on *European Communities-Anti-Dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India*.

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quoting these alleged violations have collectively accounted for 7.85 percent of the total number of complaints.

The AD Articles where alleged violations have numbered less than ten times include Article 17 (Consultation and Dispute Settlement), Article 10 (Retroactivity), Annex I (procedures regarding on-the-spot investigations), Article 15 (special regard to developing countries), and Article 8 (price undertakings). Cases lodged by quoting alleged violations under these provisions have collectively accounted for 5.13 percent of the total number of complaints.

### C. *Analysis of the DSB Results*

In this phase of the analysis, complaints where WTO-incompatibility of the alleged policies have been proved at both the dispute settlement panel and AB are studied at length. The analysis on the DSB verdicts is summarized in Figures 3 and 4. A provision will not be considered "violated" if that Article in a particular dispute is first ruled to be WTO-incompatible by the panel, but the finding is later reversed by the AB. However, violation is proved under the reverse scenario.

Figure 3 notes the proven violations of the AD provisions, as reflected from the panel and AB verdicts, at the Article level. It is observed that the Articles which have been violated more than thirty times include Article 3 (determination of injury to domestic industry) and Article 6 (concerning evidence), the two of which collectively account for 46.24 percent of the total proved violations. The findings clearly underline the frequent WTO-incompatibility of the dumping determination process.

The Articles for which violations have been proved between ten and thirty times include Article 2 (determination of dumping), Article 5 (concerning initiation procedures and subsequent investigation), Article 18 (procedures relating to final provisions), and Annex II provisions (determination on the basis of best information available when collecting direct evidence is a problem). These proved violations collectively account for 35.26 percent of the total verdicts on the AD front.

Finally, the use of a number of AD Articles has been proved to be WTO-incompatible at times, but violations have never exceeded ten. In decreasing order of proved violations, they are: Article 12 (public notification of the procedures and explanation of the determinations), Article 9 (imposition and collection of ADD), Article 4 (definition of domestic industry), Article 1 (conformity of applied procedures with the ADA), Article 11 (duration and review of ADD and price undertakings), Article 7 (provisional measures), Article 10 (Retroactivity), Article 15 (special regard to developing countries), and Annex I (procedures regarding on-the-spot investigations). This category collectively accounts for 18.50 percent of the total number of proved violations.

In order to understand the intensity of the potential misuse of individual AD Articles, their alleged and actual violations are compared next. It is observed that in 61.29 percent of the lodged complaints, the alleged violation of Article 3 (determination of injury to domestic industry) has indeed been confirmed by the DSB. The corresponding figures for Article 6, Article 10, Annex II, Article 2, and Article 3 are 60.87, 28.57, 28.21, 27.27, and 27.27 percent, respectively. The extent

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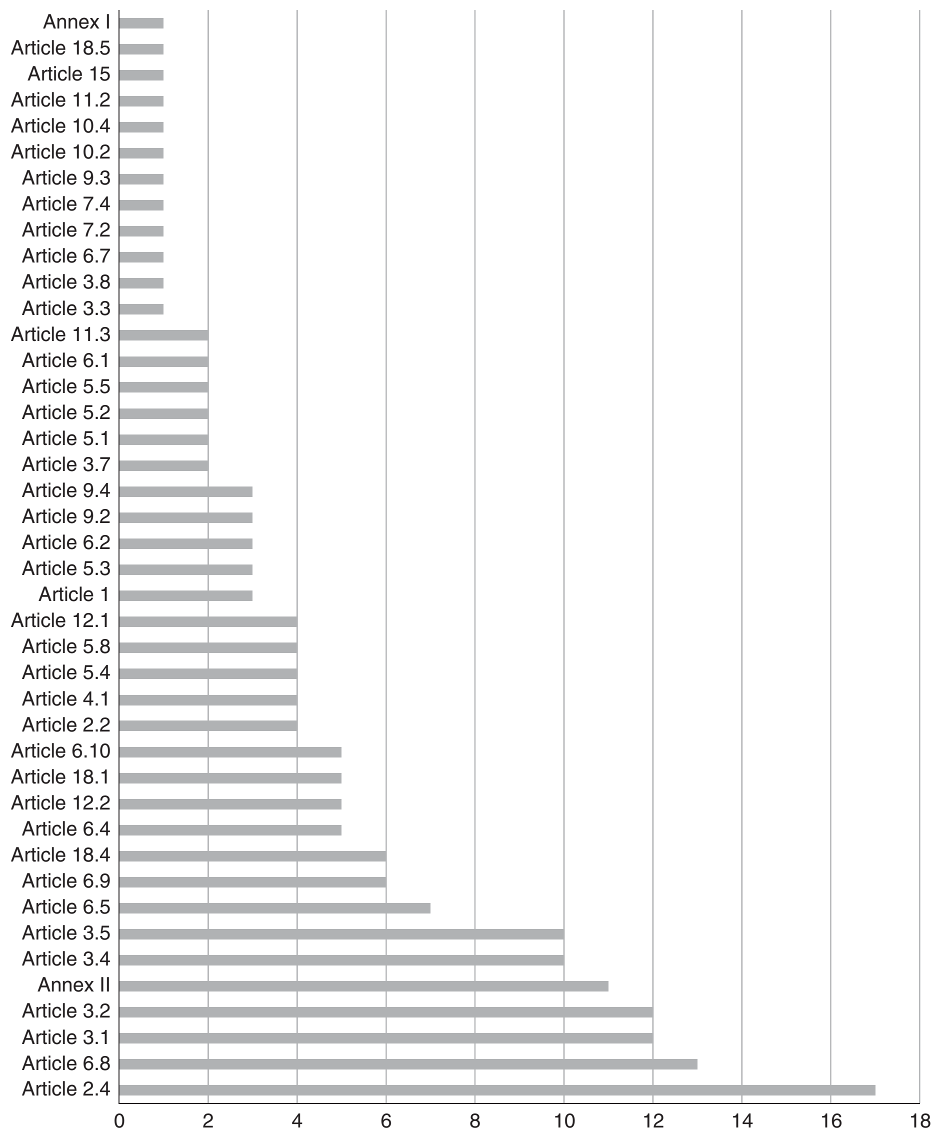


**Figure 4:** Actual violations of WTO ADA, by specific provisions (DSB rulings)
SOURCE: Constructed by the authors from the WTO ADA related disputes (01/01/1995–16/02/2015).

of proven misuse under the provisions of determination of dumping (Article 2) and evidence collection (Article 6) and other provisions raises serious concerns over the fairness of the AD determination framework to respondent countries on several occasions.

The next part of the analysis identifies the frequency of the exact AD provisions which have proved to be susceptible to misuse. The findings from the disputes are presented in Figure 4, which summarizes the proven violations of the AD provisions at the sub-Article level.

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The analysis reveals that Article 2.4 ("fair comparison" between export price and normal value) has been declared to be WTO-incompatible most often (17 times), followed by Article 6.8 (final determination on the basis of "available facts"), Article 3.1 (examination of the impact of dumped imports on prices of domestic "like products" and their producers), Article 3.2 (investigation of a significant increase in dumped imports and price undercutting), and Annex II (determination on the basis of best information available when collecting direct evidence is a problem). In addition, Article 3.4 (consideration of "all relevant economic factors" for determination of dumping) and Article 3.5 (demonstration of causal relationship between dumped import and injury) have been violated ten times each. The frequency with which determinations of the dumping margin and the investigation procedure have been declared to be WTO-incompatible underlines traces of protectionism in the entire process. In addition, a high number of violations under Annex II bears serious consequences for exports coming from low-cost developing countries like India and Thailand, and NMEs like China, Russia, and Ukraine, as noted in Table 5 earlier.

Article 6.5 (information confidentiality) has been violated seven times, while Article 6.9 (full opportunity to all interested parties to defend their interests before final determination) and Article 18.4 (adoption of "all necessary steps" to conform with the ADA) have each been declared to be WTO-incompatible six times; underlining the high frequency of violations during investigations, especially diversions from supporting evidence. Article 6.4 (timely opportunities for all interested parties to see all information), Article 12.2 (detailed notification of the findings), Article 18.1 (imposition of no specific action in disagreement with GATT 1994), and Article 6.10 (determination of individual margin of dumping) have been proved to be WTO-incompatible five times each. Violations under all these measures bear profound implications at the time of AD investigations and final duty determination. At times, simultaneous violations of these provisions along with other provisions have been proved, which compounds the problem for the exporting Members.[67]

Article 2.2 (procedure for collecting cost and profit data), Article 4.1 (definition of domestic producers), Article 5.4 (application "by or on behalf of the domestic industry"), Article 5.8 (immediate termination of investigations in the absence of sufficient evidence), and Article 12.1 (public notification of sufficient evidence to reach the interested parties) have been proved to be WTO-incompatible four times each. The tendency in the importing countries to protect their domestic players is understood from these verdicts.

Article 1 (principles), Article 5.3 (examination of the accuracy and adequacy of the evidence provided), Article 6.2 (providing full opportunity to all interested parties to defend their interests throughout the investigation), Article 9.2 (AD duty collection in appropriate amounts), and Article 9.4 (AD duty applied to imports from exporters or producers not included in the examination) have each been proven to be

67. For instance, in *DS 405* violations of arts. 2.2, 6.5, 6.10, 9.2, and 18.4 have been noted by the DSB; *European Union-Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/5, 9 December 2011.

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WTO-incompatible three times. The nature of these Articles clearly underlines the violation at the duty determination and collection stage, extending undue protection to the domestic sector.

Article 3.7 (determination of threat on the basis of facts, and not merely on allegation, conjecture, or remote possibility), Article 5.1 (application "by or on behalf of the domestic industry"), Article 5.2 (evidence of dumping, injury, and their causal link in the written application), Article 5.5 (publicizing of the application for the initiation of an investigation), Article 6.1 (due opportunities for exporters or foreign producers to respond), and Article 11.3 (maximum period of five years) have been proved to be WTO-incompatible twice each. The violated Articles demonstrate the relaxation of procedures during initial investigations on the one hand, and the continuation of protectionist measures beyond due period on the other.

Finally, Article 3.3 (simultaneous AD investigations on imports of a product from more than one country), Article 3.8 (special care while evaluating threat of injury), Article 6.7 (investigations carried out in the territory of other Members), Article 7.2 (nature of provisional measures), Article 7.4 (limit on provisional measures), Article 9.3 (lesser duty rule), Article 10.2 (retroactive levying of AD duties), Article 10.4 (imposition of definitive ADD only after determination of threat), Article 11.2 (reviewing of the need for continuing the duty after the lapse of a "reasonable period of time"), Article 15 (special regard to developing countries), Article 18.5 (information on any changes in laws and regulations relevant to AD Agreement), and Annex I (procedures regarding on-the-spot investigations) have been proved to be WTO-incompatible once each. While their absolute number in isolation looks small, the fact that they have been simultaneously violated with several other frequently violated AD provisions in a number of cases reflects the compound nature of the problem.

While the frequency of violation of the ADA provisions underlines their potential misuse, a further analysis by identifying the development profile of the defeated respondents provides additional insights. Ten sub-Articles of the ADA, which have been violated a maximum number of times, are separately considered for this purpose; the summarized results are presented in Figure 5.

An interesting observation from the "developmental" analysis emerges here. While WTO-inconsistency has been shown most frequently against the developed countries for abusing the provisions under Article 2.4 ("fair comparison" between export price and normal value) and Article 18.4 (adoption of "all necessary steps" to conform to the ADA), the developing countries have emerged as the major violators for three other provisions, namely Article 6.8 (final determination on the basis of "available facts"), Article 3.2 (investigation of a significant increase in dumped imports and price undercutting), and Article 6.9 (full opportunity to all interested parties to defend their interests before final determination). The pattern of misuse under Article 6.5 (information confidentiality) is found to be similar for both sets of countries. In other words, the potential misuse of ADA provisions, cutting across development profiles, becomes evident.

Economic considerations suggest that dumping facilitates lower prices to consumers, greater competition in the market, and improved performance of the

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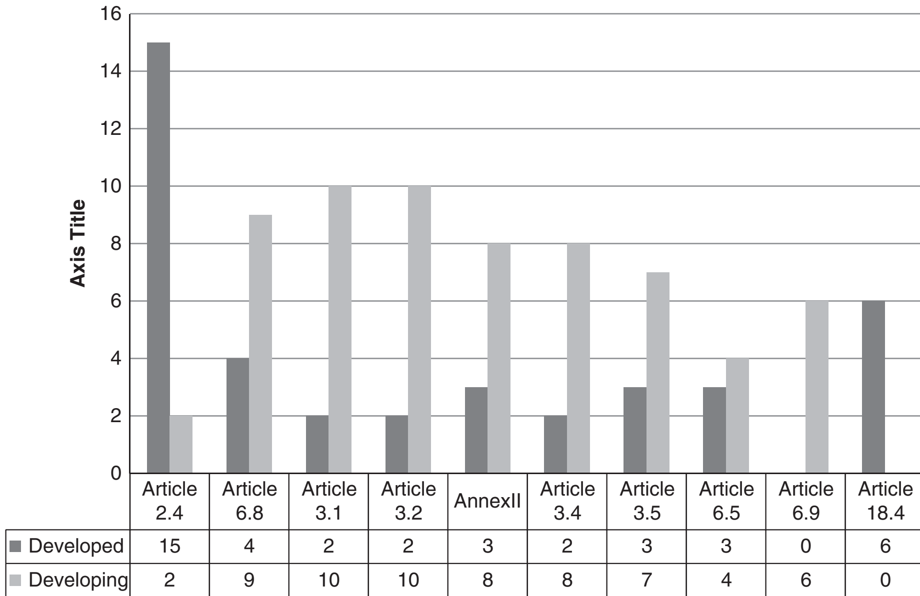


| | Article 2.4 | Article 6.8 | Article 3.1 | Article 3.2 | AnnexII | Article 3.4 | Article 3.5 | Article 6.5 | Article 6.9 | Article 18.4 |
|---|---|---|---|---|---|---|---|---|---|---|
| Developed | 15 | 4 | 2 | 2 | 3 | 2 | 3 | 3 | 0 | 6 |
| Developing | 2 | 9 | 10 | 10 | 8 | 8 | 7 | 4 | 6 | 0 |

**Figure 5:** Developmental profile of the top ten actual violations of WTO ADA, by specific sub-Articles
SOURCE: Constructed by the authors from the WTO ADA related disputes provisions (01/01/1995–16/02/2015).

domestic industry. It also acts as an anti-inflationary mechanism of price control. When looking into AD calculus, each country must take into account the benefits of dumping, as well as its costs to the economy as a whole and to consumers. It is also important to understand why increased dumping is occurring. In most cases, international trade rules under domestic laws, as well as under the GATT and the WTO, have branded dumping as bad due to its ability to cause injury to the domestic industry. Therefore, relief is provided in the name of combating unfair trade. However, this results in the possibility of using AD as a state-led barrier to trade, for protecting domestic industries.

At the domestic level, governments must facilitate innovation and technological progress within their industries to make them internationally competitive. The validity of the infant industry argument in the age of globalization is debatable, given that certain forms of protection lead to demands for more and more protection through a never-ending spiral effect. However, various methodologies used for proving dumping are not standardized and they are extremely tentative in nature. The objective of AD relief and its status as an unfair trade remedy has diminished in the last decade, with a consequent rise in conflicts with the free trade principles of the WTO. Hence, it has emerged not as a question of free trade versus regulated trade; rather, it is a question of how WTO Members are using the AD law and allowing free trade in the market. Given the importance of this provision in multilateral trade architecture, nobody can argue for the abolition of the AD law as a tool for maintaining peaceful trade relations between countries. Consequently, it is high time to repeal and improve the ADA to further the economic growth of developing countries.

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## IV. CONCLUSION: THE WAY AHEAD

The principal paradox posed by the recent increase in dumping by many developing countries, mostly Asian, is that it is simultaneously a reflection of the internal weakness of the dumping country and an external challenge to the importing country. This indicates the inefficiency of the domestic industry in always asking for protectionism. Currently, the problem of subsidy and dumping is not dealt with in a co-ordinated manner either at the domestic level or at the WTO, with the different agreements acting simultaneously on and dealing separately with the same issues.

The most frequent justification for AD measures is predatory pricing. However, many studies reveal hardly any predatory intent in dumping—the reasons are more likely to be political and economic. The analysis of the cases above reveals that there are many gaps in the WTO ADA. The most popular methodologies are not consonant with the ADA itself. The finding of a normal value and margin of dumping is unrealistically inflated. The selection of a surrogate country in the case of NMEs is not consistent with the economic realities existing in dumping and dumped-upon countries. The administrative procedures in the case of the facts-available provision are highly discretionary and subject to the bias of the authorities of the investigating countries.

To minimize the misuse of discretion, more explicit and clearer guidelines should be developed and the investigations need to be more transparent. Some scholars have prescribed competition policy as an antidote to AD misuse. However, dumping and competition policies exist in parallel and can never meet. What is presently needed is more transparency in procedures and the use of clear definitions and formulations for the determination of dumping.

The conflict between the interests behind the decisions made by the domestic authorities to protect their industries and the reviews by the panel and AB to balance the international trade interests is likely to continue. Trade barriers such as AD reveal the split between buyers and sellers. Sellers and consumers want as many choices as possible, while producers want to limit choices.[68] The present AD laws of WTO Members are not intended to serve consumer interests; on the contrary, AD measures mostly end up hurting consumer interests as well as downstream industry interests.[69] Given the growing misuse of AD investigations, there is an urgent need to look into the modification of the procedure, and the current analysis has attempted to identify potential candidates for future reform. In line with the Hong Kong Declaration, the focus of the future negotiations should be on the reform of those Articles of the ADA which leave room for various interpretations for fulfilling protectionist purposes, and on limiting the use of the very mechanism itself. The present analysis contributes to the literature, as the Articles identified as "misused" in Figure 3 may be considered as strong candidates for reform in future multilateral negotiations.

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68. Casey J. LARTIGUE, Jr., "Policymakers Dumping on Trade" (2001) CATO Institute, online: <http://www.cato.org/publications/commentary/policymakers-dumping-trade>.

69. Klaus STEGEMANN, "Anti-dumping Policy and the Consumer" (1985) 19 Journal of World Trade 466 at 467.

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