Chapter 4

Substantive Elements

"FAIR COMPARISON" AND DETERMINATION OF "DUMPING MARGIN"

Article 2 of the WTO Antidumping Agreement provides the framework for determination of *dumping margin* based on a *fair comparison* of '"*normal value*' and '*export price*'. Chapter 3 provided a detailed framework of WTO Agreement and national antidumping legislation of countries under study. This chapter deals with the substantive elements of "dumping" in the Agreement and compares them with the national antidumping rules and practices in these countries. The objective is to analyse various concepts in dumping determination and identify the asymmetries in the Agreement as well as national antidumping practices.

4.1 Basic Definitions: Dumping

Article VI of GATT defines *dumping,* as the introduction of a product from one country into the commerce of another at less than its "*normal value.*" As per this article, such dumping is to be condemned if it *causes* or *threatens* to cause "*material injury*" to an established industry in the importing country or "*materially retards*" the establishment of domestic industry.

DUMPING

- Essentially deals with the Price behaviour of exporters
- Dumping exists when the Export Price is less than Normal Value
- Dumping must cause injury to be actionable
- Causal link between dumping and injury must be established

For the purpose of this article the "*normal value*" has been defined as:

- The comparable price for the "*like product*", "*in the ordinary course of trade*", when destined for consumption in the domestic market of the exporting country, **Or** in the absence of such a domestic price, normal value shall be determined either as

  i) the highest comparable price of the *like product* for exports to an appropriate *third country, in ordinary course of trade*; Or

  ii) the *cost of production* of the product in the country of origin plus a reasonable *addition for selling costs and profit* (Constructed Price);

  The Agreement does not provide any hierarchy or order in which the above provision is to be applied in a situation where there is no sale in the domestic market or such sales are not in the ordinary course of trade. The Agreement also does not define the term 'appropriate third country'.

- Due allowance shall be made in each case for differences in conditions and terms of sale, for difference in taxation, and for other differences affecting price comparability.

The rules provide for a *fair comparison* between the 'normal value' so determined and the 'export price' at the same 'level of trade', normally at the ex-factory level. Due allowance is to be given, on merit, for differences which affect price comparability, including difference in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences that demonstratively affect price comparability. On the basis of this fair comparison 'margin of dumping' is to be established as the difference between 'adjusted normal value' and 'adjusted export price' for the purpose of imposition of antidumping duty, which should be sufficient to eliminate the injurious effect of dumping[1].

At the operational level the process of "fair comparison" and determination of "dumping margin" involves following steps:

A) Determination of 'Normal Value'

- Identification of 'like product' in the exporting country market;
- Determination of domestic sale price in the exporting country for the in the ordinary course of trade, i.e., whether there is sufficient and reliable (arms length) sales of the like product in the domestic market; Or
- Identification of an appropriate third country sales price for comparison; *Or*
- *'Construction of normal value'* if the home market prices is not in the normal course of trade or of low volume;
- Adjustment of prices for level of trade etc.

B) Determination of 'Export Price'

- Identification of the 'like product' in the domestic (importing country) market;
- Determination of '*export sales price*' and adjustment wherever necessary; or

[1] Refers to "*Lesser Rule of "Article 9.1 of WTO Agreement on antidumping* which specifies that the antidumping should not be more than that is actually required to eliminate the injurious effect of

- *Export price construction*, if exports are through related parties (Association or compensatory arrangement between parties to transaction);

C) **Comparison of 'normal value' with 'export sales price':** Adjustments for level of trade etc;

D) Calculation of 'Dumping Margin': as the difference between **Normal Value and Export Price;**

E) Special Provision for Non-Market Economy (NME) countries: Identification and determination of **"surrogate country**" cost of production**.**

4.2 Determination of normal value

Determination of the normal value is the first step in any antidumping determination. Based on the GATT Antidumping Agreement, most of the national legislation provides that the normal value can be established on the basis of the following:

- The domestic price, in the exporting country or in the country of origin, of the 'like product'; if the same is 'in the ordinary course of trade'; **or**
- A constructed value based on cost of production and selling expenses plus profit; **or**
- The comparable export price to an appropriate third country.

However, there is no clear guideline as to how the appropriate third country is to be identified for determination of the normal value and whether the 'ordinary course of trade' concept is applicable to the third country also.

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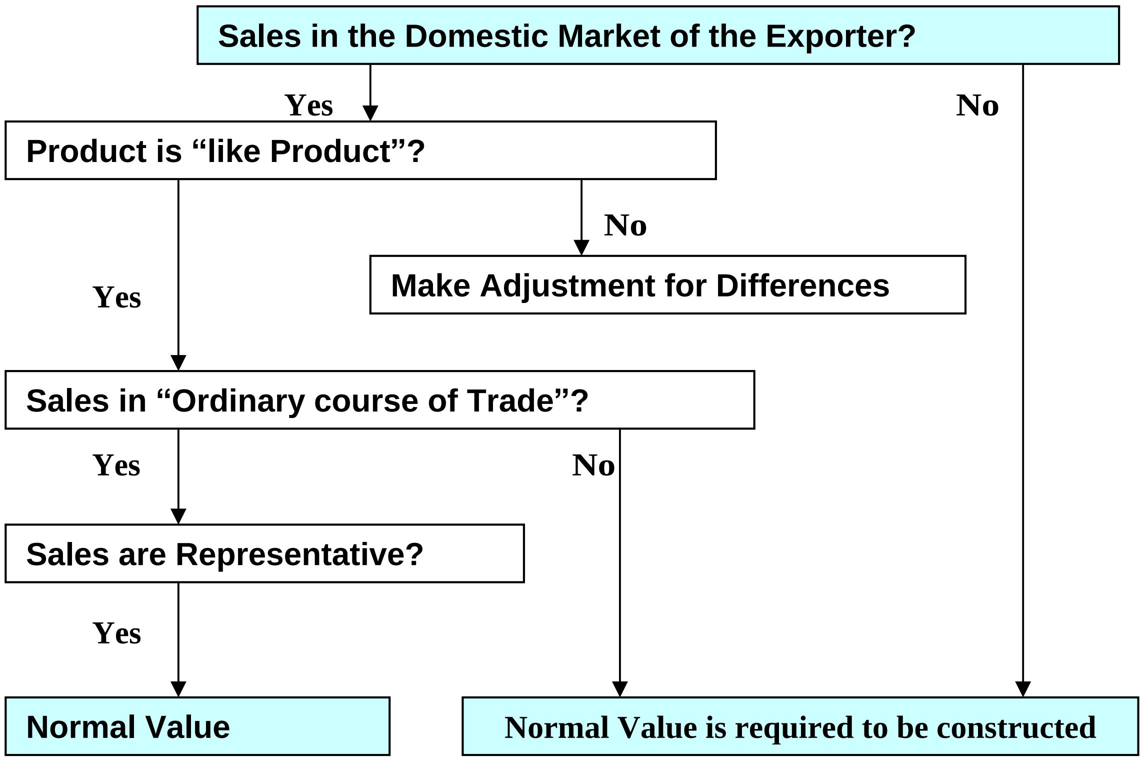
dumping.

Figure-8 **Determination of normal value**



Source: Gupta, R.K (1998)

Due to the complexity involved in determining an appropriate third country, in practice it is more convenient to use a constructed cost method for determining normal value and thus avoid some of the practical difficulties that arise in considering third country sales. It is also now accepted that the second and third methods are to be adopted only when domestic sales prices are found to be not "in the ordinary course of trade". But there is no hierarchy or priority of order in which the second or the third options are to be used. Before determination of the normal values the investigating authorities will identify the 'like product' in the exporting country (domestic like product) whose normal value is to be worked out.

4.2.1 'Like Product' in the country of export

Article 2.6 of the Agreement stipulates that for the purpose of this agreement the term "like product" (*product similaire*) shall be interpreted to mean a product, which is identical i.e. alike in all respect to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects; has characteristics closely resembling those of the product under consideration. Generally, the criteria followed by various authorities in determining like product, with variations in practices are: Commercial substitutability, Physical/ chemical characteristics, Uses, Channels of distribution, Customers' and producers' perception of the product, Common manufacturing facilities, and Prices. In the dispute between Poland and Thailand[2] involving steel beams, the WTO panel clarified that "*narrower* the category, the fewer products other than the like product will be included in the category, which would be consistent with the goal of obtaining results that approximate as closely as possible to the price of the like product in the ordinary course of trade in the domestic market of the exporting country".

Section 771 of the U.S. Tariff Act of 1930 provides the definition for the 'foreign like product' to be used in dumping determination. It deals with the physical characteristics

[2] Panel Report – WT/DS122/R

and the commercial value of the merchandise produced in the exporting country, which may be considered by the investigating authority to be reasonably comparable to the merchandise under consideration. For the purpose of injury determination however, ITC has a different standard for the ‘domestic like product’. In its PET Films investigation the USITC concluded that the general similarity in physical characteristics, the general similarity in production processes and production facilities, the single product perceptions of US producers and the similar channels of distribution indicate that PET films is a single like product in the investigation though it also noted that most PET films have distinct, mutually exclusive end use based on purchaser requirements and are generally not substitutable for one another in a particular end use.

The EC definition of “like product” concentrates on the physical characteristics of the product. The EC does not follow any specific guideline, and rather makes a case-by-case determination of like product. However, from the case histories the general practice in the EC appears to be that the export product and the domestic product must be identical or at least closely resembling. In order to determine whether products are like products, the EC authorities examine certain factors like raw materials used to manufacture the products, their chemical compositions, their physical characteristics, their applications and end-use etc. In the *Polyester Yarn case*, involving India, the EC held that the Yarn (excluding sewing threads) having very similar physical characteristics, are manufactured using the same technology and with the same type of equipment, and are marketed under similar commercial policies. Hence they should be treated as “like products”.

India also follows the same GATT principle of like product and concentrates on the physical characteristics, uses and the manufacturing process etc of the products in the exporting country for determining the normal value of the product. The guiding principle is the technical and commercial substitutability of the products to the product under consideration. In the *Catalyst case*[3] involving M/s Haldar Topsoe A.S. (HTAS), the designated authority rejected the claim of the defending exporters that the product exported was a new product manufactured from different raw materials compared to other manufacturers and therefore, should not be treated as a like product. The designated authority held that the product in question being a technical substitute of the catalysts produced by the domestic industry should, be treated as like product.

One of the contentious issue in the like product determination is the concept of 'consumer perception' and interchangeability of the products being compared as like product. Both, the EC and the US authorities take into account the consumer perception and usage for determining the like product in the investigations. These issues give a lot of discretion to the authorities to decide the like article. Therefore, there is need to increase legal certainty by limiting the discretion available to the authorities.

4.2.2 Sales not *"in the ordinary course of trade"*

One of the most complicated questions in antidumping investigations is the determination of whether the sales in the exporting country's domestic market are made in the "ordinary

[3] Notification No. ADD/1W/39/95-96 dated 7th May 1997

course of trade" or not. Article 2 of the Agreement defines the specific circumstances in which home market sales at prices below the cost of production may be considered as not made in the "ordinary course of trade" and thus may be disregarded for determination of normal value. There are three basic grounds under which the domestic sales of the like product in the exporting country can be disregarded. They are:

i) The sales in the domestic market do not provide for recovery of cost within a reasonable period of time, i.e., below cost sales; or

i) The sales are not representative, i.e., insignificant volume of sale; or

ii) The sales are not reliable or not at arms-length.

The first condition under which countries determine that sales are not made in the ordinary course of trade is, if the sales in the domestic market of the exporter are made below cost. Sales made at prices that are below per unit fixed and variable costs plus administrative, selling and general costs are treated as not in the ordinary course of trade. Such below cost sales must be within an extended period of time (normally one year, but in no case less than six months), and they must be made in substantial quantities i.e., when (a) the weighted average selling price is below the weighted average cost; or (b) 20% of the **sales by volume** were below cost. Finally, sales made below costs may only be disregarded in the determination of normal value where they do not permit recovery of costs within a reasonable period of time. However, 'reasonable period of time' has not been defined anywhere in the agreement. If the sales are below cost when made but are above the weighted-average cost over the period of the investigation, the agreement provides that they allow for recovery of costs within a reasonable period of time. The second and third reasons for not accepting certain domestic sales as not being in the ordinary course of trade, i.e., the related party sale or affiliated sales and non-representative sales are also complex issues affecting the normal value to a large extent.

4.2.3 EC method of Normal value calculation

The EC antidumping Regulation gives preference to the use of the domestic market price in the exporting country or the country of origin for determination of normal value, if the sales are in the ordinary course of trade as explained above. The domestic price must be net of taxes and all discounts, and rebates may be deducted from the domestic prices provided they are “directly linked” to the sales under consideration. Deferred discounts may be deducted if they are based on a consistent practice or on an undertaking to comply with the conditions required to qualify for the deferred discounts. For the purpose of determining whether the volume of domestic sales is ‘sufficient’, the EC uses the “5 percent representative test” as mandated under Article 2.2 of the Agreement. An exporter’s domestic sales will generally be considered sufficiently representative if they constitute 5% or more of the volume of like product he **sold to the community**. However, the domestic price is disregarded if:

- There is no sale, or insufficient sale of the like product in the domestic market; or
- There is no sale of the like product “in the ordinary course of trade” in the domestic market; or such sales do not permit a proper comparison.

- In such cases the constructed value, or the export price of a like product to an appropriate third country is used for determining the normal value.

4.2.4 Normal Value determination in the U.S.

The US law recognises dumping as the sale or likely sale of goods at ‘less than fair value’ (LTFV). The critical test of whether a foreign product is being dumped in the United States market at LTFV is to establish that the good is being sold in the US market at a price below its normal value or below the cost of production. For dumping to occur, a foreign firm must sell a product in the U.S. at a price below the sales price in the country of origin (**price dumping**) or below cost of production (**cost dumping**). The price in the home market in the normal course of trade is referred to as the product’s “normal value”. In the absence of available home market sales, the price of the product in a third country export market may be used as a proxy. If neither of these prices is available, the product’s cost of production plus profit (constructed price) may be used to establish the product’s normal value. Margin of dumping is basically obtained by deducting the export sales price (or sometimes constructed export price) from the domestic (home market) sales price.

Under the US law, although preference is given to compare US sales price to home market sales price of the exporter, home market sales will be utilized only if the home market sales are deemed “viable”. The viability test in the US is also the 5% test as in the case of the EU. It is typically performed on aggregate volume/ quantity of exports by the exporting company. However, US law contains a possible exception to disregard the domestic prices even if the 5% test is passed, if the Commerce Department determines that a "particular market situation" exists in the home market that would not permit a proper comparison. Neither the statute nor the Department's regulation defines a "particular market situation". Legislative history suggests that this exemption is revoked only to address particular unusual situations like, single home market sales, government control on pricing, or seasonal pricing, hyper-inflation etc. However, the DOC appears to be willing to apply these exceptions to more common scenarios. In the preliminary determination of *Salmon from Chile*, the Commerce Department (DOC) ruled that the grade of salmon sold in Chile was quite different from the grade sold in the U.S. and invoked the "particular market situation clause". If the home market price does not pass the "viability test" the DOC would seek to examine the foreign company's sales of the targeted merchandise to a third country which must also pass the 5% test. But typically the DOC accepts the third country sales having the highest volume. The third option, more frequently used, is the construction of the normal value.

4.2.5 Normal Value determination in India

Annexure I to Rule 10 of the notification[4] read with section 9-A (C) of the Customs Tariff Act 1975 provides the basis for determination of normal value in Indian antidumping investigations. In Indian investigations the normal value is the comparable price at which the goods under complaint are sold, in the "ordinary course of trade" in the domestic market. It does not provide any specific criteria for the threshold volume of trade within the country or volume of exports to the third country to treat the price as the normal value as in the case of the US and the EU. Rule 2 in Annexure I to the Antidumping Rules states that in determining normal value, sales below cost of production plus administrative, selling and general expenses (not including Profit) to be considered "not in the ordinary course of trade". Related party sales are also to be disregarded. Indian case laws show that the Indian authorities give primacy to reliable domestic market sales price data than the second and third option if this information is available through any source. If the domestic sale data is not representative or cannot be accepted because of 'particular market situation' existing in the home market of the exporter, the Authority proceeds with the construction of the normal value rather than accepting the third country exports. Since appropriate third country has not been defined in the Rules the Authority proceeds to accept the domestic industry's cost data to construct the normal value even if the defendants want their third country data to be relied upon.

4.3 Sales below cost of production

The Antidumping Agreement requires the antidumping investigation to determine whether a sufficient number of sales are above the cost of production to justify using those sales to calculate the normal value. However, the statute does not specify how the investigating

[4] Customs Tariff (identification, assessment and collection of Antidumping duty on dumped article and

authority should make that determination. As a matter of practice most of the authorities use the method, which is popularly known as "20% rule", but the application of this rule is again different from country to country.

Ordinary Course of Trade

- "Related Sales" not accepted as Normal Value, but used as base for 'Constructed Normal Value" calculation
- Volume of Sales in domestic market must be >5% of total exports within "reasonable time": Generally 6 Months
- **In US** : Profitable Sale> 80%, all sales accepted for Normal Value Calculation, otherwise non-profitable sales are disregarded
- **In the EC :**
  Sale made with Profit> 80%: Normal Value based on all sales (including those made at loss)
  Sales made with Profit at ≤ 80% but ≥ 10%: Normal Value based on profitable sales and sales made at loss ignored
  Sales made with Profit < 10%: Constructed Normal Value
- **India** : follows practice similar to the US

In practice, the EC authorities disregard those individual transactions below the average cost of production if they represent a substantial volume (more than 20% of total sales). In this case, normal value is established on the basis of the average price for the remaining profitable sales, unless such remaining profitable sales represent less than 10% of total sales.

Cost of production, for the purpose of sale in ordinary course of trade in the home market, is calculated as the manufacturing cost (both fixed and variable cost) plus

for determination of injury) Rules 1995.

administrative, selling and general costs appropriately allocated for the product under consideration. As far as domestic sales below cost of production is concerned US Commerce also follows the “20% rule” but with a difference. If 80% sales are above the cost of production (measured by volume), the Commerce Department uses all of the sales to determine foreign market value. But if the number of below cost sales are above 20% by volume it excludes those sales below cost and calculates weighted average price thus raising the average price and so also the dumping margin.

In India, the designated authority disregards those sales when the weighted average selling price of the article is below the weighted average per unit costs, or when the volume of the sales below per unit costs represent more than 20% of the volume sold in the domestic market. The price will be considered to provide for recovery of costs within a reasonable time if they are above weighted-average per unit costs for the period of investigation, even though they might have been below per unit cost at the time of sale.

4.4 Treatment of Related Party Sales

When the buyers and sellers in the domestic market of the exporter are related or affiliated, those transactions may not reflect correct values and therefore, should be disregarded from the normal value calculation. The rules however, permit use of downstream sales transactions in affiliated sales for working out the normal value after making allowance for level of trade and selling cost and profits from the affiliated seller to the first unrelated buyer. Appellate Body decisions[5] however, provide that the rules applied for determination of normal value in an antidumping investigation should be conveyed to the exporters.

The EC systematically disregards sales between associated parties and normal value is established on the basis of sales to unrelated parties. In case of sales made through a related sales company EC applies its controversial “single economic unit” doctrine and normal value is determined at the level of the resale by sales company to the first independent buyer and not at the level of sale by the manufacturing company to the sales company. This normally leads to higher normal value and higher dumping margin. The criticism generated by the application of the single economic unit doctrine led to the introduction of a special adjustment for the so-called difference in “level of trade” in the WTO Anti-dumping Agreement. The EC antidumping Regulation does not define the term “associates”. But in practice, the EC authorities interpret this term very broadly. A Company would be considered as an associated party, if it holds more than 1% of the exporter’s capital, or the exporter holds more than 5% of this company’s capital. The term “Compensatory arrangement” has also not been defined in the EC Regulations and has been used very rarely. Generally, sales with differentiated prices with clear distinction in terms of quantities sold and clear difference, in terms of cost and prices for each type of customer are not disregarded but adjusted for the level of trade.

[5] WT/DS184/AB/R

Related Party Sales in the US: In selecting the home market sales appropriate for comparison with each grouping of US sales, the department eliminates below cost home market sales, scrutinizes home market related party sales to accept only the so-called ‘arms-length sales’ and strictly determines home market ‘like product’ identical to the product sold in US for comparison. The order, in which those analyses are made, tends to increase the dumping margin. The US law requires the respondents to report all sales of the targeted merchandise in their home market (or the third county) to “unaffiliated” customers and to “affiliated” customers that consume the merchandise. It is important to note that the sales to an affiliated customer who resells the concerned merchandise, are not to be included in the home market sales universe, but sales by the foreign company’s affiliates in the home market for the same merchandise, will be included for determination of the normal value with applicable adjustments. Comparing the average price of sales to each affiliated customer with the average price of sales of the same product, by the same producer, to all unaffiliated customers is known as USDOC’s arms length test. This consideration of the affiliated company’s resale price inflates the dumping margin considerably.

As per the US statute and Department regulations the term “affiliated persons” is defined by the concept of ‘affiliation by control’. Under Commerce Department’s regulations, companies may be considered affiliated if the company is “in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer become reliant upon each other”. It may not require equity relationship. Under this widened definition the foreign company is forced to obtain significant sales and cost data from an affiliated customer over whom it has little or no control. This is one of the biggest burdens on the foreign party in antidumping investigation. When confronting sales to affiliated customers the Commerce Department also has a test for determining whether sales are at "arms length". Traditionally, Commerce uses so-called "99.5% test" which analyses whether the prices on transactions to an affiliated customer were at least 99.5% or more than the prices on transaction to unaffiliated customers. This test was challenged in the WTO. The appellate Body ruled in *United States –Antidumping Measures on Certain Hot Rolled Steel from Japan* on the grounds that this practice of US Commerce violated Article 2.1 of the Agreement.

Appellate Body[6] considered this issue among others, whether the so-called method of "99.5 percent" or the "arms length" test used by the US, about the exclusion and replacement of certain home market sales to parties affiliated with an investigated exporter, from the calculation of normal value, were consistent with Article 2.1 of the Agreement on Antidumping. It was held that such practice of USDOC is not consistent with Art 2.4 of the Agreement. The US contended that Article 2.1 of the ADA did not specify how to determine whether sales were made in the ordinary course of trade, and the "arms length test" was one permissible way of making this determination, on the basis of consideration whether sales to affiliates were made at prices that are comparable to those of sales to

[6] Report of the Appellate Body-WT/DS184/AB/R US Antidumping measures on certain Hot-Rolled Steel Products from Japan.

unaffiliated customers. While upholding the panel's findings, the Appellate Body concluded that the 99.5% test applied by the US was not even-handed. But it clarified that "the methods for verifying whether high and low priced sales to affiliates were in the ordinary course of trade need not be identical. As the US practice stands now, if all sales by the affiliated reseller amounts to less than 5% of total home market sale of the subject merchandise, then the respondent need not report that affiliated reseller's sales.

Related Party Sales in India: Antidumping Rules in India does not contain any specific provision regarding the treatment to be given to related party sales in the domestic market of the exporter for the purpose of determination of normal value. The Rules also do not define how to determine whether the buyer and seller are related. However, in practice the Authority in India allows 'level of trade' adjustment to such sales, when the buyer and seller are related through equity participation or otherwise.

4.5 Constructed normal value

Article 2.2 of the AD Agreement provides that when the domestic sales or third country sales are not in the ordinary course of trade or when because of the "particular market situation" or low volume of sales in the domestic market of the exporting country normal value cannot be determined on that basis, it needs to be constructed. The constructed normal value of the like product is, cost of manufacturing of the merchandise in the country of export or origin, plus the selling, administrative and general expenses**, and a**

reasonable profit. Article 2.2.1 of Antidumping Agreement provides very broad and general provisions for allocation of costs for determination of constructed normal value. Article 2.2.2 provide the method of calculation of administrative, selling and general costs and profits based on actual data pertaining to production and sales, again in the ordinary course of trade. It also provides for adopting reasonable methods for calculating these costs based on actual amount incurred and realised by the exporter/ producer either for same general categories of products in the country of origin, or weighted average of these expenses incurred and realised on the like products in the domestic market of the country of origin, or any other reasonable method. However, the practices of determination and treatment to various elements of cost differ in different countries.

4.5.1 Constructed Normal Value in the EC

Where there are grounds for disregarding the domestic price, the EC Antidumping Regulation leaves the EC authorities with complete discretion to base normal value either on ‘constructed value’, or on the ‘export price to third countries’. In practice, however, the EC authorities never use the export price to third countries. In EC, the constructed value is determined by adding the cost of production and a reasonable profit margin. Cost of production is calculated by adding the manufacturing cost in the country of origin and a “reasonable amount for selling, general and administrative expenses (SGA)”. A typical calculation for “constructed normal value” in EC is as follows:

Manufacturing cost: Material cost duly adjusted for procurement 'in the ordinary course of trade' and rebated for taxes and duties on inputs, which are not chargeable for export consignments.

(+) **Direct labour and manufacturing overheads**

(+) **Selling, general and administrative (SG&A)** expenses with respect to the domestic sale of the product concerned. As per WTO Agreement, if the domestic sale of the product falls below 5% threshold the SGA expenses are calculated by referring to the SGA expenses of other exporters of the product concerned. If that option is also not available, the reasonable amount of SGA expenses will be calculated "on any other reasonable basis". However, EC never uses the second method of referring to SGA expenses in the "same business sector" and follows "any other reasonable basis". Interestingly, wherever EC authorities apply the "single economic unit" doctrine, the SGA expenses of the related sales companies are also included in the constructed value. EC further provides for allocation of expenses on export sales and domestic sales on turnover basis.

(+) **Reasonable profit margin**: It generally mirrors the method adopted for SGA expenses calculation. But interestingly the transactions done at profit only are taken in to account for calculating average profit and transactions made at loss are ignored, thereby inflating the profit margin. In case no product specific data is available Commission tends to use "any other reasonable basis" to calculate the profit margin.

4.5.2 Constructed normal value calculation in the US

The US Department of Commerce Constructed value calculations are very elaborate and complex. A typical calculation is as follows:

1. **Cost of material**: Actual cost of the raw materials, components, and other inputs including any taxes and quality control costs etc on the merchandise sold in the United States (as opposed to cost of production of the product, which is for the home market of the exporter). But if the material supplies are from the related parties, Commerce Department will adjust the material cost upwards. Here again Commerce applies the 20% test, i.e. if one company owns 20% or more of the other company's stocks, the company is deemed to be related. This threshold has subsequently been reduced to 5%, casting even a wider net. In case of the related party sales, the burden shifts to the foreign company to prove the reasonableness of the price charged between the two companies and it becomes extremely difficult to provide satisfactory data and Commerce tends to use "facts available" to calculate the cost.
2. (+) **Labour cost**: All workers related costs including prorated bonus paid or payable outside the investigation period are included.
3. (+) **Overhead costs**: including fixed and variable overheads, R&D expenses prior to commercialisation of the product allocated over its expected life

4. (+) **General and Administrative expenses** for the investigation period allocated over the "Cost of Goods sold" basis. Commerce also includes Interests on finances i.e. finance cost, and non-operating expenses in the G&A expenses.

5. (+) **Packing:** Commerce takes the cost of packing for the foreign market instead of home market for constructed normal value.

6. (+) **Selling Expenses** based on the exporter's home market. But when there are no substantial sales in the home market, selling expenses from the US market are used as substitute.

7. (-) **Duties and taxes** on the materials that are rebated when merchandise is exported unless these inputs are obtained through duty remission or suspension routes.

8. (+) **Profit**: Earlier US law imposed a statutory minimum profit of 8%, but the practice was changed after the Uruguay Round. Now the practice is to use the price and cost submitted by the foreign supplier to calculate the actual average profit on the sales actually being made by the company. Interestingly here also the Department uses only the sales above the cost and not all sales for calculating average profit, which naturally pushes the average profit up and the department would use that higher profit margin for constructing the normal value and the dumping margin will normally be very high. This practice was challenged in the WTO in a case involving a similar EU practice. The Appellate body has ruled in the *EC-Antidumping duty on Imports of Cotton Type Bed Linen from India* case that the

authorities must include all sales in determining the profit rates, not just above cost sales.

9. (±) US law permits adjustment to the constructed value for the **credit costs.**

4.5.3 Constructed Normal Value in India

Rules 3, 4, and 5 of Annexure I to the Indian Antidumping rules provide the guidelines for determination of constructed normal value and appropriation of different costs including SG&A cost. But it does not provide a very accurate method of calculating the constructed normal value. However, India has decided a large number of cases on the basis of constructed normal vale. Normal value in those cases has been constructed based upon acceptable accounting standards and facts available. For the purpose of construction of normal value, the cost of production of the like good, in the country of origin, is taken provided all costs have been properly allocated, including amortization of capital expenditures and development costs. The selling, administrative and general charges are added to the manufacturing cost and a reasonable profit is also added. As far as selling, general and administrative charges and profit is concerned, the Rules are identical to Art 2.2.2 of the WTO Agreement. For the purpose of procurement cost of inputs the concept of ordinary course of trade is also applied and for inputs captively produced or sourced from an affiliate, transfer prices are taken into account with proper adjustment. The Designated Authority resorts to “facts available’ only when the domestic costs of the exporters are not available or not reliable or the exporter under investigation does not cooperate. In the case of *import of Certain Polyester Staple Fibres (PSF) originating in or exported from Korea*[7], and several other cases, where none of the exporters involved in the investigation cooperated in the investigation, the Designated authority relied upon 'facts available' and Constructed the normal value. The facts available, in the Indian antidumping investigations are generally based on the adjusted cost data of the domestic industry.

4.6 Third country sales price for comparison

The WTO Antidumping (Article 2.2) provides that if the exporter's home market sales price does not permit a proper comparison, the export price of a like product to a third country should be taken for determining the normal value, provided this price is representative. However, there is no clear guideline as to how an appropriate third country is to be identified. Several issues under consideration in the WTO Committee on Antidumping are whether there should be a strict hierarchy of adoption of second and third options and what would be the method of identification of an appropriate third country. Certain countries like Australia examine the volume of trade and the nature of trade to the third country from the country of export and compare it with the imports into Australia to decide an appropriate third country. The normal adjustments as applicable to the domestic sales price are also applicable to third country exports. However, the EC has never applied the third country export price for determining the 'normal value' so far. The Department of Commerce in US applies the highest export price to any third country as

[7] Notification No.22/1/2001-DGAD dated 24^{th} Dec 2002

the normal value instead of averaging. This method of determining the normal value is not a very popular method and least used by Members. In India in a couple of cases like *Bisphenol-A from Brazil and Russia* though the respondents provided the third country export price the same was disregarded as that was also below cost of production and the designated authority decided the case on constructed value basis. However, in the *Lead Acid Battery case*[8] certain exporter in China was found to be a 100% EOU and submitted information about all models and customers to whom those goods were sold. However, the authorities disregarded the third country exports of the manufacturer/ exporter and also the domestic prices of the other manufacturers of the same products on the grounds of difference in brand image and proceeded to construct the normal value.

4.7 Determination of Export Price

Article 2.2 of WTO Agreement on Antidumping provides that "fair comparison shall be made between the "export price" and the "normal value". Therefor, after deriving the "normal value" as established above, the next step in an antidumping determination is the inquiry into the "export price". Article 2.3 of the Agreement also provides that " in cases where there is no export price, or where it appears to the authorities concerned that the export price is unreliable because of *association or compensatory arrangement* between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent

[8] Notification No. 67/1/2000-DGAD dated 7th Dec 2001

buyer…". This provision provides for two different kinds of treatment for the Export i.e. "actual export price" or "constructed export price".

4.7.1 Export Price Determination in the EU

The EC antidumping Regulation provides that export price for comparison purpose can be based on one of the above. The "**actual export price**" in EC regulation is the "price actually paid or payable for the product sold for export from the exporting country to the Community". But EC authorities almost always use "the price actually paid" for comparison. The "price payable" refers to future transactions based on the contracts or 'invoiced but not yet paid' deals. But this method is rarely used in EC. The export price is always net of taxes and discounts and rebates directly linked to the sales.

However, in the EU, the actual export price may be rejected when there is an 'association' or a 'compensatory arrangement' between the exporter and the importer and "**constructed export price"** will be determined. This method is also used for barter trades, where no export price exists. The regulation does not define the term 'association' though it implies some kind of control or financial links between them. Mere existence of a contractual link e.g. an exclusive distribution agreement however, does not warrant the application of this provision unless such links constitute a "compensatory arrangement". The EC uses "the price at which the products are first sold to an independent or unrelated buyer" as the basis of construction of the prices. Where the products are not sold to unrelated buyers or where they are not resold in the same condition as imported, the Commission uses " any reasonable basis" for working out constructed export price. The export price at the Community frontier is worked backward from the first unrelated sale price paid by deducting all costs incurred in between the importation and sale within the Community. Costs deducted are:

- Purchase costs not included in the price paid by the associated buyer e.g. unloading, transportation, storage etc.;
- Import duties and any other taxes payable by reason of importation of the product (including antidumping duties) if not included in the purchase price paid by the associated buyer;
- A reasonable margin for overheads and profit and/ or any commission usually paid or agreed. A 5% margin is generally considered reasonable in most cases.
- When the export sales take place through more than one associate party, the EC authorities deduct the costs of all associated parties.

Independent Buyer

Cost incurred by associate buyer/s:

Overhead
Profit
Commissions
Purchase Costs
Import duties/taxes

↓

Community Frontier

The Anti-dumping Regulation makes it clear that the items for which adjustment shall be made include 'those normally borne by an importer but not paid by any party, either in or outside the Community, which appears to be associated or to have a compensatory arrangement with the importer or exporter. Therefore, costs of group companies located outside the Community are sometimes deducted.

4.7.2 Export Price Determination in the U.S.

Under the US antidumping law, sales made directly from the foreign exporter to the US Company are called "export price" (EP) sales. Sales, which are processed in any fashion through the foreign company's U.S. affiliate (even if the merchandise is shipped directly), is called "constructed export price" (CEP) sales. During the investigation the foreign respondent is supposed to report all its US sales during the investigation period, including those targeted imported merchandise which has undergone further processing or manufacturing in the US. During the price construction, the Department deducts the further processing expenses to arrive at the 'export price'. In the "constructed export price" determination, the US law provides for identifying the first unrelated sales price of the merchandise in the US and then works backward with a number of adjustments for different situations. In general, the DOC tries to compare the US prices to the home-market or third country prices on an "ex-factory" basis at the same "level of trade" and the same quantities. Thus, various adjustments are permitted to U.S price and the foreign market values to account for differences that can affect the relative prices in different markets. The objective is to adjust the invoice prices in both the situations to a common point of comparison, i.e. ex-factory prices. Chart 1 (Annexure 6) shows a typical calculation of export prices before fair comparison is done.

4.7.3 Export Price Determination in India

Section 9-A of the Customs Tariff Act 1975 provides the definition of ‘export price’ and when the export price will be constructed. It also provides for exclusion of such transactions where there is an association and compensatory arrangement between the parties to the transaction. In such cases the export prices are to be constructed on the basis of the price at which the imported articles are sold to the first unrelated customer in India. If the goods are not resold to an independent buyer, or if it undergoes further processing before being sold, the export price is to be constructed in any reasonable manner. Annexure I to the rules provides the method of adjustments to arrive at the constructed export price. As a matter of practice, the weighted average import price for the purpose of customs clearance as maintained by DGCIS are accepted as the export price if they are found to be reliable and adjusted for insurance and freight for working out FOB export price. Wherever, DGCIS data has not been found to be reliable, the Authority has used “best information available” for constructing the export price from the importers import data.

4.8 Comparison between Normal value and Export price

After calculating the ‘normal value’ or the ‘constructed normal value’ and the ‘export price’ or the ‘constructed export price’ as the case may be, the next step is to match and compare them to find if dumping exists. Price comparison requires a number of adjustments for the factors affecting prices at different levels. The methods of adjustment and comparison in different countries are as follows:

4.8.1 Prices Adjustment in EU

Before comparing the export price and normal value, allowances are made in the form of “adjustments” for the “difference affecting price comparability”. In EC antidumping investigation the following qualify for adjustment:

- Difference in physical characteristics;
- Difference in import charge and indirect taxes; and
- Difference in selling expenses.

The adjustment for the difference in physical characteristics of the like product is made by reducing the normal value of the export price by an amount corresponding to a reasonable estimate of the value of the differences, estimated on the basis of market value of the differences. In the absence of any relevant market information, the market value of the differences is estimated on the basis of difference in manufacturing cost between two products plus the S&GA expenses and profit margin. The normal value is reduced by the amount of any import charges or indirect taxes borne by the product sold in the domestic market or the material incorporated into that product that are collected (or refunded) in respect of the product exported i.e. duty draw back or duty suspension on export product.

The EC Antidumping Regulation contains a non-exhaustive list of the type of selling expenses which, in principle, qualify for an adjustment such as, transportation, insurance, handling, loading and ancillary costs; packing; credit rates; warranties, guarantees, technical assistance and other after sales services; commissions, currency conversion; and other factors not listed but affecting price comparability. These adjustments are not automatic. In order to qualify for an adjustment, the expenses must be directly linked to the sales and must have been incurred after the sale is made and that must affect the price comparability. An adjustment can also be claimed for discounts that are directly linked to the domestic sales transactions used for determining normal value. But contrary to the WTO Antidumping Agreement, no adjustments are granted by the Community, for price differences resulting from quantity differences (quantity discounts). Such price difference thus gets reflected in the dumping margin.

WTO antidumping Agreement forced the EC to amend its regulations to take into account the "difference in the level of trade" and apply adjustments. As per the amended Article 2.10 (d) of EC Regulation, an adjustment for difference in level of trade shall be granted where it is seen that the export price, including a constructed export price, is at a different level of trade from the normal value and this difference has affected price comparability. This rule allows for bringing the normal value and constructed export value to the ex-works level. Where the normal value has been established at the level of resale price of a related domestic distributor or retailer, and the export price has been established by deducting all SGA expenses, from the resale price of the related sale company in EC, an adjustment to the normal value will be warranted to bring it to the same level of trade. However, Community has been very restrictive in this adjustment and the conditionalities and burden of proof involved are too difficult for the defendants to satisfy to avail this adjustment.

4.8.2 Adjustments in US practice

The US system of adjustment of prices of the foreign market and US export price tries to ensure comparison of "identical and similar merchandise to customers at the same level of trade, at the same point in time and under similar selling condition". However, the treatment of various elements of costs and prices taken by the DOC is actually interesting. The treatment of various prices and adjustments is such that sometimes even if the prices of the merchandise in the home country of the exporter and its US export price are same, the DOC may find dumping. It all depends on how the DOC treats various costs involved in the miscellaneous activities like selling expenses etc., and how they are appropriated to the merchandise. Various adjustments are as follows:

- Level of trade adjustment: The latter requires the Commerce to find the difference in the levels at which the sales are made if they are at different marketing stages - different places in the distribution chain - and there are substantial differences in selling activities among the proposed levels. The level of trade analysis in a CEP sale in US is done after selling expenses incurred in the US are deducted.

- Home market delivery cost, prior to sale, do not qualify for adjustment as USDOC treats this cost as already reflected in the price. On the other hand, US delivery cost prior to sale is deducted fully from U.S sales price.
- Adjustment for packing cost includes material, labour, and factory overheads. The USDOC subtracts any packing charges from the exporter’s home market sales value and then adds back the amount of U.S. packing to arrive at the same level as if the merchandise were to be shipped to the US.
- As far as the difference in physical characteristics is concerned, adjustment is limited by law to the cost, reflected in the price through adjustments to difference in materials, labour, and variable factory overheads.
- Adjustments of the entire amount of duty drawbacks i.e. the entire amount of home-market import duties rebated or forgiven upon export.
- The adjustment for the difference in quantities is limited and extremely complex.
- Interestingly, US law permits profit deduction for US CEP sales prices i.e. an amount of profit attributable to all US operations where US sales are through affiliated companies. But similar deduction is not permitted in case of home market sales through affiliated companies.

- A cost-based adjustment for the sale of further processed goods in the US market in which all processing costs and selling expenses and allocated profit is adjusted from the selling price of the finished merchandise.
- US practice permits “circumstances of sale adjustments’, that are made for the difference in selling expenses between the US and foreign market, like credit expenses, inventory carrying costs, commissions, warranty and servicing expenses, advertising, technical services, warehousing.

Under the US law, the burden of proof of entitlement to a particular adjustment lies with the exporter. The exporter is also required to prove, if it claims a particular expense had not been incurred and should not be adjusted. The adjustment is calculated on a transaction-specific basis. If a sale-by-sale calculation is not possible, The DOC may accept a weighted-average calculation of the adjustments.

The US system of working out the export prices and adjustment of prices, both home market and US market prices, is extremely complex and difficult for any respondent to comprehend and respond to, leave alone defend successfully. This increases the chance of positive dumping determination and higher margins.

4.8.3 Constructed Export price in India and Price Comparison

Annexure I to the Rules provide the guidelines for various adjustments and allowances to be made to the export prices and constructed export prices for a like-to-like comparison.

The export price is constructed on the basis of actual cost of production of the concerned goods after appropriation of all costs and SG&A expenses for export production. When the actual SG&A expenses are not available, it is determined on the basis of weighted average of the actual amounts incurred and realized by the exporter or producer, under investigation, or other exporters or producers, in the country of origin in respect of production and sale of the like article in the domestic market, or any other reasonable method. This constructed price will be adjusted for duties and taxes, incurred between importation and resale, and for profit. Adjustment is also allowed for the level of trade, normally at the ex-factory level, difference in conditions and terms of sale, taxation, quantities, physical characteristics and any other differences, which are demonstrated to affect price comparability.

4.9 Dumping Margin Calculation

The last step in the dumping determination investigation is the calculation of the “dumping margin” i.e. the ‘amount by which the normal value exceeds the export price’. The Antidumping Agreement provides for calculation of dumping margin as follows:

$$\frac{\textbf{Normal Value (-) Adjusted Export Price}}{\textbf{Adjusted Export Price}} = \textbf{Dumping Margin (\%)}$$

(Margin < 2% is considered de minimis and shall not attract duty)

The WTO agreement requires, as a general rule, that the comparison between the normal values and the export prices be made between comparable sales and that the comparison be fair. It provides that dumping margins will normally be established ‘on the basis of a comparison of a “weighted average normal value” with a “weighted average of the prices of all export transactions” to the country of imports, or by comparison of normal value and export price on a transaction to transaction basis’. However, the Rule also provide an exception to the above provision and allows for comparison of normal value established on a weighted average basis to prices of individual export transactions, if a pattern of export prices is established which differs significantly among different purchasers, regions or time.

4.9.1 Practice in the EC (Zeroing)

For a long time EC tended to avoid a full average to average comparison by comparing an average normal value during the investigation period with average export price on products-type-per-product type basis (referred to as “product code number” or PCNs). In calculating the overall average for all types, the “undumped PCNs” were given zero values instead of negative values. This practice, termed “*Zeroing*”, was inflating the dumping margins so calculated.

The table below shows the dramatic effects of zeroing on dumping margin for the same set of exports and normal values. The calculation ‘A’ compares individual transactions with the normal value and calculates the average dumping margin taking into the negative values also and finds no dumping in the example. The calculation 'B' 'zeros' the negative dumping margins of the average dumping margins at the PCN level (group level) and finds a dumping margin of 3 units only. The result of third method of calculation is all the more dramatic. It 'zeros' the negative values of the dumping margins at the individual transaction levels itself, and then calculates the average of the positive margins, which works out to be 28 for the same set of transactions where actually no dumping was found by the first method.

Table-5 Examples and effects of Zeroing

Product Code No (PCN)	Export Price	Normal Value	Average to average Comparison Dumping Margin (A) (No Zeroing)	Average-average Comparison Dumping Margin (B) (Zeroing at Average level)	Average-individual Comparison Dumping Margin (C) (Zeroing at Individual level)
Sale 1	95	100	5	5	5
Sale 2	92	100	8	8	8
Sale 3	110	100	(-) 10	(-) 10	0
PCN -A	297	300	3	3	13
Sale 1	135	150	15	15	15
Sale 2	160	150	(-) 10	(-) 10	0
Sale 3	165	150	(-) 15	(-) 15	0
PCN -B	460	450	(-) 10	0	15
Total	757	750	**No Dumping**	**3**	**28**

This practice was challenged by India in the WTO panel in the *Antidumping duties on Import of Cotton type bed linen from India*[9] case and the WTO panel, as well as the Appellate

[9] Appellate Body Report, WT/DS/141/AB/R

body ruled that “Zeroing” was inconsistent with the provisions of Article 2.4.2 of the Antidumping Agreement. The Appellate Body held that “a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of “zeroing” at issue in this dispute – is not a ‘fair comparison’ between export price and normal value, as required by Article 2.4 and Article 2.4.2”. The Community had to abandon the practice of zeroing at PCN levels. As a result of this, there is an apprehension that the Community may move to individual transaction wise comparison of average normal value with the individual export prices and assign zero value to the undumped transactions instead of giving negative values. This will further increase the dumping margin.

4.9.2 Comparison: Practice in the U.S.

The US system of calculating dumping margins has undergone substantial changes after the Uruguay Round Antidumping Agreement and May 1997 antidumping regulations of the DOC. As per the revised provisions the Commerce Department must exhaust all opportunities to utilise a price-to-price comparison in the dumping calculation, before resorting to constructed value. As per this rule, DOC first examines whether the home markets sales are below cost before applying the “model match” methodology for like product determination. All below cost sales are then excluded from the “universe” before the model match methodology is employed. This results in more dumping margin calculations on price-to-price comparison, rather than on price-to-constructed value. Two more factors, which affect the dumping margin calculation adversely, are i) Exchange rate adjustments, and ii) zeroing.

i) The Exchange rate and currency conversion adjustment

Under Article 2.4.1 of the AD Agreement, if a fair comparison between export price and normal value requires a conversion of currencies, that conversion should be made at the exchange rate existing on the date of sale. It also requires the investigating authorities to ignore currency fluctuations, and allow exporters at least 60 days in an investigation to have adjusted their export prices to reflect sustained movements in exchange rates. These provisions have been incorporated into US antidumping law[10]. The USDOC fixes a benchmark rate based on moving average of the daily exchange rates for prior eight weeks to determine exchange rate fluctuations or sustained movements. But in practice DOC uses weighted-average exchange rate for the investigation period. But only the exchange rates for those particular dates on which there were US sales are used in calculation of the weighted-average rate. This weighted-average exchange rate is then used to convert all sales prices and adjustments in the foreign currencies, no matter when those sales and adjustments occurred. This approach can have dramatic effects on the margin if exchange rate fluctuation is significant. This exchange rate conversion has been one of the contentious issues in the antidumping investigation.

[10] Section 773A of the Tariff Act 1930.

ii) Average to average-to-average comparison and "Zeroing"

As discussed in the case of the European Community, the Antidumping Agreement required that the dumping calculations be based on comparison of "weighted-average normal value" to "weighted-average export price". Accordingly US law provides for comparison of weighted-average home market prices to weighted-average US prices (in the original investigations). The Department calculates weighted-average prices by model (i.e. by control numbers) and by level of trade (to the extent that there are different levels of trades), and for the entire investigation period. However, the benefit of average-to-average brought in by Agreement is offset by the DOC's practice of "zeroing". DOC follows the same practice as discussed in the case of EC, to change the negative dumping margins at "model" levels to 'zero' for the purpose of calculating the overall dumping margin for the company. This practice, like in the case of the EC, enhances the dumping margin significantly. The practice of "Zeroing has been condemned in the WTO Appellate ruling in the case of EC practices and now it is contingent upon the US to change its rules accordingly. However, the Appellate Body ruling in this respect pertains to original investigations only. The US antidumping regulation has a distinct system of annual administrative review, which determines the actual amount of duty chargeable on the subject goods. Unlike in a new investigation, in an administrative review the DOC does not compare the average export price to the average normal value for the whole investigation period. Instead, the DOC compares the export price for each individual transaction to the most contemporaneous monthly average normal value. The total value of the dumping margin is then calculated by aggregating only transaction-specific **positive** dumping margins and then multiplying the quantity sold in the US market for each model by the unit dumped value to arrive at the total dollar dumped. Comparison of individual export prices to weighted-average monthly normal that yields negative margins are ignored or assigned a "zero" value. However, the Appellate Body decision on "zeroing" does not appear to cover this practice in the administrative review process. In a recent communication to the DSB requesting for consultation[11], the European Commission has brought out at least 22 cases where the DOC has used the method of "zeroing" in its dumping margin calculations. It also shows the effect of "zeroing" leading to higher margin determination by DOC, even where the dumping margin in a normal situation (without zeroing) would have been negative.

Charts 1,2 and 3 in Annexure 6 show the methods of price comparison and calculation of antidumping duties in various situations for US antidumping investigations.

4.9.3 Indian Practice of Comparison

The Indian Rule provides for various adjustments to the normal value and export prices to bring them to the comparable level for an apple-to-apple comparison. Indian dumping margin calculation shall normally be established based on weighted-average normal value and weighted average export prices or on a transaction-to-transaction basis. However, the

[11] WT/DS294/1 G/L/630 G/ADP/D49/1 Dated 19 June 2003

weighted-average normal value can be compared on individual export transaction basis if the pattern of export prices differs significantly among different purchasers, regions or time periods where weighted-average-to-weighted-average calculation is not possible. For the purpose of comparison the Indian authorities generally accept the average exchange rate during the period of investigation for all transactions.

4.10 Treatment to imports from Non-Market Economies

The procedure discussed in this chapter is applicable only to those exports originating from the countries operating under market economy condition. The GATT/ WTO regulation does not mention anything about the Non-Market Economy, as most of the countries operating under non-market economy condition were not members of WTO. However, because of the peculiar market structures and the government intervention in commercial activities, which distort the prices, most of the countries have a separate set of rules for determination of dumping and calculation of dumping margins for exports from these economies. The detailed concept of NME imports ands the dumping margin calculation has been shown in the Annexure-7.

4.11 Comparative Analysis and discussion

The analysis of rule and practices in three major user countries of the antidumping provisions shows a large amount of asymmetry in standards and practices, though the basic principles and rules have been derived from the framework Agreement. The practices appear to be too legalistic in nature and based much less on economic criteria. Attention is focussed more on the legal texts of the agreement and various rules than economic principles of price discrimination and ways and means to tackle them. From a highly complex system of dumping determination and a plethora of rules for each step in determination in the US, to largely uncodified system in India, there is a huge gap in the perception and practices. The Indian law and the rules governing various provisions of the Agreement remain sketchy and the authorities have to derive the methods adopted by other countries, and most of the time taking recourse to 'facts available' clauses in the Rules. The U.S system is based on very high standards of accounting at each stage of the analysis and as a result most of the cases land up with constructed normal value and constructed export value calculations. This section summaries basic differences and complexities in the GATT code and national rules.

Parameters required for calculating dumping margin, and practices followed in different countries throw up several important issues. GATT Code gives the framework of determination of Normal Value, Export Price and Dumping Margin. However, none of the elements in those frameworks take into account the basic economic criteria, like market position of the producer/ exporter and underlying market distortion in the home market of the exporter. . There are two basic inconsistencies in the whole approach. The dumping determination starts with the premise that the exporters sell the products in the foreign market at a price, which is less than what it charges in the home market. But in the process of normal value determination, the home market sale is disregarded on some pretext or other and the rules and practices tend to favour a constructed normal value determination. Secondly, where there are no domestic sales or third country sales, the concept of dumping becomes doubtful. Because, for dumping to occur in one country, the exporter must have a market position, if not a dominant market position, either in home country or a third country. Then only the firm will be able to recover his costs or maximize profit. Moreover, GATT definition of dumping means that the dumping occurs when the exporter sells in the foreign market at a price less than in his home market. If there is no domestic sale, logically the question of dumping becomes doubtful. Even a predatory monopolization attempt requires a sanctuary market, or a strong domestic or third country position. Neither the WTO Rules, nor the national rules make any attempt to test these aspects before going ahead with antidumping measures. Reliance on the foreign exporter's data set appears to be low. The system has been so designed that it becomes extremely difficult for any exporter to provide all the information called for in the questionnaires[12] to the full satisfaction of the authorities. The manufacturing costs and marketing informations called for are too exhaustive. Moreover, the WTO Agreement does not provide an objective definition for 'like product' and the 'product under consideration', allowing discretionary treatment by the authorities.

The EC standards appear to be reasonably rational though the questionnaire response requirement is quite exhaustive. The system appears to be more transparent and

[12] For example the Questionnaire of US DOC for the exporters is a 130 page single spaced document requiring a large volume of data pertaining to all spheres of commercial activities

less discretionary compared to that of the USDOC, where the investigating authorities have large discretionary powers to accept or reject any information and proceed on ‘facts available’ basis. On the other hand the Indian Antidumping rules and systems are in the process of evolution and at present do not provide for very exhaustive details taking into account all possible scenarios. Frequent recourse to facts available or best available information is the biggest weakness of the Indian system, partly because of the lack of clear rules and guidelines and partly because of the lack of institutional strength to get into complex analysis.

As stated above Dumping determination rules of the WTO and the national rules make no attempt to look at the underlying conditions required for dumping to take place from an economic and operational point of view. Rather they deal with the issue at the legal level. The definition of dumping in the WTO Code and national laws treat international price discrimination and below cost sales, whereas such practices will normally be tolerated under national competition laws. The underlying thrust appears to be more on the injury to the domestic industry than the price discrimination per se. These laws hardly deal with the competition aspect. Tharakkan (2000), highlights the complexities of the procedures of construction of normal value and export prices to calculate dumping margin and state that any error of judgement by the investigating authorities can prove to be very costly for the firms being investigated. He also finds that discretion provided to the investigating authorities under the AD rules are susceptible to protectionist pressures. Antidumping Laws allow for disciplining (restricting) general trade practices of foreign competitors, such as injurious price matching, freight absorption or freight equalisation, which are not actionable under domestic competition or anti-trust laws. Antidumping law does not make allowance for selling at prices above variable cost but below fully absorbed costs i.e. marginal cost pricing which is a standard practice in any commercial activity and tolerated under domestic competition and ant-trust laws**.** Vengelers and Vandenbussche (1999) have shown that foreign price undercutting can be the result of a cost advantage of a foreign firm selling a differentiated product in the importing country market. In that case, price undercutting reflects the competitive advantage rather than unfair trade practice by the foreign party.

Both, the EU and US regulation allow for price difference between a home and foreign product when they differ in character and there are many occasions when quality differences between domestic and foreign products are acknowledged, but no price adjustments are made. For example in the Russian Motors case of 1987[13] the importer of the Russian motors into EU pleaded that while making price comparison between European motor and Russian motor, the Commission should take into account 'the difference in physical characteristics, the poor brand image of USSR products, the low quality of raw materials and the lower efficiency of after sales service compared to Community product". It was also argued that the electrical input, axle heights, noise and vibration level of the motor was different. But the Commission rejected the argument on the grounds that these differences did not affect price comparability and therefore no allowances were made (Vandenbussche and Wauthy, 1999). In India also the quality aspect of the products are ignored as long as the product being compared are technical and commercial substitutes. Thus n differentiated product markets the low-end products get affected adversely and will always attract antidumping action.

In antidumping investigations, as described in the preceding paragraphs, dumping margins are generally determined on the basis of price comparisons between the home (or third country) market and export market. However, the use of constructed value (fully allocated costs plus a reasonable profit margin) to determine dumping has increased significantly since the 1980s. According to different sources, the proportion of all dumping cases in the US decided on the constructed value basis nowadays ranges from 30 to 60% (Neils, 2000). Allocation of costs and SGA expenses in calculating constructed normal values has remained contentious. It is more so in case of price construction for NMEs. The WTO panel in the Bed linen case observed that all the three methods of arriving at the SGA and profit margins as laid down under Article 2.2 are 'imperfect" and there is no meaningful way of judging which of them is less imperfect. These imperfect practices and information asymmetry may cause authorities to make a positive determination where no dumping exists.

The practices in various countries are highly discretionary. Use of 'particular market conditions', 'and 'facts available', where the information from the respondents is either not

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[13] (L83/4, 27.3.1987)

forth coming, or disregarded by the authority under various pretexts, are two highly discretionary provisions used very frequently by the authorities. Interestingly in the US, in a case in which any "essential" element of requested information is not provided in a timely fashion, the authorities may disregard 'all' the information submitted and base their determination exclusively on facts available, although, the fundamental principle should have been to base the findings to the extent possible on facts. Other discretionary factors are 'reasonable period of time', 'reasonable profit margins', which have not been defined anywhere. Similarly, the concept of 'adjustments' for various factors in normal value and export prices has been so designed in the national laws that it allows the normal value to be inflated and the export prices to be depressed, to arrive at maximum dumping margin. The provisions again totally disregard the comparative and competitive advantages of the exporter and the exporting country in the adjustment mechanisms when the normal value and the export prices are adjusted for sale of identical and similar merchandise, to customers at the same level of trade, at the same point in time, and under similar selling conditions. The basic differences in market structures and costs, which add to the competitive advantages of the exporters, are eliminated in the process. The US system even disregards the quantity discounts in the process.

Another aberration of the antidumping system is the treatment to Non-Market Economy Countries (NMEs). The special provisions on NMEs in the national legislation of countries are the outcome of the interpretation of the normal value. GATT Article XVII provides for special treatment to state trading, which has allowed the WTO members to resort to contingent protection based on inappropriate designation of supplying countries. Practices related to non-market economies have been discussed separately in Annexure 7. As can be seen there, the practices are highly distorted and asymmetric compared to other market economies. Out of six matters related to this issue taken to the WTO Panels, in four, the panel found imposition of contingent protection measures based on designation of supplying country to be inappropriate. But the actions remained in place as the DSB ruled that way. The methods of determination of normal value in case of NMEs gives the importing countries great deal of scope to stop any export from these countries. As Hindley (1997) puts it, “the elements of unfairness and arbitrariness in EC (and U.S.) Antidumping procedures for non-market economies are naturally quite clear to the CIS countries, while those in the procedures for market economies are less clear. But unfairness and arbitrariness nevertheless exist in the procedures for market economies.”

The issue of “zeroing” remains unresolved even after the Appellate Body rulings in the EU Bed linen case involving India. The Appellate Body failed to lay specific guidelines for calculation of the weighted average normal value. The AB also failed to address the issue of back-to-back antidumping investigations, particularly in view of the fact that the EC started fresh investigation immediately after terminating the earlier investigation against the same product. Long period of investigation and subsequent litigation have damaging effect on the industry and “chilling effect” on trade, as it happened in the bed linen case and there is no provision in the agreement to check these misuses.

The above discussion indicates that the GATT AD code gives rise to asymmetries, distortions and arbitrariness in determination of dumping. The effects have been distortion of trade in terms of volumes and values for both importing and exporting countries, and prices of the commodities. The current negotiation again focuses more on the operational aspects of the agreement and disciplines in various aspects of investigations rather than introducing fundamental economic criteria into the AD system.

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