국제학석사학위논문

The Use of Antidumping Agreement of the WTO and Legal Capacity of Developing Countries

개발도상국의 WTO 반덤핑 협정 원용과 법적 역량에 대한 고찰

2016 년 8 월

서울大學校 國際大學院

國際學科 國際通商專攻

李 垠 兆

The Use of Antidumping Agreement of the WTO and Legal Capacity of Developing Countries

by

Eunjo Lee

A thesis submitted in conformity with the requirements for the degree of Master of International Studies (M.I.S.)

Graduate School of International Studies
Seoul National University
Seoul, Republic of Korea

August 2016

The Use of the WTO Antidumping Agreement and Legal Capacity of Developing Countries

WTO 반덤핑 협정의 원용과 개발도상국의 법적 역량에 대한 고찰

지도교수 안 덕 근

이 논문을 국제학석사학위논문으로 제출함

2016년 4월

서울대학교 국제대학원
국제학과 국제통상학 전공
이 은 조

이은조의 국제학석사학위논문을 인준함

2016년 7월

위 원 장 박 태 호 (인)

부 위 원 장 이 영 섭 (인)

위 원 안 덕 근 (인)

THESIS ACCEPTANCE CERTIFICATE

The undersigned, appointed by

The Graduate School of International Studies
Seoul National University

Have examined a thesis entitled

The Use of the WTO Antidumping Agreement and Legal Capacity of Developing Countries

Presented by **Eunjo Lee**
Candidate for the degree of Master of International Studies and hereby certify that it is worthy of acceptance

Signature
Committee Chair — **Bark, Tae-Ho**

Signature
Committee Vice Chair — **Rhee, Yeongseop**

Signature
Committee Member — **Ahn, Dukgeun**

The Use of Antidumping Agreement of the WTO and Legal Capacity of Developing Countries

ABSTRACT

As Doha Round is in stalemate for over a decade, the issue of developing country Members has become even more controversial. This paper analyzes the practical problems that developing countries face with by centering the legal disputes, and thus suggests ways to further embrace developing countries into the world trade system.

This paper categorizes the main issues arising from legal disputes within the WTO involving developing countries into procedural and substantial issues. As a result of analyzing the disputes regarding Article 2, 3 and 6, which are the most commonly arising issues, it is found that developing countries, compared with advanced countries, face difficulties with basic and fundamental requirements of Antidumping Agreement, including injury determination and evidence. This paper analyzes the representative cases involving developing countries and finds the causes of the problem as not only insufficient infrastructure and human resources

but also lack of domestic law in comparison to WTO Antidumping Agreement, judicial review or implementation system.

As a way to solve the problem, this paper suggests activating the existent program such as ‘Aid for Trade’ to improve opportunities for more legal advisory to developing countries.

Keywords: GATT/WTO, Antidumping, Developing Country, Dispute Settlement System, ACWL, Aid for Trade

Student Number: 2014-24208

TABLE OF CONTENTS

LIST OF TABLES

LIST OF APPENDICES

Chapter I. Introduction

1. Developing Countries in the WTO Dispute Settlement Mechanism

Robert E. Hudec, one of the most prominent scholars in the field, provides many findings and insight regarding the WTO dispute settlement system and trade disputes. He (1987) also provides developing countries in the GATT legal system, the evolution of the legal system from the GATT-era to the WTO period and the WTO dispute settlement remedies.

Few object to the increased judiciary characteristic under the WTO's dispute settlement system compared to the GATT-era. (Abbott and Snidal 2000; Goldstein et al. 2000; Simmons 2000). Julio Lacarte-Muro & Petina Gappah (2001) wrote that under the WTO, "the right perseveres over might", emphasizing the WTO's legalized dispute settlement system. Chad P. Bown & Rachel McCulloch (2010) provide that despite the overall decrease of disputes raised under the DSU, there has been sustained rate of self-enforcement actions of developing countries for the access to the markets of developing as well as developed country markets. Also, the study examined that many disputes targeted highly observable causes of lost foreign market access, such as antidumping, countervailing duties, and safeguards.

Yet, many scholars have questioned the dispute settlement system's actual effect on developing countries and whether it has contributed to more participation of those countries. In terms of participation, it is also important to note that only few number of countries account for the usage of the system by developing countries.

Gregory Shaffer (2003) provides a study on how the more legalized dispute settlement system functions in favor of advanced countries, and why many developing countries decide not to use it. Marc L. Busch & Eric Reinhardt (2003) underlines that under the WTO it has become even harder for developing countries to induce early settlement from defendants, which means less possibility to gain greater concessions. The study also notes that developing countries are disadvantaged in achieving early settlement because of their limited legal capacity. In opposition to this argument, Gabilondo (2001) provides that developing countries gain more early settlement as a result of the DSU's potential to better enforce rulings, which in turn might encourage greater participation. Roderick Abbott (2007) attributes low degree of wider participation of developing countries not to the WTO system itself but to the problem of internal governance and organization.

In regards to giving support to developing countries in their legal dispute, the role of Advisory Centre on WTO Law has been also much discussed. Chad P. Bown & Rachel McCulloch (2010) examines potential impacts of the Advisory Centre on WTO Law (ACWL) into the WTO system. Roderick Abbott (2007) also emphasized the critical role that the ACWL plays in supporting developing countries, especially the least developed members (for whom their services are free).

2. Why Antidumping?

First of all, anti-dumping mechanism is the most widely used form of trade protection far more than countervailing duties or safeguard mechanism. In the early 1990s, the main countries that utilized anti-dumping mechanism were industrialized countries. However, that trend has been overturned starting from mid and late 1990s as more participants from developing countries have begun to participate in using the mechanism.

Increased participation of developing countries in utilizing such a mechanism could give an impression that developing countries are better off in the WTO system with bigger chances to narrow down the discrepancy of leverage between industrialized and developing countries.

However, one of the interesting findings was that, according to Tharakan (2000), two-thirds of the anti-dumping investigation against small and vulnerable countries during 1987-1997 were filed by developing or newly industrialized countries while the number of definitive anti-dumping measure imposed by developing or newly industrialized countries were slightly higher than that imposed by industrialized countries.[1]

There are plenty of previous studies that have analyzed the elements composing legal resources and capacity so that one can find the causal relationship between a country's legal resource and its utilization of WTO dispute settlement mechanism. Most of the existing studies have focused on pre-litigation procedures. There have

[1] Tharakan, "P.K.M., The Problem of Anti-Dumping Protection and Developing Country Exports", Working Papers No. 198, *UNU World Institute for Development Economics Research*, 2000.

been little studies conducted from the perspective of post-litigation level. By analyzing the findings of Panel or Appellate Body, we can discover what kinds of difficulties developing countries are faced with during the litigation procedure.

This paper has analyzed the major legal issues that have been the key elements less developed countries faced difficulties with. For the purpose of this paper, which is to understand the problematic issues from the perspective of developing countries, they have been categorized into procedural level and substantive level.

Chapter II. Historical Evolution of Anti-Dumping Legislations

1. Birth of the Anti-Dumping Law

In 1814, the Treaty of Ghent was signed between England and the United States following the War of 1812. The signing of the Treaty triggered the rapid increase of imports from England to the United States at allegedly dumped prices.[2] That was when the United States first passed the Tariff Act of 1816 in a bid to counter the dumping from England.[3]

The first modern anti-dumping law was passed and enacted by Canada in 1904. The intention was to meet the needs of local manufacturers and farmers by countering the dumped goods from the United States and England.[4] The law was revised in 1907 and provided that "any imported article, of a class or kind also manufactured in Canada, would be assessed an additional duty whenever the price charged for the article in Canada, less the costs of shipment to Canada, was less than the price of the article in the exporter's home market".[5] Soon after Canada's pass of the law, anti-dumping legislations were also passed in New Zealand (1905), Australia (1906) and South Africa (1914). Among the anti-dumping legislations,

[2] Viner, J. 1923. Dumping a Problem in International Trade", University of Chicago Press, 38.
[3] Kindleberger. 1936. "The Theory of International Trade", Macmillan, pp. 236-237.
[4] Raju, K.D., 2008. "World Trade Organization Agreement on Antidumping – A GATT/WTO and Indian Jurisprudence", Kluwer Law International, p. 12
[5] Sykes, Alan O., April 2005. "Trade Remedy Laws", The Law School of the University of Chicago, p. 23.

there were law that are industry-specific while others were reproduction of earlier competition law.[6]

In the United States, the Antidumping Act of 1916 Act in the United States made it "unlawful for any person...to import, sell or cause to be imported...articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of their country of production, or of other countries to which they are commonly exported...[if] such act or acts be done with the intent of destroying or injuring an industry in the United States."

The U.S. Antidumping Act of 1921, unlike the 1916 Act, did not require to show the predatory design, but show only that dumped imports cause or threaten "material injury." It narrowed down the distance from Canada's legislation by accepting the anti-dumping duties as a countermeasure against dumping. The U.S Antidumping Act of 1921 was included in the Tariff Act of 1930, which was, in terms of substance and procedure of the provisions, largely reflected in the WTO anti-dumping law.[7]

---

[6] Ibid. Raju, "World Trade Organization Agreement on Antidumping – A GATT/WTO and Indian Jurisprudence", p. 13

[7] Ibid. Raju, "World Trade Organization Agreement on Antidumping – A GATT/WTO and Indian Jurisprudence", p. 13

2. Negotiations on Anti-Dumping in GATT

In 1920s, the League of Nations studied on dumping. After World War II, during the discussion of the establishment of the International Trade Organization (ITO) in the 1940s, the issue was raised for debate. The United States proposed a draft Charter for the formation of ITO, which included a provision regulating anti-dumping measure in Article 11 of the draft.[8] In the Havana Charter, which is the charter of formation of the ITO, consensus was not reached at first. It was not until the inclusion of changes to the previous draft and addition of Article VI in the GATT in 1947 that the consensus among countries reached.

Additional substance on anti-dumping measure was adopted by the introduction of the first GATT Antidumping Code in the 1960s. The Code went through amendment during the Tokyo Round, and in the end, the Uruguay Round.

3. The Kennedy Round Antidumping Code (1963~1968)

From 1963, the Kennedy Round negotiations dealt with many issues about Article VI. As a result, the 1967 Agreement on the Implementation of Article VI (the Antidumping Code) was adopted, one of the significant achievements of the Kennedy Round. The Code introduced many procedural and substantive rules in regards to the practice of anti-dumping measures along with the definitions and standards of concepts such as ‘dumping’, ‘injury’, and ‘causation’.

[8] Robert, W.B., 1947, “Towards a World Conference on Trade and Employment”, The American Journal of International Law 41, no.1, 127.

Article 1 provided that the anti-dumping action towards foreign suppliers could only be undertaken upon evidence of both dumping and material injury to the domestic industry. In addition, a notable provision, which was Article 10, stated that the imposition was recommended to be in lesser duties than the than the dumping margin where it could alleviate the injury.

In terms of substantive issues, Article 4 defined the 'domestic industry' as the producers whose collective output of the products constitutes a major proportion of the total of those products. Also, a 'like product' was clarified in Article 2 as 'identical in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling (the dumped product)'. The two definitions of 'domestic industry' and 'like product' narrowed the scope of the producers that should be evaluated as being injured to determine anti-dumping measures.[9] In terms of 'injury', the Code specified that the dumping had to be 'demonstrably the principal cause' of the injury.

The Code entered into force on 1 July 1968. However, as the United States Congress only ratified to the extent of its consistency with the domestic law, the importance of the Code was undermined among the GATT members.[10] Due to the adoption of the Code, many parties participating had to change their domestic practices.

---

[9] Trebilcock, Michael., Howse, Robert., Eliason, Antonia. 2012. "The Regulation of International Trade 4th Edition", Routledge, p. 335.

[10] Applebaum, H.M., 1974. "The Anti-dumping Laws – Impact on the Competitive Process", Anti-trust Law Journal 43, no. 3: 594.

Another issue raised in the negotiations was how to deal with developing countries. As a result of the collapse of colonial empires, there was a burst of emergence of new states at the time, but only few of the problems were solved. Nevertheless, three articles were included in the GATT agreement in 1965 as Part 4. It allowed special treatment and protectionist exceptions for developing countries. It waived the rule of reciprocity in negotiations between less developed and developed states. This encouraged more states to join in. Afterwards, the 1971 General System of Preferences was added to these agreements in order to help poorer countries. However, it took a couple of decades until developing countries were actually given with these preferences by industrial countries. In fact, the United States legislated such a content to its domestic law in 1974.[11]

4. The Tokyo Round Antidumping Code (1973~1979)

The early 1970s was marked with the trend towards nationalism and protectionism in the major trading countries. This was largely due to unsettled long-term economic problems along with unfair trade practices. While the contracting countries of the Antidumping Code of 1967 promised to ensure the consistency between their domestic legislation and the Code, the United States was faced with a difficulty. Particularly, the Code's causality test was in a conflict with the United States Antidumping Act. That was why the United States Congress was unwilling to amend its laws according to the Code. The EU sought to ensure that

[11] Buterbaugh, Kevin., Fulton, Richard. 2008. "The WTO Primer - The WTO primer: Tracing Trade's Visible Hand Through Case Studies", Palgrave Macmillan, p. 29.

the United States comply with the Code, and thus, in 1972, openly expressed its interest in a new round of trade negotiations. The United States and Japan agreed.

The Tokyo Round took an across-the -board approach, which dealt with trade issues held in agenda in a sweeping manner. The negotiations were set to negotiate on tariffs, non-tariff barriers in manufacturing and in agriculture, tropical products, and codes for preferential treatment for developing countries. In the end, 99 countries representing nine-tenths of the world's trade participated.

Meanwhile, as the United States Tariff Commission had experienced, during the Kennedy Round, the block of the passing of a bill implementing the Code due to the opposition from the United States Congress, the authority made sure that they secure an adequate negotiating mandate from Congress in the and leading congressmen on board the positions in the negotiation.[12]

The major changes from the 1967 Code were made in terms of causality and injury determination. In respect to injury, the factors to be evaluated in order to examine the impact of the dumped goods were set forth.[13] They include actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity and more.[14] Moreover, the regulations regarding the undertakings of price and quantity were expanded in the 1979. In

[12] Winham, Gilbert R., 1985. "International Trade and the Tokyo Round Negotiation", Princeton University Press.
[13] Article 3(3)
[14] Article 3(4)

addition, the Code provided that a proceeding should be completed within one year and that the rules permitting retroactive duties be more restricted.[15]

In terms of procedural rules, the 1979 Code required that anti-dumping investigations to be reported to the GATT Secretariat through a semi-annual report. Also, the removal of the 'principal causality test' was one of the major revisions in the Tokyo Round. Though there were only 25 contracting parties, the Code was crucial in that it served as an important and fundamental framework for anti-dumping investigations.[16]

However, several drawbacks were evident in the Tokyo Round Code. First of all, the adoption of the Code was not compulsory to contracting parties. In addition, the Code provided only general guidance without details on important items and a few minimum standards to the domestic anti-dumping authorities. Specifically, the Code did not provide the standards for a time period for review and the burden of proof. Also, it did not explain whether cumulative analysis could be sued for the calculation of normal value.[17] As the 1979 Code had many ambiguities and problems left unresolved, many authors pointed out that the Tokyo Round Code failed to regulate the countries' protectionist practices just like the previous Codes.

In order to include more developing countries into the Code, the Committee on Anti-dumping Practices specified the problems that developing countries experience and presented some changes in procedural and substantive rules.

---

[15] Ibid. Trebilcock, Howse, Eliason. 2012. "The Regulation of International Trade 4th Edition", p. 335.
[16] Ibid.
[17] Bhala, R., 2001. "International Trade Law Theory and Practice", 2nd edition, Lexis Nexis, p. 827.

5. The Uruguay Round AD Agreement (1986~1994)

Most of the countries in the 1980s were adopting legislations that protect their domestic industries. Because of the anti-dumping measures taken by the United States, many other countries expressed their concerns in the GATT Committee on Antidumping.[18] The EC's Parts Amendment Regulation in 1987 was also criticized. Moreover, as mentioned above, the 1979 Code resulted in a number of problems and ambiguities, and thus, led to inconsistent antidumping practices throughout the world. That was why the Antidumping Code was much emphasized in the Uruguay Round negotiations.[19]

At the time the GATT round was launched in 1986 in Uruguay, developing countries accounted for the majority in the GATT system. After intense negotiations, the future negotiations were set to be held. During the negotiations, there were growing tension between developed countries, including the United States and the EU, newly industrializing countries (NICs) and developing countries. While developed countries, which substantially took anti-dumping actions, were vigilant against the growing competition from the emerging industries, developing countries, who were mostly defenders, argued for stricter rules to block the increase of the anti-dumping initiations. This was one of the most contentious issues in the in the Uruguay negotiations.[20] One of the main issues discussed was

[18] Bael, I.V., 1987. "Creeping Protectionism", Journal of World Trade 21, no. 6: 5.
[19] "The New GATT Round", 1986. Journal of World Trade 20, no. 6, p. 597.
[20] Koulen, M., 1995. "The New Anti-Dumping Code Through Its Negotiating History", Berrod and Fournier, p. 152.

the uncertainty about details of comparison of the exporter's home market prices with export prices.[21]

The package completed in the Uruguay Round was signed in Marrakesh in 1994.The Round took more than seven years to conclude the most fundamental reform of international trade regulations since the establishment of the GATT as it included an Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Many scholars pointed out that the conclusion of the Uruguay Round negotiations was the most significant event in the field of trade after the World War II.[22] Recently, as there has been an increasing number of cases brought upon the WTO dispute settlement mechanism in respect with the practice of anti-dumping measure, it has become important to examine the decisions and ruling of the Panel and the Appellate Body, interpreting anti-dumping provisions.[23]

[21] Ibid. Raju, "World Trade Organization Agreement on Antidumping – A GATT/WTO and Indian Jurisprudence", p. 21.
[22] Moore, M.O., 1999. "Anti-dumping Reform in the United States: A Faded Sunset", Journal of World Trade 33: 41.
[23] Trebilcock, Howse, Eliason. 2012. "The Regulation of International Trade 4th Edition", Routledge, p. 336.

Chapter III. Findings in Figures of the WTO Anti-dumping Practices of Advanced and Developing Countries

Table 1. Initiation, imposition of measure and legal challenge

As Target Country	Country	Rate	As Acting Country	Country	Rate
Rate of being imposed with measure to initiation	ADV	60.8%	Rate of imposing measure to initiation	ADV	70.5%
	DEV	73.3%		DEV	67.1%
Rate of taking legal challenge to imposition of measure	ADV	3.8%	Rate of taken to legal challenge to imposition of measure	ADV	5.1%
	DEV	2.8%		DEV	2.1%

1. Initiation leading to imposition of duties

In terms of targeted country, the rate of being subject to an anti-dumping initiation that leads to actual imposition of an anti-dumping measure is higher for developing countries (73.3%) compared to advanced countries (60.8%). (Table 1) In other words, advanced countries are less likely to be imposed with actual anti-dumping duties relative to being the subject of initiation compared to developing countries. In terms of acting country, the rate of initiation leading to actual measure is higher for advanced countries (70.5%) compared to developing countries (67.1%), which means that advanced countries are more likely to impose actual measure after the initiation (Table 1).

Table 2. Rate of imposing measure to initiation in country-level

Rate of imposing measure to initiation in country level	Rate
Target country: ADV Acting country: DEV	65.0%
Target country: DEV Acting country: DEV	68.4%
Target country: ADV Acting country: ADV	53.6%
Target country: DEV Acting country: ADV	82.8%

The different patterns between the practice of developing countries and advanced countries are revealed more clearly by looking in details. Acting countries and targeting countries along with advanced countries and developing countries have been categorized in two-by-two chart. Looking at <Table 2>, we can see that when developing countries are acting countries, the rate of imposing actual anti-dumping duties is higher when targeting developing countries (68.4%) than when targeting advanced countries (65.0%). When advanced countries are acting countries, the rate of imposing actual anti-dumping duties is much higher when targeting developing countries (82.8%) than when targeting advanced countries (53.6%). These results support the finding mentioned above that advanced countries are less likely to be imposed with the actual anti-dumping duties compared to developing countries, but also extend to further findings that

both developing countries and advanced countries, when they are in the position of acting countries, are more likely to impose actual measure to developing countries more than they do to advanced countries.

On the other hand, another interesting finding is that, in terms of targeted country perspective, countries are less likely to be subject to the imposition of anti-dumping duties from countries who are in the same group. In case of developing countries, they were targeted in lower rate by developing countries (68.4%) than they were by advanced countries (82.8%). In case of advanced countries, they were targeted lower rate by advanced countries (53.6%) than they were by developing countries (65.0%).

2. Imposition of anti-dumping duties leading to legal dispute

In order to see participation of developing countries, one of the most clear and active index would be to see how they actually participate in the Dispute Settlement Body (DSB) mechanism. In that sense, looking at the figures of anti-dumping disputes from the perspective of both advanced countries and developing countries can reveal their participation in regards to anti-dumping practice in comparison.

Table 3. Number of Antidumping Cases in WTO

	Complainant		
Respondent	ADV	DEV	Total
ADV	27	33	60
DEV	17	25	42
Total	44	58	102

Looking at the figure, there were a total of 102 cases related to AD Agreement by 2014. For the purpose of this paper, the number of cases that have multiple countries, including both developing and advanced countries, as complainants has been excluded from analysis.[24] Among the total cases, the number of cases where advanced and developing country were involved as a complainant are 44 and 58, respectively, whereas the number of cases where advanced and developing countries were involved as a respondent are 60 and 42 (Table 3). By looking at these figures, we can see that there are more cases where developing countries are

[24] DS 162, 217, 234

involved as complainants than they are involved as respondents while it is the opposite for advanced countries.

Table 4. Rate of legal challenge to imposition of measure in country-level

Rate of imposing measure to initiation in country level		Rate
Target country: ADV	Acting country: DEV	2.2%
Target country: DEV	Acting country: DEV	2.0%
Target country: ADV	Acting country: ADV	7.1%
Target country: DEV	Acting country: ADV	4.1%

To see it in more detail, especially from the perspective of targeted countries, we can see that targeted advanced countries are more likely to take the opposite country's measure to DSB (3.8%) compared to targeted developing countries (2.8%) (Table 4). From the perspective of countries that imposed anti-dumping duties, advanced countries are more likely to be taken to DSB (5.1%) than developing countries do (2.1%) (Table 4). In a simple sense, it could be viewed that advanced countries are more likely to sue and be sued at least when it comes to the AD Agreement.

If taking a closer look at who takes legal challenge against whom, developing countries that are imposed with anti-dumping duties are likely to take advanced countries to the court (4.1%) about two times more than they take developing

countries to court (2.0%), while advanced countries that are imposed with anti-dumping duties are also likely to take advanced countries to the court (7.1%) three times more than they take developing countries (2.2%) (Table 4). In other words, the percentage of cases where developing countries are taken to the court by both advanced and developing countries were lower compared to that for advanced countries. It seems intuitively sensible that developing countries imposed with duties take advanced countries more to the court than they do to developing countries since they are imposed with duties by advanced countries in a higher rate. However, on the other way around, it is interesting that while advanced countries are more imposed with duties by developing countries, they have taken advanced countries more than they have taken developing countries to the court.

3. Capacity Hypothesis as an Explanation

The power hypothesis insists that weak countries tend to resist filing complaints because of the fear of retaliation. If that was so, the rate that developing countries file against advanced countries would have been lower than they do against developing countries, which was not the case according to the examination done in this paper.

Rather, such results may be explained by the capacity hypothesis, which emphasizes the importance of expected return as the key driving factor of developing countries filing complaints. According to this argument, weak or low-income countries tend to file complaints against high-income countries,

considering the higher expected return since weak countries relatively have insufficient financial, human and institutional resources to file suits against all other countries.[25] Guzman further explains as the following:

> The capacity constraint is evident in the indirect evidence of a highly constrained choice of defendants. When the ability to effectively detect and prosecute violators is low, governments will pursue only the largest cases involving the most lucrative markets. Surprisingly, limitations on a government's capacity to litigate seem to be more important than the fear of political or economic retribution. Controlling for many alternative explanations, we find that poorer complainants have tended to focus on the big targets, a strategy that is consistent with a tight capacity constraint rather than a fear of retaliation.[26]

Table 5. Rate of the legal case filed in country-level

	Complainant	
Respondent	ADV	DEV
ADV	13(52.0%)	17(51.5%)
DEV	9(52.9%)	5(20.0%)

The hypothesis that weak countries are more driven by the factor of expected return is supported by looking at the proportion of consultation leading to litigation, which is the circulation of panel report. While the rates for the cases filed between two advanced countries and between advanced countries developing countries have shown 52.0 and 52.9 percent, respectively, the rate of cases between two

[25] Guzman, Simmons (2005)
[26] Ibid.

developing countries was much lower with 20.0 percent (Table 5). In other words, when advanced countries were complainants, they progressed with litigation at similar rates in both cases where respondents are advanced and developing countries. On the other hand, when developing countries were complainants, they progressed with litigation at a much higher rate in case respondents are advanced countries.

What could this possibly indicate? Considering high cost that entails the litigation procedure taking place after the panel composition, weak or low-income countries, which relatively lack financial, human and institutional resources, may have had to make choices rather than entering into litigation procedures in all case. They may have more incentive to reach agreement with developing countries outside of the litigation and rather invest their limited resources to the litigation with advanced countries, which are "big targets".

Table 6. Disputed Cases

		Respondent				
		G2	IND	DEV	LDC	Total
Complainant	G2	8	2	10	-	20
	IND	24	2	12	-	38
	DEV	27	4	13	-	44
	LDC	-	-	1	-	1
	Total	59	8	36	0	103

Chapter IV.

The AD Agreement can be divided into procedural and substantive rules. By categorizing the major issues that have been raised in each case, interesting findings have been discovered that distinguish between advanced and developing countries.

For the advanced respondent countries, the article that has been most ruled that the countries have acted inconsistent with was Article 2 (dumping determination), which appeared in 52 percent of the total cases. It was followed by Article 6 (evidence) and Article 9 (imposition and collecting antidumping duties), which accounted for 26 and 29 percent of the total cases, respectively. For developing respondent countries, Article 3 (injury determination) was the article that showed a marked significance in general, appearing in 87 percent of the whole cases. Article 2 and Article 12 (explanation of dumping) were the next most frequently appearing articles, both accounting for 27 percent of the total cases.

It was found that there is a relatively clear difference between the frequency of raised articles between advanced and developing countries. Though both country groups include Article 2 among top three articles that were most mentioned, they differ significantly in the percentage. Most importantly, while Article 3 stands out unrivaled by other Articles with 87 percent, the article only appears in 14 percent of the total cases for advanced countries. Also, the contents dealt with within the article showed differences as well. The issues that were mentioned for advanced

countries in terms of Article 3 were period of investigation, threat of injury, domestic industry, causation and objective assessment. On the other hand, the issues for developing countries were more focused on period of investigation, factors, positive evidence and domestic industry. In addition, regarding Article 6, which was the second most mentioned article as inconsistent for developing respondent countries and the third most mentioned article for advanced respondent countries, it is interesting to find that the six out of twelve cases for the former countries were related to essential facts, three related to confidential information and two related to facts available. On the other hand, for the latter countries, six out of eight cases were related to facts available.

Meanwhile, related to Article 2, which was the most mentioned issue as inconsistent for advanced countries, it is interesting that the main issues for the article centered into fair comparison and zeroing practices, being included in 10 out of 15 cases related to Article 2. Another interesting finding was that while Article 9 was included in 29 percent of the total cases for advanced respondent countries, there was not a single case related to the article for developing respondent countries. It was similar with Article 11, which was mostly related to sunset review and accounted for 16 percent of total cases for advanced respondent countries. On the other hand, Article 10 (explanation of determination) was only visible on the developing respondent countries side, accounting for 27 percent. They were all related to notification

1. Substantive Rules

1) Article 2 and Article 15 – Lessons from "European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India"

Fair comparison

As to the determination of anti-dumping margin in the anti-dumping investigation, Article 2.4 of the AD Agreement requires that a "fair comparison" be made between the export price and the normal value. The comparison should be made at the same level of trade, normally at the ex-factory level, and on sales that occurred at as much as possible the same time. Due allowance should be made for differences that affect "price comparability", including differences in conditions and terms of sale, taxation, levels of trade, quantities, and the physical characteristics. In determining the normal value in the case where price comparability is affected, it should be done at a level of trade equivalent to the level of trade of the constructed export price. Article 2.4.1 stipulates the case where the conversion of currencies is needed.[27]

In addition, "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis". If export prices differ significantly among different

[27] Article 2.4, WTO Anti-Dumping Agreement.

purchasers, regions or time periods, "a normal value established on a weighted average basis may be compared to prices of individual export transactions".[28]

"The Issue of Zeroing" (Article 2.4. of The AD Agreement)[29]

A noticeable feature of the WTO dispute settlement cases related to advanced respondent countries is that half of them include Article 2 as one of the major issues. Among 29 cases related to advanced respondent countries, 14 cases, concluded that they violated Article 2 while 11 cases among them were all related to the violation of fair comparison clause, or Article 2.4.2. This is due to the "zeroing" practice by the United States and the European Community.[30] In all of the Panel and Appellate Body reports, such a practice of relying on dumping margins calculated on the basis of the zeroing methodology was ruled to be in a violation of fair comparison clause of Article 2.4. In fact, in the report of the Appellate Body in *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* (DS 294), the decision of the Panel that it was a "norm" that the zeroing methodology is inconsistent with Article 2.4.2[31], which regulates original investigation, was upheld by the Appellate Body.

---

[28] Article 2.4.2, WTO Anti-dumping Agreement.

[29] Other than the issue of zeroing practice, issues that were concluded to be inconsistent with Article 2.4 "fair comparison" clause were making a currency conversion (DS179), adjusting for unpaid sales through unaffiliated importers (DS179), comparing "a weighted average normal value with a weighted average of all comparable export transactions" when it using multiple averaging periods (DS179) and indicating the information necessary to ensure a fair comparison as required (DS397).

[30] DS141, DS244, DS264, DS294, DS322, DS335, DS343, DS344, DS382, DS383, DS402, DS404, DS422

[31] *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* Appellate Body Report of *DS294*

The "zeroing" practice is to impose zero values to the transaction of which the dumping margins are calculated as negative. Considering the importance of dumping calculation from the perspective of both parties who impose and are imposed with anti-dumping duties, the issue of "zeroing" and the ruling on the practice has been a critical issue. In fact, as such a practice led to legal disputes between developing countries and the US and EC, two countries most utilizing such a methodology, the ruling has been a particular importance to developing countries. The representative case related to the issue was *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*.

In the case, the EC, after categorizing cotton-type bed linen product from India in different models, calculated a weighted average normal value and a weighted average export price for each of those models to compare them for each model. By calculating the margins between the normal price and export price, the EC established the "positive" and "negative" dumping margins for each model. When determining the overall dumping margins, however, the EC assigned the value of zero to the "negative" dumping margins instead of negative figures, and then divided the sum of positive figures and zeroes by the cumulative total value of all the export transactions involving all models, including the exports of which margins were treated as zeroes.[32]

India argued the EC "effectively averaged only within a model, and not between models, and thus did not compare a weighted average normal value to a weighted

[32] European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Appellate Body of March 1, 2001. WT/DS141/AB/R.

average of prices of all comparable export transactions, as required by Article 2.4.2 of the AD Agreement"[33], since "there is clearly no justification for excluding certain amounts in establishing an average" and such a method "distorts the process of actually weighting dumping margins"[34].

The EC saw its calculation methodology consistent with the requirements of Article 2.4.2. It argued that it focused "on the need to consider all "comparable" export transactions, which it asserts is done in its practice, which observes the principle of comparing weighted averages for those products that are comparable".[35]

The Panel ruled that the practice carried out by the EC was inconsistent with Article 2.4.2 of the AD Agreement. The Panel found that "a margin of dumping, that is, a determination that there is dumping, can only be established for the product at issue, and not for individual transactions concerning that product, or discrete models of that product".[36] In addition, recognizing the word "all" in "weighted average of prices of *all* comparable export transactions", the Panel viewed that the EC changed "the results of an otherwise proper comparison" by assigning the value of zero to "negative" margins.[37] That is to say, in the Panel's point of view, the zeroing practice is "the equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a

---

[33] European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Panel of October 30, 2000. WT/DS141/R 30. At 6.103
[34] *Ibid. at 6.104*
[35] *Ibid.* at 6.106
[36] *Ibid.* at 6.114
[37] *Ibid.* at 6.115

weighted average equal to the weighted average normal value".[38] Lastly, the Panel mentioned that it does not view the investigating authorities are prohibited from making multiple comparisons of weighted average normal value and a weighted average of prices of all comparable export transactions. However, in terms of determining whether the product as a whole is being dumped, the Panel asserted that an investigating authority should take a full account for the export prices on all comparable transactions.[39] Thus, the Panel did not rule against the averaging within models itself but prohibited the zeroing of individual model averages.[40]

The Appellate Body also ruled that the EC, by treating negative dumping margin as zero, "did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where *negative dumping margins* were found". Thus, the Appellate Body viewed that the calculation of the dumping margin was overstated, and thus, asserted that the EC did not establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions". Moreover, the Appellate Body also found that the practice of zeroing, which does not take fully into account the prices of *all* comparable export transactions, is not a

[38] *Ibid.*
[39] *Ibid.* at 6.117
[40] Raslan, Reem Anwar Ahmed. 2009. "Antidumping: A Developing Country Perspective", Kluwer Law International, p. 29.

"fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[41]

Another ruling by the Appellate Body focused on the term “comparable”. The Appellate Body asserted that the EC could not “take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not *comparable*. The Appellate Body viewed that all types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.[42]

Due to such a ruling, the case can be evaluated as the victory of India over the EC at both the Panel and Appellate level. Of course, there were many issues brought by India in the case that were rejected by the Panel, such as its charges related to Article 2.2 and 2.2.2 (failure to properly construct constructed value), Articles 3.1 and 3.4 (failure to properly determine injury), Article 3.5 (failure to identify and distinguish causal factors), Articles 5.3 and 5.4 (failure to properly initiate an investigation), or Article 12.2.2 (failure to give public notice). However, considering the importance of the claim under Article 2.4.2 of the AD Agreement on the methodology widely used by not only the EC, but also the US, the ruling against such a practice can be seen as a triumph for India in the history of dispute settlement in the WTO.

---

[41] EC – Bed Linen, Report of the Appellate Body, at 55.
[42] *Ibid*. at 58.

In fact, such a ruling was well received by developing countries as it is also presented in the report of the Appellate Body. Egypt expressed that it welcomes the finding of the Panel that the practice of zeroing by the EC is inconsistent with Article 2.4.2.[43] Japan also asserted that what the Panel analyzed in regards to the practice of zeroing of the EC was consistent with the *Vienna Convention*. Also, Japan argued that the decision of the Panel with respect to "zeroing" was also consistent with the standard of review in Article 17.6(ii) of the AD Agreement.[44]

From the perspective of the developing country's legal capacity in the WTO dispute settlement mechanism, it can be viewed that the achievement of India in the *EC – Bed Linen* case proves that Third World countries can enhance their legal capacity in terms of trade law to the level of the First World.[45] The case can encourage even the LDCs the confidence to use the system to protect their interests in the world trade system.[46] The ruling has left a significant marking in the history of the dispute settlement of WTO for both developing and developed countries as the Appellate Body called for an end to the practice of zeroing in the dumping margin calculation.

Special and Differential Treatment (Article 15 of the AD Agreement)

[43] *Ibid*. at 34.
[44] *Ibid*. at 36.
[45] Bhala, Raj., Gantz, David A. "WTO Case Review 2001", Arizona Journal of International and Comparative Law, Vol. 19, No. 2, 2002, p. 539
[46] *Ibid*. p. 539

One of the features of the *EC – Bed Linen* case, which is less spotlighted but worthy enough to be mentioned, was India's claim under Article 15 ("Developing Country Members") of the AD Agreement. The provision stipulates in regards of special and differential treatment in anti-dumping cases. It states:

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.[47]

The provision is divided into two parts. First part has the tone of advice to the developed country Members that 'special regard' must be given to developing country Members when applying anti-dumping duties. The second part states that 'constructive remedies' should be explored before anti-dumping duties are applied.

In the *EC – Bed Linen* case, both parties agreed that the first sentence does not impose legal obligations on the EC. Instead, they had conflicts surrounding the issues included in the second sentence, including what constitutes "constructive remedies", the time period exploration should take place, and what is required by the obligation to "explore" the "possibilities" of such remedies.[48]

The Panel viewed "constructive remedies" as "helpful means of counteracting the effect of injurious dumping". Also, unlike the argumentation made by India, the

---

[47] Article 15, WTO The AD Agreement.
[48] *Ibid.* Panel Report, at 6.227.

Panel ruled that India possessed the burden to present a *prima facie* case of violation to indicate what actions it believes should have been undertaken.[49] As to the "constructive remedies provided for under this Agreement", the Panel viewed that imposition of a lesser duty, or a price undertaking would constitute "constructive remedies" within the meaning of Article 15.[50]

An interesting point offered by the *EC – Bed Linen* case would be the Panel's ruling in regards to the term "explore" in Article 15, which was considered as "investigate, examine, (and) scrutinize". While acknowledging that developed country Members are not imposed with the obligation to "provide or accept any constructive remedy that may be identified and/or offered", the Panel stated that the Article does impose "an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country".[51] Following such a ruling, the Panel turned to the EC and expressed its view that the EC "simply did nothing different in this case, than it would have done in any other anti-dumping proceeding – there was no notice or information concerning the opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the European Communities actively undertook the obligation imposed by Article 15 of the AD Agreement".[52] Thus, by merely

[49] *Ibid.* Panel Report, at 6.228.
[50] *Ibid.* Panel Report, at 6.229.
[51] *Ibid.* Panel Report, at 6.233.
[52] *Ibid.* Panel Report, at 6.238.

rejecting India's offer, the EC was ruled to have acted inconsistent with its obligation under Article 15.[53]

The Panel's ruling over Article 15 in the concerned case could be seen as a marking event considering the fact that the Article was left undealt with by the judges in the WTO throughout the history of dispute settlement mechanism. In fact, Article 15 was deemed as an "empty promise, or right without remedies".[54] In that sense, the *EC – Bed Linen* case could be meaningful in that India had tried to communicate with the EC by requesting to consider India's special situation as a developing country. It is also critical that the Panel offered some guidance into some of the key terms of the Article, such as "special situation" of developing countries, "constructive remedies", or "exploration" into "possibilities". Moreover, by ruling that the EC was inconsistent with an obligation to explore alternative or constructive remedies before imposing anti-dumping duties, the Panel, to some degree, sided with India.

However, there still are more to be clarified in the aspect of effective application of Article 15 by developing country Members. As there are not many adjudicated cases regarding the Article, there are limitation into deeper analysis. Therefore, it would be encouraged to take the issue to the Appellate level so that more experience of the adjudication related to the Article can be accumulated.

---

[53] Dorn, Joseph W., Layton, Duane W. "The WTO Anti-Dumping Agreement: A Guide for Developing Countries", King and Spalding Law Consultants Paper, Washington, DC, www.kslaw.com/library/pdf/DornLaytonWTO.pdf>, pp. 5-6.
[54] Bhala, Gantz.. "WTO Case Review 2001", *supra* note, p. 542.

Other than the cases related to the violation of Art. 2.4, there were few other regulations among Article 2 of which advanced respondent countries have violated. Two of them were related to Art. 2.2.2 (ii), which is about the calculation of the amounts for administrative, selling and general costs and profits. One was determined to have violated the Article by applying such a calculation where there is data for only one other exporter or producer and by calculating those of the exporters or producers not made in the ordinary course of trade. (DS141) The other case was concluded to be in a violation by calculating the cap on profit before determining the amounts for administrative, selling and general costs and profit (DS405). Two other cases were related to Art. 2.1, which is the basic clause of Article 2. One was concluded to have violated the Article by not assessing the possibility of high-priced sales, as compared to low-priced sales, between affiliates being not "in the ordinary course of trade" (DS184). The other case was determined to have excluded certain categories of economic operators from the definition of the domestic industry under investigation (DS337).

On the other hand, four cases involving developing respondent countries showed relevance to Article 2. Two cases were related to fair comparison and the other two were related to Art. 2.2, cost calculation and SG&A costs, respectively.

2) Article 3 - Lessons from "Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland" (DS 122) and "Mexico — Definitive Anti-Dumping Measures on Beef and Rice from the United States" (DS 295)

One of the most significant features found in the cases involving developing respondent countries was that in 13 cases out of 15 cases, the countries were adjudicated to have acted inconsistent with Article 3, while advanced respondent countries have been found to be inconsistent with the article in only 4 cases out of 29 cases.

Normally, if a country is found to have failed in considering positive evidence on the basis of objective examination[55] and all the injury factors listed in the article[56], the country would also be likely to be found to have failed in determining the causal relationship between dumped imports and possible injury, which should be determined based on those elements. Therefore, it can be said that there is a critical link between successful determination of injury factors and the causal relationship. It is found that many developing respondent countries experienced hardships in this aspect as it is found that in all 13 cases, which was ruled to have violated Art. 3, respondents have been found to be inconsistent with the very first clause of the Article.

[55] Article 3.1, AD Agreement
[56] Article 3.4, AD Agreement

Determination of Injury

"Injury" should be determined for a country to impose anti-dumping duties. Article 3 deals with the determination of injury. Article 3 offers the obligations that country Members should conform to when making injury determination. Largely, the meaning of injury could be categorized as material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

A determination of injury should be based on "positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."[57]

While Article 3.1 states that the impact of imports should be examined, Article 3.4 lists the factors relevant to that determination. The provision presents a non-exhaustive list of relevant economic factors to be examined when determining the impact of imports on the domestic industry. The factors include actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or

[57] Article 3.1, WTO The AD Agreement.

investments.[58] In the *US – Steel* case, it was ruled that factors beyond those listed in Article 3.4 may be considered.

As the list is not exhaustive and no element is decisive, the investigating authorities should devise the methodologies to evaluate the degree of relevance of each elements. This can pose difficulties to investigating authorities, especially the countries with less experience or expertise on the field, as there is no clear scientific guidance of the method to evaluate injury.[59] This will be reviewed in the later part of this section by looking at an anti-dumping case of Thailand.

Article 3.7 deals with the "threat of injury". The provision states that the determination may not be based on mere allegation, conjecture, or remote possibility. Rather, there should be clearly foreseen and imminent circumstances that would be likely causing injury. The provision provides a list of factors to be considered. However, similar with the list of relevant economic factors listed in Article 3.4, no one factor among those listed in Article 3.7 is decisive.

Determination of Causal Link

In order to demonstrate that the dumped imports cause injury, the examination should be based on all relevant evidence before the authorities. In addition, as it is also known as "non-attribution" requirement, any factor other than dumped imports which cause injury to the domestic industry should also be examined to make sure the injuries caused by those factors are not attributed to the dumped imports.

[58] Article 3.4, WTO The AD Agreement.
[59] *Ibid.* Raslan, "Antidumping: A Developing Country Perspective", Kluwer Law International, p. 34.

Factors, which may be relevant, include the volume and prices of imports not sold at dumped prices, contraction in demand or changes in the patterns of consumption, developments in technology, and the export performance and productivity of the domestic industry. Therefore, it is critical to distinguish between the injuries attributable to dumped imports and other factors. However, The AD Agreement does not specifically gives the factors to be examined or methodology to use when looking for causal relationship. In the *EC – Tube and Pipe Fittings* case, the Appellate Body stated that as long as the investigating authority does not attribute injuries caused by other factors to dumped imports, they are not required to examine collective effects of other causal factors.[60]

In summary, Article 3.1 provides a general criterion for injury determination in anti-dumping cases with the factors to be examined. The following provisions specifies this criterion. Specifically, Article 3.2 is about volume and prices while Article 3.4 related to impact. Article 3.5 elaborates a critical issue of causal relationship.

Thailand — H-Beams

Summary of Facts

The dispute arose due to the imposition of definitive anti-dumping duties by Thailand on H-beams from Poland. Poland requested the Panel to find that Thailand violated Article 2, Article 3, Article 5 and Article 6 of The AD

[60] Trebilcock, Michael., Howse, Robert., Eliason, Antonia. 2012. "The Regulation of International Trade 4th Edition", Routledge, p.339

Agreement. Poland argued that Thailand did not make a proper calculation for the alleged dumping margin, specifically the amount of profit in constructed normal value, and thus, violated Article 2.2. and 2.2.2(i). However, the Panel sided with Thailand and rejected Poland's arguments in this aspect. As Poland did not appeal the issue, the Appellate Body did not render any ruling regarding calculation of dumping margin. Instead, the Appellate Body ruled on the determination of injury.[61] Poland raised problems to the interpretation of a number of issues in Article 3 of The AD Agreement, particularly Articles 3.1, 3.2, 3.4, and 3.5. Basically, Poland claimed that Thailand violated Articles 3.1, 3.2 and 3.4 by not basing its determination on "objective examination" of "positive evidence" of the volume and effects on price of imports and its impact. Also, Poland asserted that Thailand violated Article 3.5 by failing to present the causal relationship between dumped imports and injury.[62]

The Panel based its examination in regards to Poland's claim under Article 3 on the requirements of "positive evidence" and "objective examination" to evaluate whether the Thai authorities carried out affirmative determination of injury by the Thai investigating authorities.[63]

The Panel viewed that the requirement under Article 3.4, which is "evaluation of all relevant factors", should be seen together with the overarching requirements imposed by Article 3.1 of "positive evidence" and "objective examination" in

---

[61] *Ibid.* Bhala. "WTO Case Review 2001", p. 545.
[62] Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland, WT/DS122/R, 28 September 2000, Report of the Panel, at 7.130.
[63] *Ibid*. At 7.319

determining the existence of injury. Therefore, the Panel stated that "Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury."[64]

One of the most disputed issues was the way of interpreting Article 3.4, which lists the relevant economic factors to be evaluated by the responsible authorities. Thailand argued that the list of factors was only illustrative and not mandatory[65] by insisting that the change in words from "such as" in the Tokyo Round Anti-Dumping Code to "including" in Article 3.4 of the AD Agreement bears no change. However, the Panel viewed that the change in words during the Uruguay Round has changed the meaning in that the list is not merely illustrative but mandatory. Also, the Panel viewed that other relevant economic factors may be considered to be required in particular circumstances. Moreover, while Thailand argued that Article 3.4 includes four basic factors, represented by the four groups within semi-colons, and that considering at least one of the factors is sufficient[66], the Panel ruled that each of the 15 individual factors in Article 3.4 should be evaluated by the investigating authorities.[67]

The Panel found that Thailand failed to consider certain listed factors[68] required by Article 3.4 of the AD Agreement. Also, the Panel viewed that the Thai

---

[64] *Ibid*. At 7.236.
[65] *Ibid*. At 7.225.
[66] *Ibid*. At 7.228
[67] *Ibid*. At 7.231
[68] The magnitude of the margin of dumping, actual and potential negative effects on wages, and actual and potential negative effects on the ability to raise capital or investments

investigating authorities did not provide adequate explanation of why it concluded that the domestic industry was injured in spite of positive trends in injury factors.[69] In addition, as the Panel did not find that the injury was determined on the basis of an "unbiased or objective evaluation" or an "objective examination" of the disclosed factual basis, the Panel ruled that Thailand acted inconsistent with Article 3.1 and Article 3.4 of the AD Agreement.[70]

The Appellate Body stated that Article 3.1 is "an over-reaching provision that sets a member's fundamental, substantive obligation" with respect to the injury determination.[71] The Appellate Body upheld the Panel's decision in regards to the interpretation of Article 3.4 of the AD Agreement, especially for interpreting the provision on the basis of customary international law on treaty interpretation and an earlier decision made by the Appellate Body in *Argentina – Safeguard Measures on Imports of Footwear*.[72] Thus, due to the Appellate Body's ruling, it has become clear that Article 3.4 of the AD Agreement should be interpreted as to require the investigating authorities to evaluate all 15 economic factors listed for determination of injury as mandatory.[73]

Implications of the Ruling in Thailand – H-Beams

---

[69] *Ibid*. Thailand – H-Beams, Report of the Panel, at 7.255.
[70] *Ibid*. At 7.256.
[71] Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland, WT/DS122/R, 28 September 2000, Report of the Appellate Body, at 106.
[72] *Ibid.* At 125.
[73] *Ibid.* Bhala, Gantz. "WTO Case Review 2001", p. 554.

The precedents set by the Panel and the Appellate Body in each case is important since they can serve as the guidelines for the future rulings. In fact, Bhala (1999) recognized the *de facto stare decisis* of the interpretation of the Appellate Body since about 2001.[74] This was even clarified in *US – Stainless Steel* where the Appellate Body did not affirm the argument for the practice of "zeroing", which neglected the Panel's decision related to the issue. Also, the Appellate Body ruled that the precedents of the Appellate Body forms the legal regime of the WTO dispute settlement mechanism and if there is no cogent reason, the same legal problem would be resolved by the same solution.[75] McRae (2004) also pointed that it is now impossible to understand the range of obligations of the WTO Agreement without considering the interpretation in each case.[76] There was a criticism that the ambiguity and generality of the languages in the Agreement would likely increase the power of the authority.[77] In regards to Article 3 of the AD Agreement set out in the Tokyo Round, Tsuyoshi (2013) pointed out that the interpretation of indefinite terms like "positive evidence" or "objective examination" can assign a large discretion of interpreting to the Panel and the Appellate Body.[78] Such a trend has been enhanced until today due to the increased number of emerging economics using trade remedies, especially in the face of the current situation where the

---

[74] Raj Bhala, "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)," Journal of Transnational Law & Policy, vol.9, Issue 1 (1999), pp.1-152.
[75] *US-Stainless Steel*, WT/DS344/ABIR (April 30, 2008), Report of the Appellate Body, at160-161.
[76] McRae, Donald. 2004. "What is the Future of WTO Dispute Settlement?", Journal of International Economic Law, vol.7, no.1, p.5.
[77] Alvarez, Jose E. 2005. "International Organizations as Law", Makers, ch.8.
[78] Tsuyoshi, Kawase. 2013. "The Debate on International Trade Law – Trade, Investment and Competition", Parkyougsa, part 2, ch. 6, p. 101.

establishment of the new legislation is in stalemate since the Tokyo Round (Tsuyoshi, 2013)[79].

In that sense, the Panel and the Appellate Body's ruling in *Thailand – H-Beams* holds broad implications for several aspects as it has certainly set a strict standard in terms of the interpretation of evaluation of economic factors in injury determination. It could have contributed to the harmonization of policies among WTO Members by avoiding controversies in regards to the provision by extracting the subjectivity in the interpretation.[80] Despite the request by Thailand for looser interpretation of Article 3.4 of the AD Agreement, the Panel and the Appellate Body have corrected the view of Thailand toward the provision clearly and stringently. It has been solidified that the investigating authorities have to take deeper and more thorough investigations on the impact of dumped imports on domestic industries. In particular, the national authorities would have to provide thorough explanation on why and how the injuries are attributable to the relevant factors.[81]

Then, what impact would the ruling have had from the perspective of developing countries involved in the WTO legal disputes? In order to evaluate the impact and outcome of the ruling, it would be imperative to look into the legal basis, particularly the national law of Thailand at the time of the dispute, of which the Thai authorities have based their arguments on.

---

[79] *Ibid.*
[80] *Ibid.* Bhala, Gantz. "WTO Case Review 2001", p. 556.
[81] "WTO Ruling in Thai Steel Dispute May Raise Bar in Antidumping Cases", 19 Oct. 2000. 17 Int'l Trade Rep. (BNA), at 1591.

Domestic Law in Thailand

The relevant provision, of which the Thai authorities have based their claim on, was the seventh paragraph of the 'Notification of the Ministry of Commerce on the Imposition of Anti-Dumping and Countervailing Duties B.E. 2539' (or '1996 Notification'), which was adopted in 1996 to make its domestic law conform to the General Agreement on Tariffs and Trade (GATT) set during the Uruguay Round negotiations. The 1999 Act came into effect. It consisted provisions for anti-dumping and countervailing measure. Then, in 2000, '2000 Regulation' was adopted in addition to the 1999 Act. The 1996 Notification provided that it would be applied to all the petitions which had been filed under the 1991 Notification but had not been finalized. In addition, the 1999 Act provided that all the proceeding that took place before the 1999 Act came into effect should continue with its proceeding until the end. Thus, the 1996 Notification continued to be applied to proceedings even after the 1999 Act was introduced.[82]

As explained before, the 1996 Notification emerged in order to ensure the conformity of the domestic law related to anti-dumping with the WTO AD Agreement. Therefore, the provisions were generally similar to the words written in the AD Agreement. However, according to the WTO Trade Policy Review on Thailand, several countries raised questions on the relatively insufficient provisions

[82] Nakagawa, Junji. 2007. "Antidumping Laws and Practices of the New Users", Cameron May, pp. 133-134.

provided in the Notification compared to the AD Agreement.[83] The WTO Trade Policy Review Report on Thailand issued in November 1999 made a remark that the 1996 Notification attracted numerous questions and comments from WTO Members. Hong Kong, Korea, Poland, Turkey, and the United States have presented their questions. Since the Notification was set out to achieve compliance with the AD Agreement, the questions were not really about whether the Notification was consistent with the AD Agreement. Rather, it was the insufficient provisions in the Notification that triggered other countries' questions.

There were concerns that, in the 1996 Notification, many of the specific provisions in the AD Agreement were missing even though the Notification is a much improved version compared to the previous legislations. To be specific, the 1996 Notification lacked the items, including start-up costs (Article 2.2.1); administrative, selling and general costs (Article 2.2.2); exchange rates used (Article 2.4.1); confidential information (Article 6.5); procedures for on-site verification (Article 6.7 and Annex I); refund procedures (Article 9.3.2); procedures regarding use of best information available (Annex II); sampling; and *de minimis* margins and negligible volume. For instance, the Notification gave the Department of Foreign Trade the authority to define the term *de minimis* and "negligible" in respect of the dumping margin and the volume of dumped imports, but the Notification did not give any guidance on how to calculate them. Likewise, there were several provisions providing that rules and procedures were to be

[83] The WTO Trade Policy Review on Thailand (1999; xix).

prescribed by the Department of Foreign Trade, but were not issued. WTO Members pointed that these problems may allow excessive arbitrary interpretation.[84]

In particular, the seventh paragraph, which served as the basis of the Thai authorities' injury investigation, was in the center of debate among other Member countries. It is also presented by the Panel Report in *Thailand – H-Beams* that Article 7.2 of Thailand's domestic law was in a conflict with Article 3.2 of the AD Agreement as it did not require the Thai authority to consider several items including whether there were "significant" increase in the volume of imports, "significant" price undercutting, "significant" price depression and "significant" prevention of the price due to imports.[85] Moreover, the provision merely stated the requirement of "objective examination" of an examination of the impact of the dumped imports on domestic producers, which is stipulated in Article 3.1 of the AD Agreement. It was not until the adoption of the 2000 Regulation (II) that the provision listing the relevant economic factors and indices to be evaluated by the authorities was introduced. Though the 1999 Act was deemed as an improvement from the previous legislation, it still had a limitation that it merely repeated the wording of the 1996 Notification. This was why the United States questioned

[84] WTO Trade Policy Review on Thailand, Report by the Secretariat, WT/TPR/S/63, 17 November 1999. Box III.2.
[85] *Ibid. Thailand – H-Beams*, Report of the Panel, Annex 1-2, at 40.

Thailand as to how the seventh paragraph of the 1996 Notification is consistent with Article 3.4 of the AD Agreement.[86]

It is true that some of the flaws that were pointed by the Panel and the Appellate Body were attributable to the lack of details in the Thai legislation regarding the injury determination. First, though the second paragraph of the 2000 Regulation (II) followed the language of Article 3.4 of the AD Agreement, the former provision categorized those factors to be evaluated into four groups, which was reflected in the Thai authorities' argument in the legal dispute before the Panel. Second, as Article 3.4 states that the list is not exhaustive, the Regulation of Thailand only provided the listed factors without giving remarks on other possible economic factors. After the Panel report was circulated, the concerned provision was revised in 2002 to reproduce the language of Article 3.4 of the AD Agreement completely. It did not categorize the factors into four groups and also mentioned that those factors are not exhaustive.[87]

Legal Regime in Thailand

Apart from the legislation, another issue that was pointed out as to the weak arguments of Thailand based on the 1996 Notification was the separation between the bodies that are in charge of dumping investigations and injury investigations,

[86] *Ibid.* Nakagawa 2007. "Antidumping Laws and Practices of the New Users", Cameron May, pp. 150.
[87] *Ibid.*

which were Department of Foreign Trade at the Ministry of Commerce and the Department of Internal Trade in the same Ministry, respectively.[88]

Another problem was that the 1996 Notification did not provide tribunals or procedures for the domestic judicial review of final anti-dumping determinations and reviews of determinations that are independent of the authorities responsible for the determination or review[89] or for the incorporation of such reviews into individual anti-dumping investigations. Lastly, the 1996 Notification failed to deal with the procedures of implementing the decision of the Panel or the Appellate Body.[90]

Concluding Remark – Insight to Developing Countries Use of Article 3

Considering the fact that Article 3 rarely appeared as the violated provision in anti-dumping cases where developed countries are involved as respondents, it can be said that developing countries particularly have difficulties in determination of injury. As the injury determination is a critical part in anti-dumping practices, the weakness of developing countries as to the provision indicates a fatal problem for them. Therefore, it is important to recognize the reasons why developing countries are struggling with it from their perspective and set forth reasonable solutions.

The above case clearly shows the difficulties that developing countries, who are seeking for trade remedies, might have when they stand in front of the legal dispute.

---

[88] *Ibid.* WTO Trade Policy Review on Thailand, Box III.2.
[89] Article 13, WTO AD Agreement.
[90] *Ibid.* WTO Trade Policy Review on Thailand, Box III.2.

We have looked into what are some of the problems that make developing countries struggle when arguing for their positions. Some of the reasons were the lack of the provisions in the domestic anti-dumping law in comparison with the AD Agreement of the WTO, and the setting of the provisions that are in discordance with the AD Agreement. These can pose great hindrances to developing countries in the WTO dispute settlement mechanism as their basis could be ruled as being deficient to back their arguments. Also, lack of the provisions that provide proper tools for the judicial review of anti-dumping determinations and for the implementation of the decisions of the Panel and Appellate Body could cause problems prior to and after the legal dispute. Another reason was technical problems, such as independent bodies that are responsible for dumping and injury investigations. This can cause confusion in determining the causal link between the dumped imports and injury, which is the key to anti-dumping investigations.

Many figures indicate that emerging economies have intensified their participation in the WTO dispute settlement mechanism as well as enhancing their use of trade remedies. This would be largely due to their accumulated experience and subsequent expertise acquired through those experiences. For example, Thailand, as explained above, has amended its domestic regulation after the circulation of the Panel Report so that it would better comply with the AD Agreement. However, we should consider the majority of other WTO developing Member countries who are yet to make use of both the dispute settlement mechanism and trade remedies. In the circumstances where Doha Round is in

stalemate with the status of developing countries in vague, it would be even more crucial to increase the participation of developing countries in the system, and thus, promote harmonization in the practices of trade remedies around the world.

2. Procedural Rules

1) Article 6 – Lessons from "US – Anti-Dumping and Countervailing Measures on Steel Plate from India" (DS206)

The rules on evidence guarantees the disclosure and improved opportunities to make a full defence, while still preserving essential confidentiality. It states that "all interested parties shall have a full opportunity for the defense of their interests".[91] "Interested parties" in this article indicate an exporter or foreign producer or the importer of a product subject to investigation; the government of the exporting Member; and a producer of the like product in the importing Member".[92] Moreover, all interested party should have access to the record to have a full opportunity for the defence of their interests as well as to be guaranteed with the confidentiality of the essential information.

Article 6 provides the regulations concerning the process of investigation. It also contains the requirement of notice for all interested parties in an anti-dumping investigation.[93] In case the anti-dumping investigating authority requests exporters to answer the questionnaires sent to the exporters in order to perform anti-dumping

[91] Article 6.2, WTO AD Agreement
[92] Article 6.11,WTO AD Agreement
[93] Article 6.1, WTO AD Agreement

investigation, a time limit of 30 days are given. In addition, the Agreement provides the right to access evidence, non-confidential information and the full text of the written application of initiation of the investigation and the right to meet with adverse parties. Moreover, during the process of investigation, the authorities should make sure of the accuracy of the information, which their findings are based on. Also, prior to the final determination and within a sufficient time for the parties to defend their interests, the authorities should notify all interested parties of the essential facts, which the decision of definitive measures are based on. Besides the above mentioned provisions, the provision that has been most debated is Article 6.8, which stipulates in regards to 'facts available'. This issue will be dealt with on the part below in this section.

In terms of Article 6, about 80 percent of cases, or 12 cases out of 15 cases, involving developing respondent countries have shown connection to Article 6. Among them, six cases were related to 'essential facts', three cases to 'confidential information' and two to 'facts available'. This is also a stark contrast to the cases involving advanced respondent countries where only 26 percent, or 8 cases out of 29 cases were related to Article 6. Among them, six cases, which is over half of the total cases, were related to 'facts available' provision. Would the fact that the cases involving advanced respondent countries are mostly related to 'facts available' provision and the cases involving developing respondent countries are related to 'confidential information', 'facts available', and 'essential facts' evenly hold any meaning? If so, what insight would such an implication have especially from the

perspective of developing countries? In order to look into the difference between the two groups of countries, it would be crucial to take a deeper examination into some of the issues regarding Article 6.

Facts Available (Article 6.8)

The 'facts available' provision (Article 6.8 of the AD Agreement) has been the most controversial provision throughout the WTO jurisdiction.[94] The Agreement states:

> "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."[95]

The term 'facts available' is often replaced by 'best information available (BIA).' As is mentioned in the provision as well, the provision should be considered together with Annex II. Annex II provides some limitations on the issue of facts available as it was much discussed in the Tokyo Round Anti-Dumping Code.

The Appellate Body in *US – Steel*, which is reviewed thoroughly below, viewed that Articles 6.1.1, 6.8 and Annex II of the AD Agreement must be read together to control and expedite the investigating process. Also, in *Argentina – Tiles*, it was

---

[94] *Ibid.* Trebilcock, Howse, Antonia. "The Regulation of International Trade", p. 340.
[95] Article 6.8, WTO AD Agreement.

ruled unjustifiable to neglect the information provided by exporters based on the failure to comply with certain procedural requirements.

Since the Article states that in case an interested party refuses access to necessary information within reasonable period, or significantly impedes the investigation, the determination may be made on the basis of the facts available, Article 6.8 guarantees the availability of an investigation by investigating authority even when any interested party is unable or unwilling to provide necessary information within a reasonable period.[96] In fact, Annex II (7) states, "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

Based on these grounds, there have been many cases where investigating authorities base their investigations on facts available given by the complainant side in the event where exporting firms fail to provide the information requested. Since certain information, such as sales and cost information, is needed in order to carry out the calculation of normal value in the process of dumping investigation, the authority sends questionnaires to the interested parties. If that interested party fails to provide clear and adequate information, the investigation authority may make its final determination on the basis of the facts available. Such practices are usually used to penalize uncooperative countries.[97] This was the case when the

[96] *Ibid.* Trebilcock, Howse, Antonia. "The Regulation of International Trade", p. 340
[97] Debroy, Bibek., Chakraborty, Debashis. 2007. "Anti-Dumping – Global Abuse of a Trade Policy Instrument", Academic Foundation, pp.57-58.

United States, in the circumstance of which China did not participate in the review for imposition of anti-dumping duties on imports of pencils from China, decided to make determination on the basis of the facts available from the original investigation and prior reviews and the limited new information on the record in the concerned review.[98]

This provision can serve as the safety net ensuring investigating authority to carry out its investigation on facts although the counterpart does not or cannot provide necessary information within a reasonable period. On the other hand, such provision could also pose a threat to small or developing countries since they are obligated to give satisfying and sophisticated responses to questionnaires requested upon them by advanced countries. As developing countries generally lack the expertise and the resources such as staff needed to reply to complex questionnaires, they might be disadvantaged by the use of facts available against them. Though Annex II has been set forth in order to limit the use of the practice, especially by the United States and the EC, it may not be sufficient to prevent the abuse of the facts available in practice.[99]

One of the significant but less highlighted issues regarding litigation surrounding 'facts available' is the request of and response to questionnaires. In fact, looking

---

[98] "19 U.S.C. 1677e(a) authorizes the Commission to *use the facts otherwise available* in reaching a determination when (1) necessary information is not available on the record or (2) an interested party or other person withholds informations requested by the agency, fails to provide such information in the time, form, or manner requested, significantly impedes a proceeding, or provides information that cannot be verified pursuant to section 782(i) of the Act. 19 U.S.C. 1677e(a)." Cased Pencils from China, U.S. International Trade Commission, Publication 4239, Investigation no. 731-TA-669 (3rd Review), June 2011, pp. 10-11.

[99] *Ibid.* Raslan. "Antidumping: A Developing Country Perspective", p. 44.

into the series of events of parties exchanging questionnaires could provide the actual picture of how the circumstances are turning out.

US – Steel Plate (DS206)

Summary of Facts

In the case, the Panel concluded that the US violated Article 6.8 and Annex II of the AD Agreement by not accepting the information provided by the India side without giving sufficient justification. Also, in determining the dumping margin, the US relied entirely on facts available in the investigation. However, the Panel found that the US did not violate Article 15 in regard to India in the anti-dumping investigation.[100] The Appellate Body noted that failure to provide information should not be considered equal to a lack of cooperation.[101]

In the first written submission, India asserted the difficulties of providing the information up to the level the US requested. First, there were differences in the accounting systems and standard costs in three quasi-independent plants, six regional sales offices and 42 local sales offices, which are all related to the investigation of the concerned dispute. Also, there was a problem of communication, such as telephone, fax or e-mail, since there was short supply of computers and photocopiers. India made such difficulties known to the US investigating authority through the response to the initial questionnaire and in the

[100] Praptap, Raindra. 2003. "WTO Panel Report on Indian Steel: Issues of Interpretation", Economic and Political Weekly, Vol. 38, No. 11 (Mar. 15-21, 2003), pp. 1021-1023.

[101] Ibid. Trebilcock, Howse, Eliason. 2012. "The Regulation of International Trade 4th Edition".

subsequent submissions. The US also verified the problems India had in terms of resources and infrastructure by visiting the site and facilities in India.[102]

India argued that it put the best effort to cooperate with the investigating authority of the US in spite of the aforementioned hardships by providing documents with lots of papers, allowing verification and investing resources according to the timeline. Nevertheless, the US determined that the given information collected was not qualified for use and that justified its use of facts available based on Section 776(a) by arguing that India withheld information requested by the US, failed to provide information by the deadlines or in the form or manner requested, and that the information cannot be verified.[103]

Following such final determination, India appealed to the US Court of International Trade, arguing that facts available cannot be used instead of the data India provided in terms of sales. Also, it argued that the US should have considered that India acted to the best of its ability despite the difficulties in collecting data to provide complete responses to questionnaires. The court upheld the decision to apply facts available based on the US's assertions that there were deficiencies which "cut across all aspects of SAIL's data," and because SAIL had not met the deadlines. However, the court found that, in the case of a respondent like SAIL, the US should conclude that the exporter actually had the ability to comply with the request for information, which the US did not.[104]

---

[102] *Ibid.* Praptap, Raindra.
[103] *Ibid.*
[104] Ibid.

The US investigating authority revised its basis for the determination following the request of remand of the court. The US argued that SAIL said it would correct the problems in its data, and pointed to the late submission of the data. Also, it argued that SAIL had the ability to complete the questionnaires considering that it is a large company with audited financial statements and owned by the government.[105]

Case Interpretation

It is interesting that the point of legal debate appearing in the case shifted from whether India provided the appropriate data requested by the counterpart to whether India was able or unable to respond to the questionnaires. One of the most significant but difficult issues in this debate is to strike the balance between the efforts that one party can expect the other party to make in responding to questionnaires and the ability of the party to provide the response up to the satisfying level requested by the investigating authorities.

Article 6.13 of the AD Agreement stipulates that "the authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable." This has been the basis of the decision of the Appellate Body, judging that the exporter met its interpretation of 'cooperate' in terms of Annex II, para. 7

[105] Ibid.

since there was notification to the US investigating authorities of its difficulties and lack of US' assistance to the exporter.

As one of the solutions to strike the balance between the demand from the investigating authorities and the exporter, the standardization of the anti-dumping procedure in different jurisdictions has been presented.[106] Since responding to voluminous questionnaires could be an enormous burden to some countries, including least developed countries, and it is found that questionnaires have become increasingly complicated in traditional user countries, many developing countries may face hindrances to participate in the practice. Therefore, revising and improving the amendments can harmonize the interest of both investigating authorities and exporting countries.

[106] Datta, Sachin. "Discussion Paper on the Use of 'Facts Available' in Antidumping Investigations", ALG India Law Offices.

Chapter V. Ways to Embrace Developing Countries into the WTO Legal Sphere

Many papers have evaluated the problems faced by developing countries in the legal perspective. Some of the reasons why developing countries struggle to set forth legal argument or do not even take a chance to challenge other countries legally have been introduced by many scholars.

First is the lack of staff and expertise in administering the anti-dumping practices. In addition to human resources, and personnel and expertise, investigating authorities also need to establish a dockets room, a central records unit, and a hearing room. The dockets room will receive filings from interested parties. The central records unit will store the records of all proceedings, including the public documents which must be available for inspection.

Moreover, pursuant to Article 6.2 of the AD Agreement, interested parties have the right to present oral argument at a hearing conducted by the investigating authority. Therefore, the authority must, at a minimum, set aside a room where the parties may present their cases and be subject to examination by the investigators.

Moreover, involvement in an anti-dumping investigation is a very expensive undertaking. Apart from significant legal costs, the opening of an investigation ties down exporting enterprises with uncertainty over the outcome, which can last for years. This makes it difficult for developing country exporters to equally defend their interests.

Such problems such as insufficient legal and financial resources do not only restrict the capacity to contest the legitimacy and legality of an anti-dumping action but it also limits developing countries possibilities to become active users of these instruments themselves. This is one of the reasons why so many developing countries do not actively engage in anti-dumping procedures and do not even adopt their own national legislation.

ACWL for Aid for Trade

As a part of Aid for Trade that has been discussed as the way for embracing developing countries into the world trade regime, legal advisory system has been also mentioned along with other elements.

In that sense, the Advisory Centre could serve as an ideal supporting body for developing countries, particularly for those who have no experience in taking legal challenge against other countries through DSB. As also examined in *Thailand – H-Beams* case, the accumulation of experience in legal disputes can enhance the capacity of one country in terms of legislation and expertise. However, considering the expensive cost of launching investigations and so forth, countries may hesitate to even start their journey. Therefore, some help should be given to them until they acquire enough experience to take the challenge by themselves in the future.

For instance, ACWL helped with the preparation of Bangladesh's 'request for consultations' served on India at the WTO. It also provided two lawyers to assist the Bangladeshi team during the Consultation with India under the provisions of

WTO dispute settlement. Without the assistance of ACWL, it would have been very difficult for Bangladesh to seek redress in the WTO.

Chapter VI. Conclusion

This paper has analyzed the major legal issues that have been the key elements less developed countries faced difficulties with. For the purpose of this paper, which is to understand the problematic issues from the perspective of developing countries, they have been categorized into procedural level and substantive level.

Following the explanation of the results of analysis on the figures and numbers that represent the participation of developing countries in the procedure of dispute by resorting to capacity hypothesis, the importance of legal capacity becomes critical in terms of embracing developing countries into the WTO mechanism. In that sense, this paper looked into the key issues that arise from legal disputes from the perspective of developing countries by categorizing the issues into procedural and substantive rules of AD Agreement. In particular, issues, including 'fair comparison', 'injury determination' and 'evidence', have been dealt with particular detail.

Despite partial victory of developing countries such as in 'zeroing' practice by advanced countries, it is found that there are still many difficulties they face in terms of basic and critical elements in anti-dumping practice. Some of the reasons are lack of the provisions in the domestic anti-dumping law in comparison with the AD Agreement, proper judicial review or implementation mechanism and so forth. One of the ways to solve the problems mentioned above would be activating the

programs such as Aid for Trade to provide further legal advisory system to developing countries.

Considering that the majority of WTO developing Member countries are yet to make use of both the dispute settlement mechanism and trade remedies in the circumstances where Doha Round is in stalemate with the status of developing countries in vague, it would be even more crucial to increase the participation of developing countries in the system, and thus, promote harmonization in the practices of trade remedies around the world.

REFERENCES

Articles, Books, Theses, and Working Papers

Alvarez, Jose E. 2005. International Organizations as Law." Makers.

Applebaum, H.M. 1974. "The Anti-dumping Laws – Impact on the Competitive Process." Anti-trust Law Journal 43(3): 594.

Bael, I.V. 1987. "Creeping Protectionism." Journal of World Trade 21(6): 5.

Bhala, Raj. 1999. "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)." Journal of Transnational Law & Policy 91(1).

Bhala, R. 2001. International Trade Law Theory and Practice 2nd edition. Lexis Nexis.

Bhala, Raj., Gantz, David A. "WTO Case Review 2001." Arizona Journal of International and Comparative Law 19(2): 539

Buterbaugh, Kevin., Fulton, Richard. 2008. The WTO Primer - The WTO primer: Tracing Trade's Visible Hand through Case Studies. Palgrave Macmillan.

Datta, Sachin. "Discussion Paper on the Use of 'Facts Available' in Antidumping Investigations", ALG India Law Offices.

Debroy, Bibek., Chakraborty, Debashis. 2007. Anti-Dumping – Global Abuse of a Trade Policy Instrument. Academic Foundation.

Dorn, Joseph W., Layton, Duane W. "The WTO Anti-Dumping Agreement: A Guide for Developing Countries." King and Spalding Law Consultants Paper.

Graafsma, Folkert. 2001. "Recent WTO Jurisprudence in the Field of Anti-Dumping." In Legal Issues of Economic Integration 28(3). Kluwer Law International.

Kindleberger. 1936. The Theory of International Trade, Macmillan.

Koulen, M. 1995. The New Anti-Dumping Code Through Its Negotiating History. Berrod and Fournier.

McRae, Donald. 2004. "What is the Future of WTO Dispute Settlement?" Journal of International Economic Law 7(1): 5.

Moore, M.O. 1999. "Anti-dumping Reform in the United States: A Faded Sunset." Journal of World Trade 33: 41.

Nakagawa, Junji. 2007. Antidumping Laws and Practices of the New Users. Cameron May.

Praptap, Raindra. 2003. "WTO Panel Report on Indian Steel: Issues of Interpretation", Economic and Political Weekly, Vol. 38, No. 11 (Mar. 15-21, 2003), pp. 1021-1023.

Raju, K.D. 2008. World Trade Organization Agreement on Antidumping – A GATT/WTO and Indian Jurisprudence, Kluwer Law International.

Raslan, Reem Anwar Ahmed. 2009. Antidumping: A Developing Country Perspective. Kluwer Law International.

Robert, W.B. 1947. “Towards a World Conference on Trade and Employment.” The American Journal of International Law 41(1): 127.

Sykes, Alan O. April 2005. “Trade Remedy Laws.” The Law School of the University of Chicago.

Tharakan, 2000. “P.K.M., The Problem of Anti-Dumping Protection and Developing Country Exports.” UNU World Institute for Development Economics Research, Working Papers, no. 198.

Trebilcock, Michael., Howse, Robert., Eliason, Antonia. 2012. The Regulation of International Trade 4th Edition, Routledge.

Tsuyoshi, Kawase. 2013. “Part 2, Ch. 6.” In The Debate on International Trade Law – Trade, Investment and Competition. Parkyougsa.

Winham, Gilbert R. 1985. “International Trade and the Tokyo Round Negotiation.” Princeton University Press.

Viner, J. 1923. “Dumping a Problem in International Trade.” University of Chicago Press, 38.

WTO Agreements, Reports and Documents

"The New GATT Round." 1986. Journal of World Trade 20(6): 597.

"WTO Ruling in Thai Steel Dispute May Raise Bar in Antidumping Cases." 19 Oct. 2000. 17 Int'l Trade Rep. (BNA), at 1591.

United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) Appellate Body Report of DS294

European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Appellate Body of March 1, 2001. WT/DS141/AB/R.

European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Panel of October 30, 2000. WT/DS141/R 30. At 6.103

Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland, WT/DS122/R, 28 September 2000, Report of the Panel, at 7.130.

Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland, WT/DS122/R, 28 September 2000, Report of the Appellate Body, at 106.

US-Stainless Steel, WT/DS344/ABIR (April 30, 2008), Report of the Appellate Body, at160-161.

The WTO Trade Policy Review on Thailand (1999; xix).

WTO Trade Policy Review on Thailand, Report by the Secretariat, WT/TPR/S/63, 17 November 1999. Box III.2.

APPENDIX 1 <Country Classification>

G2	Dev	LDC	
EU(15)	Argentina	Afghanistan	Mali
US	Brazil	Angola	Mauritania
	Chile	Bangladesh	Mozambique
	Colombia	Benin	Myanmar
IND	Costa Rica	Bhutan	Nepal
Australia	Ecuador	Burkina FASO	Niger
Canada	Guatemala	Burundi	Rwanda
Finland	Honduras	Cambodia	Sao Tome and Principe
Hong Kong	India	Central America Republic	Senegal
Iceland	Thailand	Chad	Sierra Leone
Japan	Bulgaria	Comoros	Solomon Islands
South Korea	Croatia	Dem. Rep of the Congo	Somalia
Liechtenstein	Czech Rep.	Djibouti	South Sudan
Netherlands	Cyprus	Equatorial Guinea	Sudan
New Zealand	Estonia	Eritrea	Timor-Leste
Norway	Hungary	Ethiopia	Togo
Singapore	Latvia	Gambia	Tuvalu
Switzerland	Lithuania	Guinea	Uganda
	Malta	Guinea-Bissau	United Rep. of Tanzania
	Mexico	Haiti	Vanuatu
	Poland	Kiribati	Yemen
	Romania	Lao People's Dem. Republic	Zambia
	Slovakia	Lesotho	
	Slovenia	Liberia	
	Turkey	Madagascar	
	Israel	Malawi	

APPENDIX 2 <Initiation of Antidumping by Country>

Initiator		Exporter				
		G2	IND	DEV	LDC	Total
G2	EU	16	68	384	0	468
	US	65	122	340	0	527
	G2 Total	81	190	724	0	995
IND-15	Australia	64	78	147	0	289
	Canada	47	32	117	0	196
	Japan	1	3	4	0	8
	Korea	30	34	63	0	127
	New Zealand	10	13	34	0	57
	IND Total	152	160	365	0	677
DEV-31	Argentina	55	34	227	0	316
	Brazil	100	52	216	1	369
	Bulgaria	0		1	0	1
	Chile	2	4	19	0	25
	China	80	98	40	0	218
	Colombia	2	7	63	0	72
	Costa Rica	2	0	8	0	10
	Czech Republic	3	0	0	0	3
	Dominican Republic	1	1	0	0	2
	Ecuador	0	0	3	0	3
	Egypt	12	8	62	0	82
	Guatemala	0	0	2	0	2
	Honduras	1	0	2	0	3
	India	127	187	422	3	739
	Indonesia	5	46	71	0	122
	Israel	27	5	16	0	48
	Jamaica	1	0	5	0	6
	Jordon	0	0	1	0	1
	Latvia	0	0	7	0	7
	Lithuania	0	0	7	0	7

	Malaysia	8	27	35	0	70
	Mexico	41	8	80	0	129
	Morocco	3	0	3	0	6
	Nicaragua	0	0	2	0	2
	Pakistan	17	20	45	0	82
	Panama	1	0	5	0	6
	Paraguay	0	0	2	0	2
	Peru	3	5	64	0	72
	Philippines	1	5	13	0	19
	Poland	1	0	11	0	12
	Russian Federation	2	9	27	0	38
	Slovenia	0	0	1	0	1
	South Africa	65	43	120	1	229
	Thailand	1	17	43	0	61
	Trinidad and Tobago	0	1	12	0	13
	Turkey	13	22	145	0	180
	Ukraine	7	2	36	0	45
	Uruguay	1	1	5	0	7
	Venezuela, Bolivarian Republic	4	4	23	0	31
	Viet Nam	0	1	3	0	4
	DEV Total	586	607	1847	5	3045
LDC		0	0	0	0	0

APPENDIX 3 <Imposition of Antidumping Measure by Country>

Imposed by		Exporter					
		G2	IND	DEV	LDC	Total	
G2	EU	8	29	261	0		298
	US	39	71	235	0	345	
	G2 Total	47	100	496	0	643	
IND-15	Australia	23	43	56	0	122	
	Canada	29	17	73	0	119	
	Japan	1	3	3	0	7	
	Korea	15	26	41	0	82	
	New Zealand	4	2	18	0	24	
	Singapore	0	0	2	0	2	
	Taipei, Chinese	0	7	10	0	17	
	IND Total	80	151	305	0	536	
DEV-31	Argentina	26	32	170	0	228	
	Brazil	46	24	126	1	197	
	Chile	0	0	10	0	10	
	China	66	79	31	0	176	
	Colombia	3	0	31	0	34	
	Costa Rica	1	0	2	0	3	
	Czech Republic	1	0	0	0	1	
	Dominican Republic	1	0	1	0	2	
	Egypt	11	9	34	0	54	
	Guatemala	0	0	1	0	1	
	India	93	134	304	3	534	
	Indonesia	6	16	32	0	54	
	Israel	11	0	12	0	23	
	Jamaica	0	0	4	0	4	
	Latvia	0	1	1	0	2	
	Lithuania	0	0	7	0	7	
	Malaysia	3	15	20	0	38	

	Mexico	26	5	68	0	99
	Morocco	4	0	2	0	6
	Nicaragua	0	0	1	0	1
	Pakistan	9	12	29	0	50
	Paraguay	0	0	2	0	2
	Peru	1	3	46	0	50
	Philippines	1	3	7	0	11
	Poland	1	1	7	0	9
	Russian Federation	2	8	18	0	28
	South Africa	40	30	62	0	132
	Thailand	1	11	35	0	47
	Trinidad and Tobago	0	0	7	0	7
	Turkey	8	18	137	0	163
	Ukraine	5	2	31	0	38
	Uruguay	0	0	2	0	2
	Venezuela, Bolivarian Republic of	3	3	19	0	25
	Viet Nam	0	1	3	0	4
	DEV Total	369	407	1262	4	2042
LDC		0	0	0	0	0

APPENDIX 4. <Articles raised in the WTO dispute - Advanced Respondent Countries>

Article	Related cases	Features	Concerned cases/Total cases
Art. 1 (General principle)	1		3%
Art. 2 (Dumping determination)	15	10 cases related to fair comparison (zeroing)	52%
Art. 3 (Injury determination)	4	2 concerned with period, 2 with threat of injury, 2 with domestic industry, 2 with causation, 1 with objective assessment	14%
Art. 4 (Domestic industry)	3	All concerned with Art. 4.1 domestic industry	10%
Art. 5 (Initiation of investigation)	1	Application and notification	3%
Art. 6 (Evidence)	8	6 cases concerned with Art. 6.8 (facts available)	26%
Art. 9 (Imposition and collecting anti-dumping duties)	9		29%
Art. 11 (Duration and review)	5	Four cases concerned with Art. 11.3. (Mostly, sunset review)	16%
Art. 15 (S&D Treatment)	1	EC-India	3%
Art. 18 (Final provisions)	3	All concerned with China	10%

APPENDIX 5. <Articles raised in the WTO dispute - Developing Respondent Countries>

Article	Related cases	Features	Concerned cases/Total cases
Art. 2 (Dumping determination)	4		27%
Art. 3 (Injury determination)	13	Factors, period of investigation, positive evidence, domestic industry	87%
Art. 5 (Initiation of investigation)	3	All concerned with insufficient evidence	20%
Art. 6 (Evidence)	12	6 concerned with essential facts, 3 with confidential information, 2 with facts available	80%
Art. 7 (Provisional measures)	1	Provisional measure	7%
Art. 10 (Retroactivity)	1	Retroactive levying of final duties	7%
Art. 12 (Public notice and explanation of determinations)	4	Notification	27%

국문초록

도하라운드의 정체기 속에서 세계무역기구 내 개발도상국의 지위에 관한 논의가 뜨거운 가운데, 본 논문은 세계무역기구 내 분쟁해결을 중심으로 개발도상국이 마주하는 실질적인 문제를 고찰하여 개발도상국을 세계 무역 체계 안으로 포용하는 방안을 제시한다.

본 논문은 개발도상국의 세계무역기구 내 법적 분쟁에서 가장 논란이 된 주요 항목을 절차적 및 내용적 측면으로 구분하여 분석한다. 특히 본 논문은 세계무역기구의 반덤핑협정 제 2 조, 제 3 조 및 제 6 조와 관련하여 분쟁을 분석한 결과 개발도상국이 협정의 가장 기본이 되는 항목, 즉 피해 판정 및 증거의 측면에서 선진국과 비교하였을 때 상당히 부진한 성적을 보이고 있음을 밝힌다. 구체적으로, 개발도상국이 포함된 가장 대표적인 사례를 연구함으로써 기반시설 및 인적 자원의 부족과 함께 세계무역기구 반덤핑협정에 부합하지 않는 국내법, 사법심사제도 및 이행 제도의 부재 등을 문제의 주 원인으로 밝힌다.

본 논문은 위의 문제의 해결책으로서 '무역을 위한 원조'와 같이 현재 운영이 되고는 있으나 활발하지 않은 프로그램의 활성화를 통해 개발도상국에 법적 자문을 제공할 것을 제시한다.

주제어: 세계무역기구, 반덤핑협정, 개발도상국, 분쟁해결기구, 무역을 위한 원조

학번: 2014-24208