Chapter 5

Substantive Elements

INJURY DETERMINATION

Dumping *per say,* is not actionable under the GATT rules. The dumped imports must be causing injury to the domestic industry in the importing country in order to be subjected to antidumping action. This chapter deals with the provisions relating to the determination of injury to domestic industries and discusses the asymmetry in the practices across the selected countries.

5.1 WTO Provisions

Before any measure in the form of antidumping duty is imposed on the dumped imports, Article VI of the WTO Antidumping Agreement provides that, the investigating authority must establish that such dumping is causing 'material injury' to the domestic industry, or 'threatening material injury', or causing 'material retardation of the establishment' of an industry. Therefore, a finding of dumping is necessary but not sufficient for imposition of protective measure in an antidumping investigation. The dumping must be causing injury to the domestic industry to attract action under the antidumping law. The original GATT antidumping code under Article VI did not have an injury test requirement for the

antidumping action. The injury test was first introduced in the US law, and subsequently included in Article VI of GATT during the Kennedy Round (1962-67). However, the Tokyo round refined the concept, which was later incorporated in the Uruguay Round negotiations.

Injury shall unless otherwise specified, be taken to mean:

- **Material injury to a domestic industry,**
- **Threat of material injury to a domestic industry; or**
- **Material retardation of the establishment of such an industry,**

Article 3 of WTO Agreement on Antidumping

The Agreement does not provide any definition for the term "**material injury**" but only stipulates the criteria for establishing **existence of injury.** In the ordinary sense, material injury would mean existence of harm to the industry, which is not insignificant, immaterial or unimportant. This is how the US legislation defines material injury without specifying the measure of harm to the industry, which will be actionable. It appears to have been left to the subjective judgement of the authorities to decide on the basis of criteria laid down in the Agreement, whether the harm caused to the domestic industry is such that it causes material injury to the domestic industry.

A **threat of material injury** means the likelihood of material injury being caused to the domestic industry, if the dumped imports are allowed to continue to enter the importing country unchecked. In making a determination regarding existence of a threat of

material injury, the authorities need to consider the following factors: (a) Substantial increase in the dumped imports (b) Sufficient freely disposable, or imminent substantial increase in the capacity of the exporter, (c) Prices of the dumped imports having a depressing or suppressing effect on domestic price, increasing the demand for imports further, and (d) Inventories of the products being investigated. None of these factors can necessarily give decisive guidance, but the totality of the factors considered may lead to a conclusion. However, any determination has to be based on positive evidence and not on conjectures and possibilities. In the *Mexico – High fructose Corn Syrup (HFCS) from United States*[1] case the Appellate Body considered the material injury test and held that the authorities are required to prove that injury due to such dumped imports are "clearly foreseen and imminent" and therefore, found that Mexico failed to prove this "imminent and foreseen injury" to its sugar industry.

While the test of material injury or a threat of material injury can be applied to an existing domestic industry, in case of domestic industry yet to be established, the test to be applied is the test of **material retardation caused by the dumped imports**. This test applies to a "developing industry" which has not yet begun commercial production but substantial resources have been committed for commercial production to begin, or to a "nascent industry" which is yet to find its place in the market.

[1] WT/DS132/R

Article 3 of the Agreement also provides the framework for determination of injury in an antidumping investigation. **An injury investigation involves four basic steps**:

- It must be determined whether the domestic producer of the like product constitute a "**domestic industry**";
- It must be determined whether the product under investigation and the product of the domestic producers are "**like products**";
- It must be determined whether the domestic industry is experiencing **"injury"**; and
- It must be determined that there is a "**causal link"** between the dumped imports and injury.

A determination of injury, for the purpose of Article VI of GATT 1994, shall be based on **positive evidence** and shall involve an **objective examination** of both, (a) the **volume** of the dumped imports and the effect of the dumped imports, on **prices** in the domestic market for **like products**, and (b) the consequent impact of these imports on domestic producers of such products. The Agreement also provides that all known factors other than the dumped imports, which at the same time are injuring the domestic industry, must be segregated and not attributed to the dumped imports. Article 3.3 of the Agreement also contains a controversial clause of 'Cumulative assessment' of injury to domestic industry from imports from many sources provided the dumping margin established in relation to the import from each country is more than *de minimis* (i.e. > 2%) and volume of imports from each country is not negligible. Volume of imports from individual countries may be negligible or *de minimis (less than3% of total imports),* but if cumulatively these imports

are above the threshold level of 7% of all imports of the subject goods from all such sources (with individual share of less than 3%) to the country of imports. The cumulation is subject to further condition that the product being imported from various sources must be competing with each other and the domestic like product. This condition of competition is the subject of the current negotiation under the Committee on Antidumping Practices. As per these proposals under considerations, while deciding to cumulatively assess the effect of imports the authorities are required to examine the physical characteristics, technical specifications, quality, use, degree of interchangeability and fungibility, customer requirements and perceptions, common or similar channels of distribution, geographic areas of the domestic markets etc. during the period of data collection.

All countries more or less follow the above steps in their injury determination tests. However, the injury determination procedures in different countries are quite different. There is difference in institutional framework also which has been discussed in this paper.

5.2 Determination of Like Product

In injury determination, the concept of "like product" is somewhat different from that of the dumping investigation. The "like product" for the purpose of injury test is the identification of the product produced in the importing country, which is identical to the product under investigation. It defines the domain of the product and the producers of the

same who will be identified as the domestic industry for the purpose of injury determination and standing of the domestic industry to file an antidumping petition. In terms of Article 2.6 of Antidumping Agreement the term "like product"("*product similarie*"), shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. Article 2.6 also provides the basis for analysis and the manner in which the effect of the injurious imports on the domestic industry is to be examined for an affirmative injury determination. But the provision in itself is not exhaustive and confirmatory, and therefore, provides scope for further expansion of the scope of injury determination. Although the Agreement adopts the same definition of the term "like product" for the determination of the domestic industry in the importing country, various authorities adopt different standards for these determinations. In light of these provisions, the practices in different countries are discussed in the following paragraphs

5.2.1 *"Like product" in the EC*

The like product definition provided for in the EC Antidumping Regulation concentrates on the physical characteristics and interchangeability of end use of the products. In EC however, the standards for determination of domestic like product and imported like products are same. The domestic products must be identical or, at least closely resembling to the product being imported, to be treated as like product for the purpose of injury

analysis. If two products are distinct, the EC authorities will not consider them as like products even though they may compete with each other. In order to determine whether products are like products, the EC authorities may examine even the raw materials used to manufacture the product, their chemical composition, their physical characteristics, their applications and their end-use.

5.2.2 *"Like product"* in the US

In the US, the like product for dumping and injury determination has different standards. The U.S. law defines the "domestic industry" as those producers producing the "like product"- that domestically produce product, which most closely resembles the imported product under investigation. In each injury investigation the International Trade Commission (ITC) has to define the scope if its investigation and the "like product" for identification of the domestic industry as well as its "standing". In determining what products are included as the like product, the Commission examines whether the products have interchangeable use; similar physical appearance; common manufacturing and distribution; similar prices; and similar customer perceptions. No single factor is deterministic in isolation. The Commission considers the cost of adapting the product to a particular use, and the probability of so adapting the product in its interchangeability test. In its physical characteristic analysis, the ITC looks at that part of the product representing the majority of the product value, ignoring the nonessential attachments. The more similar the method of production, common-manufacturing facilities, common inputs etc., more is

the likelihood of the product being determined as "like product". Consumer perception plays a vital role in the ITC 'like product' determination. Even if consumers think that two products are different, if the uses and composition of the products are the same, the Commission will find a single 'like product'.

5.2.3 "Like Product" in India

As per the Indian law, "like product" means an article which is identical or alike in all respects to the article under investigation for being dumped in India, or in the absence of such an article, another article which although not alike in all respects, has characteristics closely resembling those of the articles under investigation. In the antidumping investigation concerning Purified Terephthalic Acid (PTA) the Designated Authority held that the scope of the term like article shall include those articles having closely resembling characteristics to those under investigation in the absence of articles identical or alike in all respects[2]. Accordingly it held that there is sufficient literature available to suggest that even though DMT is not identical to PTA, DMT has been and commercially substituted by PTA and, therefore, in the absence of any domestic industry producing an article identical to PTA, it is DMT which will be treated as the like product for PTA. Therefore, the technical and commercial substitutability condition is also well accepted in the Indian injury determination "like product" tests.

[2] Notification No. 14/1/96-ADD dated 4 September 1997.

Determination of domestic 'like product' assumes great importance in an antidumping investigation as it defines the scope of the investigation as well as the 'standing' of the domestic industry filing the antidumping petition. Due to the flexibility and discretion available to the authorities to determine the 'like article' based on subjective judgements, the scope of the like article can always be expanded or contracted in favour of the domestic industry.

5.3 Determination of Domestic Industry

Determination of the 'domestic industry' of the 'like product' has dual importance. It defines the eligibility of the industry, allegedly being injured, to file an antidumping petition. It also defines the scope of injury determination. Rule 2 (b) of Anti Dumping Rules 'domestic industry' constitutes the domestic producers as a whole engaged in the manufacture of the Like Article and any activity connected therewith whose collective output of said article constitutes a 'major proportion' of the total domestic production. The Agreement does not define the term 'major proportion' but the footnotes to the Agreement provide the guidelines for the purpose of determining the 'standing' of the petitioners approaching the authorities with an antidumping petition. It provides that the domestic producers expressly supporting the application should account for minimum 25% of the total production of the Like Article by the domestic industry. Support by those domestic producers whose collective output constitute more than 50% of the total production of the Like Article produced by that portion of the domestic industry

expressing either support for or opposition to the application. However, clarity on this dual test of 25% and 50% as to which of them should be the cut-off limit for determining the standing of the domestic industry has remained unresolved so far.

For the purpose of identification of the domestic producers of the 'like product' that comprise 'domestic industry', the authorities may exclude the producers who are either related to the exporters or importers or who are themselves importers of the alleged dumped product. This is a discretionary power given to the authority to be exercised under different circumstances.

The Agreement also provides for segregation of the domestic industry, in exceptional circumstances, into two or more competitive markets and treatment of producers within each market as separate industry or the purpose of injury analysis, provided that the markets are almost isolated and demand in one market is not substantially supplied by the production in the other market. This provision makes it possible to find injury even when a major portion of the domestic injury is not injured. However, in such a case the antidumping duty will be applicable on those imports of the products involved consigned for final consumption to that market/ area. This concept of geographical segregation was extended by Mexico in its *High Fructose Corn Syrup case* Mexico[3] case. Mexico argued that injury or threat could be determined only for that segment of the domestic production (in this case Mexico's sugar industry) which directly

[3] WT/DS132/R

competes with subject imports. The Panel was of the view that an analysis limited to that portion of the domestic industry's production in one market sector is sufficient for establishing injury or threat of injury to the domestic industry as inconsistent with the Agreement. This decision was however, not appealed by Mexico.

5.3.1 The EC Community Industry

The EC Antidumping Regulation defines the Community industry as:

- The community producers of the like products as a whole;
- It excludes the Community producers related to the exporters of the subject merchandise under investigation.
- For the purpose of "standing" in an antidumping investigation, the Community producers whose output of the like product represents a major proportion of the production of these products will be considered as the community industry. For this purpose the Regulation provides that the community producers in favour of an antidumping complaint will be considered to represent a major proportion of the production of the subject product when: (i) their collective output represents more than 50% of the total production of the product produced by that portion of the industry expressing their support or opposition to the complaint and (ii) they account for at least 25% of the total Community production of the like product. It conforms to Article 5.4 of the Antidumping Agreement. It also incorporates three exceptions, namely, producers related to the exporters, segregation of the domestic market into

competitive markets, and regional industries where the dumped imports injures a 'concentrated industry' in those regional markets. The EC Regulation also provides that when the Community production of the product has no separate identity, the effect of dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which include the like product.

5.3.2 The US Domestic Industry

After identifying the domestic "like product", the ITC identifies all domestic companies producing the like product and decides whether to exclude any of the domestic 'like product' producers from the injury investigation. It has also to decide whether to base its analysis on a single national industry, or a more narrowly defined regional industry. The US law is designed to protect only the U.S. industries and not all companies located within US, which may include foreign companies, set up units in the US. The ITC also excludes those companies whose primary interest is in importation than in manufacturing the like product. Commission generally bases its decision on inclusion or exclusion of the companies from the domestic industry on the following: a) structure of capital investment (dominant foreign capital invested companies are excluded); b) Technical expertise involved (mere assembly operation does not qualify for US industry status); c) Employment (Underlying purpose is to protect US jobs); d) Sourcing of parts; e) Value added; f) Other costs. But the final decision to exclude a company is subject to the ITC's discretion, not a strict legal

standard. Antidumping cases based on determination of injury to a regional industry are very rare and difficult to prove.

Section 771(c)(iv) of the US Tariff Act 1930 as amended mandates the USITC to 'focus primarily" on the part of the industry that was most likely to be injured, i.e., the merchant market when considering market share and financial performance of the industry. Therefore, 'captive production' of the domestic 'like product', that is internally transferred for processing into downstream article without entering the merchant market, is excluded from the injury analysis. However, this practice of the USITC was challenged by Japan in the DSB in *United States- Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* case. The Panel noted that the statute of the US does not require a general and exclusive focus on the merchant market when considering market share and industry performance, but only a "primary focus". However, the AB observed that an examination of only certain parts of domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole. So the evaluation in this case did not meet the requirement of "objectivity" in Article 3.1 of ADA[4]. At the same time, the AB recognized the methodology of calculating injury by the "captive production" provision and noted that "we saw no necessary inconsistency between the captive production provision, on its face, and the Antidumping Agreement". As such, the AB accepted the US argument, and its tool for calculating injury determination. This decision of AB is likely to help to find "injury" in

[4] AB Report, para.206

every determination by excluding or ignoring the larger and more profitable segments of domestic industry.

5.3.3 Domestic industry in India

In India the antidumping rules require the producers related to the exporters and importers or who are themselves importers to be excluded from the domestic industry for the purpose of injury determination. It does not give any discretion to the authorities in this regard. However, in a situation where there are very few producers and a strict exclusion criteria may land 'no domestic industry' determination or a very small section which will fall below the 'standing' threshold level of 25%, the Authority may base their decision on other factors and include all such domestic producers within the 'domestic industry' consideration. The Authority in India also excludes the production of domestic 'like product' for captive consumption for the determination of domestic industry and injury analysis. In the *Low ash metallurgical coke from China* case the Designated Authority excluded the integrated steel plants from the domestic industry consideration on the ground that they are the captive consumers of the metallurgical coke they produce.

5.4 Determination of Injury

The WTO Antidumping Agreement defines "injury" in an antidumping investigation as, (a) material injury; (b) threat of material injury, and (3) material retardation of the establishment of an industry. The most significant change in injury determination brought

about by the Uruguay Round Code is contained in Art. 3.3, dealing with the **"cumulation"** of imports from more than one country for injury determination. It legitimized the practice begun a number of years ago that was of questionable legality, under the Tokyo Round Code. As Palmeter (1996) puts it, it is no longer possible to question its legality, only its wisdom. Ninety one percent of the multi–country filings by the EU between 1980-87 were determined on the basis of cumulation. In the US, 1984 Trade and Tariff Act made it almost mandatory for the US ITC to cumulate the injury determination by incorporating the conditions under which cumulation is to be invoked. The provision provides for cumulative assessment of injury with reference to the combined effect of dumped imports from a number of countries. It denies the benefit of injury test to individual exporting countries. As a result, countries with low or negligible market share in the importing country are also clubbed with others, which may act to their detriment. The Agreement provides that where the imports of a product from more than one country are subject to simultaneous anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of article *5*[5], and the volume of imports from each country is not negligible, and (b) a cumulative assessment of the effects of the imports is appropriate in the light of

[5] Article 5.8 of the Agreement provides that the margin of dumping shall be considered de minimis if this margin is less than 2%, expresses as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3% of imports of the like product in the importing member, unless countries which individually account for less than 3% of the imports of the like product in the importing member collectively account for more than 7% of imports of the like product in the importing member.

the condition of competition between the imported products, and the condition of completion between the imported products and the like domestic product. There are various arguments, which have decried this provision of the Agreement, which will be discussed later in this chapter.

Determination of Injury involves examination of:

- **Volume of the dumped imports;**
- **Effect of the dumped imports on the prices of like product in domestic market; and**
- **The Consequential impact of these imports on domestic products**

The injury determination involves determination of 'volume effect' and 'price effect' of the dumped imports on the domestic industry. The authorities need to examine whether there has been significant increase in the volume of dumped imports either in absolute terms or relative to the production or consumption of the product in the importing country. The effect of the dumped imports on the prices is examined with reference to whether there has been a significant price undercutting by the dumped import or the dumped imports have caused depression or suppression of the prices to a significant degree affecting the domestic industry. Article 3.4 of the Agreement sets out 15 factors that must be considered among other relevant factors, in examining the impact of imports on the domestic industry and Article 3.7 provides for the additional factors to be considered in a threat determination. In practice some countries in the past had been limiting their

examination to few factors only. However, several Panel and Appellate Body decisions have now confirmed that all relevant injury factors listed in Article 3.4 are mandatory for an injury determination, and the authorities are required to consider all the listed factors in injury determination analysis[6].

5.4.1 Injury determination in the EC

The antidumping injury determination in the EC follows the same fundamental principles and steps as outlined above. The DG Trade under the European Commission who investigates "dumping" also conducts the injury determination simultaneously. The injury requirement of the Community definition follows the WTO definition of injury, though allegation of injury based on material retardation of the establishment of industry is very rare in EC.

(i) Material Injury: The EC Antidumping Regulation does not contain any definition of the concept of material injury. It lists the following factual elements that should be assessed in order to determine whether there is material injury: (a) the volume of dumped imports; (b) the effect of the dumped imports on prices in the Community market for like products; and (c) the consequent impact of the dumped imports on the Community

[6] Panel Report No WT/DS132/R *Mexico high fructose corn syrup (HCFS) from the US* and Appellate Body Report –WT/DS184/AB/R *United States-Certain Hot-Rolled Steel Products from Japan* in the HRS case the Appellate Body held that "Article 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to each potentially relevant factor and the weight to be attached to it. In every investigation, this determination turns on the "bearing" that the relevant factors have "on the state of the [domestic] industry"

industry. All these elements must be examined together by the EC authorities. No one of these elements alone can give decisive guidance.

For the injury determination, the EC authorities must first determine whether there has been a significant increase in imports, either in absolute terms, or relative to production or consumption in the Community. Thus it is possible to find a positive determination when there is a drop in imports in absolute terms but increase in relation to Community consumption. There is also no binding obligation on the EC authorities to assess injury only on the basis of the free market.

The main element the authorities look for is the "price undercutting"[7]. In most cases where price undercutting is found the EC concludes that the Community industry was injured. Authorities also see the "price depression" and "price suppression" effects of the imports on the community producers. Even if there is no price undercutting the authority may conclude that the prices of the Community industry would have been higher in the absence of dumped imports and conclude injury.

Further in order to assess the impact of the dumped imports on the Community industry, the EC authorities examine a number of elements listed in the EC Regulation e.g. (1) production and utilisation of capacity; (2) stocks; (3) sales and market share; (4) prices; (5) profits, (6) return on investment and cash flow; (7) employment; and (8) magnitude of

[7] The imported products are said to have undercut the prices if the landed cost of the imports is less than the selling price of the like product of the domestic industry.

the dumping margin etc. One or several of these elements cannot give a decisive guidance. Therefore all these elements need to be assessed as a whole by the community authorities.

(ii) Cumulation: EC regulation[8] on cumulation is not binding on the investigating authority. The EC Regulation provides that the effects of the dumped imports of different origins will be cumulatively assessed if it is determined that:

- The dumping margin established in respect of each country is more than *de minimis* i.e. >2%, and
- Imports from each country are not negligible i.e., represent a *market share* of 1% or more, (as opposed to WTO provision of *import share* of 3% or more*)* or imports from all countries with negligible export i.e., less than 1% market share but collectively accounting for a *market share* of 3% or more (as opposed to WTO provision of *import share* of 7% or more); and
- The cumulative assessment of the effect of all imports is necessary in the light of the conditions of competition between the imported and the like Community products.

However, the EC generally concludes that the conditions for cumulation exist and cumulation continues to be a more common practice in the EC. A major difference in the EC Regulation in respect of injury determination, from the WTO Agreement on Antidumping, is its *de minimis level* determined in terms of market share of the imports causing injury. The EC Regulation provides the *de minimis* level as '1% of the **market share**

[8] Article 3.4 of Council Regulation No. (EC) No. 3283/94

of the subject product under investigation' for individual countries, or '3% cumulatively', whereas the WTO provision puts the *de minimis level at* 3% for individual countries and 7% cumulatively in terms of their **share in total imports** of the subject merchandise causing injury. Only when this threshold limit is passed the EC authorities will determine, whether the dumped imports from theses countries have had an incidence on the prices of the Community producers, by comparing the prices of the imports with the prices of like Community products.

(iii) Threat of material injury:

> **A determination of a threat of material injury shall be based on facts and not merely on allegations, conjectures or remote possibility.**
>
> **-Article 3.7 of Agreement on Antidumping**

In the absence of actual material injury that can be established, the EC authorities look for evidence that there is a threat that community industry will suffer material injury in the future and such determination must be based on facts. In determining whether there is a threat of material injury the EC authorities must consider the following factors laid down in Article 3.7 of Agreement on Antidumping:

- Significant rate of increase in the dumped imports into the Community
- The freely disposable capacities of the exporters, or an imminent, substantial increase in the capacity.

- Whether the price at which the imports entering the Community have a depressing or suppressing effect on domestic prices, and affect further demand for the imports;
- Inventories of the product being investigated.

These factors must be examined as a whole as none of them alone can determine conclusively whether material injury will occur in the absence of protective measures. However, generally no case is decided on the basis of threat to material injury alone, and it is always combined with actual material injury.

(iv) Material retardation of the establishment of an industry: Neither WTO rules, nor the EC Regulations are very clear about this aspect. However, in practice, while assessing whether the dumped imports have had the consequent effect of materially retarding the establishment of an industry, the Commission will first consider whether the Community industry, as represented by the complainants, is an 'established industry', or an 'infant' or 'nascent' industry in the process of establishment. In determining whether an industry is an established or nascent one, the commission considers whether the industry in question has the necessary production facilities and required equipment and technical know-how and the past production history including non-commercial production.

5.4.2 Injury determination in the US

For preliminary determination in AD cases it is necessary for the US ITC to determine, based on available information, whether there is reasonable indication that a domestic

industry is materially injured, threatened with material injury, or the establishment of an industry is materially retarded due to alleged 'less than fair value' imports. The ITC has to determine whether (1) there is clear evidence that there is material injury or threat of material injury, and (2) likelihood exists that no contrary evidence will arise in a final investigation.

Material Injury occurs when there is "harm which is inconsequential, immaterial, or unimportant". In evaluating harm, the ITC considers (a) the volume of subject import, (b) the effect of these imports on the price of domestic like products, and (c) the impact on producers of the domestic like product. Relevant economic factors that may be considered when determining material injury include:

1. Actual or potential decline in output, sales, market share, profits, productivity, return on investment, and capacity utilization;
2. Factors affecting domestic prices;
3. Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment;
4. Actual and potential negative effects on the existing development and production efforts of domestic industry; and the margin of dumping.

Other factors may also be considered, providing flexibility to the injury determination process. But the problem with this kind of analysis is that the relationship between the trends behind these factors and the condition of domestic injury is unreliable

from a causal point of view. The method usually used for measuring injury margin is 'price under cutting'. This consists of the comparison of 'adjusted weighted average resale prices' of foreign products with the prices of similar products in the domestic market. The price difference thus measured might be simply an indicator of the economic inefficiency of the firm believed to have been injured, or distort the structure of the market in which they are operating. At present only the United States International Trade Commission seems to use counterfactual models to measure injury margins. The possibility of disclosure of confidential informations under Administrative Protective Orders (APO) in the US makes it possible for parties to antidumping cases to have such analysis carried out through their consultants. In this model the link between the injury and causation is based not on the existing trends, but on results from a counterfactual exercise, simulating what that condition would be if the measures are to be withdrawn. However, in a case involving Chile, the WTO panel held that such counterfactual analysis did not justify imposition of definitive measures.

The ITC follows the same fundamental principles laid down in the WTO Agreement and bases its determination on, a) material injury, b) threat of material injury, and c) material retardation of establishment of an industry and analyses the causal link to the dumped imports. Cumulation is also a dominant concept in US injury determination. However, the ITC injury determination involves a lot of economic analysis of large amount of data and final negative determination by the ITC is also quite high at about 30 to 40% of the cases.

(i) Material injury: To determine whether the industry has been materially injured by the dumped imports, the ITC normally looks at industry trends over a three-year period, ending with the initiation of the investigation. The Commission considers a wide variety of economic factors in three broad categories: (1) the volume of imports; (2) the price of imports, and (3) the impact of the imports on the domestic industry. It looks at the following factors: domestic consumption, domestic production, capacity built up and utilisation, shipment and inventories, employment levels, profitability, ability to raise capital, expenditure on R&D. Again no single factor is deterministic in itself. If the domestic consumption is rising while the domestic industry's market share is falling the ITC will find material injury. Domestic industry's decreased production without a tangible, market-based reason leading to decrease in capacity utilisation, shipments and employment will also indicate material injury. The Commission places a great deal of emphasis on employment, in particular. A drop in profitability is also considered as an element of material injury. Though price effect and volume effect of the dumped import play a crucial role in injury determination in the US, an interesting issue has been considered by the US ITC in the investigation of DRAM case[9]. The point decided in the case was whether changes in prices of DRAMs as a part of the product life cycle have an impact on injury determination. The ITC held that the fact that the DRAMS prices declined as a part of the product life cycle did not mean that the dumped imports were not causing material injury to the US domestic industries. The evidence of domestic prices declining in tandem, along

with consistent underselling supported a finding that less than fair value imports depressed the prices in the domestic industry to a significant degree.

(ii) Cumulation: Interestingly Cumulation is mandatory in the US for an injury determination when the complaint is against dumped imports from more than one country. While it is discretionary in most of the countries, the US Congress made cumulation mandatory in the 1984 Trade Act. However, cumulation in the US is somewhat different. The ITC cumulates imports from various countries if the following conditions are met: (a) they are all subject to investigation under either the antidumping or countervailing duty law; (b) they compete with each other and with the domestic like product; and (c) their marketing is reasonably coincidental. The second factor is most important as the US law provides for "reasonable overlap" of competition for cumulation to take place. In practice the ITC considers an argument for cumulation if the overlap is more than 5%. This limited overlap of competition can be either with the other imports or with the domestic industry, but the US statute provides for presence of both the elements, that is, overlap with the imports as well as domestic industry for cumulation to be allowed by the ITC. In assessing the degree of overlap, the ITC considers the degree of fungibility or substitutability, geographic spread of the market for the product, common distribution channels, and the period of sales, of the competing products. As far as the threshold limit for "negligible" imports is concerned, the ITC Rule follows the WTO Agreement stipulated limits. If imports from a country account for less than 3% of all imports by volume over most

[9] Publication No 2997 Oct 1996, Original USITC publication No. 2629, May 1993

recent 12-month period, it will be considered negligible and not considered for injury determination. But if all negligible countries together account for more than 7% of the volume of imports, all those negligible countries can be captured and included in the analysis through cumulation. The U.S. law also provides certain specific exceptions to cumulation. Most important among them being that the ITC cannot cumulate a country for which the USDOC has made a negative preliminary determination of dumping or subsidies. Secondly the ITC cannot cumulate if for any reason the investigation with respect to that country has been terminated.

(iii) Threat of Material injury: Irrespective of whether actual material injury test is positive or negative the ITC would examine the potential material injury to the domestic industry due to the dumped imports. In determining whether imports threaten future injury, the ITC looks at:

- The foreign companies excess capacity for the subject good; If the foreign company has expanded capacity and has no other market, it will give indication of threat of injury.
- Recent and sudden increase in the market share of the imported merchandise;
- Substantial increase in the US inventories of the imported merchandise; and
- Possible price suppressing effects of the imported merchandise, either because of large market share or because of the general condition of domestic industry.

As per the rules the ITC must find that these factors provide evidence that the threat of material injury is real and actual injury is imminent and affirmative finding is not based on mere conjectures or supposition of injury. Unlike cases involving material injury, in which cumulation is mandatory, in cases involving only threat of injury, cumulation is still discretionary with the Commission and it has to analyse the trends in various import sources to decide about cumulation.

(iv) Material Retardation: The US law allows a finding of injury if imports prevent the US domestic industry from being established. However, this is a rarely used provision and the ITC has very few cases in which they have found material retardation.

5.4.3 Determination of Injury in India

Indian Antidumping regulation follows the same fundamental rules laid down in the WTO Agreement though it does not provide a very detailed guideline for the determination of injury in the Indian context. Annexure II to the Antidumping Rules provides the framework for determination of injury caused by dumped imports. The rules provide for an objective examination of both volume and price impact of the dumped imports and consequences of this impact on the domestic industry. The volume impact is examined, either in absolute terms, or relative to production or consumption in India. The price effect is examined in terms of the "price undercutting", "price depression" or "price suppression" with respect to domestic industry, which prevents it from recovering costs

and a reasonable profit margin. The rule also lists 15 factors to be examined for an objective determination of injury, which is in tandem with the WTO Agreement.

(i) Material Injury: Determination of material injury in India is an objective examination of the volume and price of dumped imports and its impact on the domestic industry in terms of the 15 point parameter. The Authority analyses most of the factors listed based on the questionnaire responses from the domestic industries, its own verifications, and facts available. However, a very detailed objective examination as seen in the US or the EU is very much lacking. In the *Bisphenol case* the designated authority observed that the quantum as well as market share of the defendants had increased over the previous periods and the prices had fallen[10]. Though the production, capacity utilisation and sales in absolute term had shown improvement, the authority found that the price was the most important factor to the customer in determining the source of supply. Therefore, the improvement in production, capacity utilisation and sales were a direct consequence of the lowering of the prices by the domestic industry to match the declining import prices, which prevented them from realising a reasonable profit margin. On the basis of this the Authority concluded that the industry suffered material injury. However, this shows a very narrow approach to injury determination, which was possible to sustain probably at that point of time. But the current cases show some amount of detailed analysis of the economic factors along with the volume and price effects.

[10] Notification No. 9/11/94-ADD Dated 20th Nov 1995

(ii) Cumulation: Indian rules on cumulation are identical to the Agreement in terms of grounds and threshold levels for considering cumulated examination of injury. But it does not provide any other guidelines about the methods in which the competition aspects are to be examined. However, cumulation is a normal practice in India wherever it is warranted and follows the basic WTO Rules.

(iii) Threat of Material Injury: In India injury determination based only on threat to material injury is rare. It is generally determined along with the material injury determination. In the *Graphite Electrodes case* [11] the Authority simultaneously examined material injury and threat to material injury in terms of Annexure II to Rule 11 and concluded that there are enough indications that imports of graphite electrodes from the petitioners would cause a threat of material injury to the domestic industry and cited the following reasons: (a) Increase in imports of the subject good from the subject countries and history of imports from such countries, (2) Availability of sufficient capacity with the exporters to continue dumping and there was a significant margin of dumping in this case, and (c) the prices of imports had a significant depressing and/ or suppressing effect on the domestic producer's prices.

(iv) Material Retardation: The Indian Antidumping Rules do not have separate provisions for material retardation. However, this provision of the WTO should be of importance to developing countries like India, as in a way it provides protection to infant

[11] Notification No. ADD/ IW/43 dated 9th June 1997

and nascent industries from the impact of dumping. However, such cases are very rare. In the case of *Import of Bisphenol from Japan* the Authority found that establishment of the new industry set up by the complainant was being retarded by low price imports from the defendants[12]. The defendant's claim, that the problem was with the over sized plant compared to the domestic demand, and not with the imports, was not accepted by the Authority. It was held that material retardation of the domestic industry was attributed to the declining prices of the like product originating from Japan than to the size of the plant commissioned by the petitioner.

5.5 Causal Links

Establishing a causal link between the dumped imports and injury to the domestic industry is the most critical aspect of the injury determination and involves separation of other factors affecting the industry, not attributable to the dumping. While the dumping and material injury may occur simultaneously no action can be taken against such dumping, unless it is established that the dumping is the cause of such injury to the domestic industry. The WTO Agreement provides for 'demonstration' of the 'causal link' between the dumped imports and the material injury before antidumping duties can be levied. It provides for segregation and separation of other factors also causing injury to the domestic industry at the same time, and those factors are not to be attributed to domestic injury. In

[12] Notification No. 14/73/92-tpd dated 18th Feb 1994

the *US- HR Steel from Japan*[13] case, the Appellate Body ruled that, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury, which under the Antidumping Agreement justifies the imposition of antidumping duties. Appellate Body recognised the difficulty in separating and distinguishing the injurious effects of different causal factors., but held that "although the process may not be easy, this is precisely what is envisaged by the non-attribution language". In the *United States- Wheat Gluten case*[14] the Appellate Body made it clear that an antidumping investigating authority must ensure when injury caused by alternative factors is subtracted, the remaining injury still rises to the level of "material injury". The AB also held that in order to comply with the non-attribution language of Article 3.5 of the Agreement, investigating authority must make an appropriate assessment of the injury caused to the domestic industry by other known factors, and they must separate and distinguish injurious effects of dumped imports from injurious effects of those other factors. The Rules list several actors, which may be relevant for demonstrating a causal link. They include, inter alia, volume and prices of imports not sold at dumped prices, contraction in demand or change in pattern of consumption, trade restrictive practices and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. These factors are only some of the factors, which may result in an adverse impact on the domestic industry. Sometimes the domestic industry may face

[13] Appellate Body Report- WT/DS184/AB/R.
[14] AB report, WT?DS166/AB/R dated 19th January 2001.

adverse competition because of better technology adopted by the foreign producers, or because the market may be shrinking due to a change in the pattern of consumption. The examination of the authorities should be in a position to isolate such situations from those where the dumped imports only cause injury and subject the later for action under antidumping laws.

5.5.1 Causal links in the EC

Once the EC authorities have found that the Community industry is suffering material injury, the Regulation requires that they must establish the causal link to justify antidumping action. The Commission's causal link investigation follows two methods: Cumulative assessment of all imports from different sources (Cumulation), or "Concurrent injury" investigation. It also assesses the effect of other factors on the industry in a causal relation analysis to isolate the effects of such factors from injury caused by dumping.

The '**concurrent injury'** test in the EC tries to identify whether the dumped imports are the cause of the negative situation in the community industry. This is assessed by checking, whether the increase in the volume of imports, and/ or the existence of price undercutting temporarily coincides with the negative development of the financial situation of the Community industry. Where the increase in dumped imports coincides with a worsening of the economic situation of the complainants, the EC tends to assume automatically the existence of causal relationship between the two events, unless

demonstrated otherwise. In its **"other factors" examination** the EC examines the following factors to examine if they break the causal link between the injury and the dumped imports: 1) The volume and price of imports not sold at dumped prices; 2) Contraction in demand and changes in the pattern of consumption; 3) Restrictive trade practices; 4) Strong competition by producers located within the community; 5) Insufficient productivity of the Community industry; 6) Poor marketing performance and after-sales services of the Community industry; 7) Wrong assessment of market development; 8) Insufficient product quality or product range of the Community industry; 9) Exchange rate fluctuation; 10) Community industry relocation of production outside the Community. It will only be concluded that the injury is not caused by the dumped imports, where it can be unequivocally determined that injury is exclusively due to these other factors.

5.5.2 Causal links in the US

Beyond finding that the US industry is materially injured, the Commission must also determine that this injury was caused by 'less than fair value imports'. The more common approach is to look at injury and causation as related questions. The ITC follows the statutory outline of looking at the volume effect, price effects and adverse impact of dumped imports. It looks at various factors like: (1) whether the volume of imports, or the increase in volume, is significant; (2) whether the imported products have undersold the domestic products; (3) whether the domestic industry has lost sales to imported products;

and (4) whether domestic prices have been either depressed or prevented from increasing in an economically reasonable manner. The Commission analyses these factors over the three-year period preceding the petition to discern the trends during that period. If the imports have been increasing and the prices have either decreased or failed to increase reasonably, the ITC may find causation and a positive determination of injury.

5.5.3 Causal links in India

The Indian Antidumping rules provide similar guidelines for establishing and demonstrating a causal link between the dumping and injury. The Rules under Annexure II require it to be demonstrated that the dumped imports are, through the 'volume' and 'price' effects on the domestic industry, causing injury to the domestic industry. The demonstration of the causal relationship is based on examination of relevant evidence before the Designated Authority, who will examine and segregate other factors injuring the domestic industry at the same time. The Rule lists several factors, which may be taken into account for segregation of injury not caused by the dumped imports. They include volume and prices of imports not sold at dumped prices, contraction in demand or changes in the patterns of consumption, etc. However, in practice it appears that the attempt to segregate and eliminate other factors, that might be affecting the domestic industry, are pretty low and cases are decided based more on positive determination of injury than examining other factors.

5.6 Injury Margin

Without defining the term 'Injury Margin' the Agreement provides that it is desirable that the antidumping duty be less than margin of dumping so determined in an investigation if such lesser duty would be adequate to remove the injury to the domestic industry.. The Agreement however, provides that in any case the quantum of duty cannot exceed the 'dumping margin'. Thus this provision necessitates the quantification of injury to the domestic industry to estimate an 'injury margin' so that the duty to be imposed is adequate to remove the margin of injury. However, such calculation of injury margin is not mandatory or obligatory under the Agreement, nor the Agreement provides how the 'lesser duty' is to be computed. It leaves it to the judgement and discretion of the authorities to adopt such "lesser duty" rule. Most of the advanced countries, including the US do not have "lesser duty" rules in their antidumping law and impose duty to the full extent of dumping margin. However, India and EU follow the lesser duty rule scrupulously. The EC authorities construct 'target prices' (export prices) for the domestic industry for comparison with the dumped price of the exporter to arrive at the 'injury margin'. The authorities tend to assume that the prices are depressed and proceed to construct the target price. The 'injury margin' in India is calculated as the difference between the "Non-injurious Price" at which the domestic industry can produce and sell the like good in the domestic market and earn a reasonable profit, and the 'landed cost' of the imported goods (all duties paid). The Non-Injurious Price (NIP) of the domestic industry is calculated based on the cost data of the complainant industries supporting the petition. Due care is

taken to rationalize the data for factors such as low capacity utilization, inefficiency in production, high capital costs and depreciation etc. to remove the aberrations to the costs. NIP is calculated on a weighted average basis for the industry as a whole. If required data of highly inefficient producers can be ignored and NIP may be worked out based on the data of efficient producers.

Landed cost of imports are worked out on the basis of assessable value of the goods plus a reasonable handling and landing charge and applicable duties during the period of investigation. In India the authority conducts the twin test of comparison of normal value to the export price and NIP to the Landed cost to arrive at the 'dumping margin' and the 'injury margin' respectively. The duty imposed is generally the lesser of the two.

5.7 Chapter Summary and Comments

Vermulst and Water (1991) find that of the two provisions (Dumping and Injury), the provision concerning injury leaves more latitude to the administrators of the antidumping law. Examination of various provisions of national laws and practices in the three countries under reference indicate that, though the basic principles and framework for determination of injury are similar in all the countries, except for the threshold limits for cumulation in the EC, the practices and standards vary widely. While the US ITC uses economic models and counterfactual analysis for injury determination, India on the other hand appears to

lack any proper guideline and method to analyse the economic data sets, to demonstrate an affirmative injury determination. At the same time the type of information and data sought by both the US ITC and the EC through their questionnaire responses and verification visits are enormous and difficult for the foreign parties to provide.

Identification of domestic 'like product' varies widely in the US and the EC, and the process is subjective and discretionary. In fact the Agreement does not have a very clear and detailed provision for defining the 'product under investigation' and 'like product'. Countries have used the general provision in the Agreement to define the product in their own ways. This in turn affects the 'standing' of the domestic industry in an antidumping complaint. By excluding the foreign companies set up within the domestic tariff areas, the US law, in effect, reduces the threshold limit for standing and facilitates filing of antidumping complaints.

The examination of various provisions of the Agreement and the national legislation dealing with injury determination and establishing causal link between the dumping and injury indicates that there is very little substantive element in the provisions, which can conclusively prove that the injury suffered by the industry is caused by the dumped imports alone. The comments of the Appellate Body on the issue are most relevant. Yet these provisions and parameters set therein are used to establish injury and causation even where there is no conclusive evidence. It is surprising that the most crucial element, on which the final action under an antidumping action depends, is based on such

a weak economic foundation. The Agreement merely lists a number factors to be considered without telling how they are to be used, and leaves it to the subjective judgement of the authorities to decide the injury and causation, based on these and other factors. The non-attribution language of the Agreement also does not provide any clue as to how the aspect of separation and distinction of injury suffered by other factors are to be handled. The counterfactual model used in the US uses simulation techniques to evaluate the effect of the dumped imports on the domestic industry if the duties are not imposed. But it does not demonstrate existence of current injury or an extrapolation of the existing trends. However, this method seems to have at least some rational basis and requires econometric analysis through simulation techniques using large volume of industry data. But the view of the WTO Panel appears to be different, as discussed earlier. Moreover, this method may be difficult for small and developing countries to adopt.

The literature on antidumping has dealt with collusive behaviour of the domestic industries in initiating injury determination with an intention to cartelize their operation. Such collusive behaviour can artificially create a situation so as to demonstrate injury, in order to attract antidumping action, and force the foreign competitor to enter a cartel agreement. In 1989, the largest U.S. Based producers of ferrosilicon, an industrial metal, formed a cartel, set a collusive price and withdrew capacity from the market. These firms then used the drop in their sales to prove injury from dumping and AD rules were imposed in 1993 against five foreign competitors. The US firms were then free to manage the cartel. When import began to enter the U.S from another country, Brazil, US firms invited the

Brazilians to enter the cartel. The Brazilian producers did not accept the offer and were then subjected to AD action with duties. Subsequently the cartel was discovered, leading to criminal proceedings and prosecution[15]. There is a belief in the economics literature that a withdrawn AD petition is a signal that foreign and domestic firms have reached a collusive out-of-court settlement. The examination of the subjectivity and discretion involved in the analysis of factors and evidence of injury indicates that such a possibility cannot be ruled out.

The second complex issue has been **Cumulation**. It has also been one of the most controversial issues in injury determination, as it has been found to enhance the chance of a positive determination. The argument in favour of cumulation has been that" being injured in many nibbles at once is just as bad as being injured in one large bite" (Horlick 1990). Or as the " hammering effect hypothesis" implies, what is important is the injury caused by total imports of unfairly traded goods, not their distribution (Suder 1983). But the 'affirmative-injury-finding bias' of cumulation and the 'super-additivity effect' provide powerful counter argument against the practice. Tharakan *et al* (1998), estimate the change in probability of an affirmative decision due to cumulation could be nearly 42% for the EU antidumping cases and that in about 36.5% of the cumulated cases the outcome would have changed from affirmative to negative findings, if cumulation had not been used. Tharakan (1998) estimate that about 91% of all multi-country filings during the period

[15] Taylor Christopher T. (2001), *The Economic Effects of Withdrawn Antidumping Investigations: Is there Evidence of Collusive Settlements, Federal trade Commission*

1980-87 in EU were determined by the authorities on the basis of cumulation. Cumulation is particularly unfair to countries with very small import market share. Hansen and Prusa (1996) point out that cumulation encourages the domestic industries to file more multi-country petitions and file more cases against countries with smaller import market shares. In their estimate, cumulation increases the probability of an affirmative determination by 20 to 30 % and has changed ITC's decisions from negative to affirmative in about one-third of the cumulated cases ('affirmative finding bias'). They have also found that the protective effect of cumulation increases as the number of countries involved increases, holding the total market share constant ('Super-additivity effect'), This has also been supported by a later study by Tharakan *et al* (1998) for EU injury determination.

Economists argue that this affirmative finding bias and 'super-additivity effect justifies abolition of the practice or at least raising of *de minimis* injury level for AD action, combined with more stringent rules based on competition policy considerations. Cumulation should also be linked to proof of collusion, or at least the existence of an oligopolistic market structure in the countries of the defendants whose market shares are cumulated. However, the current study of the cases in the referenced countries indicate that hardly any of the exporters in foreign countries allegedly dumping and injuring the investigating country's domestic industry, have dominant market power to cause injury. Most of the time small exporters with very negligible exports and impact on the domestic industry get cumulated and eliminated because of the process involved.

Confidentiality of information and defending decisions taken based on these confidential decisions is another issue, which needs to be addressed. The authorities are required to base their decision about injury and causation, on the totality of evidence including confidential information, which cannot be revealed to other parties. This puts a tremendous burden on the defendant, who has no clue about the actual basis of determination to defend the case.