IN THE HIGH COURT OF SINDH, KARACHI
CP Nos. D-4780-4782 of 2017
and CP D-2605/2017

Date	Order with signature of Judge

Present: **Munib Akhtar and Omar Sial, JJ.**

For hearing of main case

Dates of hearing: 20 and 29.09 and
12, 26 and 27.10 and 02, 09 and
21.11.2017

Counsel for petitioners:

Dr. Farogh Naseem and Mr. Altamash Arab a/w
Mr. Asad Arain, and
Mr. Umar Zad Gul Kaka, Advocates

Counsel for respondents:

Mr. Shahzad A. Elahi, Mr. Salman Zaheer, and
Mr. Shahid Iqbal Rana and Mr. Muhammad Ali,
Advocates for the complainants

Mr. Ahmed Sheraz, Advocate for NTC

Mr. Asim Mansoor Khan, DAG and
Mr. Ghulam Shabbir Baloch, Assistant
Attorney General

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Munib Akhtar, J.: These petitions arise under and in relation to the Anti-Dumping Duties Act, 2015 ("ADD Act"). The authority that acts under and in respect of the ADD Act is the National Tariff Commission ("NTC"), which is a statutory body set up under its own statute, the National Tariff Commission Act, 2015 ("NTC Act"). The petitioners are aggrieved by two sets of proceedings/complaints initiated under the ADD Act. In one the final, and in the other a provisional, determination has been made and the petitioners challenge both. The grounds of attack, which are two, are the same in all cases and may be stated at the outset in broad terms. Firstly, it is contended that the anti-dumping duty is a tax, and inasmuch as it is determined and imposed by the NTC acting under the ADD Act, there has been an impermissible delegation of legislative power. The second ground is that the import data that underpins and forms the basis of the complaints, and which has admittedly been provided to the complainants by NTC, has been made available in violation of law. Reliance in this regard is placed on s. 155H of the Customs Act, 1969. Hence, the very foundation on which the complaints rest is said to be unlawful and fatally compromised. The complaints and the determinations must therefore, according to the petitioners, fail and be set aside. Relief is

sought accordingly. Needless to say, learned counsel for the complainants and NTC strongly contest the case sought to be made out for the petitioners.

2. Learned counsel for petitioners, referring to s. 56 of the ADD Act which provides for mandatory imposition of anti-dumping duty, submitted that the duty was nothing other than a tax and that, therefore, it came within the competence of the legislature which alone could impose the duty. Learned counsel contended that the NTC could not be conferred any such power. Learned counsel referred to the preamble to the ADD Act which specifically provides that the Act has been placed on the statute book to give effect to Pakistan's obligations under Article VI of the General Agreement on Tariffs and Trade, 1994 and to the Agreement on the Implementation thereof. The purpose of the ADD Act and the Agreement were to provide protection to local industry in the country on import on account of any dumping and the injury caused thereby. Referring to s. 3 of the Act learned counsel submitted that subsection (1) used the word "anti-dumping measures" in the plural. Thus, according to learned counsel, there could be different measures adopted to achieve the purpose of preventing the dumping which causes injury to local industry. One of these measures was imposition of an anti-dumping duty. Learned counsel submitted that though the anti-dumping duty was a price control mechanism, such mechanisms could take different forms one of which was to control price by the imposition of a tax or duty. There could be other measures adopted in this regard also. However, the one chosen by the ADD Act was to impose price control by way of a tax. Learned counsel submitted that the anti-dumping duty imposed thereby was a compulsory exaction and therefore came squarely within the well-known description of a tax. But, and this constituted the core of his submissions on the first ground, since the anti-dumping duty was a tax it could only be imposed by the legislature and could not be delegated to the NTC in the manner as laid out in the Act. Learned counsel submitted that the anti-dumping duty was a special kind of tax. It was submitted that the Agreement also recognized this aspect and reliance was placed in particular on footnote 12 to Article 4.2 of the Agreement. This footnote provides as follows: "As used in this Agreement "levy" shall mean the definite or final legal assessment or collection of a duty or tax". Thus, according to learned counsel the anti-dumping duty was nothing but a tax as understood by and in the jurisprudence of this country. Learned counsel submitted that this interpretation accorded with the manner in which anti-dumping duty was regarded in other jurisdictions. Reference was made to EU law and to a certain Council Regulation as also some decisions of the European Court of Justice. Learned counsel also relied on certain academic literature in this regard. Learned counsel submitted that the anti-dumping duty was in its essence a customs duty and submitted that the ADD Act was

structured in such a way that the essential legislative function had been delegated to the NTC. It was submitted that this was an impermissible delegation of legislative power and learned counsel referred to various cases in this regard. Thus, it was contended that the ADD Act could not be given any force or effect in the manner as enacted, although learned counsel fully accepted the need to implement the Agreement within the municipal law of Pakistan. As we understood him, his grievance was not with the imposition of an anti-dumping duty as such but rather with the manner in which this exercise had been carried out by the legislation currently in force.

3. With regard to the second ground of attack, learned counsel placed reliance on s. 155H of the Customs Act. This relates to the confidentiality of trade information gathered by the Customs Department during the clearance of goods. Referring to the complaints on the basis of which the NTC had taken action and commenced proceedings under the ADD Act, learned counsel submitted that such complaints were based crucially and essentially on the customs data provided to the complainants by NTC. Learned counsel submitted that this was unlawful as such data was protected as confidential information in terms of s. 155H. Learned counsel submitted that insofar as the ADD Act itself was concerned, there was as such no provision therein for the providing of data to a person by the NTC in order to enable such person to make a complaint under the Act, and reference was made to ss. 31 and 35. Thus, according to learned counsel, the information and data that formed the basis of the complaints had been unlawfully acquired and it was submitted that information obtained in this manner could not support any lawful action. Furthermore, learned counsel submitted, when the petitioners had sought to obtain the same data and information from NTC, their request had been declined. Thus, it was submitted, NTC had acted in a clearly discriminatory manner which further compounded the illegalities that had occurred in the entire exercise that had been and/or was being carried out. Learned counsel submitted that on both these grounds, the proceedings and determinations challenged ought to be quashed and prayed accordingly.

4. Learned counsel for the complainants, i.e. the private respondents, submitted that there were two challenges mounted by the petitioners. Firstly, what was the nature of anti-dumping duty and secondly, whether there had been any violation of s. 155H. On the first question learned counsel submitted that the anti-dumping duty was not a tax. It was, in fact, a regulatory charge or a penalty. In this regard learned counsel submitted that the ADD Act had not been passed as a Money Bill but as legislation in the ordinary course. It was submitted further that the amounts recovered under this head were classified as non-tax revenue by the Federal Government and finally it was contended

that the anti-dumping duty was a person specific levy which was particularized in the manner as provided for under the ADD Act and it was subject to appeal. Thus, it was not a tax at all. Learned counsel submitted that the nature of the anti-dumping duty as a regulatory charge or penalty meant that it was relatable to entry Nos. 3, 27, 32 and 56 of Part-I of the Federal Legislative List. However, primarily reliance was placed on entry No.27 which, *inter alia*, provides for the legislative competence of import and export across customs frontiers and trade and commerce with foreign countries. Learned counsel submitted that the purpose of the anti-dumping duty was to regulate international trade.

5. Amplifying his submissions as to the nature of the anti-dumping duty, learned counsel submitted that in addition to the well-known categories of "tax" and "fee" there was another sort of charge that could be imposed by the legislature being a regulatory charge and that the anti-dumping duty squarely fell in this category. Reliance was placed primarily on a judgment of the Supreme Court of Canada reported as *Westbank First Nation v. British Columbia Hydro and Power Authority* [1999] 3 SCR 134. Referring to various passages from the judgment, learned counsel submitted that they aptly described the nature of a regulatory charge and were fully applicable to the anti-dumping duty imposed under the ADD Act. Reference was also made to a decision from South Africa in which the Canadian decision was followed and applied. Learned counsel submitted that the primary purpose of anti-dumping duty was not to raise revenue. Rather, it was to regulate the international movement of goods so as to discourage exporters from engaging in dumping and to disincentivize such acts or practices. Learned counsel submitted that this aspect was amply demonstrated in the Act itself which provided that if the anti-dumping duty imposed was successful, then there would be no amount received in terms thereof, i.e., that no revenue would be raised. Referring to the nature of anti-dumping duty as a penalty, learned counsel submitted that it was relatable to entry No.56 of the Federal List. Thus, according to learned counsel the conduct that was proscribed by the ADD Act was dumping as therein defined and the consequence of such dumping was the penalty that had to be paid in terms of the duty. Learned counsel submitted that entry Nos.3 and 32 of the Federal List also came into play because admittedly the position was that the ADD Act had been enacted in order to give effect to an international treaty. Learned counsel submitted, in the alternative, that even if the anti-dumping duty was a tax, i.e., that it was a customs duty (which was not accepted) even then Article 77 of the Constitution was not contravened. Reliance was placed on certain case law in this regard.

6. In so far as s. 155H was concerned, learned counsel submitted that there had been no violation of this provision and drew attention to clauses (c), (d) and (e) thereof. Learned counsel submitted that the data that was provided to the respondents in order to enable them to file their complaints was general and generic in nature and did not provide the details of particular importers or exporters as such. The data provided, according to learned counsel, was concerned only with the quantities imported and the prices declared. Reliance was also placed on the National Tariff Commission Rules, 1990 and learned counsel submitted that Rule 3 thereof could be read along with s. 155H. Reference in this regard was also made to a Division Bench judgment of this Court.

7. Learned counsel for NTC submitted that there were three issues before the Court. Firstly, whether the anti-dumping duty was a tax or otherwise; secondly, whether the subject matter of the ADD Act was within the legislative competence of Parliament; and thirdly, whether there had been any breach or violation of s. 155H of the Customs Act. As regards the first issue learned counsel submitted that anti-dumping duty was entirely different from a tax. A tax, according to learned counsel, was levied or imposed for purposes of raising revenue. The purpose of the anti-dumping duty was to guard against unfair trading practices. It was submitted that anti-dumping duty could be avoided altogether by the simple expedient of goods not being sent to this country at an "export price" that was lower than the "normal price". Thus, there was no element of taxation in the imposition of anti-dumping duty. Learned counsel submitted that imposition of a tax was a commercial or fiscal policy measure whereas no such policy could be ascertained in the imposition of anti-dumping duty. It was simply a trade remedy measure. Learned counsel submitted that there was no compulsory exaction in the imposition of anti-dumping duty and in this context referred to the "price undertakings" envisaged by Part XII of the ADD Act. Learned counsel submitted that under the WTO system customs duties in the context of international trade had to be imposed on an MFN (most favored nation) basis which principle was one of the twin pillars supporting the international trade system. The MFN principle required that tariffs of duties be imposed without discrimination. The anti-dumping duty made permissible by and in terms of the WTO system was a recognized and accepted derogation from this freedom of trade, allowing exporter and/or country specific action to be taken in case there was any dumping and injury. Learned counsel submitted that while customs duty under the WTO system could not be imposed beyond the bound tariffs, the anti-dumping duty constituted a charge over and above the said tariffs, which again showed that it was not a tax.

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8. Continuing with his submissions, learned counsel submitted that the true nature of anti-dumping duty was that it was a trade protection measure, which could also be described as a deterrent and/or a remedial measure or a price control mechanism. Learned counsel submitted that the ADD Act was covered by entry Nos. 3, 27, 32 and 59 of the Federal list, but placed principal reliance of entry Nos. 3 and 32. Learned counsel submitted that the term "anti-dumping duty" was just a label and the form of the matter could not override the substance thereof. Once the legislative competence of Parliament to enact the ADD Act had been established (which, learned counsel contended, was indeed the case) then what the measure was called was not relevant. Learned counsel also submitted that it was well settled that the Court should not too readily conclude that a statute was *ultra vires* the Constitution. As regards s. 155H of the Customs Act, learned counsel referred to various provisions of the NTC Act including in particular s. 10(3) thereof and submitted that when these provisions were read with the National Tariff Rules 1990, there was more than ample power available with NTC to provide information and data to any party in order to enable it to file a complaint under the ADD Act. In this regard reference was also made to s. 20 of the latter statute.

9. Learned counsel for respondent No.3 in CP D-4780/2017 referred to Article 77 of the Constitution and submitted that the anti-dumping duty was a regulatory charge to regulate the conduct of foreigners exporting goods to this country. Learned counsel submitted that anti-dumping duty was neither a tax nor a fee but a third kind of levy, i.e., regulatory charge. Learned counsel submitted that in its pith and substance the ADD Act was relatable to entry No.27 of the Federal list and placed reliance on a decision of the Lahore High Court reported as *D.S. Textile Mills Ltd v. Federation of Pakistan* PLD 2016 Lahore 355. Learned counsel referred to several passages from this judgment. Referring to Article 73(3)(a) of the Constitution, learned counsel submitted that the sort of levies mentioned therein did not constitute an exhaustive list of the categories in which the appropriate legislative competence could be exercised by the concerned legislature. It was submitted that a regulatory charge was well within the scope of entry No. 27 and reliance was placed accordingly. Learned counsel also referred to entry No.54, which allows for the imposition of fees and submitted that this term, when used on the constitutional plane, should be given a broad meaning and that therefore anti-dumping duty could also regarded as a regulatory fee chargeable in terms of entry No. 27. As regards the second ground taken, i.e., with reference to s. 155H, learned counsel placed reliance on various provisions of the NTC Act including the aforementioned s. 10(3), as well as the s. 20 of the ADD Act. It was further submitted that Rule 3 of the Anti Dumping Duties Rules 2001, in its clauses (f), (g) and (h) covered the objection that had been taken by learned

counsel for the petitioners as regards the second ground. The learned DAG adopted the submissions made as noted above by learned counsel for the various respondents.

10. The right of reply was exercised. Learned counsel for the petitioners submitted with regard to the information that had been provided that in the cases at hand it was only provided to the complainants and not to the petitioners when they sought the same treatment from NTC. This, learned counsel submitted, was patently discriminatory. It was submitted that the manner in which NTC had acted in this regard was mala fide and hence without jurisdiction thereby vitiating the entire exercise. As regards the data actually provided to the complainants, learned counsel submitted that, in fact, the data was not in anonymous form as was being claimed but the particulars of specific parties could be established from the same. Referring to the NTC Act and s. 10 thereof, learned counsel submitted that the concept of "information" as used therein divided information into various categories and that subsection (3) being relied upon did not apply to "confidential information". Reference was made to other provisions of the Act as well. Learned counsel further submitted that the power conferred on NTC under section 10(3) was only in relation an "investigated protect" in terms of s. 3 of the ADD Act and not otherwise and that therefore even on such basis the information provided in the instant cases was a violation of the law. As regards s. 155H, learned counsel submitted that the various clauses thereof sought to be relied upon to justify the release of information/data did not apply in the facts and circumstances at hand. As regards the decision of the Lahore High Court, learned counsel submitted that it only established the distinction between "fee" on the one hand and "license fee" on the other and therefore did not provide any support for the broad propositions put forward on behalf the respondents. Finally learned counsel submitted that the Canadian decision relied upon could not apply as it would be contrary to the law laid down by the Supreme Court in various decisions already relied upon including in particular *Iqbal Zafar Jhagra v. Federation of Pakistan* 2013 SCMR 1337.

11. We have heard learned counsel as above, considered the record and material, and the case law cited and relied upon. We may note firstly that both the ADD Act and the NTC Act were preceded by earlier statutes, being respectively the Anti-Dumping Duties Ordinance, 2000 and the National Tariff Commission Act, 1990. The Anti-Dumping Duties Rules, 2001 ("ADD Rules") and the National Tariff Commission Rules, 1990 ("NTC Rules"), which are continued under the present legislation, were framed under the predecessor laws. Secondly, as is clear from the preambles of both the ADD

Act and the predecessor Ordinance, they were enacted to give effect in the municipal law to Pakistan's obligations under the World Trade Organization treaties which have set up the principal system of international trade, the WTO system. In particular, the legislation gives municipal effect to Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 and the Agreement on Implementation of Article VI ("AD Agreement"). A comparison of the ADD Act and the AD Agreement shows that the former seeks to faithfully give effect to the latter. The WTO system was the culmination of several years and rounds of multi-lateral negotiations known as the Uruguay Round. The member states of the WTO entered into a whole series of agreements relating to different aspects of international trade, which have been given effect in our municipal law either by various statutes relatable to specific agreements (as is the case at hand) or by extensive amendments in existing legislation. Thus, e.g., the Agreement on Valuation was given effect by amendments made in the Customs Act, 1969 and rules thereunder. These have been considered in detail in *Sadia Jabbar v. Federation of Pakistan and others* PTCL 2014 CL 537 (SHC, DB; herein after "*Sadia Jabbar*"). An important aspect of the WTO system is an elaborate dispute resolution mechanism. (Reference may be made in this regard to Article 17 of the AD Agreement.) In *Sadia Jabbar*, the dispute resolution mechanism was explained in the following terms (pp. 565-6):

> "9. ... In order to understand the full significance of the obligations undertaken by member states under the WTO system, it must also be kept in mind that the WTO provides for a detailed formal mechanism for dispute resolution, to which any member state can resort if it is of the view that another member state is not fulfilling its WTO obligations. This mechanism is contained in a separate agreement known as the "Understanding on Rules and Procedures governing the Settlement of Disputes" (generally referred to as the "Dispute Settlement Understanding" or "DSU").... The DSU provides for an adjudicatory mechanism by which binding rulings can be made by "panels" and, on appeal, by appellate bodies. If the defaulting state fails to abide by its obligations, and the relevant panel and/or appellate body find against it, then the aggrieved member state may, if certain conditions are met, impose sanctions (known as "measures") against the former. Thus, the WTO system has a lot of bite in it, and member states must be, and generally are, careful to ensure that they are compliant with their obligations under its various agreements."

12. Before proceeding further, it will be convenient to give a brief description of anti-dumping as understood within the WTO system. In fact, actions taken by governments to protect local industry against dumping long predate the WTO system. The WTO gives the following description on its website (www.wto.org), right at the opening of the webpage relating to "anti-dumping":

"If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. The WTO Agreement does not regulate the actions of companies engaged in "dumping". Its focus is on how governments can or cannot react to dumping — it disciplines anti-dumping actions, and it is often called the "Anti-dumping Agreement"."

In follow-up webpages, there is an elaboration in the following terms:

"Binding tariffs, and applying them equally to all trading partners (most-favoured-nation treatment, or MFN) are key to the smooth flow of trade in goods. The WTO agreements uphold the principles, but they also allow exceptions — in some circumstances. Three of these issues are:

- actions taken against dumping (selling at an unfairly low price)
- subsidies and special "countervailing" duties to offset the subsidies
- emergency measures to limit imports temporarily, designed to "safeguard" domestic industries."

"**Anti-dumping actions**

If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. Is this unfair competition? Opinions differ, but many governments take action against dumping in order to defend their domestic industries. The WTO agreement does not pass judgement. Its focus is on how governments can or cannot react to dumping — it disciplines anti-dumping actions, and it is often called the "**Anti-Dumping Agreement**"....

The legal definitions are more precise, but broadly speaking the WTO agreement allows governments to act against dumping where there is genuine ("material") injury to the competing domestic industry. In order to do that the government has to be able to show that dumping is taking place, calculate the extent of dumping (how much lower the export price is compared to the exporter's home market price), and show that the dumping is causing injury or threatening to do so.

GATT (Article 6) allows countries to take action against dumping. The Anti-Dumping Agreement clarifies and expands Article 6, and the two operate together. They allow countries to act in a way that would normally break the GATT principles of binding a tariff and not discriminating between trading partners — typically anti-dumping action means charging extra import duty on the particular product from the particular exporting country in order to bring its price closer to the "normal value" or to remove the injury to domestic industry in the importing country.

There are many different ways of calculating whether a particular product is being dumped heavily or only lightly. The agreement narrows down the range of possible options. It provides three methods to calculate a product's "normal value". The main one is based on the price in the exporter's domestic market. When this cannot be used, two alternatives are available...

Calculating the extent of dumping on a product is not enough. Anti-dumping measures can only be applied if the dumping is hurting the industry in the importing country. Therefore, a detailed investigation has to be conducted according to specified rules first. The investigation must evaluate all relevant economic factors that have a

bearing on the state of the industry in question. If the investigation shows dumping is taking place and domestic industry is being hurt, the exporting company can undertake to raise its price to an agreed level in order to avoid anti-dumping import duty.

Detailed procedures are set out on how anti-dumping cases are to be initiated, how the investigations are to be conducted, and the conditions for ensuring that all interested parties are given an opportunity to present evidence. Anti-dumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would lead to injury.

Anti-dumping investigations are to end immediately in cases where the authorities determine that the margin of dumping is insignificantly small (defined as less than 2% of the export price of the product). Other conditions are also set...."

13. We now take up the first ground of attack, namely that the anti-dumping duty is a tax and the manner in which it is imposed in terms of the ADD Act is an impermissible delegation of legislative power to the NTC. For reasons that follow, we are firmly of the view that the anti-dumping duty, as imposed by the ADD Act, is not a tax. We begin by noting that it is well settled that in determining whether an imposition is a tax, it is not the form (and certainly not the label) that is decisive but rather the substance. The classic case is the decision of the Supreme Court in *Sohail Jute Mills Ltd. and others v. Federation of Pakistan and others* PLD 1991 SC 329. A customs duty, to be known as the Iqra Surcharge, was levied. It was challenged on the ground, *inter alia*, that education in general being exclusively in the provincial domain, the levy was unconstitutional. The Supreme Court rejected this challenge. It was held that it was the substance that mattered and the levy was clearly a customs duty. The case at hand is of course the obverse situation but in our respectful view is covered by the logic of the principle enunciated by the Supreme Court. Simply because it is dignified by the appellation "duty", that does not necessarily, or in and of itself, mean that the anti-dumping duty is a tax.

14. It will be recalled that one of the submissions made by learned counsel for the petitioners was that the imposition of an anti-dumping duty in terms as laid down in the AD Agreement was but one option among many that could be adopted by a member state while exercising its right to take anti-dumping measures. It will be seen from the foregoing extracts taken from the WTO website that "GATT (Article 6) allows countries to take action against dumping" and that the "Anti-Dumping Agreement clarifies and expands Article 6, and the two operate together". It will take us too far afield to consider in detail the rulings given by panels and appellate bodies under the WTO dispute resolution mechanism in this regard. Reference may however be made to an Appellate Body report dated 28.08.2000 (referred to as *US-1916*

Act) on a dispute between the USA on the one hand, and the European Communities and Japan on the other. The principal question was whether a 1916 US statute, that adopted anti-dumping measures totally different from the AD Agreement, was inconsistent with Article VI and the said agreement. The Appellate Body held that inasmuch as the 1916 Act did not adopt the measures as given in the AD Agreement, the US was in violation of its WTO obligations. The gist of the Appellate Body report, as presently relevant, is set out in para 133 as follows (internal citation omitted):

> "... [W]e agree with the Panel's conclusion that Article VI of the GATT 1994 applies to the 1916 Act. We also agree with the Panel that, having regard to the relationship between Article VI and the *Anti-Dumping Agreement*, "the applicability of Article VI to the 1916 Act also implies the applicability of the Anti-Dumping Agreement" to the 1916 Act."

Thus, the right of a member state to take anti-dumping measures under Article VI of GATT 1994 and the AD Agreement go hand in hand. A member state may, or may not, take anti-dumping measures and to this extent the matter is permissive. However, if a state does decide to take such measures, then they must accord with the AD Agreement. This, in summary, is what was held by the Appellate Body and we are in agreement. However, in our view, what really clinches the matter is that Parliament has certainly chosen to adopt the AD Agreement as the means and manner in which anti-dumping measures will be applied in this country, by enacting it into municipal law in the shape of the ADD Act. More importantly, it appears that Parliament has chosen it to be the only means for this purpose (though applied in tandem with the NTC Act, as explained below). This of course accords with the approach required under the WTO system. Parliament's choice cannot be gainsaid and must be given effect.

15. In *Sadia Jabbar*, the following observations were made with regard to how a statute enacted for purposes of giving effect to a WTO agreement ought to be interpreted and applied (pp. 566-7):

> "10. ... It is of course, well settled as a general principle that if two interpretations of a provision are possible, then the one consistent with international law or Pakistan's treaty obligations will be preferred. And it is equally well settled that if the meaning of the municipal law is clear then it must be given effect to, even though it may conflict with Pakistan's obligations under international law. Reference in this regard may be made to *Hanover Fire Insurance Company* v *Muralidhar Banechand* PLD 1958 SC 138, 142 and *Marine Engineers' Association of Pakistan* v *Shipping Office, Government of Pakistan and another* 1989 CLC 588 (SHC; DB). In our view, a gloss should be placed on these principles in their application to the special case of the WTO system and its component agreements. If it is clear that a statute or statutory provision embodies a WTO agreement, and

especially where the statutory language essentially reproduces or closely follows the text of the agreement, then the interpretation should invariably be that which is consistent with the agreement and obligations thereunder. In other words, the threshold for concluding that a meaning inconsistent with the WTO agreement was intended must be regarded as higher than would be the situation in the general case. To the maximum extent possible, the relevant provision should be understood and applied in its WTO context.... Of course, if the relevant statutory provision ... is clear, and admits to only one meaning, then the courts must give effect to that meaning even if inconsistent with international law or a treaty obligation. But Parliament is presumed to know and keep in mind the country's international treaty obligations, and the consequences that could flow from any non-compliance with such obligations. The courts should therefore, to the maximum extent possible, avoid an interpretation that conflicts with the WTO agreement concerned, and thereby has the potential of exposing Pakistan to the possibility of retaliatory measures being adopted by other member states under the WTO system. At the same time, it must also be remembered that, in the final analysis, principles of statutory interpretation are but aids to discovering and giving effect to the legislative intent, and if that intent is clear, then it must be recognized and given effect to...."

16. An examination of the AD Agreement and the ADD Act shows that one of the essential features of the imposition is that it has to be calculated and determined on an individual basis, i.e., in respect of each exporter or producer who is alleged to have dumped his goods in the country of import and thereby caused injury to its domestic industry. There are exceptions to this basic requirement, but they are precisely that: exceptions which allow for only such derogation as is made permissible under the AD Agreement or the ADD Act. The calculation and imposition of anti-dumping duty on an individualized basis is of the essence. In the AD Agreement, Article 6.10 provides as follows:

"The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

The corresponding provisions in the ADD Act are as follows:

"**14. Individual dumping margin.**– (1) The Commission shall determine an individual dumping margin for each known exporter or producer of an investigated product.

(2) Notwithstanding anything contained in sub-section (1), where the Commission is satisfied that the number of exporters, producers or importers, or types of products involved is so large as to make it impracticable to determine an individual dumping margin for

each known exporter or producer concerned of an investigated product, the Commission may limit its examination to a reasonable number of interested parties or investigated products by using samples which are statistically valid on the basis of information available to the Commission at the time of selection, or to the largest percentage of volume of exports from the country in question which can reasonably be investigated."

"51. **Imposition and collection of anti-dumping duties.-** ...

(2) Save as provided in sub-section (3), the Commission shall establish an individual anti-dumping duty for each known exporter or producer of dumped imports."

The affinity between the agreement and the statute is obvious.

17. In a dispute between the European Communities (i.e., the European Union) and China (referred to as *EC-Fasteners (China)*) that went to an Appellate Body, one question was whether Article 6.10 was mandatory or otherwise. The dispute was raised by China, alleging that certain provisions of the relevant EC Regulation were inconsistent with the AD Agreement. The Appellate Body, which gave its report on 15.11.2011, made the following observations (internal citations omitted):

"311. The European Union claims that Article 6.10 should not be read as establishing a rule subject to a single exception and that it does not impose an unqualified obligation, but rather states a preference for determining individual dumping margins. The European Union maintains that the term "as a rule", which is inserted after the word "shall", "indicate[s] that the obligation is only a general principle and not a strict obligation that is to be complied with in any and all circumstances". The European Union observes that Article 6.10 refers to one affirmative situation (sampling) where such a preference "may" not be followed, and argues that "sampling" is not the only situation in which a Member is not required to determine individual dumping margins. According to the European Union, that Article 6.10, first sentence, does not contain a strict rule, as the Panel found, but a preference, is borne out by the existence of other situations where the preference does not need to be followed.

312. China responds that the use of the word "shall" in the first sentence of Article 6.10 establishes the mandatory nature of this provision, and that "sampling" is the only exception to this rule. In China's view, the expression "as a rule" is necessary to the extent that it creates a "link between the obligation contained in Article 6.10 first sentence which constitutes the rule and the exception to that rule included in the second sentence of that provision". According to China, if the drafters' intention was to allow more exceptions than "sampling", they would have expressly mentioned that the derogation from the general rule was permitted in situations other than the one mentioned in the second sentence of Article 6.10.

313. We observe that two main interpretative questions are raised in respect of the Panel's findings under Article 6.10. First, whether the first sentence of Article 6.10, through the use of the terms "shall" and "as a rule", expresses a mandatory rule or a mere preference to

determine individual margins of dumping. Second, whether "sampling", as permitted by the second sentence, is the only exception to the rule formulated in the first sentence."

316. We note that the auxiliary verb "shall" is commonly used in legal texts to express a mandatory rule. In the phrase "[t]he authorities *shall, as a rule*, determine an individual margin of dumping for each known exporter or producer", "shall" is followed by the term "as a rule". The definition of the latter term includes "usually" and "more often than not". The combination of the terms "shall" and "as a rule" does not connote a mere preference. Had the drafters of Article 6.10 wanted to avoid formulating an obligation to determine individual dumping margins, they would have used terms such as "it is desirable" or "in principle" instead of "shall".

317. Although the term "shall" renders the rule in the first sentence of Article 6.10 mandatory, this obligation is qualified by the term "as a rule", and this qualification must have a meaning. In our view, the term "as a rule" in the first sentence indicates that this obligation is not absolute, and foreshadows the possibility of exceptions. Absent the insertion of "as a rule" in the first sentence of Article 6.10, the obligation to determine individual margins would be difficult to reconcile with other provisions of the *Anti-Dumping Agreement* that permit derogations from the rule to determine individual dumping margins. However, while the term "as a rule" should be read as modifying the obligation to determine individual margins, it does not render it a mere preference. Otherwise, the use of "shall" in the first sentence would be deprived of its ordinary meaning.

320. By inserting the term "shall, as a rule", the drafters of Article 6.10 were careful not to express an obligation that would conflict with other provisions in the *Anti-Dumping Agreement* permitting derogation from the rule to determine individual margins of dumping apart from the sampling exception, and would oblige investigating authorities to determine individual margins of dumping in all cases. However, in our view, such exceptions must be provided for in the covered agreements, so as to avoid the circumvention of the obligation to determine individual margins of dumping in Article 6.10. The term "as a rule" in the first sentence not only anticipates the exception that follows in the second sentence of Article 6.10, but also other provisions in the *Anti-Dumping Agreement* that allow Members to depart from the requirement to determine individual margins of dumping. At the same time, we do not consider that the flexibility provided by the term "as a rule" goes as far as providing Members with an open-ended possibility to create exceptions, which would erode the obligatory character of Article 6.10. It would be incompatible with the existence of such an obligation if Members were free to depart from it by unilaterally determining what qualifies as an applicable exception. The general rule, that is, the obligation to determine individual margins of dumping for each known exporter or producer, applies, unless derogation from it is provided for in the covered agreements.

329. In the light of the above, we interpret Article 6.10 of the *Anti-Dumping Agreement* as expressing an obligation, rather than a preference, for authorities to determine individual margins of dumping. This obligation is qualified and is subject not only to the exception specified for sampling in the second sentence of Article

6.10, but also to other exceptions to the rule to determine individual dumping margins that are provided for in the covered agreements."

18. We have quoted somewhat extensively from the Appellate Body report because in our view it holds the key to understanding why, with respect, the submission made by learned counsel that the anti-dumping duty is a tax cannot be accepted. Since the ADD Act should, to the maximum extent possible, be interpreted and applied consistently with the AD Agreement, it follows that in our view, the provisions from the statute reproduced above must be regarded as mandatory. "Shall" as used therein means precisely that and nothing else. In other words, it is obligatory to compute the dumping margin (s. 14(1)) and the anti-dumping duty (s. 51(2)) on an individual basis, particularized to each offending exporter or producer. Only such derogation from this mandatory requirement is permissible as is expressly provided for in the statute. Now, the question is this: can a tax ever be imposed on such a basis? Is it lawful, in the constitutional sense, to impose a tax that is—indeed must be—tailored to specific individuals or persons? The answer to this must surely be in the negative. Any such tax would be struck down immediately as a gross violation of the Constitution, and this is so notwithstanding the latitude that the Courts are generally willing to grant in tax and fiscal matters. No doubt an exemption from a tax can be given on a basis that is as narrow as a particular person. This is well established as, e.g., even a cursory glance at the Second Schedule to the Income Tax Ordinance 2001 will indicate. But, the imposition of a tax is a different matter. During the course of the hearing, we specifically invited learned counsel to give any example of a tax imposed in the sort of individualized and particularized manner as envisaged by the AD Agreement and the ADD Act. No such example was forthcoming because, as far as we are aware, none exists. And no such example exists for the excellent reason that such a tax would be unconstitutional.

19. Notwithstanding what has just been said, what of footnote 12 to Article 4.2 of the Agreement, which was relied upon by learned counsel for the petitioners? It will be recalled that this footnote provides as follows: "As used in this Agreement "levy" shall mean the definite or final legal assessment or collection of a duty or tax". Furthermore, even the extracts taken from the website of the WTO describe the 'typical' anti-dumping action as being the "charging [of] extra *import duty* on the particular product from the particular exporting country in order to bring its price closer to the "normal value" or to remove the injury to domestic industry in the importing country" (emphasis supplied). Should not then the imposition under the ADD Act be regarded also as a tax, given the manner in which it ought to be interpreted as held in *Sadia Jabbar*? In our view, in appropriate circumstances a distinction may have to

be drawn in how a levy or imposition is to be regarded at international law and how it translates into the municipal system of the state giving effect to the same. This is especially so where the state has, like Pakistan, a federal structure. The WTO system is concerned with international trade, and customs duties are of course universally levied by all states. The WTO system requires each state to make binding commitments as regards the customs duties that it will charge and requires that such duties be levied on a "most favored nation" (MFN) basis. Inasmuch as anti-dumping measures allow for derogation from these foundational principles, it is not surprising that in the WTO system such measures are considered from the perspective of customs duties. But, when considered from the internal (i.e., municipal) perspective of a federal state like Pakistan, it may not be possible (or, as we have concluded, constitutionally permissible) to impose anti-dumping measures as customs duties. However, this is of no moment if the anti-dumping measures are in fact given effect in such manner as fulfills the international obligations. In other words, as long as the substance of the obligations is met, it matters not on the international stage how the obligation is treated or dealt with internally by the state while taking into account its constitutional and municipal position. There is, in other words, a certain duality: when viewed from the international perspective, the matter may take one aspect, and when viewed municipally it may take on a different color. Now, the ADD Act certainly gives faithful effect to the AD Agreement. Therefore, it matters not on the international stage nor for purposes of the WTO system or Pakistan's obligations in terms thereof that within our municipal system, an anti-dumping duty cannot be characterized as a tax. The substance of footnote 12 to Article 4.2 is certainly given effect and achieved in terms of the ADD Act. It creates a system that provides—again while remaining faithful to the terms of the AD Agreement—for a definite legal assessment of the anti-dumping duty. How the ADD Act is to be characterized for constitutional or municipal purposes does not conflict with Pakistan's international obligations or create any difficulties for purposes of compliance with the same.

20. If, as we have concluded, the anti-dumping duty that can be imposed by the ADD Act is not a tax, then what is it? It was described by learned counsel for the complainants as a regulatory charge that could be imposed for purposes of the regulatory scheme said to have been set up in terms of the ADD Act. It will be recalled that learned counsel submitted that a regulatory charge was a third type of levy, distinct from both a tax and a fee. Reliance was placed principally on a Canadian decision, *Westbank First Nation v. British Columbia Hydro and Power Authority* [1999] 3 SCR 134 ("*Westbank*") as well as a decision of the Lahore High Court in which this case is referred, *D.S. Textile Mills Ltd v. Federation of Pakistan* PLD 2016

Lahore 355. (A South African decision was also relied on but since that essentially follows *Westbank* it need not be considered in any detail.) However, we will consider a later decision of the Canadian Supreme Court, *620 Connought Ltd. v. Canada* [2008] 1 SCR 131, 2008 SCC 7 ("*620 Connought*"), in which *Westbank* as well as other decisions are considered in detail and applied. The reason for looking at the later decision is that it sets out clearly what, in Canadian jurisprudence, is the concept of a regulatory charge and how it relates to, but is separate from, that of a tax and a fee. The Court held as follows (pp. 144-5; emphasis supplied):

> "[25] In *Westbank*, Gonthier J. established a two-step approach to determine if the governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. To do so:
>
> > [A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) *the presence of actual or properly estimated costs of the regulation*; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. [para. 44]
>
> *The first three considerations establish the existence of a regulatory scheme.* The fourth consideration establishes that the regulatory scheme is relevant to the person being regulated.
>
> [26] Although this list of factors provides a useful guide, it is not to be treated as if the factors were prescribed by statute. As stated by Gonthier J., at para. 24:
>
> > This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.
>
> Nonetheless, there must be criteria establishing a regulatory scheme and its relevance to the person being regulated.
>
> [27] Provided that a relevant regulatory scheme is found to exist, the second step is to find a relationship between the charge and the scheme itself.
>
> > *This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.*
> >
> > (*Westbank*, at para. 44)
>
> [28] In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself-under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax?

and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank*."

21. In our view, with respect, the reliance placed by learned counsel on the Canadian jurisprudence is misconceived. According to learned counsel, the ADD Act to be regarded as a "regulatory scheme" and the imposition of the anti-dumping duty as regulating the behavior of persons exporting to this country by proscribing, prohibiting or lending preference to a certain type of behavior (see *620 Connought* at para 20, pg. 142), *viz.*, not to sell goods to this country at a price (i.e., the "export price") that is less than the "normal price". These submissions cannot, with respect, be accepted. Firstly, while the ADD Act certainly sets up an elaborate mechanism that does not mean that it is necessarily a "regulatory scheme" as understood in the Canadian jurisprudence. Secondly, the fact that an anti-dumping duty is "charged" if dumping and injury are found to exist and the imposition of the duty is designed to deter such action, that does not mean it is a "charge" connected with a "regulatory scheme" within the meaning of the Canadian jurisprudence.

22. Now, as already noted, according to the complainants a regulatory charge a third type of levy, distinct from a tax or a fee. However, and this is crucial to a proper understanding of its nature, in all three types there is always an actual levy. A tax is a levy "(1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose" (*620 Connought* at para 22, pg. 143). (It will be noted that this is, in substance, no different from the classic description of a tax given by Latham, CJ of the High Court of Australia, which has been approved many times by our Courts and has become virtually a definition.) A "user fee" (being what in our jurisprudence is called a "fee") is described in *620 Connought* at para 19 (pg. 142) in terms quite similar to those with which Pakistani law is very familiar. Insofar as a "regulatory charge" is concerned, it is described as follows (emphasis supplied):

> "[20] By contrast, regulatory charges are not imposed for the provision of specific services or facilities. *They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour*. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour...." (*ibid*)

Thus, it is integral to each type of levy that something is actually being charged from someone. In this sense the levy of a regulatory charge, like a tax

and a fee, is self-executing, i.e., the regulatory scheme is put in place with the expectation that revenues will be generated by and from it. However, the position under the ADD Act is materially different. It does not apply automatically if there is dumping and injury is thereby caused. Section 20(1) provides that NTC is to initiate an investigation on the written application by or on behalf of "domestic industry". In terms of s. 26 an application can also be made by the authorities of a "third country" if the conditions of the latter section are fulfilled. And, in relation to "domestic industry", s. 24 imposes further conditions and limitations. While the NTC may, in terms of s. 25, initiate an investigation on its own and without having received a complaint, the legal test remains the same: there must be "sufficient evidence of dumping and injury within the meaning of [the] Act" both for purposes of an investigation initiated on complaint (see s. 23(4)(b)) and one undertaken *suo moto*. Furthermore, Article 5.6, which corresponds to s. 25, provides that the authorities empowered to undertake anti-dumping investigations are to act on their own initiative (i.e., suo moto) in "special circumstances". Given the interpretative approach highlighted in *Sadia Jabbar* (see para 15 above), it is at least arguable that the suo moto powers of NTC under s. 25 are therefore to be used sparingly and exceptionally. Thus, the ADD Act is not self-executing in the sense described above, i.e., it is not enacted with the expectation that revenues will be generated by the statute. For precisely that reason there are (and can be) no "revenues tied to the costs of the regulatory scheme" nor are any funds collected under the Act so as to be used to finance the putative scheme. Indeed, even if an anti-dumping duty is imposed, it can be avoided by giving a price undertaking as provided for in Part XII of the ADD Act. The anti-dumping duty is certainly intended to deter behavior, but that is not the same thing as a self-executing charge being imposed in the sense that a regulatory charge is understood in the Canadian jurisprudence.

23. Furthermore, as is clear from the extracts reproduced above, the Canadian jurisprudence looks for the existence of four indicia in order to determine whether or not a regulatory scheme exists. One of those criteria is there should be the presence of actual or properly estimated costs of regulation. There are no such estimates, actual or otherwise, in the context of the ADD Act because, as just explained, the anti-dumping duty is not self-executing. The contrast between a regulatory charge in the Canadian sense and an anti-dumping duty under the ADD Act is therefore clear. The duty is not a charge or levy at all; it is a penalty imposed if there is dumping and injury is thereby caused. Thus, there is and can be no estimation of the costs under the ADD Act in terms as contemplated by the Canadian jurisprudence. One of the key indicia of a "regulatory scheme" is therefore missing. Additionally, simply because the ADD Act sets up an elaborate mechanism

for determining whether the conditions and circumstances exist for imposing an anti-dumping duty that does not therefore mean that the statute creates a "regulatory scheme". The provisions of the ADD Act are complex and detailed, and it certainly seeks to deal "completely" with anti-dumping measures. However, that does not make it a "scheme" as understood in the Canadian context.

24. In our view therefore, with respect, the reliance placed on the Canadian case law is misconceived. The anti-dumping duty is not a regulatory charge as understood in Canadian jurisprudence. It remains only to consider the decision of the Lahore High Court relied upon, *D.S. Textile Mills Ltd v. Federation of Pakistan* PLD 2016 Lahore 355. The Court was there concerned with the imposition of a licence fee under the Punjab Local Government Ordinance 2001. The principal question was whether the levy was a fee or not. The Court observed (at para 15), referring to Article 73(3)(a) of the Constitution, that there was a distinction between a "fee" and a "licence fee" and that the latter did not "require services to be rendered in return". The Court then reviewed certain Indian decisions where the distinction and difference between a "fee" and a "licence fee" was spelt out and explained. It was held in the Indian cases that a "licence fee" could be either regulatory or compensatory. The difference between "fee" and "licence fee" as considered in the Canadian and Australian jurisdictions was also noted, and it was here that the Court referred to the Canadian concept of a regulatory charge and *Westbank*. The Court then set out its conclusions in para 20. We have carefully considered the judgment. In our view, learned counsel for the petitioners is correct in stating that the *ratio decidendi* of the judgment is to be found in para 20 and that it is tied to the issue of "licence fee" which was before the Court. In our respectful view, to read the *ratio* more broadly than that would not be correct. Certainly, it would not be appropriate to read the judgment as laying down a principle that could mean that an anti-dumping duty imposed under the ADD Act is a regulatory charge imposed in terms of a regulatory scheme within the meaning of Canadian jurisprudence.

25. So, anti-dumping duty is neither a tax nor a regulatory charge. Then what is it? A clue as to our understanding of it has been given in para 23 above: it is a penalty imposed if there is dumping and injury within the meaning of the ADD Act. However, a penalty does not exist independently and of itself. It must be tied to something. In constitutional terms the question therefore is what is the legislative competence to which anti-dumping duty is relatable as a penalty? In our view, the answer lies in ss. 3 and 4 of the ADD Act. Section 3 lays down the dual requirements for anti-dumping duty to be

imposed, i.e., there being a determination by the NTC of dumping and injury to domestic industry. Section 4 provides as follows:

> "**4. Identification of dumping.**— For the purposes of this Act an investigated product shall be considered to be dumped if it is introduced into the commerce of Pakistan at a price which is less than its normal value."

The essence of what is normal price is set out in s. 5(1):

> "**5. Normal value based on prices in exporting country.**— (1) Save as provided for in section 6, the Commission shall establish normal value of an investigated product on the basis of comparable price paid or payable, in the ordinary course of trade, for sales of a like product when destined for consumption in an exporting country."

Section 10(1) establishes what is meant by export price in its essential terms:

> "**10. Export price.**—(1) Save as provided for in sub-sections (2) and (3), an export price shall be a price actually paid or payable for an investigated product when sold for export from an exporting country to Pakistan."

26. Thus, in its essence, there is dumping if the export price of a product is less than its normal price, and this is what s. 4 seeks to prevent. If an exporter or producer is in violation of this provision, and there is injury to domestic industry within the meaning of the ADD Act, then a dumping margin is determined, and based on that anti-dumping duty is imposed. As already noted both the dumping margin and the anti-dumping duty are to be determined on an individually particularized basis unless the matter comes within one of the permissible exceptions. Thus, anti-dumping duty is the penalty imposed if there is a violation of s. 4, which violation causes injury to domestic industry. The purpose is to remove the injury by, in effect, aligning the export price with the normal price by imposition of the penalty.

27. When all of the foregoing is kept in mind, in our view the essence of the subject matter of the ADD Act can be regarded from two perspectives. From one perspective, it could be regarded as the regulation of the import of goods into Pakistan, looked at from one particular aspect namely the price. From another perspective, it could be regarded as the regulation of price (i.e., price control), looked at from one particular aspect namely in relation to imported goods. Functionally, these perspectives are equivalent. However, when considered in terms of legislative competence there is an important difference. If the first perspective applies, then in its pith and substance the ADD Act is relatable to the legislative competence of "import and export across customs frontiers" and/or "trade and commerce with foreign countries".

But, if the second perspective is correct, then in its pith and substance the ADD Act is relatable to the legislative competence of "price control". The importance of the distinction lies in that the first legislative competence is exclusively within the federal domain (entry No. 27), whereas the second is exclusively within the provincial domain (being, in terms of the Constitution a non-enumerated power). Now the ADD Act, as already noted, gives effect in municipal law to the AD Agreement. Entry No. 3 of the Federal List relates to "external affairs" and the "implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries". As the illustrative mentioning of "educational and cultural" agreements shows, this entry covers also those treaties in which the subject matter, when considered as a legislative competence, would in its pith and substance fall exclusively within the provincial domain. Post the 18th Amendment, which in addition to omitting the Concurrent List made several changes to the Federal List as well, there is also entry No. 32, which now provides as follows: "International treaties, conventions and agreements and International arbitration". So, it would seem that even if in its pith and substance the ADD Act were regarded as relatable to the legislative competence of "price control", it would still come within the federal domain by reason of entry Nos. 3 and 32.

28. Having considered the matter in its totality, in our view it is the first perspective that most appropriately applies to the subject matter of the ADD Act. Therefore, in its pith and substance the statute is relatable to entry No. 27 of the Federal List. In its essence, it imposes a condition on the import of goods into the country, namely that they will not be brought into Pakistan at a price (i.e., the export price) lower than the normal price. If there is a violation of this condition, and the further condition of injury to domestic industry is also established, then a penalty, i.e., the anti-dumping duty, will have to be paid. It is most certainly not a tax, and in our view, it is also not a regulatory charge as understood in the Canadian jurisprudence. But in any case, it follows from the foregoing discussion and analysis that the first ground of attack fails, and we so conclude.

29. We turn to the second ground. As initially set out by learned counsel for the petitioners, this ground attacked the supply of information and data to the complainants by NTC as being in violation of s. 155H of the Customs Act. However, during the course of the hearing the issue developed, in our view quite appropriately, along somewhat broader and more general lines, and submissions were made accordingly. The issue, as it finally crystallized, can be stated in terms of the following questions: does the NTC have the jurisdiction to obtain import data and information from the Customs Department and use it and/or provide the same to a person desirous of making

a complaint under the ADD Act? Further, can such a complaint at all be made without such data or information being provided?

30. To consider these questions, for the time being we put s. 155H to one side, and look at the ADD Act and the NTC Act. The first point to note is that both sections have overriding provisions, being s. 78 of the former and s. 30 in the latter. Both provide that the statutes shall "have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force". In addition, s. 78 has a proviso the effect of which is that in case there is any conflict between the ADD Act and the NTC Act, it is the provisions of the latter that will prevail. We may note that both statutes received the President's assent on the same date (05.09.2015) and came into force immediately. We start therefore with the NTC Act.

31. Section 2(f) of the NTC Act defines "Trade Remedy Laws" as including "the Anti-Dumping Law", i.e., such legislation on this subject as is for the time being in force, which at present obviously means the ADD Act. Section 8 of the NTC Act sets out the functions of the NTC. Subsection (2) provides as follows:

> "In addition to the functions specified in subsection (1), the Commission shall also perform such functions with respect to international trade and other matters that may be assigned to it by the trade remedy laws or any other law for the time being in force."

When this provision is considered, and the NTC Act is read as a whole, the legislative intent is clear: in order to make the ADD Act properly and fully effective, it has at every relevant point to be read along with the NTC Act. In other words, the two statutes are intended to be complementary and to work and be applied in tandem.

32. Section 10 of the NTC Act needs to be set out in full. It provides as follows:

> "**10. Power of Commission to access information.**—(1) The Commission shall have the powers to solicit, gather, obtain, and verify any relevant information for the purposes of its functions from any Ministry, Division, Federal or Provincial Department, private or public entity or agency.
>
> (2) Notwithstanding anything contained in this Act or in any other law for the time being in force, any business confidential information received or obtained, directly or indirectly, by the Commission, pursuant to or in connection with an investigation, inquiry or study shall not be subject to disclosure by the Commission to any Ministry, Division, department, agency or instrumentality of the Federal Government or a Provincial Government without the prior permission of the party submitting such business confidential information.

(3) The Commission shall take all acts and measures necessary to provide transparent and prompt access to information to all parties, in a prescribed manner."

Subsection (1) is, clearly, intended to apply in broad and general terms. The entities from whom the NTC can obtain information certainly include the Customs Department, and thus the former can obtain "any relevant information" from the latter. It will be recalled (see para 22 above) that there must be "sufficient evidence of dumping and injury within the meaning of [the ADD] Act" for a complaint under s. 20 to be maintainable, or even suo motu action to be taken by the NTC under s. 25. Since the two statutes must be read and applied complementarily and in tandem, the sort of information and data that the NTC can, e.g., obtain from the Customs Department as "relevant information" would certainly include any information that would constitute "sufficient evidence" under the ADD Act. Thus, any bar that may operate in terms of s. 155H of the Customs Act cannot apply or stand in the way of NTC obtaining information and data from the Department under s. 10(1), for purposes that would include the application thereof under and in terms of the ADD Act. If at all s. 155H creates, or has the potential of creating, any such bar then it would be inconsistent with both the NTC Act and the ADD Act, and stand overridden. The objection taken by learned counsel for the petitioners, if considered solely from the perspective of s. 155H therefore necessarily fails. However, the issue must be considered in the broader terms as set out in para 29 above.

33. Subsection (2) of s. 10 provides, *inter alia*, that any "business confidential information" provided to NTC or obtained directly or indirectly by it pursuant to or in connection with an investigation shall not be disclosed by it to any Governmental agency or entity "without the prior permission of the party submitting such business confidential information". This subsection, on which some reliance was sought to be placed, has no application to the issue at hand. No doubt subsection (2) does interact with subsection (1) to the extent that the latter empowers the NTC to obtain relevant information even from a "private entity" and hence such information, if coming within the meaning of "business confidential information" cannot be disclosed to any Governmental agency or entity except by permission. But this has no relevance for whether import data could be obtained by NTC from the Customs Department and used by it or passed on to any person wishing to make a complaint under the ADD Act. Before proceeding further, it will be convenient to consider here s. 31 of the ADD Act on which reliance was also sought to be placed. This relates only to how information provided by a party during an investigation is to be treated, both while the investigation is underway and thereafter. It obviously has no relevance for the issue at hand.

34. Continuing with our consideration of s. 10, subsection (3) is in many respects the crucial provision. In our view, the "information" referred to in this subsection will include, *inter alia*, the "relevant information" obtained under subsection (1) minus (i) any "business confidential information" to which subsection (2) applies unless the party concerned gives prior permission for its release, or (ii) any information to which s. 31 of the ADD Act may apply. The term "party" used in subsection (3) must be distinguished from "interested party", which is defined in s. 2(b). "Party" includes "interested party" but covers a broader range and is not limited to the latter. Thus, with respect, we cannot accept a submission made by learned counsel for the petitioners that information could only be provided by NTC in relation to an "investigated product", which is defined in s. 2(k) of the ADD Act as meaning a product "which is subject to an anti-dumping investigation as described in the notice of initiation of the investigation". Learned counsel had argued that once an investigation had been initiated then the NTC could (possibly) provide information. But it could not provide information to a person wishing to file a complaint since at that time there would be no investigation initiated and hence, *ex hypothesi*, no "investigated product". In our view, with respect, this is contrary to the obvious legislative intent behind subsection (3). We may note that the definition of "interested party" in s. 2(b) is broadly similar to the definition of this term in s. 2(j) of the ADD Act. In both the term includes the complainants and those complained against once an investigation is initiated. The use of "parties" instead of "interested parties" in subsection (3) is therefore clearly designed to allow for a broader category to be given access to "information" in terms thereof. It certainly includes a person wishing to make a complaint under the ADD Act. (Before proceeding further, we may note, strictly as an aside, that there is also s. 35 of the ADD Act, but since no reliance was placed thereon by either side, we do not consider it here.)

35. We now turn to the ADD Act, and consider its provisions by primarily focusing on the situation where a complaint is made by domestic industry. Section 20 provides for the initiation of a complaint, which can only be by way of a "written application". Clause (b) of subsection (1) provides that such application shall include evidence, as is "reasonably available to the applicant", of "dumping and injury within the meaning of [the] Act" and of the "causal link between the dumped imports and the alleged injury". Clause (c) requires that the application contain "such further information as may be prescribed". As already noted, no investigation is to be initiated unless the NTC is satisfied that there is "sufficient evidence of dumping and injury within the meaning of [the] Act" (s. 23(4)(b)). Indeed, subsection (2) of s. 23 provides that the NTC shall reject the application as soon as it is satisfied that "sufficient evidence" is not available. Now, it will be recalled that the ADD

Rules framed under the predecessor Ordinance, are continued under the ADD Act. Section 20 of the former corresponded to s. 20 of the present statute. Rule 3 of the ADD Rules elaborates as to what is required by way of "further information". All of these correlate to various articles of the AD Agreement. It will be convenient to set out in tabular form the relevant provisions of the AD Agreement, and the ADD Act and Rule 3:

AD Agreement	ADD Act and Rules
Article 5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following: (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers; (ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question; (iii) information on prices at which the product in question is sold when destined	**Section 20. Requirement of a written application.**—(1) Subject to section 24 and save as provided for in section 25, an investigation by the Commission shall only be initiated upon a written application by or on behalf of domestic industry. (2) An application under sub-section (1) shall— (a) be submitted to the Commission in such manner, number and form and with such fee as may be prescribed; (b) include evidence of dumping and injury within the meaning of this Act and the causal link between the dumped imports and the alleged injury, as is reasonably available to the applicant; and (c) contain such further information as may be prescribed. **Rule 3. Disclosure in application.**- An application shall, in addition to the information specified in section 20 of the Ordinance, contain such information as is reasonably available to an applicant on the following, namely:- (a) name [etc] ... of the applicant; (b) the identity of domestic industry by or on behalf of which the application is being made ...; (c) information relating to the degree of domestic industry support for the application, including – (i) the total volume and value of domestic production of a domestic like product; and (ii) the volume and value of a domestic like product produced by the applicant and by each domestic producer identified;

for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

(d) a complete description of the allegedly dumped product, including the technical characteristics and uses of such product and its current customs tariff classification number as specified in the First Schedule to the Customs Act, 1969 (IV of 1969);

(e) the country in which the allegedly dumped product is manufactured or produced and, if it is imported from a country other than the country of manufacture or production, the intermediate country from which the product is imported;

(f) the name and address of each person the applicant believes sells the allegedly dumped product and the proportion of total exports to Pakistan that person accounted for during the most recent twelve-month period;

(g) information on prices at which the product in question is sold when destined for consumption in domestic market of the country of export or origin or, where appropriate, information on the prices at which the product is sold from the country of export or origin to a third country or on the constructed value of the allegedly dumped product, and information on export prices or, where appropriate, on the prices at which the allegedly dumped product is first resold to an independent buyer in Pakistan, and on any adjustments as provided for in section 11 of the Ordinance; and

(h) information on an evolution of volume of the allegedly dumped imports, the effect of such imports on prices of a domestic like product in domestic market and the consequent impact of the imports on domestic industry as demonstrated by relevant factors and indices having a bearing on the state of domestic industry, including those listed in sections 15, 16, 17, and 18 of the Ordinance, and information on the existence of a causal link within the

	meaning of section 19 of the Ordinance.
Article 5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation. **Article 5.8** An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.	**Section 23. Initiation of an investigation.**—(1) Subject to section 24, the Commission shall examine accuracy and adequacy of evidence provided in an application to determine whether it is compliant with the requirements of section 20 and if so whether there is sufficient evidence to justify initiation of an investigation. (2) An application under section 20 shall be rejected as soon as the Commission is satisfied that sufficient evidence is not available to indicate dumping or any injury to justify initiation of an investigation. (3) The Commission may seek additional information from an applicant before deciding whether to initiate an investigation and such information shall be provided by the applicant to the Commission within such time and in such manner as may be prescribed. (4) When the Commission is satisfied that — (a) an application under section 20 has been made by or on behalf of domestic industry; and (b) there is sufficient evidence of dumping and injury within the meaning of this Act, the Commission shall initiate an investigation. (5) Where the Commission does not consider it appropriate to initiate an investigation, it shall inform all the applicants of the reasons for not initiating the investigation and shall inform the exporting country of its decision.

36. We begin the comparative analysis by noting that Article 5.2 provides that the application is to contain the information listed in its various clauses "as is reasonably available to the applicant". In other words, this qualification relates to all of the information listed. When subsection (2) of s. 20 is considered, it appears to suggest that the requirement, that the complainant produce the evidence "as is reasonably available", applies only in relation to clause (b) and not to the "further information" that the NTC may require in terms of clause (c). Now, the "further information" required is set out in Rule

3 of the ADD Rules. When the various clauses of Rule 3 are considered, they are essentially the same as the clauses of Article 5.2. In our view therefore, by applying the interpretative approach highlighted in *Sadia Jabbar* (see para 15 above) even the "further information" that the complainant has to provide in terms of Rule 3 is only such as is "reasonably available" to it. The relevance of this will emerge as the analysis progresses.

37. Articles 5.2 and 5.3, and how they interact, have been considered by many panels constituted under the DSU dispute resolution mechanism. As a result, a not inconsiderable WTO jurisprudence exists in relation to these provisions. It suffices for our purposes to refer to only certain aspects of that jurisprudence. In a panel report dated 13.04.2004 and referred to as *US-Lumber V*, the panel observed as follows (internal citations omitted; underling added; italics in original):

> "7.54 We note that the words "such information as is reasonably available to the applicant", indicate that, if information on certain of the matters listed in sub-paragraphs (i) to (iv) [of Article 5.2] is not reasonably available to the applicant in any given case, then the applicant is not obligated to include it in the application. It seems to us that the "reasonably available" language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit *all* information that is reasonably available to it. Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality. As the purpose of the application is to provide an evidentiary basis for the initiation of the investigative process, it would seem to us unnecessary to require an applicant to submit *all* information reasonably available to it to substantiate its allegations. This is particularly true where such information might be redundant or less reliable than information contained in the application. Of course, this does not mean that such information will necessarily be sufficient to justify initiation under Article 5.3 – that is a separate question, not encompassed by the issue before us here...."

An earlier panel, in a report dated 28.01.2000 and referred to as *Mexico-Corn Syrup*, had observed as follows (emphasis supplied; internal citation omitted):

> "7.74 Obviously, the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury. Moreover, the applicant need only provide such information as is "reasonably available" to it with respect to the relevant factors. Since information regarding the factors and indices set out in Article 3.4 concerns the state of the domestic industry and its operations, such information would generally be available to applicants. *Nevertheless, we note that an application which is consistent with the requirements of Article 5.2*

will not necessarily contain sufficient evidence to justify initiation under Article 5.3."

Thus, the information required to be provided by an applicant/ complainant in terms of s. 20 read with Rule 3 is only such information as is "reasonably available" to the applicant. It need not even be the whole of the information "reasonably available", but only such as is deemed necessary by the applicant to substantiate the existence of dumping, injury and causality. Furthermore, and more importantly for present purposes, the information that meets the requirements of s. 20 read with Rule 3, and hence results in an application that is maintainable, need not necessarily be the information that would be "sufficient evidence" to justify the initiation of an investigation— which, as will be recalled, is the sort of evidence required in terms of s. 23(4)(b) and the absence of which results in the termination of proceedings (per s. 23(2)).

38. Section 23(1), which corresponds to Article 5.3, establishes the link between the sort of information that maintains the application, and the information that constitutes "sufficient evidence" to enable an investigation to be initiated. It will be noted that insofar as the former is concerned, the provision requires consideration of the "accuracy and adequacy" of the information, whereas as regards the latter the criterion is of course 'sufficiency'. In a panel report dated 24.10.2000 and referred to as *Guatemala-Cement II*, it was observed as follows:

> "8.31 We recall that, in accordance with our standard of review, we must determine whether an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation. Article 5.3 requires the authority to examine, in making this determination, the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authorities' determination whether there is sufficient evidence to justify the initiation of an investigation. It is however the sufficiency of the evidence, and not its adequacy and accuracy per se, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation."

The panel further observed as follows (emphasis supplied):

> "8.62 It is evident to us that the Guatemalan authorities relied on the same evidence that was presented in the application for purposes of the initiation. We have expressed the view that Articles 5.2 and 5.3 contain different obligations. *One of the consequences of this difference in obligations is that investigating authorities need not content themselves with the information provided in the application but may gather information on their own in order to meet the standard of sufficient evidence for initiation in Article 5.3.* On this issue we are

in full agreement with the reasoning and findings expressed in by the *Guatemala-Cement I* panel which made the following comments:

> "7.53 We have concluded that the question whether there is "sufficient evidence" to justify initiation is not answered by a determination that the application contains all the information "reasonably available" to the applicant on the factors specified in Article 5.2 (i) - (iv). *This does not, however, mean that investigations may not be initiated in cases where "sufficient evidence" is not "reasonably available" to the applicant. In particular, there is nothing in the Agreement to prevent an investigating authority from seeking evidence and information on its own, that would allow any gaps in the evidence set forth in the application to be filled.* We do not suggest that such action by the investigating authority is in any case required by the ADP Agreement. However, if, as in this case, an authority chooses to refrain from such action, the "reasonably available" language in Article 5.2 does not permit the initiation of an investigation based on evidence and information which, while all that is "reasonably available" to the applicant is not, objectively judged, sufficient to justify initiation...."

39. In our view, the position that emerges from the WTO jurisprudence, when applied to the ADD Act is as follows. Firstly, the information/evidence to be provided in the complaint/application, both in terms of s. 20 and Rule 3 is such as is "reasonably available" to the applicant. Secondly, the applicant need not provide all the information "reasonably available" to it but only such as relates to the issues of dumping, injury and causality. Thirdly, the "reasonably available" information/evidence that is required to be provided in the complaint/application may not be enough to constitute "sufficient evidence" to enable the initiation of an investigation. Fourthly, even if this is so, the complaint/application will nonetheless be maintainable. In determining the aspect of maintainability the NTC will examine the "accuracy and adequacy" of the information/evidence (s. 23(1)). While the accuracy and adequacy of the information/evidence will be relevant in determining whether there is "sufficient evidence", it is not adequacy and accuracy per se that suffice. Fifthly, and perhaps most importantly for present purposes, if the "reasonably available" information/evidence as provided is accurate and adequate to maintain the application but does not constitute "sufficient evidence" to enable the initiation of an investigation, the investigating authority (i.e., NTC) *need not content itself with the information provided in the application but may gather information on its own in order to meet the standard of sufficient evidence for initiation of investigation.* There is nothing in the AD Agreement, and nothing in the ADD Act, to prevent an investigating authority (i.e., NTC) *from seeking evidence and information on its own, that would allow any gaps in the evidence set forth in the application to be filled.*

40. Before applying these conclusions to address the issue before us (i.e., the questions posed in para 29 above), one final comment must be made, in relation to s. 10(3) of the NTC Act. It will be recalled that it empowers—indeed in our view casts a statutory duty on—NTC to provide transparent and prompt access to information to all parties. However, this can only be done "in a prescribed manner". This last condition is important, and crucial for present purposes. "Prescribed" is defined in s. 2(d) in the usual terms. Now, it has been seen that the NTC Rules, which continue to remain in force under the present statute, were framed under the predecessor Ordinance. We were informed that NTC has not made any rules under the NTC Act. The predecessor Ordinance did not have any provision similar to s. 10(3) and there is no such provision in the NTC Rules. Equally, the ADD Rules also do not contain any such provision. Thus, at the present time, it appears that NTC has not exercised its power under s. 10(3)—or, rather, discharged its duty in terms thereof. Can it nonetheless provide information to any party, including a person seeking to make a complaint/application under s. 20 of the ADD Act, i.e., without there being any rules in this regard? This is, as will be appreciated, a question that lies at the heart of the second ground of attack. In our view, it must be answered in the negative. It is well settled that if the law prescribes something to be done in a certain manner, then it must be so done or not at all. The NTC has been given a power (or, rather, a specific duty has been cast on it) in terms of s. 10(3), which was not there before. If the mandate of the law is that that power is to be exercised or duty discharged by the framing of rules, then that is what has to be done. Either fresh rules ought to have been framed or the NTC Rules should have been suitably amended. Neither option has been exercised. It follows that NTC cannot provide (and in the case of the present complainants/respondents could not have provided) the import information and data that it had obtained from the Customs Department. It must be clearly understood that the obtaining by NTC of the data is beyond any doubt. Being covered by s. 10(1), it is lawful. It is the present further dissemination of that data and information to the respondents that is legally invalid. It is unfortunate that NTC has not taken the requisite action in terms of s. 10(3). This needs to be done promptly. NTC is therefore hereby directed to frame the rules necessary to give effect to s. 10(3) with all convenient dispatch but in any case within four months of this judgment.

41. This does not however end the matter. We must now take into consideration and apply also the conclusions arrived at in para 39. In our view, even if NTC has not framed the requisite rules under s. 10(3) of the NTC Act and cannot therefore as yet provide information to any person wishing to make a complaint, that does not prevent NTC from itself using the data and information obtained under s. 10(1) when considering an application

under s. 20 of the ADD Act. In other words, as long as an application is otherwise compliant with the requirements of s. 20 in the manner explained above but the information/evidence provided by the complainant is not "sufficient evidence", there is nothing that would prevent NTC from itself using the data and information available with it under s. 10(1) in addition to that provided by the applicant in order to meet the required standard and fill in any gaps so as to enable it to initiate an investigation. And, if such information not be at hand, there is nothing that would prevent NTC from seeking the same in terms of s. 10(1).

42. In light of the above discussion and analysis, the questions posed in para 29 are answered as follows. Insofar as the first question is concerned, in our view NTC does have the jurisdiction to obtain import data and information from the Customs Department in terms of s. 10(1) of the NTC Act and if there is anything in s. 155H of the Customs Act that would stand in the way of NTC doing so, then to that extent s. 155H stands overridden by reason of both s. 30 of the NTC Act and s. 78 of the ADD Act. Furthermore, NTC has the jurisdiction and power to use this information and data under and in terms of the ADD Act, either for purposes of any suo motto investigation under s. 25 or in relation to and for the purposes of complaints filed under ss. 20 or 26. In the latter situation (and especially for purposes of a complaint under s. 20), NTC would be entitled and empowered (subject to what is said below) to either provide the said information to a person wishing to make a complaint or an actual complainant, or to itself use the information and data to, inter alia, see whether there is "sufficient evidence" of the dumping and injury. However, NTC can provide the information and data to a person who wishes to file a complaint under s. 20, or an actual complainant, in terms of s. 10(3) of the NTC Act only if the requisite rules are in place. In case the rules are not framed then NTC has no power to provide the information and data to any person (except to the extent otherwise expressly made permissible by or under the ADD Act). However, it is clarified that in such a situation if NTC decides to itself use the information in terms as explained, and there is by that act or for that reason a disclosure of the information to any person, that, and any subsequent or consequential use of the information, would not be impermissible. If the rules have not been framed under s. 10(3) or, if framed, no information or data is sought from NTC but a complaint is nonetheless filed under s. 20, then the maintainability of the application must be considered in the manner as indicated above. If the application so considered is maintainable then, as just noted, NTC can itself use the information and data to determine whether there is "sufficient evidence" within the meaning of the ADD Act. Insofar as the second question is concerned, a complaint under s. 20 of the ADD Act can be filed even without NTC providing any

information or data as may have been obtained by it in terms of s. 10(1) of the NTC Act.

43. Insofar as the actual and particular facts and circumstances of the present petitions are concerned we conclude as follows. Since the requisite rules have not yet been framed under s. 10(3), it was impermissible and unlawful for NTC to have provided the import information and data to the present complainants/respondents. However, the fact that this was done does not necessarily and automatically invalidate the complaints, and the investigations initiated in terms thereof and determinations made. The reason is that the NTC could in any case itself have used the information and data in the manner as explained above. Furthermore, even if the said information and data was, as it were, subtracted from the complaints filed, it could well be that they were nonetheless maintainable, again in terms as already explained. It appears that the complaints were not, in fact, considered on any such basis. However, it must be kept in mind that matters have progressed apace in these cases. In one investigation there is a final determination, and in the other a preliminary determination has been made. The investigations appear to be based in relevant and substantial part on the data and information obtained from and/or by NTC, which was in any case usable by it. Therefore, in the rather peculiar situation before us, and in terms of the facts and circumstances actually at hand, we are not inclined to exercise our discretionary jurisdiction under Article 199, and invalidate either the investigations or the determinations as challenged by the petitioners.

44. Before concluding one final point may be made. During the course of submissions, we were referred to a decision of a learned Single Judge of this Court, reported as *Ellecot Spinning Mills Ltd. v. Federation of Pakistan and others* 2016 PTD 1334. The case involved the imposition of an anti-dumping duty. A preliminary determination had been made. When the order is read, it appears to be premised on the anti-dumping duty being a customs duty, although the point whether it could be so regarded was apparently not raised. We would like to clarify, and only out of abundant caution, that if at all this decision is cited in support of any submission or proposition that an anti-dumping duty is a tax, that would not be correct. On account of what has been said above the cited decision cannot now be so read or understood.

45. In view of the foregoing discussion and analysis these petitions fail and are hereby dismissed. There will be no order as to costs.

Judge

Judge

19/2/2018