

Bhumika Billa, *Strategising Protectionism: An Analysis of India's Regulation of Anti-Dumping Duty Circumvention*  
10(2) TRADE L. & DEV. 417 (2018)

STRATEGISING PROTECTIONISM:  
AN ANALYSIS OF INDIA'S REGULATION OF ANTI-DUMPING  
DUTY CIRCUMVENTION

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*Circumvention (or evasion) of anti-dumping duties, though widely debated during the Uruguay Round negotiations, led to nothing but a three paragraph long Ministerial Decision acknowledging the problem. Nevertheless, the European Union (EU), USA and India have gone on to incorporate anti-circumvention rules in their domestic regulations. However, principally against the Free Trade Theory and leaving excessive scope for protectionist abuse, these rules seem to protect the domestic industries even from fair trade. This is especially true considering the difficulties faced in differentiating between legitimate commercial activities and intentional cases of circumvention. Apart from highlighting the potential inconsistencies of these rules with the Anti-Dumping Agreement, the present paper explores the theoretical aspects of Indian law on circumvention in detail. In the absence of any judicial interpretation on it, reference to the EU law has been made to clarify various principles considered as grey areas that are yet to be settled. This comparative analysis helps give an idea about the quantitative and qualitative tests that can be borrowed from EU jurisprudence to make the law less ambiguous. However, a better alternative might be to deal with such cases with the help of already existing anti-dumping laws and other simpler solutions. Such alternatives become especially important when the cost of protectionist abuse and the risk of protection from even 'fair trade' outweigh the burden of fresh investigations in the long run.*

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## I. DUMPING, ANTI-DUMPING, AND CIRCUMVENTION

## A. Background

Dumping is a situation of international price discrimination where the selling price of an imported product is less than the price of that product in the domestic market of the exporting country.<sup>1</sup> While, dumping, theoretically, can simply be determined by comparing prices in the two markets, it involves a series of complex analytical steps to tackle situations such as non-availability of the prices in the domestic market, fluctuating prices, confusion with regard to the concept of 'like products' and so on. Typically, the practice of dumping is considered harmless,<sup>2</sup> primarily because the ultimate effect of dumping is availability of cheaper goods to the consumers and better competition to domestic producers. However, dumping becomes harmful in cases of predatory pricing (pricing of exports below cost to drive out rival producers) as it causes injury to a domestic industry through unfair competitive prices.

Therefore, while the General Agreement on Tariffs and Trade, 1994 (GATT) ensures 'free trade' through the 'Most Favoured Nation'<sup>3</sup> principle (according to which countries cannot normally discriminate among trading partners) and the 'National Treatment'<sup>4</sup> principle (according to which both imported and locally produced goods must be treated equally), Article VI of GATT and the Agreement on Implementation of Article VI of the GATT, 1994 (Anti-Dumping Agreement) provide the principles and essentials required to constitute, determine and calculate dumping. The three requisite conditions for the imposition of anti-dumping duties are dumping, injury to the domestic industry of the importing country and a causal link between the first two. Dumping, in such situations, is considered as an 'unfair' trade practice, because of which countries have often imposed anti-dumping and countervailing duties on

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<sup>1</sup> *Technical Information on Anti-Dumping*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm) (last visited Nov. 14, 2018).

<sup>2</sup> JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (A.M. Kelley ed., 1966). See also Howard S. Ellis, 67(1) J. POL. ECON. (1959) (reviewing JACOB VINER, *THE LONG VIEW AND THE SHORT: STUDIES IN ECONOMIC THEORY AND POLICY*). Two common principles have been acknowledged by the abolitionists. First, that dumping generally has positive welfare effects on the economy of importing country and second, anti-dumping duties negate these effects and can be simply used as a tool to protect domestic markets from cheaper imports.

<sup>3</sup> General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187, art. I [hereinafter GATT 1994].

<sup>4</sup> *Id.*, art. III.

imports.<sup>5</sup> Article VI of the GATT explicitly authorizes the imposition of specific anti-dumping duties on imports fulfilling the aforementioned essentials.<sup>6</sup>

*B. Defining Circumvention: Theoretical Aspects and Development*

While exploring the cases where the imposition of anti-dumping duties significantly undermined free trade, one inevitably comes across the phenomenon of ‘circumvention’. Circumvention means ‘to get around’, and in this context, relates to the evasion of anti-dumping duties. The World Trade Organization (WTO) defines circumvention as ‘getting around commitments in the WTO’.<sup>7</sup> The circumvention of anti-dumping measures is a trade strategy for exporting complex manufactured products when an importing country applies or is likely to apply anti-dumping duties for the protection of a national product.<sup>8</sup> The imposition of anti-dumping duties increases the cost of the exported product which acts as an ‘incentive’ for the producer to evade and avoid such duties.<sup>9</sup> Circumvention can therefore be said to be practised to avoid the imposition of these duties and trade in the product which is otherwise subject to duties in such a manner so as to hide the true character of the product or the origin of that product.

The objective of an anti-circumvention regime is to prevent unfair avoidance of duties which are imposed to counter the effects of injury to the domestic market caused by imports below the normal value. In other words, it is a way of extending the application of anti-dumping duties upon ‘like products’<sup>10</sup> which would otherwise be outside the purview of the said application. The protectionist approach seeks to save the domestic market from unreasonably cheap substitutable goods from exporting countries.

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<sup>5</sup> Norman S. Fieleke, *The Uruguay Round of Trade Negotiations: An Overview*, NEW ENG. ECON. REV., May - Jun. 1995, at 3.

<sup>6</sup> GATT 1994, *supra* note 5.

<sup>7</sup> *Glossary ‘Circumvention’*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/glossary\\_e/circumvention\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/circumvention_e.htm) (last visited Aug. 19, 2018).

<sup>8</sup> Lucia Ostoni, *Anti-Dumping Circumvention in the EU and the US: Is there a Future For Multilateral Provisions under the WTO?*, 10 FORDHAM J. CORP. & FIN. L. 407 (2005).

<sup>9</sup> Arnoud R. Willems & Bregt Natens, *What’s Wrong with EU Anti-Circumvention Rules and How to Fix it*, 19 J. INT’L ECON. L. 497 (2016).

<sup>10</sup> The concept of ‘likeness’ covers ‘identical’ and ‘closely related’ products i.e. having characteristics closely resembling to the product in comparison. See WON-MOG CHOI, LIKE PRODUCTS IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE, ¶ 2.1.2, at 132 (2003).

The phenomenon was discussed at length during the Uruguay Round Negotiations following the *Screwdriver Assembly* case,<sup>11</sup> where European Union's anti-circumvention regulations were challenged before a Panel. However, the members of the Uruguay Round were unable to reach any consensus.

### C. *Defining the Scope: Problems and Issues*

All trade remedies when imposed, afford protection to the domestic producers. Despite being principally against the Free Trade Theory,<sup>12</sup> such remedies, available in the form of trade barriers, cannot be dispensed with. The problem however, arises when such protectionism leaves scope for 'protectionist abuse' and creates an unfair playing field which is harmful to the economy in the long term. Anti-circumvention regimes thus provide a breeding ground for 'protectionist abuse' and impede 'free trade' in the domestic industry. To test the aforementioned hypothesis, the following issues have been explored:

- i. How are anti-dumping duties circumvented?
- ii. What is the legal framework for preventing circumvention inside and outside India?
- iii. Are Indian anti-circumvention rules consistent with the Agreement on Implementation of Article VI of the GATT, 1994 (hereinafter Anti-Dumping Agreement)?
- iv. How does an anti-circumvention law hinder free trade and go to the extreme of protectionism?
- v. How effective is the anti-circumvention law of India and what alternative solutions could address the problem of circumvention?

### D. *Overview*

The present paper explores the theoretical aspects of Indian law on circumvention in detail. In the absence of any judicial interpretation with respect to the same, the law of the European Union has been referred to clarify various principles that can be considered as grey areas and are yet to be settled. There are various forms of circumvention and the three most commonly acknowledged forms are transshipment,

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<sup>11</sup> Report of the Panel, *European Economic Community – Regulation on Imports of Parts and Components* 132 L/6657 (Mar. 22, 1990), GATT BISD (37<sup>th</sup> Supp.) at 132 (1991) [hereinafter Imports of Parts and Components Report].

<sup>12</sup> While the idea that all countries can benefit from international trade goes back to Adam Smith and David Ricardo, subsequent research has described the gains from free trade in a much greater detail. For a detailed analysis of all those studies, see DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 46 (3<sup>rd</sup> ed. 2009).

minor alterations, and assembly operations.<sup>13</sup> Both the internal and external dimensions of the new law have been scrutinised with regard to all three forms. With respect to internal dimensions, the law is inefficient due to a plethora of ambiguities and loopholes that need to be explained. With respect to external dimensions, the paper highlights the inconsistencies of the present legal framework including the GATT framework and the Anti-Dumping Agreement.<sup>14</sup> In light of these loopholes and inconsistencies, it has been explained how an anti-circumvention regime runs directly in conflict with the Free Trade Theory and why there is no practical need for a law specifically addressing anti-circumvention in light of easier and more straightforward solutions available.

## II. INTERNATIONAL LEGAL FRAMEWORK

The absence of anti-circumvention provisions in the Anti-Dumping Agreement till date is indeed a question to ponder upon. Anti-circumvention provisions were intended to be included in the Anti-Dumping Agreement, as provided by Article 12 of the Dunkel Draft (a draft version of GATT, 1994).<sup>15</sup> However due to lack of political interest, Article 12 was deleted from the Dunkel Draft. The issue of circumvention is therefore not addressed in the Anti-Dumping Agreement as it was a controversial issue during the Uruguay Round Negotiations. Thereafter, it was decided to refer the question to the WTO Committee on Anti-Dumping Practices for resolution. The relevant text of the decision on Anti-Circumvention as per the Uruguay Agreement is produced below<sup>16</sup>—

*“Noting that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text, Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,  
Decide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution.”*

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<sup>13</sup> For more information on the forms and types of circumvention practices, see Rainer M. Baigerwagen & Kay Hailbronner, *Input, Downstream, Upstream, Secondary, Diversionary and Components or Subassembly Dumping*, 22 (3) J. WORLD TRADE 27 (1988).

<sup>14</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, 1868 U.N.T.S. 201 [hereinafter Anti-Dumping Agreement].

<sup>15</sup> GATT Secretariat, *Decision on Anti-Circumvention, Results of the Uruguay Round of Multilateral Trade Negotiation*, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991).

<sup>16</sup> *Decision on Anti-Circumvention*, WORLD TRADE ORG., [https://www.wto.org/english/docs\\_e/legal\\_e/39-dadp1\\_e.htm](https://www.wto.org/english/docs_e/legal_e/39-dadp1_e.htm) (last visited Aug. 19, 2018).

The aforementioned Ministerial Decision on Anti-Circumvention not only acknowledged the problem of anti-circumvention but also urged the desirability to adopt uniform rules with respect to the same. To fulfil this mandate, at its meeting on April 28-29, 1997, the WTO Committee on Anti-Dumping Practices established what came to be known as 'Informal Group on Anti-Dumping'.<sup>17</sup> It was agreed that the Group would be open to all members, who can make recommendations for consideration by the Committee. Despite the absence of an express provision in the Anti-Dumping Agreement, various countries like United States,<sup>18</sup> European Union,<sup>19</sup> Argentina,<sup>20</sup> Australia,<sup>21</sup> and India<sup>22</sup> have adopted laws with respect to anti-circumvention, arguing that the Ministerial Decision forms an integral part of the Uruguay Round Multilateral Trade Negotiations.<sup>23</sup>

### III. INCONSISTENCY WITH THE INTERNATIONAL REGIME: CRITICALLY EVALUATING THE EXTERNAL DIMENSIONS

Since the existing WTO Regime does not provide an explicit provision allowing imposition of anti-circumvention measures, the question as to whether such imposition is consistent with the existing WTO Rules needs to be considered. To determine the validity of an anti-dumping measure (extended duty in cases of circumvention), it must be tested on the following touchstones<sup>24</sup>:

- i. Whether the measure qualifies to be an anti-dumping measure within the meaning of Anti-Dumping Agreement;
- ii. Whether the measure complies with Article VI of GATT and the Anti-Dumping Agreement;
- iii. Whether it violates an obligation under GATT; and,
- iv. Whether an exception may justify the measure.

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<sup>17</sup> Committee on Anti-Dumping Practices, *Communication from the Chairman*, WTO Doc. G/ADP/W/404 (Mar. 20, 1997).

<sup>18</sup> Tariff Act of 1930, §§ 1202-1683g, 19 U.S.C. (2006).

<sup>19</sup> Council Regulation 1225/2009 of Nov. 30, 2009, Protection against Dumped Imports from Countries not Members of the European Community, O.J. (L 343) 51.

<sup>20</sup> Rules and Regulations for the Effective Implementation of Law No. 24,425 Chapter IX, Sept. 22, 2008, Decree 1393/2008 (Arg.).

<sup>21</sup> Customs Amendment (Anti-Dumping Improvements) Act 2012 (Cth) sch 2, §§ 19-38 (Austl.); Customs Amendment (Anti-Dumping Measures) Act 2013 (Cth) § 48, Div. 3 (Austl.); Customs (International Obligations) Regulation 2015 (Cth) § 48, Div. 3(Austl.).

<sup>22</sup> The Custom Tariff (Identification Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Amendment Rules, 2012.

<sup>23</sup> One of EU's contentions in Imports of Parts and Components Report, *supra* note 11.

<sup>24</sup> Willems & Natens, *supra* note 9, ¶IV.

*A. The Touchstone of Article VI and Anti-Dumping Agreement*

Since Article VI permits the imposition of anti-dumping duties that may otherwise be inconsistent with the other provisions of GATT, the consistency of an anti-dumping measure with Article VI, GATT must be assessed before determining whether it is consistent with the basic principles of GATT.<sup>25</sup> Since an anti-circumvention measure is just another form of anti-dumping duty, it is extremely important that the substantive elements<sup>26</sup> for determination of dumping (as laid down by Article VI GATT) *vis.* dumping, injury and causal link as well as the procedural elements as laid down by the Anti-Dumping Agreement, are respected by the rules governing anti-circumvention.

1. First Substantive Element: Determination of Dumping

The first problem relates to calculation of ‘normal value’. The existing anti-dumping agreement is based upon the country of export and not the country of origin.<sup>27</sup> This is because ‘normal value’ is usually calculated based on the domestic market price of the country of export, and not the country of origin. As a result, if the exporter changes the country of export, the normal value would change, and consequently the dumping margin would also change, thereby ultimately affecting the calculation of the anti-dumping duty to be levied. In the case of third country circumvention, exporters often select the country of lower normal value to decrease the amount of anti-dumping duty as much as possible. Circumvention operates on the logic that if the new products or components (i.e. products or components found to be circumventing the anti-dumping duty) are originating in the country originally subjected to anti-dumping duty, then the duty shall be extended to such new like products or components regardless of the country they are imported from. In contrast to the Anti-Dumping Agreement, this method hinges on the concept of

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<sup>25</sup> Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶392, WTO Doc. WT/DS397/AB/R (adopted Feb. 12, 2016).

<sup>26</sup> Lakshmikumaran & Sridharan, *Indian Anti-Dumping Law and Practice: A Handbook*, 5 (2013), [https://www.lakshmisri.com/Uploads/MediaTypes/Documents/L&S\\_Indian%20Anti-Dumping%20Law\\_2013.pdf](https://www.lakshmisri.com/Uploads/MediaTypes/Documents/L&S_Indian%20Anti-Dumping%20Law_2013.pdf). Remedy under anti-dumping provisions is available only when the dumping margin (i.e. difference between the export price and ‘normal value’) has resulted in injury to the domestic industry of the importing country. Thus, imposition involves detailed examination of 3 principle factors- Dumping, Injury and Causal Link.

<sup>27</sup> Anti-Dumping Agreement, *supra* note 14, at art. 2.1. It states that “a product is considered as being dumped (i.e. introduced in the commerce of another country at less than its normal value) if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”



country of origin rather than the country of export.<sup>28</sup> This dangerously expands the scope of dumped products as many countries might export products or components that originate from the same country. The effect would be the same duty being imposed on various countries exporting product of the same origin.

The second problem is inconsistency of the anti-circumvention law with Article 2.4 of the Anti-Dumping Agreement<sup>29</sup> according to which the comparison between normal value and the export price to determine the dumping margin must be made 'at as nearly as possible the same time'. However, in case of anti-circumvention investigations, the export price is compared with the normal value calculated in the original investigation. The investigation time for anti-circumvention proceedings is 12–18 months.<sup>30</sup> Therefore, the earlier normal value obviously falls redundant for the purposes of determining the dumping margin.

## 2. Second Substantive Element: Determination of Injury

A violation of Article VI:2<sup>31</sup> is witnessed from the fact that these duties are applied in the absence of an investigation of whether the imported parts are dumped and cause any injury to a domestic industry.<sup>32</sup>

## 3. Third Substantive Element: Causal Link

Japan challenged an EU Regulation<sup>33</sup> that redressed assembly operations as one of the possible means of circumventing anti-dumping duties in 1987.<sup>34</sup> The case is a typical example of how the extension of duties upon exporters of parts and components being imported from a country, which was earlier subjected to levy only for the finished products, can result in injustice. Japan's fundamental argument was that the companies producing parts and components were different from those producing the finished products. Hence, prior to extending the levy, they should have been given an opportunity to defend themselves while being subjected to

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<sup>28</sup> YANNING YU, CIRCUMVENTION AND ANTI-CIRCUMVENTION MEASURES: THE IMPACT ON ANTI-DUMPING PRACTISE IN INTERNATIONAL TRADE 209 (2008).

<sup>29</sup> Anti-Dumping Agreement, *supra* note 14, at art. 2.4.

<sup>30</sup> Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty of Dumped Articles and for Determination of Injury) Rules, 1995, rule 26 [hereinafter The Rules].

<sup>31</sup> It talks about levy of anti-dumping duty and initiation of investigations.

<sup>32</sup> Imports of Parts and Components Report, *supra* note 11, at 12, ¶ 3.30.

<sup>33</sup> Council Regulation 1761/87, O.J. L. 167. The preamble to this Regulation stated "experience gained from the implementation of Regulation (EEC) No. 2176/84 has shown that assembly in the Community of products whose importation in a finished state is subject to anti-dumping duty may give rise to certain difficulties".

<sup>34</sup> Imports of Parts and Components Report, *supra* note 11.

investigation. In other words, parts manufactured by producers other than those who also produced the finished products were subjected to definitive anti-dumping duties and therefore treated unfavourably.

*B. The Touchstone of GATT obligations: Neglecting the Pillars of Free Trade*

There are four pillar of free trade *vis.* Most Favoured Nation Principle ('MFN'),<sup>35</sup> Tariff Bindings,<sup>36</sup> National Treatment<sup>37</sup> and Non-Tariff Barriers<sup>38</sup>. The first sentence of Article III:2 calls for non-discriminatory treatment with respect to internal taxes or other internal charges as between imports and 'like' domestic products.<sup>39</sup> The objective of national treatment is to ensure that the internal measures are not applied to imported or domestic products so as to afford protection to the domestic products.<sup>40</sup> Anti-circumvention measures are clearly in conflict with the said Article as they lead to an unequal treatment of domestically produced and imported products.

*C. No Escape under Article XX(d) of GATT*

Article XX(d) of GATT allows for the adoption and enforcement of measures that are necessary to secure compliance with laws not inconsistent with the provisions of the Agreement.<sup>41</sup> The question here is whether the phrase 'to secure compliance with laws' also includes securing their objectives? This is because anti-circumvention laws are primarily put in place to prevent the undermining of the objective behind anti-dumping duties. Another question is whether introduction of a Regulation would amount to 'adopting and enforcing of measure'? The Panel in *EC-Parts and Components*<sup>42</sup> answered both the questions in the negative and ruled that anti-circumvention duties could not be justified by Article XX(d) of GATT.

#### IV. INDIAN REGIME

Anti-Dumping laws enacted by India are covered within the ambit of The Customs Tariff Act, 1975<sup>43</sup> along with the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty of Dumped Articles and for Determination of

<sup>35</sup> GATT 1994, *supra* note 3, at art. I.

<sup>36</sup> GATT 1994, *supra* note 3, at art. II.

<sup>37</sup> GATT 1994, *supra* note 3, at art. III.

<sup>38</sup> GATT 1994, *supra* note 3, at art. XI.

<sup>39</sup> GATT 1994, *supra* note 3, at art. III.

<sup>40</sup> *Supra* note 18, §337, ¶5.10.

<sup>41</sup> GATT 1994, *supra* note 3, at art. XX(d).

<sup>42</sup> Imports of Parts and Components Report, *supra* note 11.

<sup>43</sup> The Customs Tariff Act, No. 51 of 1975, §9A (1A) [hereinafter The Act].

Injury) Rules, 1995<sup>44</sup> (hereinafter Anti-Dumping Rules, 1995). After adopting the Anti-Dumping Agreement, its use has increased significantly.<sup>45</sup> In India, anti-dumping investigations are conducted by the Directorate General of Anti-Dumping and Allied Duties ('DGAD') which is a separate department under the Ministry of Finance.

In 2002, the Federation of Indian Chambers of Commerce and Industry (FICCI) suggested that although the Anti-Dumping Agreement contained no specific provision addressing the issue of circumvention, India needed to adopt a law pertaining to the same, unilaterally similar to other countries like EU, US and Canada.<sup>46</sup> This opinion seemed to have majorly been triggered by the case of nitrile rubber, where imports from Japan had found a way through Korea thereby declining the imports from Japan significantly and increasing that from Korea by almost 50%.<sup>47</sup> The prerogative given by FICCI for supporting such law was that the time taken for extending the already imposed duties, once levied upon a finding of circumvention, was much easier and quicker than going through the tedious process of fresh anti-dumping investigations all the time.<sup>48</sup> Hence, putting a law with respect to circumvention in place would enable an anti-circumvention investigation to be considered as an extension of the already ongoing investigation on the subject goods.<sup>49</sup>

A law was finally enacted in two stages to address the problem of ineffective implementation of anti-dumping laws. Firstly, Section 9A (1A) was inserted in Customs Tariff Act, 1975 in 2011.<sup>50</sup> This was done to maintain a level playing field and prevent dumping, while also maintaining healthy competition.<sup>51</sup> The provision provided for three types of circumvention—alteration of description or name of composition of the subjected article (minor alteration) or importing the subjected article in an unassembled form (assembly operations) or by changing its country of export or origin (transshipment). According to Section 9A (1A), where the Central Government is of the opinion that circumvention of anti-dumping duty has taken place by either of the three means and such imposition has been rendered ineffective,

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<sup>44</sup> The Rules, *supra* note 30.

<sup>45</sup> Lakshmikumaran & Sridharan, *supra* note 26, at 3.

<sup>46</sup> *FICCI for law to prevent evasion of anti-dumping duties*, THE HINDU, Jul. 22, 2002, <http://www.thehindu.com/2002/07/22/stories/2002072203761300.htm>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *FICCI seeks anti-circumvention law in anti-dumping*, THE TIMES OF INDIA, Jul. 21, 2001, <https://timesofindia.indiatimes.com/business/india-business/Ficci-seeks-anti-circumvention-law-in-anti-dumping/articleshow/16651204.cms>.

<sup>50</sup> The Act, *supra* note 43, at §9A (1A). It came into force on April 08, 2011.

<sup>51</sup> *Reliance Industry Ltd. v. Designated Authority and Ors*, (2006) 10 SCC 268. (India) at para 7.

the anti-dumping duty may be extended to such article or that originating or exported from such country, as the case maybe. Secondly, four new rules (Rules 25-28) have been added in the Anti-Dumping Rules, 1995. Rule 25<sup>52</sup> lays down three situations of circumvention:

1. When a subjected article is imported in an unassembled, unfinished or incomplete form and is assembled, finished or completed in India. Alternatively, this assembly, finishing or completion may take place in a third country; or
2. When a minor alteration is made to the form or appearance of the subjected article when imported from a country notified for the purpose of levy; or
3. When the subjected article is routed through another exporter or country not notified for such levy.

Rule 26<sup>53</sup> empowers the designated authority to initiate investigation upon receipt of a written complaint by or on behalf of the 'domestic industry'<sup>54</sup> provided that the application suggests there is enough evidence for initiation. It also allows for *suo motu* initiation where any information of such evidence is received from the Commissioner of Customs or any other source. The investigation must be completed within 12 months and must not exceed 18 months from the date of initiation, in which case reasons must be recorded in writing for the delay. Once the fact of circumvention is determined, Rule 27<sup>55</sup> allows the designated authority to recommend imposition of anti-dumping duty to articles found to be circumventing the existing anti-dumping duty or to articles originated or being exported from countries other than the countries earlier notified. Such levy may also be imposed retrospectively from the date of initiation. However, a public notice recording the findings is mandatory. Rule 28<sup>56</sup> empowers the designated authority to review the need for continued imposition of duty subject to the condition that no review shall exceed a period of 12 months from the date of initiation.

## V. CRITICALLY EVALUATING THE INTERNAL DIMENSIONS: WHAT COULD BE BORROWED FROM EUROPEAN JURISPRUDENCE

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<sup>52</sup> The Rules, *supra* note 30 at rule 25.

<sup>53</sup> The Rules, *supra* note 30 at rule 26.

<sup>54</sup> 'Domestic Industry' can be defined as "domestic producers as a whole or those whose collective output constitutes a major proportion of the total domestic production of those products". See *Technical Information on anti-dumping*, *supra* note 1.

<sup>55</sup> The Rules, *supra* note 30 at rule 27.

<sup>56</sup> The Rules, *supra* note 30 at rule 28.

As mentioned above, anti-dumping duties can be circumvented through various means. The three most common means of circumventing anti-dumping duties are first, rerouting the product through a third country that is not subject to the levy of anti-dumping duties (also known as 'transshipment'); second, slightly altering the product or its description in order to bring it out of the ambit of the class of articles subjected to anti-dumping duties (also known as 'minor alterations'); and third, changing assembly operations such that the parts of a subjected article are imported and then assembled or assembled in another country to avoid imposition of anti-dumping duties which would otherwise have been levied if the article had been imported as a whole (also known as 'assembly operations').

#### A. *Transshipment*

According to Rule 25(3) of Anti-Dumping Rules, 1995,<sup>57</sup> where an article subject to anti-dumping duty is imported into India through exporters/producers in a country not subject to anti-dumping duty, such exports shall be considered circumventing the anti-dumping duty. It will further be seen if the exporters or producers notified for the levy of anti-dumping duty, change their trade practice, pattern of trade or channels of sales of the article in order to export their products to India through exporters or producers or country not subject to anti-dumping duty. The following essentials are required to be fulfilled for the application of this provision:

- i. Goods must be imported into India through an exporter/producer/country not subject to the anti-dumping duty;
- ii. It has to be established that there was no justification, other than imposition of anti-dumping duty, for such changed trade pattern;<sup>58</sup> and
- iii. The remedial effects of the anti-dumping duty were undermined in terms of price or quality of the like products.<sup>59</sup>

By studying the aforementioned provision carefully, one finds various loopholes that need to be addressed to make the determination of circumvention easier and the tracing of evidence more effective. Firstly, this provision doesn't require the finding of circumvention to be supported by evidence of dumping.<sup>60</sup> This further raises multiple problems, *inter alia* ambiguity pertaining to the calculation of 'normal value' as the price will still be compared with the normal value calculated during the original

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<sup>57</sup> The Rules, *supra* note 30, at rule 25(3).

<sup>58</sup> The Rules, *supra* note 30, at explanation (a) to rule 25.

<sup>59</sup> The Rules, *supra* note 30, at explanation (b) to rule 25.

<sup>60</sup> EU Regulation 2016/1036 art. 13(1) ¶ 3 [hereinafter the Regulations]. It requires evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2 of the Regulations.

investigation.<sup>61</sup> Secondly, it is not clear why the term ‘quality’ has been used. Since the undermining of remedial effect is usually calculated in terms of ‘price’ and ‘quantity’ of the like products, this is most likely to be an unintended error. Thirdly, the Regulations do not lay down any criteria or guidelines for the purposes of interpretation of ‘change in trade pattern’. These ambiguities make the provisions extremely ambiguous and leave a lot more than necessary to the discretion of the adjudicating authority. In absence of Indian jurisprudence, to define what would constitute a ‘change’, an idea can be borrowed from the EU law. Article 13(1) of the EU Regulations<sup>62</sup> lays down the essentials of circumvention almost similar to those listed in the Anti-Dumping Rules, 1995 *vis.* change in the pattern of trade, insufficient due cause or economic justification (other than the imposition of anti-dumping duties), evidence of undermining the remedial effects of anti-dumping duty, and lastly an evidence of dumping. A more detailed study of how these factors are determined can form the basis of reform, in order to make the Indian provisions more transparent, specific, and clear to ensure they are not used as leverage by the domestic industry to demand protection even where it is not required.

### 1. Change in Pattern of Trade

The first essential of circumvention as per EU Regulations is that there must be a change in the pattern of trade. It can either be in the form of increased imports from a third country, also known as transshipment, or in the form of minor alterations that is treated separately in the Anti-Dumping Rules, 1995 and has been explained in the next section. A change in the trade pattern can be seen if the imports of products from a third country, not subject to anti-dumping, increase. The factors in determining such change in pattern are as follow:

- i. Substitution Effect - A clear and consistent trend of substitution over an extended period of time, i.e. imports from one country significantly replace the imports from the country subject to levy;
- ii. Levels of Imports - Substitution imports need not occur at the same levels;
- iii. Volume of Imports - There must be substantial or significant increase since the imposition of anti-dumping measures; and
- iv. Time of Change in Pattern - A change in the pattern of trade may occur after the imposition of anti-dumping measures (provisional or definitive), or after the initiation of the original anti-dumping

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<sup>61</sup> Calculation of ‘Normal Value’ even in accordance with what has been laid down in Article 13(1) of the EU Regulations makes it inconsistent with Anti-Dumping Agreement.

<sup>62</sup> The Regulations, *supra* note 60.

investigation. For example, in the *Polyester Staple Fibre* case,<sup>63</sup> the Commission compared the period immediately following the imposition of provisional measures with the period subsequent to the initiation of the original anti-dumping proceedings and noted that the PSF-PFT product mix changed radically and abruptly after the imposition of the provisional anti-dumping measures on imports of PSF. This marked a change in the pattern of trade.

The Substitution Effect in case of Transshipment can be better understood through the following case study:

**Case Analysis: Stainless Steel Fasteners<sup>64</sup> (2013)**

An investigation was initiated by the Commission *suo motu* regarding the possible circumvention of anti-dumping measures imposed on imports of certain stainless-steel fasteners and parts thereof originating in the People's Republic of China and others consigned from Malaysia, Thailand and the Philippines. Results of the investigation varied from country to country.

With respect to the Philippines, a change in pattern of trade was established as after the imposition of original measures on the imports from China, product under investigation from the Philippines increased suddenly and markedly. The data showed that imports from the Philippines to the European Union were negligible in 2004-05 whereas in 2006, they surged suddenly and partly replaced the exports from China to the Union market in terms of volume (pertaining to 70% decrease). At the same time, exports from China to the Philippines were also on a sharp rise during the same period. In the absence of any sufficient cause or economic justification for the aforementioned change, coupled with the undermining of remedial effects in terms of both prices and quantities, the measures were extended to the imports from the Philippines. (Fig.1)

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<sup>63</sup> Notice of initiation of an anti-subsidy proceeding concerning imports of polyester staple fibres originating in the People's Republic of China, India and Vietnam, Dec. 19, 2013, 2013 O.J. (C 372) 31.

<sup>64</sup> Council Implementing Regulation (Eu) No 205/2013 of 7 March 2013 extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) No 2/2012 on imports of certain stainless steel fasteners and parts thereof originating in the People's Republic of China to imports of certain stainless steel fasteners consigned from the Philippines, whether declared as originating in the Philippines or not and terminating the investigation concerning possible circumvention of anti-dumping measures imposed by that regulation by imports of certain stainless steel fasteners and parts thereof consigned from Malaysia and Thailand, whether declared as originating in Malaysia and Thailand or not, Mar.12, 2013, 2013 O.J. (L 68) 1.

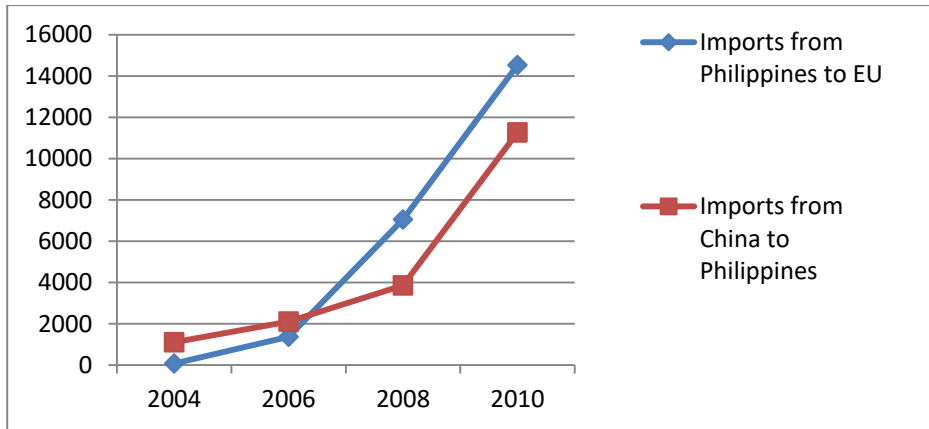


Fig.1

With respect to Malaysia, although a change of trade pattern was established by way of an increase in imports into the Union, the Commission stressed that the steady increase was explained by the increase in genuine production in Malaysia over the same period which amounted to a sufficient economic justification. With respect to Thailand, the change was not very significant and was further explained by the lapse of earlier measures imposed.

Hence, it was concluded that the definitive anti-dumping duty imposed on imports of certain stainless-steel fasteners and the parts thereof originating in China was circumvented by transshipment, via the Philippines, within the meaning of Article 13(1) of the EU Regulation<sup>65</sup> and investigation with respect to Malaysia and Thailand were terminated accordingly.

## 2. Insufficient Due Cause or Economic Justification (other than imposition of duty)

The second essential of circumvention as per the EU Regulations<sup>66</sup> (which has also been envisaged in the Indian Rules) is that there must not be any other economic justification or a sufficient due cause for explaining the aforementioned change in pattern of trade. Europe has laid down certain parameters that can be tested to trace a direct nexus between the imposition of anti-dumping duty and the change in pattern of trade. In other words, if no sufficient justification is found to exist for the sudden change in pattern, then such change shall be clearly attributable to the imposition of anti-dumping duty, thereby suggesting circumvention. Whether there

<sup>65</sup> The Regulations, *supra* note 60 at art. 13(1).

<sup>66</sup> The Regulations, *supra* note 60 at art. 13(1).



was any economic justification or sufficient due cause for the change in pattern of trade is determined by the following factors:<sup>67</sup>

- i. Cost Benefit Analysis: The Commission may consider whether there are any quantifiable benefits existing for importers to economically justify the change in pattern of trade.
- ii. Other Export Markets: It shall be seen whether other export markets continue to be supplied with the product subject to the anti-dumping measures and whether the practice is carried out in other industrialized markets similar to the Union.
- iii. Other Factors: Factors such as a high dumping margin established in the original investigation, volume of output, purchasing arrangements, and degree of the value-added are used to determine the sufficiency of justification for a change in pattern of trade.

The method of determining whether there was sufficient cause or economic justification for change in pattern of trade can be analysed through the following case study:

**Case Analysis: Open Mesh Fabrics<sup>68</sup> (2014)**

The Commission initiated an investigation on the possible circumvention of anti-dumping measures imposed on certain imports of certain open mesh fabrics of glass fibres originating in China.

The investigation showed that there was no difference, in the production process of the product under investigation and the product concerned, other than the proportion by weight between rovings and yarns. In many cases the difference between the two was not visible and could only be established by laboratory examinations. Hence, there was no material difference.

With regard to the change in pattern of trade, it was concluded based on the facts available that there was an overall increase in the imports of the product under investigation and a parallel decrease in the imports of product concerned. Therefore, it was considered as a significant change. The investigation didn't bring into light any due cause or economic justification due to the following reasons:

- The product concerned and the product under investigation were used as reinforcement material in construction and hence had common end-users;

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<sup>67</sup> IVO VAN BAEL & JEAN-FRANCOIS BELLIS, EU ANTI-DUMPING AND OTHER TRADE DEFENCE INSTRUMENTS, 5<sup>th</sup> ed. (2011).

<sup>68</sup> Commission Implementing Regulation (EU) No. 976/2014 of 15 September 2014, 2014 O.J. (L 274) 13.

- A light modification of the product under investigation doesn't provide any different substantial characteristic to the product concerned; and
- There was no price difference between the two products in the Union market.

The investigation also showed that there was significant undermining of the remedial effects, as a comparison of the injury elimination level established in the original Regulation and weighted average export price showed significant underselling. Hence, the measures in force on imports of the product concerned were extended to the slightly modified product, i.e. the one under investigation.

### 3. Evidence of undermining the remedial effects of the anti-dumping duty

When determining whether the remedial effects of the duty have been undermined in terms of prices, evidence of undercutting is generally determined by comparing the average sales price of the alleged circumvented product or assembled product in the Union with the 'un-dumped export price'<sup>69</sup> of the like product established in the original investigation or with sales prices and costs of the Union industry as established in the original investigation.

### 4. Evidence of Dumping

The absence of the requirement of evidence of dumping is one of the biggest loopholes in the Anti-Dumping Rules, 1995. EU Regulations<sup>70</sup> require that a finding of circumvention must be supported by evidence of dumping in relation to the normal values previously established in the original investigation. The price of the substituted product or assembled product will be compared with the normal value of the like or similar product as established in the original investigation.

#### *B. Minor Alteration*

Rule 25(2) of the Anti-Dumping Rules, 1995<sup>71</sup> declares the practice of altering the description, name or composition of the subjected article to be circumvention, if the article is slightly altered in form or appearance regardless of the variation in tariff classification. The biggest drawback of this provision is its failure to mention the test for effect of such alteration. Literal interpretation of the aforementioned rule misleads one into thinking that any sort of minor alteration would amount to circumvention, even if the alteration results in drastic change in the utility or

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<sup>69</sup> Price after the imposition of anti-dumping duty.

<sup>70</sup> The Regulations, *supra* note 60, at art. 13(1) ¶ 3.

<sup>71</sup> The Rules, *supra* note 30, at rule 25(2).

functioning, thereby making it non-substitutable from the article originally subject to anti-dumping duties. An interpretation of the Rule along these lines would surely be absurd. Hence, taking a cue from the EU law, the grey areas can be clarified to some extent. To resolve this ambiguity, an 'Essential Characteristics Test'<sup>72</sup> was developed according to which slightly modified products were covered by the definition of the 'product concerned' as the modification did not alter its essential characteristics. The following two cases can be studied to understand the application of 'Essential Characteristics Test':

**Case Analysis: Certain Ring Binder Mechanisms<sup>73</sup> (2008)**

An anti-circumvention investigation was initiated based on *prima facie* evidence that the anti-dumping measures were being circumvented by means of a slight modification of the product to make it fall under the customs code not subject to measures. There was also evidence of transshipment via Thailand.

The 'Essential Characteristics Test' was applied to the allegation of slightly modified ring binder mechanisms ('RBMs'), and the investigation established that one of the two cooperating Chinese exporting producers was producing slightly modified RBMs. The modification consisted of changing the rectangular shape of the sheets and cutting some material off the edges. The question whether the modification altered the essential characteristics of the product was answered in negative. Hence, all RBMs were considered to constitute one single product as they all had the same physical characteristics and hence were interchangeable.

A change in pattern of trade was also noted as imports of slightly modified RBMs into the community increased during the investigating period. The absence of economic justification was based on the following elements:

- The modifications made to the product concerned were minor and the saving in the raw material used was negligible;
- The slightly modified product was sold to only one customer in the European Union;
- There was no demand of the slightly modified product in Thailand.

As far as undermining of the remedial effects was concerned, it was noted that imports of slightly modified RBMs from China had taken place at price levels below the export price and well below the normal value established in the review investigation.

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<sup>72</sup> Council Regulation (EC) No. 818/2008 of 13 August 2008 amending Regulation (EC) No 2074/2004, 2008 O.J. (L 221) 1.

<sup>73</sup> *Id.*

Regarding the second allegation of transshipment via Thailand, the investigation showed that in the years 2004-05, only the producer from Thailand was producing RBMs from the main raw materials, the quantity of which was sufficient to produce the number RBMs he was actually producing. Hence, because there was an economic justification for increased imports and the producer was genuine, it was held not to be an assembly operation.

In view of the aforementioned findings, the anti-dumping measures were extended to slightly modified RBMs originating in China and the investigation was terminated against Thailand.

**Case Analysis: Pocket Flint Lighters<sup>74</sup> (1999)**

The anti-dumping duty was allegedly circumvented through a change in pattern of trade in two ways—Firstly, the imports of disposable, non-refillable lighters originating in the People’s Republic of China, was transhipped via Hong Kong, Macao and Taiwan and, Secondly, such imports after slight modifications, were declared to be refillable, although they were not.

With regard to the first aspect of the allegation, the Commission examined Taiwanese export statistics and found that during the investigation period, Taiwanese exports accounted for approximately half the community imports from Taiwan. Hence, it was concluded that these imports should be considered as originated in China and transhipped through Taiwan. There was also evidence of falsified certificates of origin relating to disposable lighters which wrongly declared them to be of Taiwanese origin. The existing measures were therefore extended to imports of disposable flint lighters from Taiwan, however, the same were not extended to Hong Kong and Macao.

With regard to the second aspect of the change in pattern of trade, during the investigation, it was found that according to the Eurostat, imports into the community of refillable flint lighters from China increased substantially and at the same time, imports of non-refillable lighters had decreased. Such increase in quantities further affected the prices, and coincided with the start of the review investigations. No due cause or economic justification was found for the addition of the refill valve in the basic disposable lighter, other than the imposition of existing measures. It was therefore concluded that imports of the disposable, refillable flint

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<sup>74</sup> Council Regulation (EC) No. 192/1999 of 25 January 1999 extending the definitive anti-dumping duty, imposed by Regulation (EEC) No. 3433/91, 1999 O.J. (L 22) 1, at recitals 9-10.

lighter significantly undermined, both in terms quantities and prices, the remedial effects of anti-dumping duty imposed on disposable, non-refillable flint lighters originating in the People's Republic of China. Hence, the existing measures were extended to disposable, refillable flint lighters originating in the People's Republic of China.

### C. Assembly Operations

Apart from transshipment and minor alterations, anti-dumping duties can also be circumvented by de-localizing assembly operations. Rule 25(1) of the Anti-Dumping Rules, 1995 lays down the essentials for the de-localization of assembly operations to amount to circumvention when an unassembled, incomplete or unfinished article is imported and assembled, completed or finished in India or in some other country:

Time of Operation: The operation started or substantially increased either, *since* or just *prior to* the initiation of anti-dumping investigation; and

Country: The parts concerned are from the country subject to measures; and

Value Added Test: Value<sup>75</sup> consequent to assembly, completion or finishing is less than 35% of the cost of assembled, completed or finished product.<sup>76</sup>

Indian law seems to be inadequate in terms of carving out a criterion to determine the origin and valuation of parts. For instance, it is unclear whether the parts being assembled in India or a third country must have an origin in the country which was subject to anti-dumping duties. Furthermore, the valuation becomes even more complicated in cases where assemblies imported from a supplier located outside the country subject to measures are comprised of sub-assemblies from different countries.<sup>77</sup>

The term 'since' or 'prior to' signify a nexus between the initiation of the investigation and the intent to avoid duties proposed to be imposed after the said investigation. The Indian 'Value Addition Test' differs from that of the EU,<sup>78</sup> where

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<sup>75</sup> The Rules, *supra* note 30, at explanation I to rule 25(1). It defines 'Value' as "*the cost of assembled, completed or finished article less the value of imported parts or products.*" Explanation II further states that – "*For the purposes of calculating the 'value', expenses on account of payments relating to intellectual property rights, royalty, technical know-how fees and consultancy charges, shall not be taken into account.*"

<sup>76</sup> The Rules, *supra* note 30, at rule 25(1).

<sup>77</sup> 'Molecular Approach' has been adopted by EC in cases such as Electronic Weighing Scales, 1997 O.J. (L 141) 57, recital 11; Certain Magnetic Disks (3.5" micro disks), 2000 O.J. (L 96) 30, recital 11. The approach implies that sub-assemblies which cannot be taken apart without destroying any of the sub-parts is treated as one single part and hence be attributed one origin even if the sub-assembly includes sub-parts from different origins.

<sup>78</sup> The Regulations, *supra* note 60 at art13(2).

the value added must not be more than 25% of the manufacturing cost.<sup>79</sup> The Substitution Effect in cases of de-localizing of assembly operations can be understood through the following case:

***Case Analysis: Bicycle Parts<sup>80</sup> (1997)***

As finished bicycles would have been subject to anti-dumping duties, the classification of the imported parts was avoided by suppliers ensuring that, for shipments to Europe, parts were spread across multiple containers and sent on different dates, despite the assembler being the same. Therefore, according to the findings of the investigation, a change in trade pattern was established as the main bicycle parts imported for assembly operations increased by more than 139%, whereas imports of bicycles from China (the product subject to anti-dumping duties) decreased by more than 98%. In this case, the Substitution Effect was corroborated by the fact that the output of bicycles assembled in the EU from bicycle sets originating in China increased by 80%. (Fig. 2) Further, the investigated companies could not give any sufficient cause or economic justification for such a change in the pattern.

As far as the ‘start or substantial increase in operations’ was concerned, the assembly operations for all 5 companies concerned, started in 1992-1993, i.e. when the original investigation took place. (Fig.2)

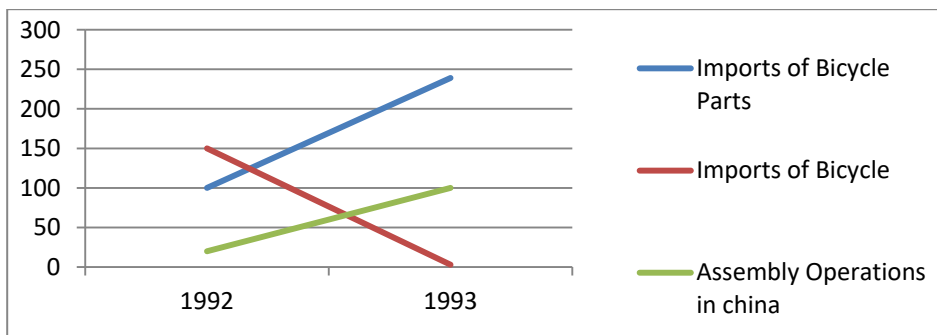


Fig.2

<sup>79</sup> Commission Regulation (EC) No 2408/2000 of 30 October 2000, 2000 O.J. (L 96) 30. The investigation was terminated as the value added upon assembly operations of magnetic disks imported from China and Taiwan crossed the 25% threshold.

<sup>80</sup> Council Regulation (EC) No. 70/97 of 20 December 1996 concerning the arrangements applicable to imports into the Community, 1997 O.J. (L 16) 55.

The undermining of the remedial effects of the anti-dumping duties was established in two ways—Firstly, the overall comparison showed that the sales price of assembled bicycles had undercut the non-dumped prices of the bicycles in the original investigation period by an average of 14.5%. Secondly, in terms of sales quantities, the volume of Chinese bicycles in the original investigation was substantially replaced by imports of finished bicycle frames of Chinese origin. Hence, the anti-dumping duty on complete bicycles in force was extended to certain bicycle parts originating in or consigned from China with an exception of those not proven to be of Chinese origin.

## VI. RECENT APPLICATION OF EU PRINCIPLES IN INDIA: COLD ROLLED FLAT PRODUCTS OF STAINLESS STEEL

The principles relating to anti-circumvention developed by the EU were applied by India in the first anti-circumvention investigation, initiated in the year 2016.<sup>81</sup> The investigation related to the Anti-dumping duty imposed on cold rolled flat products of stainless steel of width between 600 mm to 1250 mm exported from China, Korea, EU, South Africa, Taiwan, Thailand and USA.<sup>82</sup> The duty was continued after the sunset review in 2015.<sup>83</sup>

The domestic industry noticed a change in the pattern of trade, when imports ('product under consideration'- PUC) were replaced by cold rolled flat products of stainless steel of width above 1250 mm ('product under investigation'- PUI).<sup>84</sup> It was alleged that the PUI were being imported to India in an unfinished form and then being slit into sheets of width below 1250 mm (which subjected to levy if imported as is). The final findings were given in August 2017<sup>85</sup> and the analysis can be explained as follows:

### A. Findings with respect to 'Change in Pattern of Trade'

The trade pattern shift from PUC to PUI was examined from the time of levy of anti-dumping duties, i.e. 2008-2009 until the period of investigation, i.e. 2014-2015. The following observations were made with regard to the same:

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<sup>81</sup> Initiation Notification, Director General of Anti-Dumping (SI 14/1/2014) (Ind.).

<sup>82</sup> Customs Notification (SI 14/2010) (Ind.).

<sup>83</sup> Customs Notification (SI 61/2015) (Ind.).

<sup>84</sup> Twesh Mishra, *Steel importers skirting anti-dumping duties, say domestic firms*, THE HINDU BUSINESS LINE, Aug. 13, 2017, <http://www.thehindubusinessline.com/economy/steel-importers-skirting-antidumping-duty-say-domestic-firms/article9816404.ece>.

<sup>85</sup> *Supra* note 81.

- Imports of PUC from the subject countries declined with a simultaneous increase in imports of PUI from the same subject countries. This can be easily compared to the substitution effect tested under the EU law.<sup>86</sup>
- Majority of imports were just above the threshold limit of 1250 mm and very few were below the said limit.
- Such change in the trade pattern was not witnessed from other countries and was only observed during the period of investigation. This implied that there was no change in consumption pattern that would otherwise justify the change in pattern of trade and the substitution effect.
- The quantum of value added after slitting the PUI to PUC was not more than 5% which falls within the threshold of 35% (In the Value Added Test<sup>87</sup> laid down by Rule 25 of Anti-Dumping Rules, 1995).

Hence, it was found that there was indeed a change in the pattern of trade stemming from a practise that had no other sufficient cause or economic justification.

*B. Findings with respect to 'Undermining Effect of Anti-Dumping Duty'*

Once the circumvention was determined, the designated authority went on to determine the effect of the anti-circumvention. The following observations were made with respect to the same:

- The landed value of the imported PUC (along with anti-dumping duty<sup>88</sup>) was higher than the value of the PUI (without measures) from the same subject countries.
- There was a price depressing effect on the net sales of PUC which undermined the remedial effect of anti-dumping duty.

In view of the aforementioned findings, the duties were therefore extended to PUI as well. The balancing of interest of parties was done by excluding PUI which was imported for an end use in the same form without slitting or which even after splitting was intended to be of the width above 1250 mm. This balancing played a significant role in avoiding the domestic industries from abusing the process by roping in innocent and legitimate imports falling out of the purview of the levy.

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<sup>86</sup> See 5.1.1 for detailed explanation of Substitution Effect in relation to Change in Pattern of Trade.

<sup>87</sup> See 5.3 for detailed explanation of the relevant rule.

<sup>88</sup> Also known as 'undumped price'.



However, despite such a balanced approach, the risk of subjecting even legitimate imports to levy is extremely high in view of the difficulties the government might face in distinguishing these cases. Moreover, such provisions in the absence of such a balanced approach may tilt the scales a little too much in favour of domestic industries, thereby inducing extreme protectionism. Hence, the real problem lies in the absence of any requirement for such tests in the statutory provisions.

## VII. STRATEGISING PROTECTIONISM: THE ECONOMIC LENS

Having looked at the legal aspects, this section deals with the theoretical arguments for why imposing such barriers is not healthy for the economy in the long term. Any imposition of a trade remedy is at odds with the Free Trade Theory<sup>89</sup> as explained earlier. In order to understand the conflict, a brief overview of the economic principle of 'Comparative Advantage' will help in expounding the analysis provided thereafter.

### A. Theory of Comparative Advantage

The theory of comparative advantage was developed by David Ricardo, John Stuart Mill and Adam Smith. In brief, it states that—

*“Each country will benefit if it specializes in the production and export of those goods that it can produce at relatively low cost. Conversely, each country will benefit if it imports those goods which it produces at relatively high cost.”*<sup>90</sup>

Ricardo's model of comparative advantage is based on the following example.<sup>91</sup> Countries A and B both produce products X and Y. The time required to produce X in Country A is far lesser than the time required producing X in Country B. This gives Country A an absolute advantage in producing X over B. Similarly, Country B takes far lesser time to produce Y than A which gives B an absolute advantage in producing Y over A. Instead of producing both and aiming for self-sufficiency, the model of comparative advantage suggests that Country A should specialize in X, while B should specialize in Y. This way, both countries benefit from comparative advantage, as trading and exchanges the products each specializes in allows both

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<sup>89</sup> RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTISE ¶V, at 876-887, (3<sup>rd</sup> ed. South Asian Reprint 2014).

<sup>90</sup> PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 433, ¶B, (19<sup>th</sup> ed. Special Indian Edition, 2010).

<sup>91</sup> See also, PAUL A. SAMUELSON & PETER TEMIN, ECONOMICS, 10<sup>th</sup> ed. (1976); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989).

Country A and B to have more of Y and X respectively than they could have individually produced.

B. *Legitimate Commercial Activities versus Actual Circumvention*

Such utilisation of production advantages as proposed by the ‘Theory of comparative advantage’ will lead countries to engage in and benefit extensively from free trade. This utilisation, however, will only be possible if countries are allowed to allocate their resources in the most efficient way. Tariff and non-tariff barriers distort this efficient chain of production, thereby preventing countries, whose primary goal is to look for the most efficient allocation of resources for maximum utilization of production advantages, from engaging in free trade. Therefore, the main argument of producers and foreign exporters is that practices which may be labelled as ‘circumvention’ are more often than not a sincere attempt to seek the most efficient resources for production to gain comparative advantage.<sup>92</sup> In other words, the sole reason for trade diversion is not the *mala fide* intent to circumvent, but a genuine attempt to legally avoid the duty and divert trade which is incentivised from the implied preference granted to exporters spared from such levy.<sup>93</sup>

A philosophical difference exists between cases of fair competitive trade and those of ‘unfair’ trade effecting the same result. Judith Goldstein suggests two problems that are faced in the administration of laws that attempt to enforce a fair market:<sup>94</sup> Firstly, there is an issue in the discovery and definition of a violation and secondly, determining intention is almost next to impossible. For example, a foreign producer’s practise without any predatory intent may be viewed as an ‘unfair trade practise’ by the country imposing measures. The challenge of differentiating circumvention cases from cases motivated by protectionism in the form of legitimate commercial activities or simple trade diversions often makes the acting governments vulnerable to accusations of protectionist abuse<sup>95</sup> and the *bona fide* exporters vulnerable to being abused by excessive protectionism. The co-existence of both these cases *vis.* circumvention and legitimate commercial activities is unavoidable as both are inevitably a reaction to the imposition of anti-dumping duty. Hence, it

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<sup>92</sup> Yu, *supra* note 28.

<sup>93</sup> Laura Puccio & Aksel Erbahar, *Circumvention of Anti-dumping: A Law and Economics Analysis of Proportionality in EU Rules*, 50(3) J. WORLD TRADE (2016).

<sup>94</sup> Judith Goldstein, *The Political Economy of Trade: Institutions of Protection*, 80(1), AM. POL. SCI. REV., 161 (1986). *Also see*, Judith Goldstein, *The Political Economy of Trade: Institutions of Protection*, in INTERNATIONAL TRADE LAW 63 (Ronald A. Cass & Knoll S. Michael eds., 2003).

<sup>95</sup> Japan accused EU of creating artificial anti-dumping Margins through new methodologies to protect its domestic industries pertaining to the sharp increase in the number of investigations. Imports of Parts and Components Report, *supra* note 11, at 4, ¶ 3.5.

seems almost impossible to distinguish the two as a result of which, cases where circumvention is proved 'just prior to' or 'after' the imposition of anti-dumping duty, are roped in and subjected to extended duties. This has also been argued by Japan, an expressive opponent of the idea of establishing any special rules expanding the scope of anti-dumping in the name of addressing 'circumvention'.<sup>96</sup> This not only builds distrust between the parties but also hinders free international trade at a macro level.

### C. *Less-than-Fair Value Cases: Potential of Protectionist Abuse*

Anti-dumping cases with sales at a price below the foreign producer's costs or home-market price are usually described as 'less-than-fair value cases'.<sup>97</sup> This leads to what is popularly known as the 'Prisoners' Dilemma'<sup>98</sup> that a nation faces while choosing between the two extremes of free trade and protectionism, keeping in mind long term self-interest.<sup>99</sup> Various theorists argue that the measures imposed to deal with such cases will always be protectionist.<sup>100</sup> The obvious logic behind this proposition is that they are a channel for complaints about a surfeit of import competition and not a lack thereof. Hence, the direction of bias will inevitably be in the favour of domestic producers. The role of misdirection and obfuscation in such cases cannot be undermined. The economics of such mechanisms usually suggest that measures imposed will go as far as protecting domestic producers from 'fair competition' as well.<sup>101</sup> Anti-circumvention seems to be just another case of 'strategic trade policy'<sup>102</sup> adopted by the governments to shift the gains from foreign exporters to domestic industries in order to attain a level-playing field.

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<sup>96</sup> Committee on Anti-Dumping Practices- Informal Group on Anti-Circumvention, Topic 1, *What Constitutes Circumvention- Paper by Japan* ¶1, WTO Doc. G/ADP/IG/W/15 (Oct. 30, 1998).

<sup>97</sup> Another administrative mechanism to deal with 'less-than-fair value' cases is the 'Escape Clause' which is less technical and wider than measures such as the imposition of anti-dumping duties. These clauses are included in Free Trade statutes to allow the governments to conduct investigations in case of an 'injury' from the imports. One such example is §201, Trade Act of 1974 in United States.

<sup>98</sup> It is a classic game where both the players use their respective "dominant strategies" to further their self-interest such that the pay-offs of one player is bound to affect that of the other.

<sup>99</sup> Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L. J. 501 (1985).

<sup>100</sup> J. M. Finger, Keith Hall & Douglas R. Nelson, 6: *The Political Economy of Administered Protection*, 72(3), THE AMERICAN ECON. REV. 452 (1982). See also, Cass & Michael, *supra* note 94.

<sup>101</sup> *Id.*

<sup>102</sup> The theory of 'Strategic Trade Policy' allows government intervention to strike the imbalance caused by unfair competition. See STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (Paul Krugman ed., 1986).

*D. Principle of Proportionality: A Silver Lining*

Laura Puccio and Aksel Erbahar have suggested a way to distinguish between legitimate circumvention cases and cases motivated by protectionism.<sup>103</sup> According to them, the application of the ‘principle of proportionality’ to anti-circumvention cases will go a long way in ensuring that measures are not applied in a protectionist way. The principle was first applied by Europe in the *Starway* case,<sup>104</sup> where it was held that goods that are found to have an origin in a country other than that subjected to the levy of anti-dumping duty should be exempted from the extension of that levy. In other words, any product coming through a third country must not be considered to be circumventing the duty unless it is effectively engaged in circumvention. This effective engagement must further be determined through the following tests:

- i. Like Product Test
- ii. Circumvented Trade Flow Test
- iii. Injury and Dumping Test

The ‘Like Product Test’ usually becomes hard to satisfy in case of assembly operations, thereby making it the most difficult and complicated form of circumvention. ‘Trade Flow Test’ is somewhat similar to the Substitution Effect<sup>105</sup> while determining the change in pattern of trade. The ‘Injury and Dumping Test’ is not applicable in case of India as no evidence of dumping is necessary to extend the duty once circumvention is proved. Hence, it is suggested that four things must be positively established in order for anti-circumvention provisions to be proportional—like product, like origin, intent and persistent injury. Including these tests in the Anti-Dumping Rules, 1995 might be a solution to the problem of protectionist abuse since they will mark the boundaries of exercising discretion and ensure imposition only in well-deserving cases. However, an even better alternative would be to not have these rules at all.

**VIII. NO NEED TO KILL THE FLY WITH A CANNON: SUITABLE ALTERNATIVES**

In light of prospective inconsistencies with the international framework and threat of protectionist abuse as stated above, it becomes important to consider any alternatives that may address the issue. Japan argued, while presenting its case against

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<sup>103</sup> *Id.*

<sup>104</sup> Case T-80/97, *Starway SA v. Council of the European Union*, [2000] ECR II-3099.

<sup>105</sup> *See* 5.1.1.

anti-circumvention rules, that there exists no practical necessity for special rules on anti-circumvention in light of the limited number of such cases, thus demonstrating that it shall not be burdensome to initiate a fresh anti-dumping investigation.<sup>106</sup> In India, since 2012 there have only been two anti-circumvention investigations till date: First, regarding the Cold Rolled Products of Stainless Steel<sup>107</sup> initiated in 2016 and second in Diclofenac Sodium (DFS)<sup>108</sup> initiated in 2017. Coincidentally, both circumventions occurred through the means of de-localization of assembly operations. The cost benefit analysis of the imposition of such duties might show that the cost paid by the economy in the long run usually outweighs the time saved in imposing the duties without fresh investigations. Furthermore, even in regard to imposition of anti-dumping duties through the normal route, empirical evidence shows that the gain from obtaining dumped merchandise outweighs the cost that has to be incurred by domestic producers.<sup>109</sup> The policy implication therefore, being not to levy anti-dumping duties to avoid the wiping out of net gain.<sup>110</sup> Hence, it must be considered whether the menace of circumvention can be tackled without separate rules on circumvention.

There are many easier and simpler alternatives available to the anti-circumvention regulations, the most obvious one being, a sound full-fledged anti-dumping regime already being in place. These alternatives can be considered separately for different forms of circumvention.

#### A. Transshipment

There exists no need to address cases of transshipment through anti-circumvention laws. The problems like fraud of origin can easily be tackled by existing customs law. Willem and Natens list down the advantages of doing so,<sup>111</sup> by stating that:

- i. No new investigations will be required;
- ii. Only the violators face customs investigations and there is no risk of roping in innocent exporters who happen to produce in the country subjected to the levy;
- iii. Fraudulent customs activities attract criminal sanctions which are far more effective than economic sanctions under the anti-circumvention regime.

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<sup>106</sup> *Supra* note 96.

<sup>107</sup> *Supra* note 81.

<sup>108</sup> Final Findings, Anti-Circumvention Investigation, (SI 14/22/2014) (Ind.), [http://www.dgtr.gov.in/sites/default/files/FF\\_NCV\\_Eng.pdf](http://www.dgtr.gov.in/sites/default/files/FF_NCV_Eng.pdf).

<sup>109</sup> Keith B. Anderson, *Anti-Dumping laws in the US: Use and Welfare Consequences*, 27 J. WORLD TRADE 115 (1993).

<sup>110</sup> BHALA, *supra* note 89 at 882.

<sup>111</sup> Willems & Natens, *supra* note 9.

### B. *Minor Alterations*

A uniform tariff classification will be helpful in determining 'like products'. Sufficiently detailed tariff classifications are an extremely helpful tool to decide the question of product similarity.<sup>112</sup> Hence, the practices of circumvention by slight moderation can be easily tackled by widening the scope of the definition of the products in tariff classifications so as to include even slightly altered or modified products.<sup>113</sup> A provision regarding the 'same essential characteristics'<sup>114</sup> can be included which would automatically allow the customs authorities to levy anti-dumping duties even on altered products with the same utility.

### C. *Assembly Operations*

There are two types of circumvention practices pertaining to assembly operations. The first practice is where parts of a finished product are assembled in the country of import itself that levies the duties. This problem can be addressed through better regulation of licensing that may or may not allow manufacturing and assembly operations. The second practice is where assembly is done in a third country. This is probably the most complicated and difficult scenario, majorly because of the impossibility of distinguishing between legitimate cases and those specifically intended to avoid duties. In such cases, it would always be safer to initiate fresh investigation against a country whose exporters are allegedly circumventing.

## IX. CONCLUSION

A brief comparative analysis between the EU law and Indian law reflects that India still has a long way to go in making its anti-dumping framework efficient. The absence of well-defined principles in the form of express guidelines or judicial interpretation further enhances this problem. Apart from carving out the inherent loopholes in the anti-circumvention rules, this paper also highlights prospective inconsistencies of the regime with GATT principles and Anti-Dumping Agreement. Finally, in light of the argument of how anti-circumvention substantially contradicts the Free Trade Theory, coupled with practical impossibilities in differentiating legitimate trade diversions from circumvention; the paper attempts to suggest simple alternatives. With respect to cases involving minor alterations, an effort can be made

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<sup>112</sup> BHALA *supra* note 89 at 377.

<sup>113</sup> Committee on Anti-Dumping Practices – Informal Group on Anti-Circumvention, Topic 1, *What Constitutes Circumvention – Paper by Hong Kong, China* ¶11, WTO Doc. G/ADP/IG/W/8 (Apr. 28, 1998).

<sup>114</sup> Yu, *supra* note 28.

for including altered products in the same notification levying original anti-dumping duties. The menace of circumvention by de-localizing assembly operations in the importing country itself can be tackled by regulating licensing. As far as cases of transshipment and delocalization of assembly operation in the third country are concerned, the law already in place would prove to be sufficient. Moreover, initiating a fresh investigation in such cases would not be much of a burden, considering the limited number of cases and extensive complications and risks involved in skipping a fresh comparison of prices altogether. Therefore, it can be concluded that the cost of protectionist abuse and the risk of protection from even 'fair trade' far outweighs the burden of fresh investigations in the long run, questioning the need for the enactment of a separate anti-circumvention law.