Chapter 6

Procedures

Initiations, Investigations, Reviews, And Institutional Arrangements

After analyzing the substantive provisions of the Agreement and national rules concerning antidumping practices, it is important to understand the procedural intricacies of antidumping actions in these countries. Institutional arrangements play a very important role in the antidumping system and affect the procedures, as well as the outcome of the investigations. This chapter deals with the procedures followed in the selected countries, and their institutional arrangements.

6.1 WTO Provisions

The GATT Antidumping Code provides a broad framework for the procedures to be followed at various stages of investigation and other actions under the antidumping proceedings. Members have drawn up their own procedures and institutional framework to handle these investigations and affirmative actions. This chapter analyses these procedures in the reference countries with respect to the WTO provisions. Since the institutional frameworks and the procedures followed are closely intertwined, both the issues have been

discussed side by side. With local variations, a standard antidumping investigation normally follows the following steps. (1) Initiation of the Investigation; (2) Preliminary Injury and Dumping Determination; (3) Questionnaire Response and Verification; (4) Public Hearings and Legal arguments; (5) Final Injury and Dumping Determination; (6) Antidumping Duty Orders; (7) Judicial Reviews; (8) Interim/Administrative Reviews.

Article 6 of the Agreement has laid down detailed rules on the process of investigation, including the collection of evidence and the use of sampling techniques for selecting exporters for determination of dumping margins. It requires authorities to guarantee the confidentiality of sensitive information and verify the information on which determinations are based. To ensure transparency of proceedings, authorities are required to disclose to the 'interested parties', all non-confidential information on which determinations are to be based, and provide them with adequate opportunity to comment. Article 6.11 of the Agreement defines "**interested parties**" to the investigation to include:

(i) Exporters or foreign producers or importers of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such a product;

(ii) The governments of the exporting Members and

(iii) The governments of the exporting Members, or a trade and where a majority of the members produce the like product in the territory of the importing Member.

Without explicitly declaring them interested parties to the investigation, Article 6.12 provides that the authorities shall provide opportunities for the industrial users of the product under investigation and the representatives of the consumer organisations to provide information, which is relevant to the investigation.

Article 7 of the Agreement provides guidelines for imposing **provisional measures** in the form of provisional duties or preferably, a security- by cash deposit or bond- equal to the estimated provisional duty. The authorities have to come out with a preliminary affirmative finding both in their dumping and injury investigations following due process of initiation and notice to all interested parties. Provisional measures cannot be imposed sooner than 60 days from initiation, and the duty amount cannot be more than the provisional dumping margin so estimated.

Article 8 provides for termination or suspension of provisional measures on receipt of satisfactory **voluntary undertaking** from the relevant exporter to revise its prices or cease to export at dumped prices, provided that the authorities have made a preliminary affirmative injury determination. In spite of the "price undertaking" having been given and accepted, the exporter may desire, or the authorities may decide to continue with the final investigation. If the final investigation is negative, the undertaking would lapse. The price undertaking may be monitored by the investigating authority and shall be in force till further reviews.

Total time taken for completion of investigation varies from country to country. In the EC the procedure is usually completed within one year but in no case can it exceed 15 months. In the US it takes up to 390 days for the final determination to be completed depending upon the outcome of the preliminary determination. In India it takes about one year for an investigation to be completed and compares well with other countries. But the processes are different in all the countries.

6.2 Institutional Arrangements

Institutions play a major role in any administrative and quasi-judicial proceeding. The quality of the investigation, and determination as well as the impact of any action depends on the quality and the structure of the institution handling the issue. Therefore, before analysing the practices in the reference countries, it is essential to understand the institutional arrangements and frameworks within which the trade-remedy laws, particularly antidumping actions are administered.

6.2.1 The EU

Chart 4 in Annexure 6 shows the institutional arrangement for administering antidumping action in the European Union. The Council of Ministers of the European Community is the apex decision-making body for the trade-remedy actions, including antidumping. The Council, consisting of 15 Member States of the Community, has to approve any definitive measures whether in the form of antidumping, safeguards or countervailing measures. For

imposing a definitive measure, the Council will require a vote of simple majority of its Members. An appeal against the Councils decision lies with the Court of First Instance (CFI) of the European Communities and second appeal lies with the European Court of Justice.

The European Commission (EC) is the main administrative institution to carry out all investigations, acting through the Director General (Trade) of the Commission. The EC is responsible for investigation under all trade remedy laws and drafting the regulations leading to imposition of trade remedies. The EC also has the powers to impose provisional measures in consultation with the Advisory Board. The Advisory Board is a consultative body consisting of official representatives from all 15 Member States, and has no decision-making powers. The investigating teams under the investigating officers assigned with the individual cases, conduct the investigations, verifications, and prepare all the documents required for preliminary and final determinations. EC has a well structured set up of investigating teams, consisting of specialists from various fields under the investigating officer, assigned to individual investigations and they are well equipped to handle them professionally.

6.2.2 The US

The institutional arrangement in the US for administration of its trade remedy laws is more complex. The reason is historical as has been discussed in Chapter 2. Chart 5 in Annexure-

6 shows the US institutional set up. The investigations under all trade remedy laws have been assigned to two separate agencies. The Department of Commerce (DOC), under the International Trade Administration investigates the dumping and subsidization aspects. Whereas the International Trade Commission (ITC) investigates the injury to the domestic industry caused by dumping or subsidization or surge of imports under safeguards provisions. Both the agencies have well structured investigating teams headed by investigating officers. The teams comprise of lawyers, accountants, industry analysts, and economists among others. The ITC, a quasi-judicial body under the supervision of the US Congress, determines the injury aspect and submits its reports to the DOC. The DOC is the final authority to notify all duty orders under the antidumping law.

6.2.3 India

The institutional arrangement in India is in its formative stage and therefore, weak and unstructured. Formal institutions for administration of trade remedy laws came into existence in India only in the late 1990s. Two separate institutions handle trade remedy laws in India. The Directorate General of Antidumping and Allied Duties and the Designated Authority, under the Ministry of Commerce and Industry, appointed under the law, is responsible for the investigation of all antidumping and anti-subsidy complaints, and recommend actions, including provisional and definitive duties, to the Government. The Directorate General of safeguards, under the Ministry of Finance, is responsible for investigating the complaints under safeguards provision. The DG Safeguard is a quasi-

judicial authority but its findings are recommendatory in nature. These findings are submitted to a Committee of Secretaries headed by the Commerce Secretary, in the Ministry of Commerce and Industry for approval. Once the measures are approved by the Committee of Secretaries quantitative measures are notified by the Directorate General of Foreign Trade, in the Ministry of Commerce and Industry, and/ or definitive safeguard duties are notified by the Central Board of Excise and Customs, Ministry of Finance, under the Customs Act.

The Designated Authority and the Director General of Antidumping and Allied Duties (DGAD) is responsible for conducting investigations under antidumping and countervailing laws and recommends provisional and definitive measures to the Government. However, the status of the Designated Authority and the nature of the proceedings under the Antidumping Rules in India are not very clear. Antidumping Rules and Customs Act of India do not define the nature of proceedings conducted before the DA. However, in settling certain legal issues arising out of Indian Antidumping investigations Indian courts have held that the proceedings before the Designated Authority are quasi-judicial in nature. The Law also does not recognize the role of Directorate General of Antidumping and Allied Duties (DGAD). The Designated Authority and DGAD, and the staff under him are responsible for both injury and dumping or subsidization investigations. The findings of the Designated Authority are recommendatory in nature, and after notification in the Gazette of India, are submitted to the Central Government, in the Ministry of Finance. The Government, after having

satisfied itself that the imposition of the definitive duties are in the public interest, approves imposition of definitive duties as recommended by the Designated Authority. The Central Board of Excise and Customs notifies such affirmative duties within 3 months of notification of the findings of the Designated Authority.

Being an organisation in its infancy, DGAD has a skeletal structure with just 7 investigating authorities drawn from the Indian Trade Service cadre and 4 costing officers, and a skeletal staff of about 14 members. With this staff strength and structure the organisation handles about 25 initiations among other reviews etc per year, which is almost equal to the number, handled by the US and the EU with their well-structured and large organisation base. This organisational inadequacy might be getting reflected in the quality of its investigations and findings. Institutional set up for India's AD administration has been shown in Chart 6 in Annexure 6.

6.3 Investigation Process

The process of investigation in any antidumping action is extremely important as the outcome of such investigation reflects the process undertaken. The following section examines various aspects of the investigation process as mandated under the Agreement and the asymmetries that exist in the practices in various countries.

6.3.1 Initiation of Antidumping Actions

Article 5 of the Agreement establishes the requirement for the initiation of an antidumping investigation. The Agreement provides that investigations should generally be initiated on the basis of a written request submitted "by or on behalf of the domestic industry" and such application should contain evidence of (a) dumping, (b) injury, within the meaning of the Agreement, and (c) a causal link between the dumped imports and alleged injury. The accuracy and the adequacy of the information, substantiated by relevant evidence, provided in the petitioner's application are to be examined by the investigating authority justifying the initiation of an investigation. The "standing" requirement for the "domestic industry" for filing the complaint includes, the numerical limits for determining whether there is sufficient support by domestic producers, to conclude that the request has been made on behalf of the domestic industry and thereby warrants initiation. For this the application is required to be supported by "those domestic producers whose collective output constitutes more than 50% of the total production of the 'like product' produced by that portion of the domestic industry expressing either support or opposition to the application". "However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25% of total production of the 'like product' produced by the domestic industry."

The agreement also provides for *suo moto* initiation of investigation by the authorities on the basis of information gathered from various sources, only if there is

sufficient evidence of dumping, injury and a causal link. Art. 5.8 of the Agreement provide that evidence of both dumping and injury shall be considered simultaneously. It provides for immediate rejection and termination of an investigation proceeding, where there is not sufficient evidence of either dumping or injury. If the margin of dumping is *de minimis* (less than 2%) and volume of dumped imports from a country is less than 3% individually, or 'cumulated' imports are less than 7% of total imports, this is treated as negligible for the purpose of investigation of injury.

The investigating authorities are also required to examine the accuracy and adequacy of the information provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation. This issue has been dealt with by a number of WTO panels. In the *Mexico High fructose Corn Syrup case*[1] and *Guatemala Grey Portland Cement case*[2] the panels observed that*: "An antidumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward. However, the evidence must be such that an unbiased and objective investigation authority could determine that there was sufficient evidence of dumping within the meaning of Artide 2 to justify initiation of an investigation."*

The rules provide the need to avoid publicizing an application for initiation unless a decision is taken to initiate investigation. However, the Rules also require that the respective Governments be notified before the investigation is initiated. Though there is a

[1] Panel Report-WT/DS132/R

bit of contradiction in these provisions the essence of the Rule appears to be the confidentiality of the proceedings till the initiation is notified.

(i) Initiation in the EC

The Directorate General (Trade), under the European Commission is the competent authority to initiate and investigate an antidumping complaint received from the domestic industry. An antidumping proceeding can be initiated on the basis of either a complaint received by a community industry, or on the Commission's own initiative. The complaints can be submitted to the EC or to a member state, which will forward it to the EC. Generally interim reviews are initiated *suo moto* by the Commission and *suo moto* initiation of original proceedings is done in very special circumstances. The Commission follows the practice of pre-initiation consultations with the complainants. The complainants approach the Commission officials with the draft complaint before the final version is submitted. This process avoids rejection of complaints at initiation stage. A written complaint may be submitted by "any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry". In practice, a European Federation representing the industry generally files complaints. Chart 7 in Annexure 6 shows the typical initiation process in the EU

[2] Panel Report- WT/DS156/R

The EC follows the 50% and 25% rules for deciding the 'standing' of the Community industry in the complaint. It has adopted the practice of sending pre-initiation questionnaires to the Community producers asking for information on their production and sales quantities and whether they support the complaint. An antidumping complaint must contain the evidence in support of the claim of dumping and injury and must contain the following:

- The standing of the domestic industry, their production and sales figures of the subject product, full description of the like product, and volume and value of the Community production of the product.
- Details of the dumped product and the details of the exporting countries and exporters, and Community importers of the product
- Information on the existence of dumping; and
- Information on injury caused by the dumped imports to the Community industry.

Once a complaint is filed the Commission has 45 days to decide whether to initiate an investigation or not. The EC is under obligation to verify and ensure that sufficient evidence of dumping and injury exists to justify initiation. However, the EC prefers to initiate the investigation first and then terminate it, if dumping and/ or injury cannot be established. This practice of the EC appears to be in variance with the WTO rules. The WTO rule provides that the decision to initiate a proceeding must be based on "sufficient evidence" of dumping, injury, and causation. The WTO panel deliberated on the issue of 'sufficiency' of evidence at the time of initiation, in great detail in *Guatemala Grey Portland*

Cement case. The panel viewed that the authorities failed to point out how the evidence supported any of the customary injury or threat factors set forth in Article 3.7 of the Agreement. It considered that statements and assertions unsubstantiated by any evidence do not constitute sufficient evidence of threat of injury to justify initiation. Once the investigation is initiated, it is notified in the Official Journal of the EC.

(ii) Initiation in the US

In the US, antidumping duty investigation is an administrative proceeding conducted by two different Government agencies. The US Department of Commerce (DOC) investigates the dumping part and calculates the dumping margin, while the US International Trade Commission (ITC), which is a quasi-judicial authority, determines the injury and causation. This bifurcated approach is unique to the United States. The investigation in the US usually begins when an "interested party" files a petition both with the DOC and the ITC alleging dumping and injury. Interestingly in the US, "interested party includes labour unions along with the domestic producers and trade associations. However, DOC alone can initiate an investigation on its own, whenever it determines that an investigation is warranted. Such *self-initiation* of investigation is very rare and happens in very political cases like the lumber case from Mexico or the semiconductor case from Korea. Chart 8 in Annexure 6 shows the initiation process in the US.

In the US the investigation is virtually automatic because it permits the petition to be amended from time to time. The ITC begins its investigation almost immediately, and imposes virtually no requirements on the petitioner before beginning the investigation. Because of the pre-initiation consultation carried out by the Commission before formal filing of the complaint, most of the problems are sorted out before the filing. The DOC practices are somewhat different. Though the DOC is supposed to decide about the admissibility of the complaints within 20 days of it's filing, the DOC also follows the practice of pre-initiation consultation with the petitioners and virtually always initiates investigations without rejecting. However, the US law permits 20 days extra if the DOC requires a 'special review' to be conducted to determine the 'standing' of the domestic industry to file a complaint. The 'standing test in the US law is same as the standard WTO rule. The ITC follows the 'model match' method as discussed earlier to identify the US like product producers to be included in the 'standing' determination.

(iii) Initiation in India

The procedure for initiation in India is pretty simple. The Designated Authority (DA) in the Ministry of Commerce is responsible for initiating and conducting antidumping investigation and it is a quasi-judicial proceeding under the Indian Law. Application for initiation of an investigation can be made by or in behalf of the concerned domestic industry. The Designated Authority may also initiate an investigation *suo-moto* where the DA is satisfied with the information received from the Commissioner of Customs or any

other source that sufficient evidence exists regarding dumping of goods, material injury and causal link between the two. In the past only few cases of *suo-moto* initiations were made by the DA against some Chinese exports and almost all of them were subsequently dropped.

The applications received are scrutinised to see if they are fully documented and provide adequate evidence of dumping and injury for initiation. If the evidence is not adequate or not properly documented, a deficiency letter is issued within 20 days of receipt of the application. When a fully documented petition is received, and the DA is satisfied that there is a prima facie evidence of dumping and injury, and the complainants satisfy the 'standing' requirement, the DA issues a public notice initiating the investigation within 45 days of the receipt of properly documented application. In accordance with the Rule 6(2), copies of the notification are also forwarded to all known exporters, whose details are made available by the petitioners. Chart 9 in Annexure 6 shows the Indian Initiation process.

6.3.2 Preliminary Injury and Dumping Determination

Article 6 of the Agreement provides detailed rules on the process of investigation, including the collection of evidence and Articles 7 and 8 provide for imposition of provisional measures pending final outcome of the investigation. There are substantial differences in the approach to the investigation in different countries. However, imposition of provisional duty is not automatic. Article 7 provides that provisional measures may be

applied only when a properly conducted preliminary investigations yields an affirmative finding of dumping and injury and in the authority's judgement a provisional measure is required to prevent the injury being caused to the domestic industry. Provisional measures may take the form of a provisional duty or, preferably- by cash deposit or bond- equal to the estimated provisional antidumping duty payable. The Agreement further restricts the application of provisional measures sooner than 60 days from the date of initiation of the investigation and shall not be in force for a period more than 6 months (extendable up to 9 months in exceptional cases) from the date of its imposition. In some countries preliminary determination is based on very poor standards of test and actual examination takes place at the time of final determination, while in others, the preliminary investigation itself is very elaborate and the final determination becomes a mere formality. This distinction will be more visible when the EU and the US practices are discussed in detail.

(i) Preliminary determination in the EU

Preliminary investigation in the EU is more elaborate and the standards of test are very high. Even before the preliminary finding, the EC completes most of its investigation formalities and imposition of provisional duty is not rushed through, as is the case with other countries.

After initiation of the investigation and publication of the same in the official Journal (OJ), the EC sends questionnaires to all interested parties. In an EC investigation,

the 'interested party' includes 'consumer organisations' along with the complainants, importers and exporters, and their representative associations. Exporters are also supplied a non-confidential version of the complaint. The questionnaire is very exhaustive and calls for a large variety of data. It contains questions related to dumping determination and a separate document is sought from the exporters commenting on the alleged injury to the domestic industry. The responses to them are to be submitted to the separate groups for Dumping and Injury within the EC. The exporters have 37 days, to respond to the questionnaire and comment on the alleged injury, from the date of despatch of the questionnaire. The EC generally asks most of the information and data in electronic media along with hard copies. Confidential and non-confidential versions of the responses are to be submitted separately. Where an investigation involves a large number of complainants the EC may decide to resort to sampling techniques to pick up 'representative' companies for investigation.

Once the responses are received, they are examined by the investigating authority and the case handlers. All the interested parties are allowed to inspect the non-confidential information made available to the EC by any party to an investigation to the extent that is relevant to the defense of their interests.

After submission of the questionnaire responses and examination of the same by the EC officials, the investigating officer and a team of two officers proceeds for verification of the premises of the importers and producers in the EC first to corroborate the evidence of

injury. Once the verifications within the EC are complete, the investigating officer and his team proceed to carry out verification visits at the premises of the exporting country provided the consent of the exporter has been obtained, to corroborate the information submitted in the questionnaire responses. This process is generally completed within 3 to 4 months from initiation. On the basis of these verifications the investigating team prepares a verification report. At this stage the interested parties are called to present their views orally before the EC officials in a public hearing. However, all arguments extended during the oral submission at the time of public hearing are to be followed up with written submissions. to resort to sampling techniques to pick up 'representative' companies for investigation.

. The Advisory Committee has no official decision making capacity, however, it can influence the decision making process, by providing indication of the stand that may be taken by the 'Ministerial Council' at the time of final affirmative action. The EC will get a fair idea whether the individual Member States oppose or support the action. However, the Advisory Committee cannot stop a provisional duty imposition based on the preliminary determination. If dumping and injury to the Community industry has been established in the preliminary determination, provisional duties will be imposed. The provisional duties cannot be imposed until 60 days after the initiation of the investigation nor can it be imposed any later than 9 months from initiation. Provisional duty is imposed for a period of 6 months extendable up to 9 months. Provisional duties are not actually paid. Importers are required to execute a bank guarantee or deposit an amount equivalent to the

provisional duties. The provisional duty so determined is intimated to the Council, which must accept or reject it within 1 month. However, in the event of emergency, the duty is imposed first and then the Council is intimated which may reject it with qualified majority. If, on the other hand, the investigation has demonstrated that there is no dumping or, that there is no injury or the causation is not established, the proceeding is usually terminated. In the either case the provisional determination and the imposition of provisional duty is published in the Official Journal of the EC. Chart 10 in Annexure 6 shows the EC preliminary determination process.

(ii) Preliminary Determination by the US

The US follows two different streams of investigation. The injury and dumping investigations are separated and conducted by the US ITC and DOC respectively.

Preliminary Injury determination: Within 45 days after the petition is filed, the ITC must make a preliminary determination of whether there is evidence of injury to the domestic industry based on whatever information is available. The domestic industry in its application has to show that there is a reasonable indication that an industry in the US is materially injured or threatened with material injury. The Commission publishes its schedule for the preliminary determination within a week from the filing of the petition, in the Federal register and draws up an investigation team of 5 to 6 officers from the fields of economics, law, accounting etc headed by an investigating officer to investigate the injury.

The team sends out questionnaires to the domestic industry, importers and the exporters and collects all available information about the industry. The Commission's main source of information at this stage is the questionnaire responses. The questionnaire to the importers, domestic producers and the foreign exporters is quite exhaustive and looks for evidence of injury and threat of injury. However, due to the severe time constraint the quality of information collected is generally pretty low. The commission staff also resorts to telephone interviews with the customers to understand their buying preferences and the role of price in their purchase decisions. The investigating officers also call for public hearings, called 'staff conferences' where the parties are allowed to submit additional information and arguments and clarify their respective positions. ITC allows post conference submissions and informal consultations with the staff, after the staff conference, to gather more information. On the basis of the data gathered through questionnaire and the staff conference, the investigating officer prepares, what is known as the "Staff Report", which is submitted to the Commission at least 10 days before the 45th day from the initiation. Based on the staff report, the Commission votes to determine whether there is a reasonable indication of injury. The Commission has **6** members and a tie vote is also considered affirmative. Finally, based on this vote, final opinion of the Commission is prepared and a formal notice of either positive or negative determination of injury is published in the *Federal Register*. However, due to severe time constraints, the standards of proof in a preliminary injury determination is generally poor, which can be judged from the fact that only about 15% of the findings at the preliminary stage are

negative whereas about 40% of final ITC determinations are negative. The Commission does not make separate injury determination for individual companies at both the preliminary and final stages. It takes exports from individual countries only, for its injury determination. If the determination is negative at this stage it terminates all investigations including the DOC investigation for Dumping.

Preliminary dumping determination: Shortly after the antidumping investigation is initiated, the Commerce Department forms an investigating team of about 4 to 6 persons under an investigating officer. The investigating team sends out a detailed questionnaire to the foreign manufacturers and exporters of the merchandise under investigation. The questionnaire in several parts is extremely detailed and is about 130 pages of single space document. The information sought in the questionnaire is supposed to be required for making a comparison between the "US Price" and the "foreign market value" possible. The response to the questionnaire is normally due within 30 days, but an extension of 15 days is generally granted. After the responses to the questionnaires are received, the DOC may seek supplementary responses through follow-up questions. The domestic industry may file supplementary information at this stage, which will require supplemental responses. The DOC team examines the responses and prepares a 'staff report' within 160 to 210 days from the date of petition. Though the DOC rules permit a verification procedure before the preliminary finding is made, in practice, the DOC does not undertake any verification during the preliminary determination and its findings are based mostly on the questionnaire responses. The DOC thus takes all of the claims of the companies at

their face value as long as they meet DOC's standards. On the basis of these responses and supplemental information submitted, the DOC team prepares the "Staff Report" for preliminary determination. On the basis of the staff report, the DOC publishes its preliminary findings in the *federal register* within 160 to 210 days form the petition date. The preliminary findings are always company specific and DOC may also determine an "all other rate" for those companies not involved in the investigation.

If the preliminary finding is affirmative, the estimated antidumping duty for specific exporters or a country or an "all other rate" is indicated. From the date of publication of an affirmative preliminary finding in the *federal register* the US Customs Service (Customs) "suspends liquidation" of all future imports of the product under investigation from these sources. Customs clears the goods against bonds for the estimated antidumping duty. The estimated duty set in the preliminary determination is the maximum duty liability for the importer until the DOC's final determination. The actual liability to be determined later in the investigation cannot be higher than this "cap" fixed by the preliminary determination. The "cap" can only be changed after the final dumping and injury determination. The DOC may also concur with the ITC on the issue of 'Critical Circumstances" and impose the preliminary duty 'retroactively', if the relevant criteria are fulfilled. A negative preliminary investigation by the DOC does not terminate the proceedings. However, it affects the deadline of ITC to complete its final determination. In this case the ITC has to take a final decision within 75 days after DOC's final decision. Otherwise, in case of DOC's affirmative decision, the ITC has 120 days from DOC's preliminary determination

or 45 days after Doc's final determination, whichever is later. Chart 11 in Annexure 6 shows the US preliminary determination procedures.

After the publication of the preliminary determination, the DOC issues a notice summarizing the methodologies and results and publishes them in the *federal register*. However, a full version of the decision memoranda is published on the DOC web site.

(iii) Preliminary Determination in India

A single authority conducts both injury and dumping investigation in India. Once the initiation is notified by the Designated Authority (DA), copies of the notification are forwarded to all the known exporters, importers and the respective Embassies are also notified in terms of Rule 6(2) and (3) of the Antidumping Rules. The importers are required to submit their views within 40 days from the date of the notification. The Central Board of Excise and Customs is requested to provide all the details of imports of the subject goods for the past three years. The DA then proceeds with the questionnaire response from the exporters. The standard questionnaires are sent to all producers/ exporters named in the petition eliciting response within 30 days from the date of receipt of the notice (or 37 days from the date of issue) or as may be extended by the DA. The questionnaires are also forwarded through the respective embassies. Questionnaires are also sent to all known importers and producers of the like goods in India. Though Rule 6(5) provides an opportunity to the industrial users and representative

consumer organisations, to furnish information relevant to the investigation, it does not lay down the procedures for the same and the views of these parties are rarely called for or included in the findings.

On receipt of the responses from the exporters, importers and the domestic producers, the DA examines the information and may seek additional information from any of the parties. The DA may conduct spot verification of the domestic industry to ascertain the facts to the extent possible. The non-confidential versions of the evidence presented by the parties are made available to all interested parties in a public file for inspection. Wherever, any party refuses to provide the information called for, the rules provide that the DA may record its findings on the basis of facts available. Once examination of the documents and information are over, the DA comes out with the preliminary finding based on the information provided in the questionnaire responses. The rules provide that such findings shall contain sufficiently detailed information for the preliminary determination on dumping and injury and shall refer to the matters of fact and law, which have led to the arguments being accepted or rejected. The findings of the DA are notified in the Gazette of India. If the findings are positive i.e., the DA determines positive injury and dumping margins and recommends imposition of provisional antidumping duty. The Central Government, acting on these recommendations imposes provisional duty not exceeding the dumping margin. Such duties are notified by the Department of Revenue in the Ministry of Finance under the Customs Tariff Act 1975. Provisional duty cannot be imposed before the expiry of 60 days from initiation and shall

remain in force for a period of 6 months from imposition, extendable by another 3 months. The rules also provide for termination of an investigation on the basis of Price Undertakings offered by the exporter. Chart 12 Annexure 6 shows the preliminary determination procedures in Indian antidumping investigation

6.3.3 Final Injury and Dumping Determinations, Imposition and Collection of Duty

The Agreement makes it mandatory for the authorities to come out with their final findings of the investigation within a period of 12 months from the date of initiation (extendable by another 6 months in exceptional cases). The investigation has to follow the procedures of collection of evidences, confidentiality and disclosure requirements and public hearings as laid down.

(i) Final Determination in the EC

Once the preliminary finding in an antidumping investigation is positive and the provisional duty is imposed, the investigation moves to the second stage. Since most of the substantive investigation is completed during the preliminary determination stage itself, the final determination stage in the EC is very short and limited to disclosures and final arguments only. The EC is not obliged to disclose the details upon which it has based its provisional findings prior to the imposition of provisional duties. Immediately after the publication of the imposition of provisional duty in the Official Journal (OJ), the parties to

the investigation have the right to request, and the EC is obliged to provide, as soon as possible, the disclosure of the facts and considerations that were essential for the determination of the provisional duties. Parties may also request for final disclosure of the facts and considerations on the basis of which the final determination will be made, within 30 days from the date of imposition of provisional duties. Such disclosures must take place before one month from the final determination and must give at least ten days time to the parties to comment on the disclosures.

After the disclosures and receipt of comments from the parties involved, the investigating team prepares the final determination reports and initiates the consultation process with the Advisory Committee, which may influence the decision although it has no power in decision-making. After the consultation with the Advisory Committee, the final proposal of definitive action along with the results of the consultation with the Committee are sent to the European Council, at least one month before the termination of the provisional measure. The Council may either accept or reject the proposal acting by a simple majority before expiry of the provisional measure. The Council may also decide whether and to what extent the provisional duties already imposed should be collected definitively. The Council may also take into account the Community interests. No definitive collection of the duty may be decided upon unless the facts, as finally established, show that there has been dumping and injury and the imposition of the measure is not against the interest of the Community. Once the Council approves the final measure, it is published in the OJ as an EC Regulation imposing definitive antidumping duty. The order

may also consider the retroactive imposition of the duties up to 90 days preceding the imposition of provisional duties (but not prior to the initiation) provided the conditions laid down for retroactive application is met.

After notification of the definitive duty, the national customs authorities of the individual EC Member States collect the definitive duties. The bonds or deposits taken at the time of imports against the provisional duty order are adjusted on the basis of the definitive duty order. Duties are collected definitively and no refund is granted.

A price undertaking from the exporter in the form of an undertaking to revise his prices upward to eliminate the dumping or injury margin may be accepted at any time after the imposition of provisional duties but before the imposition of definitive duties. Chart 13 in Annexure 6 shows the procedure for final determination in the EC.

(ii) Final Dumping and Injury determination in the US

The final Injury and Dumping determinations in the US are rather complicated and involve several steps by both the ITC and the DOC.

Final Injury Determination by ITC: As stated earlier, the ITC's final determination schedule depends on the outcome of DOC's preliminary as well as final determinations. The process is also longer and more complicated and the standards of tests are also higher. The ITC raises its standards to determine whether the industry is actually being materially injured. The ITC begins its final investigation even before the DOC's final results are

known. The investigators prepare questionnaires for the final determination and send them to various domestic industries, foreign producers manufacturing the merchandise and importers (both related and unrelated). The ITC investigators generally allow the interested parties to review the draft questionnaire and also comment on the draft before they are sent to the parties. The final investigation process allows enough time to the parties to respond. The responses provided in the questionnaire responses are considered "factual information" and have more credibility than the arguments submitted later by the lawyers. After the questionnaire responses are received, the investigation team evaluates them and prepares the pre-hearing staff report. This report reflects the quantitative data collected and some analysis and identification of some key issues. Based on the pre-hearing staff reports the parties submit their pre-hearing briefs. A week after the pre-hearing briefs, ITC holds a public hearing attended by the Commissioners and the ITC staff. After the public hearing the parties are allowed to submit their post hearing briefs and the "final staff report" is prepared on the basis of all the relevant information collected in the process. The "final staff report" along with various supplements becomes the basis on which the Commission makes its final decision. A public version of the staff report is made available to the interested parties and the ITC "closes the records" after 5 business days after the "final staff report" and parties only have one last chance to comment on any new factual information before the record closure. On the basis of the final staff report, the Commissioners (full Commission) take a vote on whether they believe that injury or threat of injury to domestic industry exists. The vote is always in public and generally taken about

one week before the decision is due. After the vote, the staff prepares the final decision, which is communicated, to the DOC. However, if during this period the DOC's final determination turns out to be negative, the ITC stops all its proceedings. The date on which the ITC's final injury determination is published in the *Federal Register* is the date on which the 'limited liability' comes to an end. The "cap" applicable after the DOC's preliminary and final determination ceases to exist and the duty liability becomes unlimited. The importer does not know the final cost of the imported merchandise till the duty rates are decided in an annual administrative review.

Final Dumping Determination by DOC: After publication of the decision methodologies, the DOC holds separate disclosure conferences with foreign companies and the US industries and also issues verification guidelines in preparation for conducting verification of the responses to the questionnaires. DOC sends a team of two to four people to the headquarters and production facilities of the foreign companies to verify the accuracy of the information submitted. The DOC team prepares a detailed verification report based on these visits within 2 to 3 weeks after verification. If the company fails to corroborate the facts in its response during the verification, the response is rejected and the case is decided on the basis of facts available. The DOC then releases the verification report to the parties concerned for post verification arguments and public hearings. During these arguments and public hearings the parties are allowed to submit pre-hearing briefs and rebuttal briefs. Law does not require public Hearing in the US, unless one of the

parties makes a request for a hearing. The investigating team attends the Public Hearing and seeks clarifications and verifies facts.

Within 75 days after the preliminary determination, the DOC must make its final determination. However, extension is possible up to the 135th day. The final determination of the DOC states whether there have been sales at "less than fair value" and calculates the dumping margin. If the dumping margin is below the *de minimis* level, the DOC makes a negative determination and the process is terminated. If the DOC's determination is positive, the investigation returns to the ITC for final injury determination. In either case the final determination of DOC is published in the *Federal Register*. The date of publication of the DOC's final determination is legally significant as it marks a change in the potential liability for duties. U.S law provides that between the DOC's preliminary and final determinations, the duties eventually collected can be no higher than the rate set in the preliminary determination (called "Cap"). After the final determination, the DOC changes the "Cap" to reflect the margin determined in the final determination. The new "Cap" remains in force till ITC's final determination. Chart 14 in Annexure 6 shows the final determination procedures in the US.

The standards and procedures in the final determination may be substantially different from those of the preliminary determination. DOC sometimes uses the verified data only for the final determination and may use either price-to-price or price-to-cost comparison with cost based on constructed value for comparison. However, after the final

determination DOC usually holds a disclosure conference to describe the methodologies and calculation used to reach the decision. Once the ITC also completes its final determination and if it comes out with a positive determination, the DOC issues the final antidumping duty order. This order is only an estimation of the duty liability on the imported goods and the final duty is determined through the administrative reviews. The US statute however, does not provide for collection of "lesser duty" and the duty imposed in the US antidumping cases are up to the full extent of dumping margin established during the administrative reviews.

(iii) Final Determination by India

After the preliminary findings and the antidumping duties are notified, the findings are forwarded to all interested parties including all known exporter/ producers and their associations, importers and user associations, domestic producers and their associations, and their views are solicited. The authority may also conduct spot verification on the premises of the exporter, subject to its consent, to verify the facts presented by the exporter in the questionnaire. At this stage the DA makes all the non-confidential information provided by the parties, available in the public folder for verification by the interested parties. The interested parties are required to file their comments on the preliminary findings within 40 days of the notification. The DA also provides an opportunity to the interested parties to present their views orally in a public hearing and file written submissions. The parties are also provided an opportunity of submitting rebuttal

statements. On the basis of the information provided and the arguments submitted during the hearings and facts available to the DA, the essential facts/ basis considered for the findings are disclosed to the known interested parties through a disclosure statement prepared by the DA in terms of Rule 16. The comments received against these disclosure statements are also included in the final findings of the DA. Considering all facts available and the law and reasons, which have led to the conclusion, the DA has to come out with the final finding. The final findings provide the details of the findings and the dumping margins, as well as recommended rates of antidumping duties. The findings of the DA are to be made within one year from the date of initiation (extendable by six months in exceptional cases) and published in the Gazette of India Extraordinary. Within three month from the date of Gazette notification by the DA, the Central Government, acting upon the recommendation of the DA, may notify the duties that may be levied on such exports from the identified sources. The Central Government may or may not accept the recommendation of the DA or modify the duty rates as may be deemed fit. At least in 4 cases in the past, the DA recommended imposition of antidumping duty but the same was not notified by the Central Government. But no clear procedure is laid down for this and the system is non-transparent. Though apparently such orders are withheld in public interest, the same is never made public. Where the final finding of the DA is negative, the Central Government shall, within 45 days of the publication of the final finding withdraw the provisional duty imposed based on preliminary findings. The final duty imposed is effective from the date of provisional duty unless the "retroactivity" clause is revoked as

per section 9A(3) of the Act. Retroactivity allows application of duty 90 days prior to the imposition of provisional duty. In case of a positive finding, and if the final duties are higher than the provisional duties levied and collected, the differential shall not be collected. But if the final duty is lower, the differential will be refunded to the exporter. However, in practice duty once collected under a provisional duty order is never refunded in India because of the stringency in the condition of refund, which requires the importer to prove that the duty element has not been passed on to the customers. The procedures for final determination in India are shown in Chart 15 (Annexure 6).

6.4 Reviews

The Antidumping Agreement (Article 11) provides for review of the measures imposed by the same authority that had imposed it. It also provides (Article 13) for judicial review of the proceedings by the national judiciary, as may be provided in the national laws. The administrative reviews under Article 11 are meant to take into account the changed circumstance for reviewing the continuation or otherwise and the quantum of duty and its coverage from time to time after a definitive duty is in force for a reasonable period of time. It also reviews the conditions of termination or otherwise of a duty order on the fifth year of its imposition under 'termination or sunset review' clause. The judicial review mechanism built into the antidumping regulations is required to provide the interested parties an opportunity of judicial appeal against the error in judgment, and legal or

procedural infirmities by the authorities. The member countries are required to build in suitable provisions of legal remedies within their national laws.

6.4.1 Administrative Reviews in the EC

A definitive antidumping duty measure is ordinarily valid for a period of five years and has to expire at the end of the fifth year, unless extended by a review process, which considers the likelihood of recurrence of dumping and injury if an antidumping measure is withdrawn. EC antidumping Regulation provides for five different types of reviews. The review of a definitive measure in force may take place at an interim stage or the expiry of the period of its imposition. A newcomer exporting the product subject to investigation may also request a review in order to determine an appropriate dumping margin for his products. A special type of review is the "anti-circumvention' and "ant-absorption" investigation, which is initiated if the duties imposed have not had their intended effects. Chart 16 (Annexure 6) shows different types of reviews in the EU.

(a) **Interim Reviews:** Definitive measures may be repealed, amended or confirmed during their period of validity further to an interim review. Such reviews can be initiated by the EC on its own, or at the request of the Member States, or provided, if at least one year has elapsed since the imposition of the measure, at the request of any of the interested parties. The interim review procedure is almost the same as that for the original investigation, except that the definitive duty already imposed remains in force and there is

no requirement of a preliminary finding. Where the duties are amended or confirmed following an interim review, a new five-year period of validity starts as of the date of conclusion of the interim review, provided the review covers both aspects of dumping and injury.

(b) **Expiry review:** Before the measures expire, the Commission must inform interested parties of the impending expiry of the measure by publication in the OJ. A request for an expiry review must be filed by the Community Industry. But it is not necessary that the original complainants lodge the review petition. The request for review must contain sufficient evidence of the likely recurrence of dumping and injury if the measures are allowed to expire. The original measure remains in force pending the outcome of the review investigation, upon which they may be repealed or maintained. The extended measure is valid for a period of time necessary to counteract the injurious dumping, but this period cannot exceed five years.

(c) **Newcomer Reviews:** The newcomer review follows the same general rule except the time limit. The review is to be completed within a period of 12 months in place of 15 months for the original investigation. It is the newcomer, entering the market for the first time, which requests a review for his products and for a separate antidumping duty rate for itself.

(d) **Anti-absorption review:** The anti-absorption review is intended to counteract the absorption of the anti-dumping duty by exporters or importers and the EC may impose an additional antidumping duty to the extent the original duty was absorbed.

(e) **Anti-circumvention review:** Circumvention is the practices of selling exports so as to evade antidumping or countervailing duties. However, circumvention of duties is not addressed or mandated in the WTO Agreement on Anti-dumping or Subsidies and countervailing measures. It was a difficult issue in the Uruguay Round and no decision has been arrived at on this issue so far. Pending a final agreement on the issue in the Trade Negotiation Committee, EC has taken unilateral action in this matter and notified its Regulations on Circumvention. Circumvention has been defined in the EC as a change in the pattern of trade between third countries and the Community that stems from a "practice, process or work" for which there can be no other reason ("due cause or economic justification") than the imposition of the duty. The Circumvention investigation in the EC is conducted under the same rules of procedure as provided for original antidumping investigation but differs in many respects. The initiation of the anti-circumvention investigation is automatically accompanied by registration of imports. This allows retroactive imposition of duties if circumvention is found. The proceeding must be completed within 9 months.

6.4.2 Judicial Reviews in the EC

All acts of the EC and the Council are subject to judicial review of the Court of Justice of the European Community (ECJ). The appeal against the EC antidumping actions are first subject to the jurisdiction of the Court of First Instance (CFI) and the decisions of CFI can be challenged at the ECJ on points of law only. The appeal before the CFI can be in the form of an action for annulment, an action for failure to act, and an action for damage. The appellant must prove his standing before the appeal is admitted. The Courts would generally accept appeals only if the authorities failed to observe certain procedural guarantees, committed manifest errors in the assessment of the facts, or based their reasoning on considerations amounting to misuse of powers. However, of late the Courts are willing to tackle more substantive issues, referring to the discretionary powers of the Commission to assess "complex economic issues".

6.4.3 Review process in the US

The review process in the US is also extremely complex. Judicial reviews under the US system are less effective due to the uniqueness of its administrative review process. The administrative review process in the US is the most vital element of its antidumping system.

(i) Administrative Reviews: The duty orders issued by the DOC after completion of the investigation by both the agencies are only estimated duty liabilities and are used for the

purpose of setting the cash deposit amount applicable to imports after an antidumping duty order is issued. The annual review process determines actual duty at the end of every year. The US law establishes the final antidumping liability only after the shipment has already been made. Instead of charging of antidumping duty based on past exports, the US system tries to determine the actual antidumping duty payable on the actual import consignment after it has been imported. Though it appears to be a rational concept, the disadvantage is that the importer does not know the actual duty liability on his imports until the DOC completes the review at the end of the year and cannot reflect the duty in his cost data.

The administrative review process commences one year after the antidumping duty order is issued and the process takes about 12 months as it goes through the similar process, except the injury determination by the ITC. Thereafter, on each subsequent anniversary date of the order, an administrative review may be commenced and when completed will provide the basis for ultimate duty liability for the imports that might have taken place during the year. The review is therefore, always based on facts for a different period of time. Therefore, the cash deposits have little relationship with the actual amount of antidumping duties ultimately assessed. But the actual levy is directly related to the dumping margin, based on the actual imports made. If the actual duty rate determined in an annual review process is less than the deposit rates, the US Customs would refund the excess amount deposited along with interest on the overpayment. The final determination

in the administrative review will also change the cash deposit rate for estimated dumping duties, effective from the date of determination.

The process in an administrative review is very similar to an original investigation except that there is no injury determination by ITC. Moreover, there are few vital differences in the approach in the review process. Firstly, the DOC resorts to its dubious practice of calculating the dumping margin by comparing monthly average home market prices to individual US prices ("Zeroing"). This allows determination of dumping margin where actually no such dumping was found in the original investigation. Secondly, it applies a different *de minimis level* of 0.5% for the administrative reviews holding that the *de minimis* level fixed by the WTO agreement for the original investigation does not apply to the reviews. Both the above practices violate the WTO rules, but are difficult to challenge because there are WTO panel decisions[3], which have practically held that different sets of rules are applicable to original investigations and administrative reviews.

(ii) **Sunset Reviews:** Before the WTO Agreement on Antidumping, the US antidumping orders had indefinite validity. However, in conformity with the new Agreement, now the US antidumping legislation contains a specific provision calling for the revocation of antidumping order after they have been in place for five years. A measure may be continued after this period only if a review is initiated and it is determined that revocation would be likely to lead to the continuation or recurrence of both dumping and

[3] Panel Report-WT/DS99/R US antidumping duty on DRAMS of one Megabit or above from Korea

injury. This review provision is referred to as the "sunset reviews". As per this provision, both the US ITC and the DOC have to initiate and conduct two separate sunset reviews to determine whether "termination of the antidumping order would be likely to lead to continuation or recurrence of dumping and of material injury.

The DOC has to determine the dumping margin too, if the sunset review results require continuation of the measures. The DOC policy bulletin of 1998 states that the DOC will normally determine that dumping would likely recur if any of the following three scenarios exists:

1. Dumping continued at any level above *de minimis* (defined as 0.5% or less) after the issuance of the antidumping duty order;
2. Import of subject merchandise ceased after issuance of the order; or
3. Dumping was eliminated after the issuance of the order or suspension agreement, and import volumes declined.

In practice however, rather than undertaking a serious analysis, the DOC appears to simply presume likely resumption of dumping. The ITC examines whether revocation would be likely lead to continuation or recurrence of material injury. The sunset law requires ITC to:

1. Determine which product manufactured in the US is "like" the imported product under review;

2. Define the composition of the relevant domestic industry producing the "like product" under review; and
3. Determine whether that domestic industry is materially injured by reason of the imports under investigation.

This requires a serious investigation by the ITC, something similar to the original investigation.

(iii) **Circumvention:** Though the WTO agreement does not address the issue of circumvention, the US applies this law in its antidumping measures. The US anti-circumvention law provides specific statutory authority for the Commerce Department to expand antidumping duty orders to address four situations: (1) minor alterations, (2) later developed merchandise (3) assembly in the US (4) assembly in third countries.

(iv) **Critical Circumstances and Retroactivity: A**s a general rule, antidumping duties are levied on goods entering the country, after the decision is taken either in a preliminary or final determination order. However, the duties can be applied retroactively in certain cases. Article 10 of the WTO Agreement provides for such retroactive application of duties in certain cases and both the EC, and the US antidumping laws permit such action.

Under the US law, if the ITC finds positive material injury, the domestic industry may argue that "critical circumstances" exist for imposition of antidumping duty, retroactively, up to 90 days prior to the DOC's preliminary determination of Dumping. For

the retroactivity to be enforced, both DOC and ITC must come out with a "critical circumstances" finding. The Commerce Department examines whether there has been sudden surge in exports, and whether the foreign company should have known that the sales were at unfair price. The ITC examines whether the foreign company increased its exports after the petition is filed in an attempt to avoid the effect of antidumping investigation. However, ITC appears to be reluctant to apply this rule too often.

6.4.4 Judicial Reviews in the US: The US Court of International Trade has jurisdiction to hear appeals arising out of the antidumping determinations of the Department of Commerce. The US statute gives a clear and unambiguous right of appeal once the DOC has issued an antidumping duty order. There is no appeal against the preliminary determination by either agency. Because of the unique system for the administrative review process, the judicial proceedings in the US are less effective. The proceedings before the Court of International Trade are generally lengthy and lose their value because by the time the court decides the matter, the annual review process might have altered the situation completely, rendering the judicial process futile. Moreover, the Courts in US rely heavily on the technical expertise of the investigating authorities and avoid going into more substantive issues. Determinations involving Canada and Mexico are subject to review by NAFTA panels. The statute, legislative history, regulations, and court opinions provide detailed guidance on how to administer the AD and CVD laws. Annexure- 10 provides a brief outline of the review process in the countries under study.

6.4.5 Reviews in India

The Indian Antidumping rules provide for both administrative and judicial review of the duty orders. However, the peculiarity of Indian judicial review is the Writ jurisdiction of the superior Courts in India.

(i) **Administrative Reviews:** The Antidumping rules in India provide for three kinds of reviews; Interim reviews, expiry reviews, and newcomer reviews. An antidumping duty imposed under the Act has validity of 5 years from the date of imposition, unless revoked earlier. However, rules require that the DA shall review the need for continued imposition of the duties, from time to time. Such reviews can be conducted *suo-moto* or on the request of an interested party in view of the changed circumstances. The newcomer reviews are also carried out for new exporters exporting the product under duty for the first time, provided the exporter is new and not related to any of the exporters or producers who are subject to antidumping duty on the product. Expiry review is carried out to review the situation for continuance of the measure. But the procedures for the reviews have not been well codified, though DA has initiated 26 interim reviews and 15 expiry reviews so far. Rule 23 is very brief and simply says that all the rules applicable to the original investigation shall also be applicable to these review proceedings and the review processes should be completed within a period of 12 months. However, there is no preliminary finding in a review case, as the duties are already in force.

(ii) Judicial Review in India: Appeals against the decisions of the Designated authority lie with the Central Excise and Service Tax Appellate Tribunal (CESTAT) in the first instance. Only the final findings and the notification of the Department of the Revenue, imposing the definitive duties can be challenged. Preliminary Findings cannot be challenged in the CESTAT. Second appeal against the orders of the CESTAT lies with the Supreme Court of India. However, the High Courts also entertain appeals against Designated Authority's actions under its writ jurisdiction. The appeals against the DA's findings are to be on points of law only. But of late, the Tribunal and courts have also started looking into more substantive issues. Exporting country can also directly approach the Dispute Settlement Body of the WTO, if it feels that any of the provisions of the WTO Agreement have been violated.

6.5 Suspension Agreements and Price undertakings

Article 8 of the WTO Agreement provides for suspension or termination of proceedings without imposition of provisional measures or antidumping duties, upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or cease exports to the areas in question at the dumped price. Suspension or termination of duties can take place only when the authorities are satisfied that the injurious effects of dumping have been eliminated. The price increase should be such that it would be adequate to remove the injury. However, the provision is not mandatory. It leaves the option with the authorities to accept or reject the offer of undertaking by the exporter, if the authority

considers it to be impractical to monitor. It is also within the discretion of the authorities not to accept such undertakings as a general policy. Even where the authorities accept the undertakings, the investigation process is required to be completed if the exporters so desire, or if the authorities so decide. Where the final finding is negative, the undertaking shall automatically lapse, except where such a determination is largely due to the effect of such undertakings. If the final finding is affirmative, the undertaking will continue.

Price undertaking is very prevalent in the EC as a large number of initiations land up with price undertakings. Undertakings can be accepted from one or more exporters named in an investigation any time after the imposition of the provisional duties, up to the imposition of definitive duty. EU has in the past concluded a substantial proportion of antidumping cases with acceptance of price undertakings. This practice has been criticized from a welfare standpoint. Tharakkan et al (1998) estimate that in about 44.6% of cases where the defendants agreed for price undertakings, no injury would have been found if the authorities had not aggregated imports from the countries under investigation. The corresponding figures for centrally planned economies and NICs were estimated to be 39% and 41%, respectively. (Tharakkan et al 1998)

The US statute on "undertakings" is somewhat different. Though Price undertaking was prevalent before the 1979 Trade Agreement Act came into force, the new statute replaced this practice with the "suspension agreements". Under this new provision, the dumping investigation will be suspended, with no dumping duties imposed, provided

certain conditions are met. The new provision permits three types of suspension agreements: (1) agreements to cease exporting the investigated product to the US; (2) agreements to eliminate dumping; and (3) agreements to revise prices so as to eliminate the injurious effect of dumping. Agreement to cease exports is virtually useless and the agreement to eliminate dumping is also relatively uncommon. The latter requires the exporters accounting for at least 85% of the subject merchandise to sign the agreement, which is difficult to achieve. The third type, i.e., agreement to revise price to eliminate injurious effect is more flexible, yet not very workable because of stringent conditions and monitoring problems. One of the conditions to be met in this agreement is the assurance that each entry of merchandise is sold at a price that will not produce dumping margin greater than 15% of the average dumping margin found during the course of the investigation. The second condition is that the suspension agreement must prevent suppression or undercutting of domestic price, which otherwise means setting of a minimum price that makes it difficult for the exporters to remain in the market. In India, though the statute (Rule 15) provides for "price undertaking", it is not a very prevalent practice in India.

6.6 Antidumping Measures by India: An overview

India's experience with Antidumping is relatively new. The first case in India was initiated in 1992 coinciding with the liberalization process of the import regime in India. However, within this short period India has shot into prominence as one of the most frequent users

of the AD measures to protect its domestic industry. The table below shows the statistics of the cases initiated and measures imposed by India since 1992-1993 till 2002-03.

Table No: 6 YEAR-WISE BREAK-UP OF ANTI-DUMPING CASES

Financial Year	Number of cases initiated	No. of cases where Final findings / Preliminary findings have been issued	No. of measures in force as on 31.3.2003
1992-93	2	2	0
1993-94	1	1	0
1994-95	6	6	4
1995-96	5	5	1
1996-97	5	5	4
1997-98	14	13	11
1998-99	13	12	11
1999-2000	19	19	18
2000-2001	28	25	24
2001-2002	30	29	29
2002-2003	30	17	14
Total	**153**	**134**	**116**

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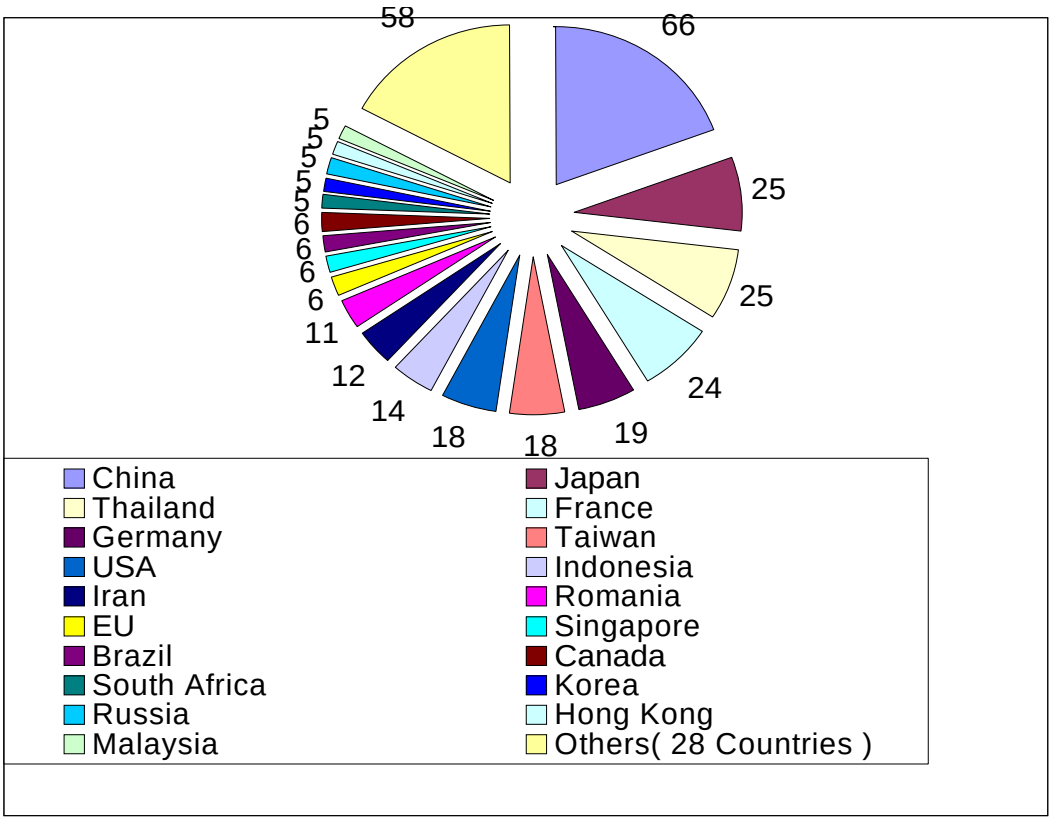
In addition to the above, original measures in force during the period 1992-93 till 31.03.2003; Indian Antidumping Authorities have also conducted 27 Mid Term Reviews, 15 Sunset Reviews and 7 New-shipper Reviews. As far as geographical spread of Indian AD measures are concerned China tops the list with 66 measures against it, followed by European Union with 58 measures against its members.

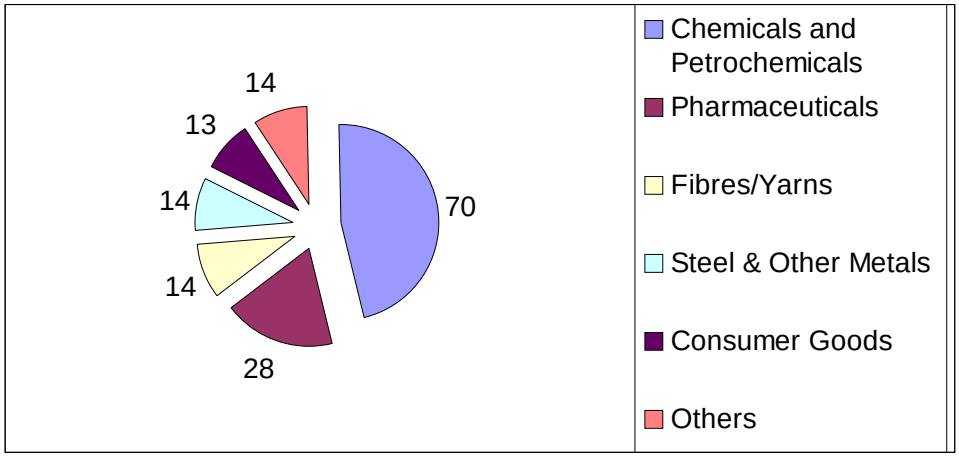
Figure No. 9 Target Country-wise Distribution of AD measures by India



Source: DGAD Annual Report 2002-03

Antidumping measures in place in India show some very distinct trends. While world-over base metals are the most targeted products for AD action, in India Chemicals and Petrochemicals, and Pharmaceuticals account for almost two third of all AD measures in place. The table below shows product-wise composition of AD measures by India.

Figure No. 9 Product-wise distribution of AD Measures by India



Source: DGAD Annual Report 2002-03

Concentration of AD action by India in a specific sector also might be indicating some kind of collusive attempt by the domestic producers to thwart international competition taking the cover of antidumping provisions. This itself can be the subject matter of another study in future. However, a limited attempt has been made in this paper to analyze the impact of the AD action on the imports in this segment. Annexur-11 shows the imports of 39 products against which antidumping measures were imposed between 1998-99 and 2001-02 and their imports during this period in terms of value. Out of 39 measures analyzed the imports have fallen drastically in 20 cases after the measures were imposed and the fall ranged from 10% to 100% within 2 years of the imposition of definitive measures. On the remaining products the AD duty did not seem to have much impact in terms of volume of imports. Though the aggregate volume of imports of the selected goods remained almost same taking into account annual growth of trade in this

sector at about 15% per year during these years, the overall fall in imports of the subject goods is substantial. However, total volume of trade covered by the commodities subjected to AD measure during the period under reference was about 9000 Million Rupees in 2001-02 and accounted for about 6% of the total imports in this sector. Therefore, in terms of economic impact antidumping duty might not have much influence on the total trade. But the impact on the downstream industry might be substantial. Public interest test under the antidumping regime should be based on such impact and overall economy's interest. However, this is beyond the scope of this study and could be the subject of a future study.

6.7 Chapter Summary and Conclusions

Examination of the procedure of investigation, as detailed in the preceding sections, show varying standards and seriousness in approach at different stages of investigation. Institutional preparedness in different countries also varies. The process of initiation of investigations appears to be a mere formality in most of the countries. The WTO panels in certain recent cases have held that Members must adhere to some kind of standard for examination of positive evidences for initiation, though the quality of evidence required for initiation of an investigation is less than that required for a preliminary, or final, determination of dumping, injury, and causation. Prusa (1999) suggests that AD actions distort trade even if duties are not levied. He finds that even in those cases, where initiated AD investigations are rejected or terminated, trade falls by as much as when duties are

imposed. He concludes that mere investigation distorts trade. Therefore, there is a need for greater discipline and tighter prima facie evidence for AD initiation.

The second important issue in the investigation process has been the rigor of the investigation process and the kind of information sought from the defendants. The balance of the burden of proof appears to be heavily loaded against the defendants. The US system of investigation is extremely complex and difficult for an ordinary exporter from an exporting country, particularly a third world country to defend. The EU system of investigation appears to be more balanced and the preliminary investigation is quite elaborate. Therefore, imposition of provisional duty is delayed but the provisional duty is levied only after a fair amount of investigation is completed, unlike in the US where the standards of preliminary determination are quite low.

Another important outcome of the preliminary findings is the suspension agreements and price undertakings. Official settlement or price undertaking requires that the exporter eliminate exactly the dumping margin by increasing the price or restricting the quantity and save itself from the huge cost of defending an investigation. Under the duty outcome, on the other hand, the exporter pays a duty equal to the margin, but retains the flexibility of choosing a price increase. Moreover, a final finding may also turn out to be negative. The US system of suspension agreements provides the opportunity for "dynamic pricing". The US System of annual reviews permits exporters to reduce home market price in order to eliminate dumping. This can result in refund of antidumping duty deposits

(after administrative review) even if the exporter has not raised its prices to the USA. This may be a practical option for some producers/ exporters whose sales to the USA are much greater than in their home market. In such situations, dumping may be eliminated but without relief to the domestic industry suffering injury. However, it may not be possible in case of constructed value (for below cost) investigations.

Blonigen and Park (2001) explore the issue of dynamic pricing by a foreign firm in the presence of antidumping policy that allows adjustment of AD duties through administrative review process. Despite the seemingly obvious incentive to raise its export price to replace (at least partially) the AD duty into part of its revenue, the exploitation of this opportunity is not a dominant choice for a typical foreign firm subject to US antidumping duty. Only about 53% of reviewed cases (163 out of 306) out of 430 affirmative actions cases filed during 1980-95 showed such reduction in AD duties due to price adjustment by foreign firms. DeValt (1993) also found that in the US, less than 25 % of cases with an affirmative preliminary finding during the 1980s resulted in settlement. Majority of AD cases withdrawn following settlement was in the steel industry. Evidence for the EU shows that almost half of the cases in the 1980s, in which an action was taken, an AD duty was paid. This indicates that price undertaking as a mechanism to check dumping is not effective. However, it is possible for the authorities to use this as a "minimum price" instrument.

The process of administrative review and sunset review in the US system is extremely complicated and the AD measure becomes self-perpetuating under this system. The inclusion of a five-year sunset review provision in the Agreement on Antidumping and SCM was seen as a major concession by the United States. But in practice, sunset review in the US is a difficult game for the defendant industries. Commerce department's approach to sunset review has been negative. The DOC does not revoke an order where dumping is found in an annual review after the original order. Where there are no imports after the original order, the measure is not revoked. Where all imports after the order are found to have been at fair value but the volume of import is lower than the pre-investigation level, it will not be revoked. Only where the exporters in question, not only stop dumping, but also increase sales in the US market (an impossible situation for a commodity under AD duty), does the DOC find future dumping unlikely and revoke its order. Revocation also depends upon whether the petitioning US industry contests the sunset review. There is no automaticity of revocation in the sunset review**.** For the defendants, hope lies with the ITC sunset review where the standard of 'imminence' of injury is somewhat different, but more favourable to US petitioners. The Commission reaches an affirmative determination based on a finding that material injury is likely at a somewhat more remote time than the "imminent injury" required in the case of threat of injury. However, at least two types of situations have emerged in which, given compelling facts, the Commission demonstrates a willingness to find no likelihood of material injury if the order is revoked:

(a) Major U.S. consumers argue, and the Commission finds it to be the fact, that the subject merchandise is in short supply and thus additional imports are needed;

(b) The foreign exporters have established production in the US, or some other reasons have greatly diminished the reason to export to the US and the exporter has little or no available capacity to increase its exports.

Thus most ITC sunset reviews result in the orders remaining in effect, except for weeding out those orders where US producers have no further interest, or where there is compelling evidence that future imports will be minimal or will be non-injurious.

The DOC has also substantially raised the bar for revocation in DOC's "change in circumstance" reviews. Three consecutive reviews in which imports are made entirely at fair value are required for revocation of dumping duty. Even that may not be sufficient. The Department has begun examines the volume of the fair value imports in each review year and rejects revocation where the volume is deemed too small.

Examination of the procedure laid down in the Agreement and practices followed in the countries under study brings out the asymmetry in the procedures and practices in these countries, complexities in the investigation process and burden of proof for the exporters to defend a dumping allegation.

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