Annexure- 4

Table 7

Antidumping Actions (targeted countries) 1987-1997

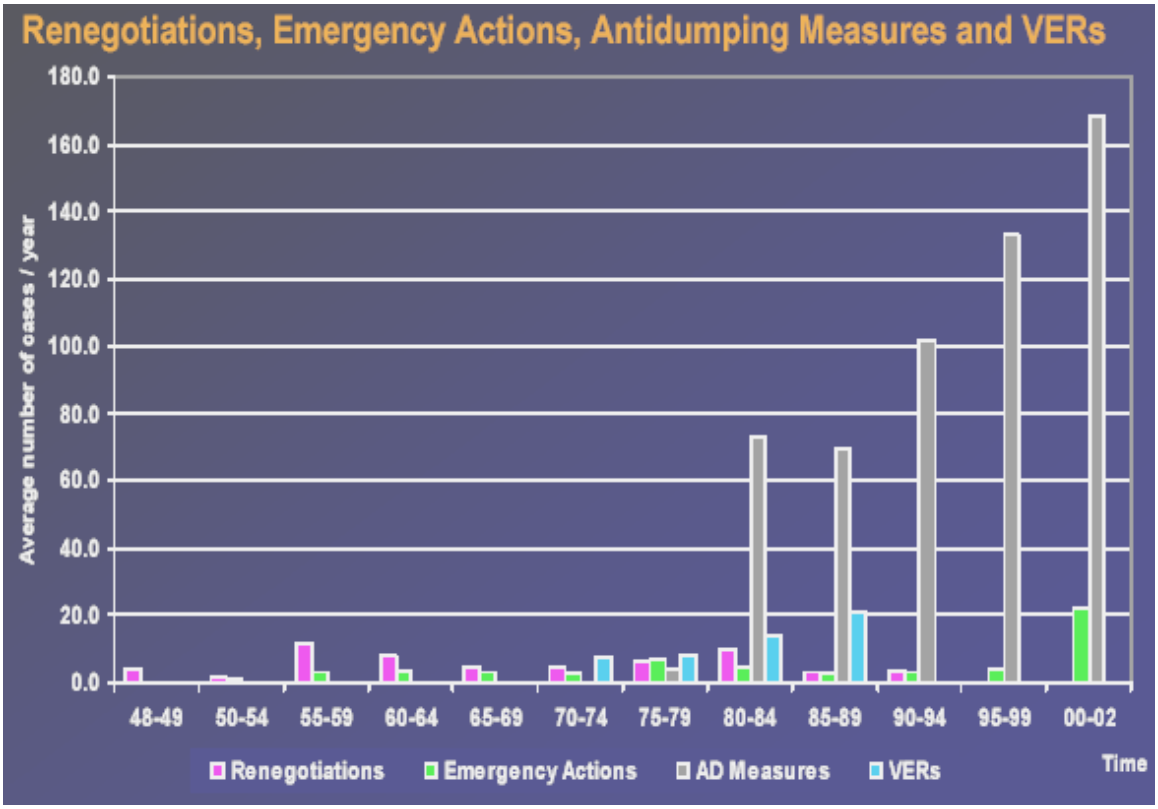
AD Actions, Targeted Countries

Targeted country	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
Traditional users												
United States	18	10	8	18	16	26	30	14	12	21	15	188
Australia	0	2	0	0	0	2	3	0	1	0	1	9
European Community	27	23	13	24	68	70	53	31	30	37	57	433
Canada	3	5	1	1	5	8	5	1	2	1	3	35
New Zealand	2	0	0	0	1	1	1	0	1	0	0	6
TOTAL	50	40	22	43	90	107	92	46	46	59	76	671
Other Leading Targets												
China-PR	1	5	4	12	16	31	45	39	20	43	31	247
Korea	8	12	6	11	12	25	17	8	14	10	16	139
Japan	19	18	10	13	18	14	11	7	5	6	12	133
Brazil	5	6	7	7	7	18	23	9	8	10	5	105
China - Taiwan	6	8	6	11	10	15	11	5	4	8	16	100
Others	31	35	41	68	75	116	100	114	59	85	77	801
TOTAL	70	84	74	122	138	219	207	182	110	162	157	1525
Overall Total	120	124	96	165	228	326	299	228	156	221	233	2196
% Against Traditional Users	41.7%	32.3%	22.9%	26.1%	39.5%	32.8%	30.8%	20.2%	29.5%	26.7%	32.6%	30.6%
% Against OECD Countries	67.5%	56.5%	42.7%	42.4%	53.9%	47.5%	40.5%	28.1%	43.6%	35.7%	45.5%	44.5%

Source: NBER Working Paper No 7404

Figure -16 **Annexure-5**

Comparative Positions of Trade Remedy Actions



Source: J. Michael Finger,(2002) American Enterprise Institute, Dec 2002

Figure- 17

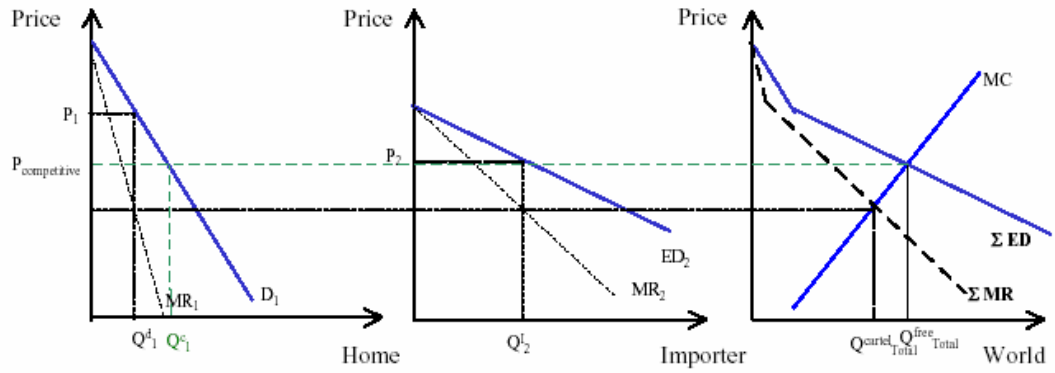
Antidumping Administration

Comparative Staff Strength

The US	The EU	India
Average Filings 35per year DOC Team for Dumping 1+3 Members ITC Team for Injury 1+4 Members (Accountant Lawyer, Economist Industry Analyst)	Average Filings 30 per year Two separate teams for Dumping and Injury within DG Trade Dumping 1+ 5 to 8 Injury 1+ 2 Accountant Lawyer, Economist Industry Analyst	Average Filing 30 per year No separate team for Dumping and Injury Each team: 1 Investigator + 1 Costing officer

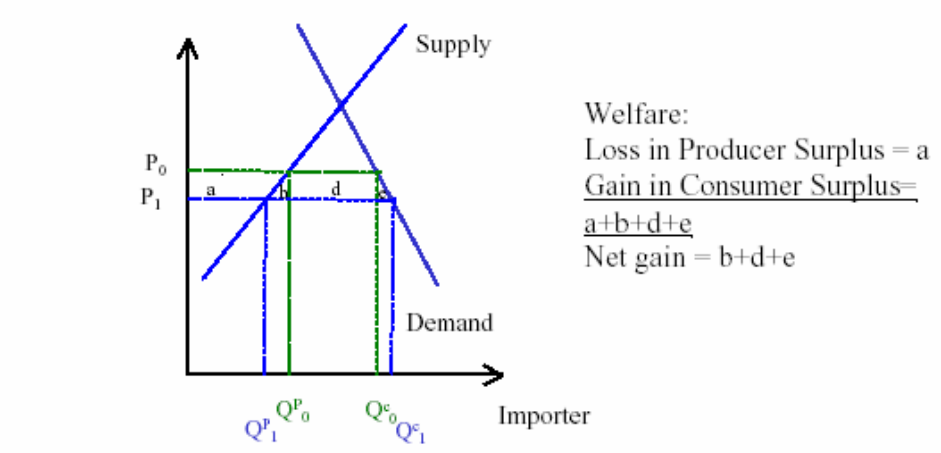
Figure - 18

Price Effects of Dumping and Price Discrimination



- **The price in the importers market is not necessarily lower as a result of price discrimination (It depends on elasticity of demand)**
- **The price in the exporters home market is usually higher**

Losers and Gainers in dumping



- **Losers are the consumers in the exporters home market**
- **Importing country gains on net. The only instance where they may lose is, if price discrimination drives out import competing firms and the exporter then increases its price in all subsequent periods i.e., predatory dumping**

Source: William A. Kerr, "Dumping—One of Those Economic Myths" The Estey Centre Journal of International Law and Trade Policy http://128.233.58.173/estey/j_pdfs/editors2-2.pdf

Chart 1 **Annexure- 6**

US Antidumping Margin Calculations

(Price-to-Price Comparison for Export Price)

Export Price (EP) US Invoice Price to Unaffiliated US Customer	Home market Price of Exporter Invoice price to Unaffiliated Customer
(-) Discounts and Rebates	(-) Discounts and Rebates
(-) Movement Costs US Customs Duties and fees Brokerage and Handling Charges International Freight and Insurance Home Market Movement Expenses Home Market Warehousing Expenses	**(-) Movement Costs** Movement expenses from plant to customer Warehousing
	(-) Selling Expenses Commissions and Royalties Advertising expenses Warranty Technical Services Other direct Selling expenses Imputed Credit cost
	(+) **US Direct Selling Expenses** Commission Royalties Warranty Advertising Technical Services Imputed Credit
Other Costs and Benefits (+) Duty Draw back	**Other Costs and Benefits** (+) Interest revenue from Home customers (+) Interest Revenue from US customer
	Dumping Adjustments (±) Variable Cost difference due to Physical characteristics (±) Level of Trade (-) Packaging cost for home market (+) Packaging cost for export to US
EX-Factory Net U.S. Price	**Ex-Factory Net Home Market Price**

Amount of Dumping = Net Home market Price- Net US Price
Dumping Margin = Amount of Dumping / Net U.S. CIF Price of Imports

Chart 2

US Antidumping Margin Calculations

(Price-to-Price Comparison for Constructed Export Price)

Constructed Export Price (CEP) US Invoice Price to Unaffiliated US Customer	Home market Price of Exporter Invoice price to Unaffiliated Customer
(-) Discounts and Rebates	(-) Discounts and Rebates
(-) Movement Costs US movement expenses Brokerage and Handling Charges International Freight and insurance Home market movement expenses Home market-warehousing expenses	**(-) Movement Costs** Movement expenses from plant to customer Warehousing
(-) Selling Expenses Commissions Royalties Advertising expenses Warranty Technical Services Other direct Selling expenses Indirect U.S. Selling expenses (SG&A) Imputed Credit cost inventory carrying costs Repackaging costs	**(-) Selling Expenses** Commissions Royalties Advertising expenses Warranty Technical Services Other direct Selling expenses Indirect selling expenses (Rents for sales offices, salesmen salaries, sales Imputed administration expenses etc) Imputed Credit cost Imputed Inventory carrying cost
Other Costs and Benefits (+) Duty Draw back (+) Interests revenue from the customers (-) Further processing cost in US (-) Profit on US sale	**Other Costs and Benefits** (+) Interest revenue from customers Dumping Adjustments (±) Variable Cost difference due to Physical characteristics (±) Level of Trade (-) Packaging cost for home market (+) Packaging cost for export to US
EX-Factory Net U.S. Price	**Ex-Factory Net Home Market Price**

Amount of Dumping = Net Home market Price- Net US Price
Dumping Margin = Amount of Dumping / Net U.S. CIF Price of Imports

Chart 3

US Antidumping Margin Calculations

(US-Export Price to Constructed Value Comparison)

Export Price (EP) US	Constructed Value (CV)
Invoice Price to Unaffiliated US Customer	Total Cost of Manufacturing (TCOM)
(-) Discounts and Rebates	(+) G&A (Ratio * TCCM) (+) Interest Expenses (Ratio * TCOM) (+) Profit (Calculated based on Home Market Sales Data) (+) Indirect Selling Expenses (based on home market sales data)
	= Constructed Value *
(-) Movement Costs US Customs Duties and fees Brokerage and Handling Charges International Freight and Insurance Home Market Movement Expenses Home Market Warehousing Expenses	(+) US Direct Selling Expenses Commissions Royalties Advertising expenses Warranty Technical Services Other direct Selling expenses Imputed Credit cost
Other Costs and Benefits	**Other Costs and Benefits**
(+) Duty Draw back	(+) Interest Revenue from US customer
	Dumping Adjustments
	(+) Packaging cost for export to US
EX-Factory Net U.S. Price	**= Adjusted Constructed Value**

Amount of Dumping = Adjusted Constructed Value - Net US Price
Dumping Margin = Amount of Dumping / Net U.S. CIF Price of Imports

Chart 4

EU Antidumping Administration

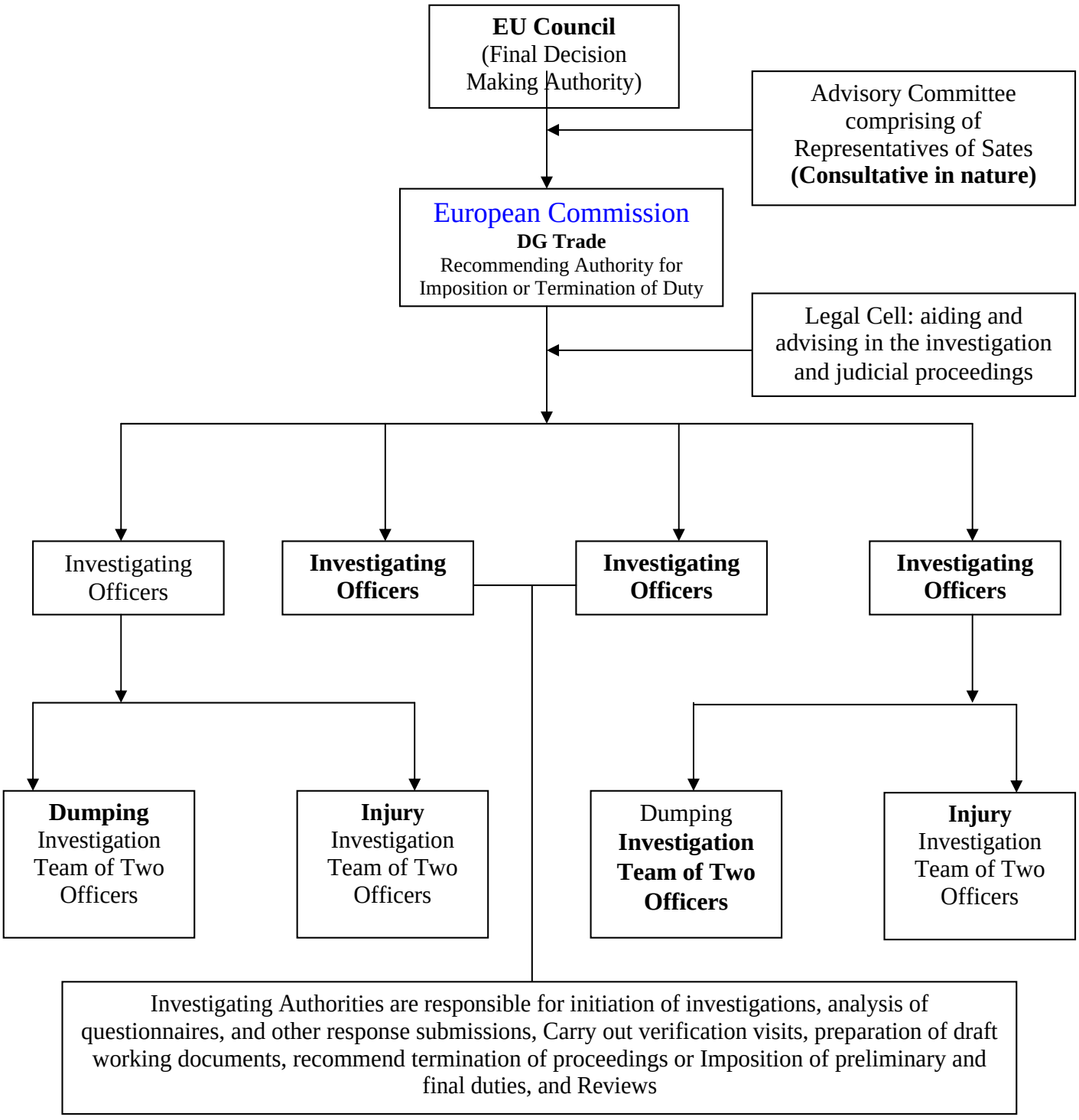
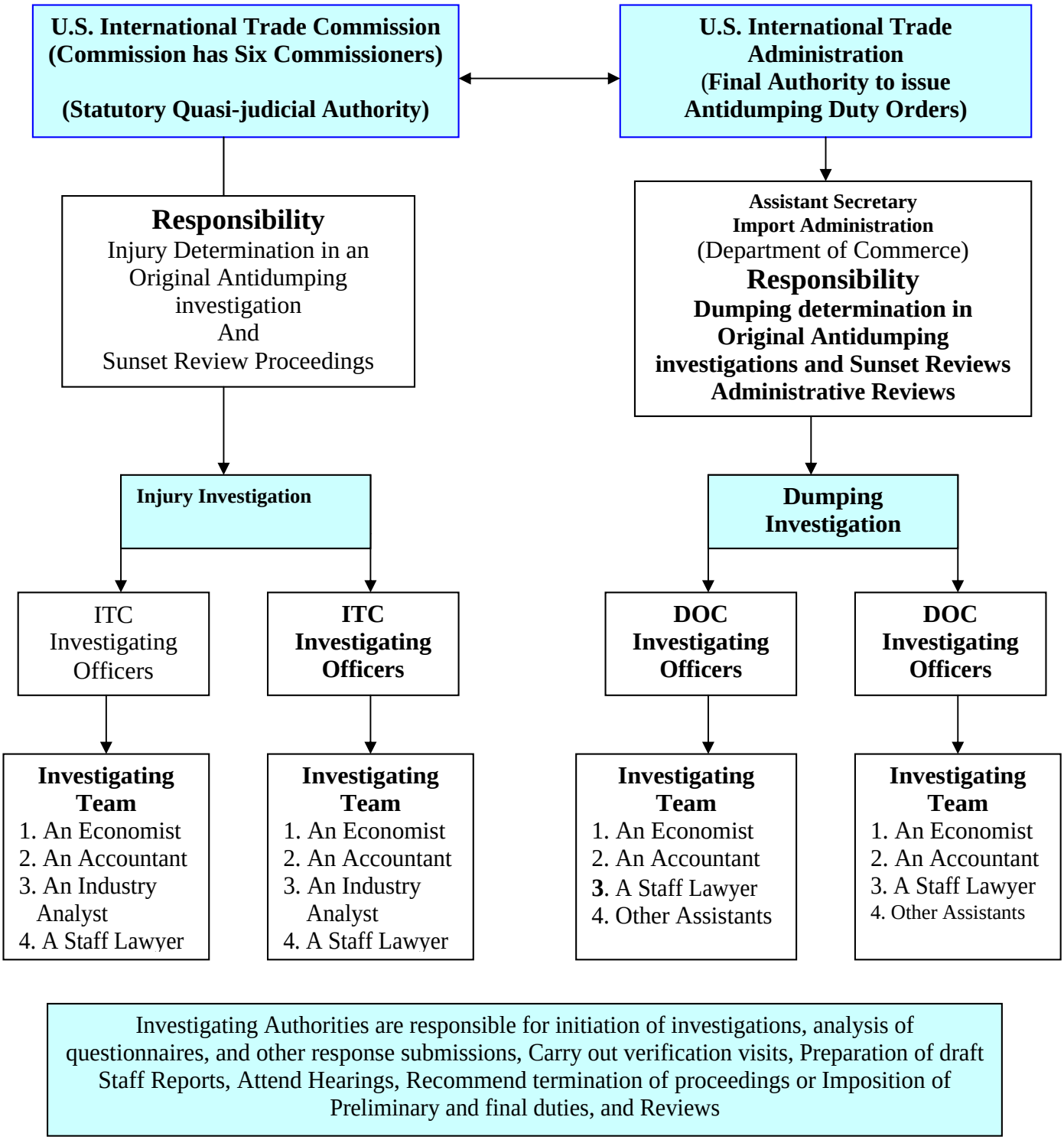


Chart 5

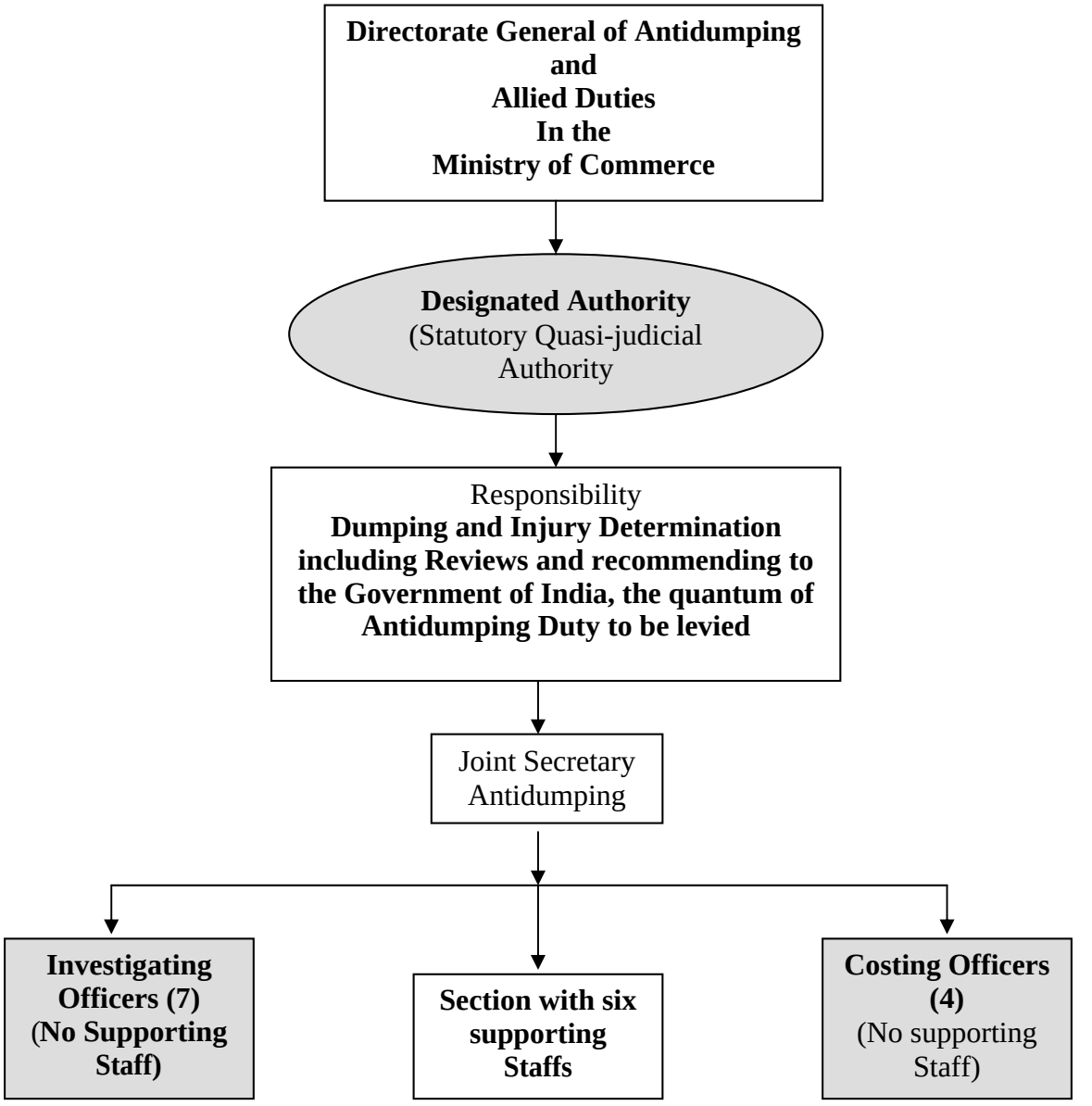
US Antidumping Administration



Investigating Authorities are responsible for initiation of investigations, analysis of questionnaires, and other response submissions, Carry out verification visits, Preparation of draft Staff Reports, Attend Hearings, Recommend termination of proceedings or Imposition of Preliminary and final duties, and Reviews

Chart 6

Indian Antidumping Administration



Investigating Officers are responsible for initiation of investigations, analysis of questionnaires, and other response submissions, Carry out verification visits, Preparation of draft orders, Attend Hearings, Recommend termination of proceedings or Imposition of Preliminary and final duties, and Reviews, attend the Judicial review Proceedings in different courts.

Chart 7

EU Antidumping Process Flow Diagram

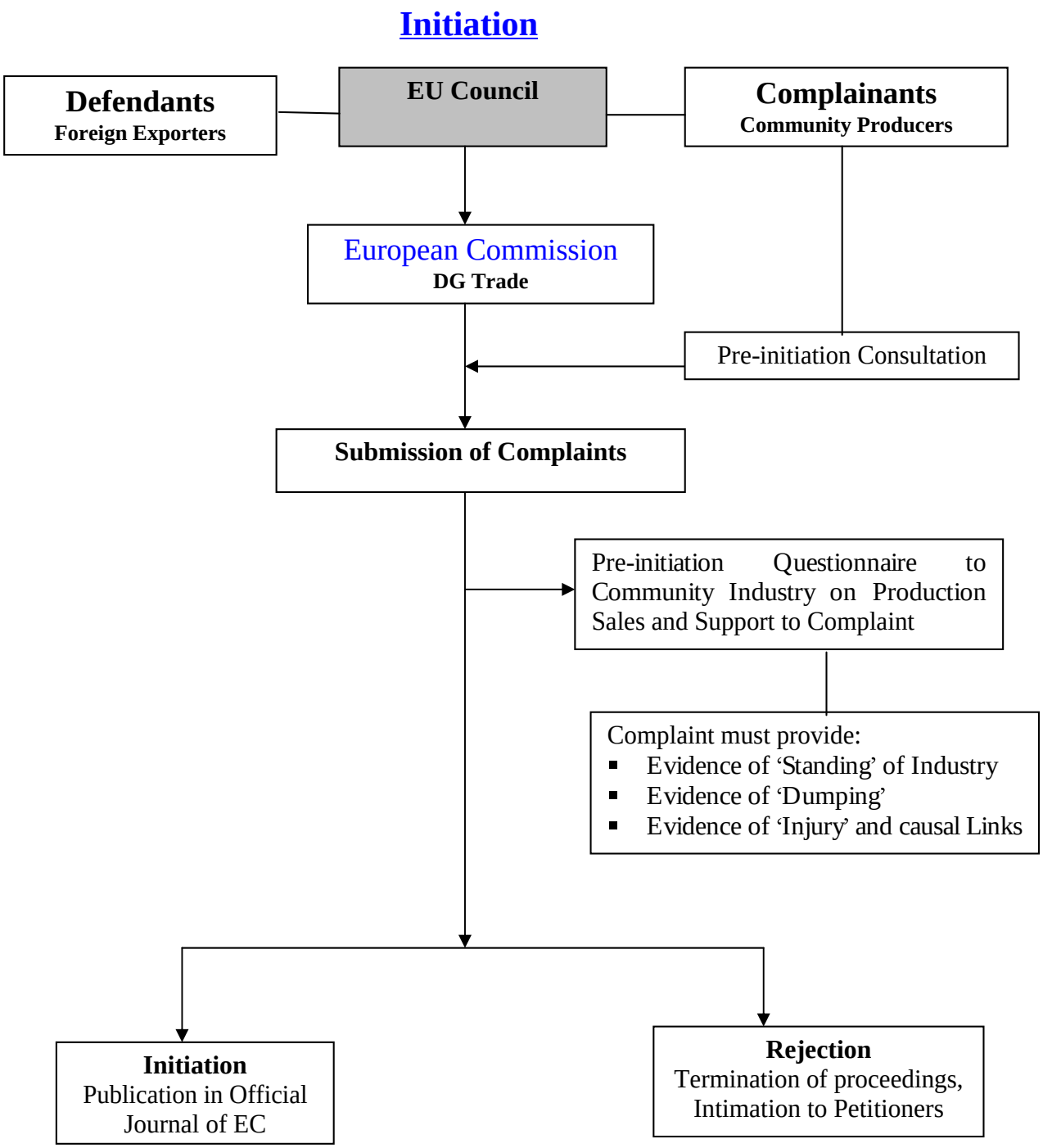


Chart 8

U.S. Antidumping Actions Process Flow Diagram

Initiations

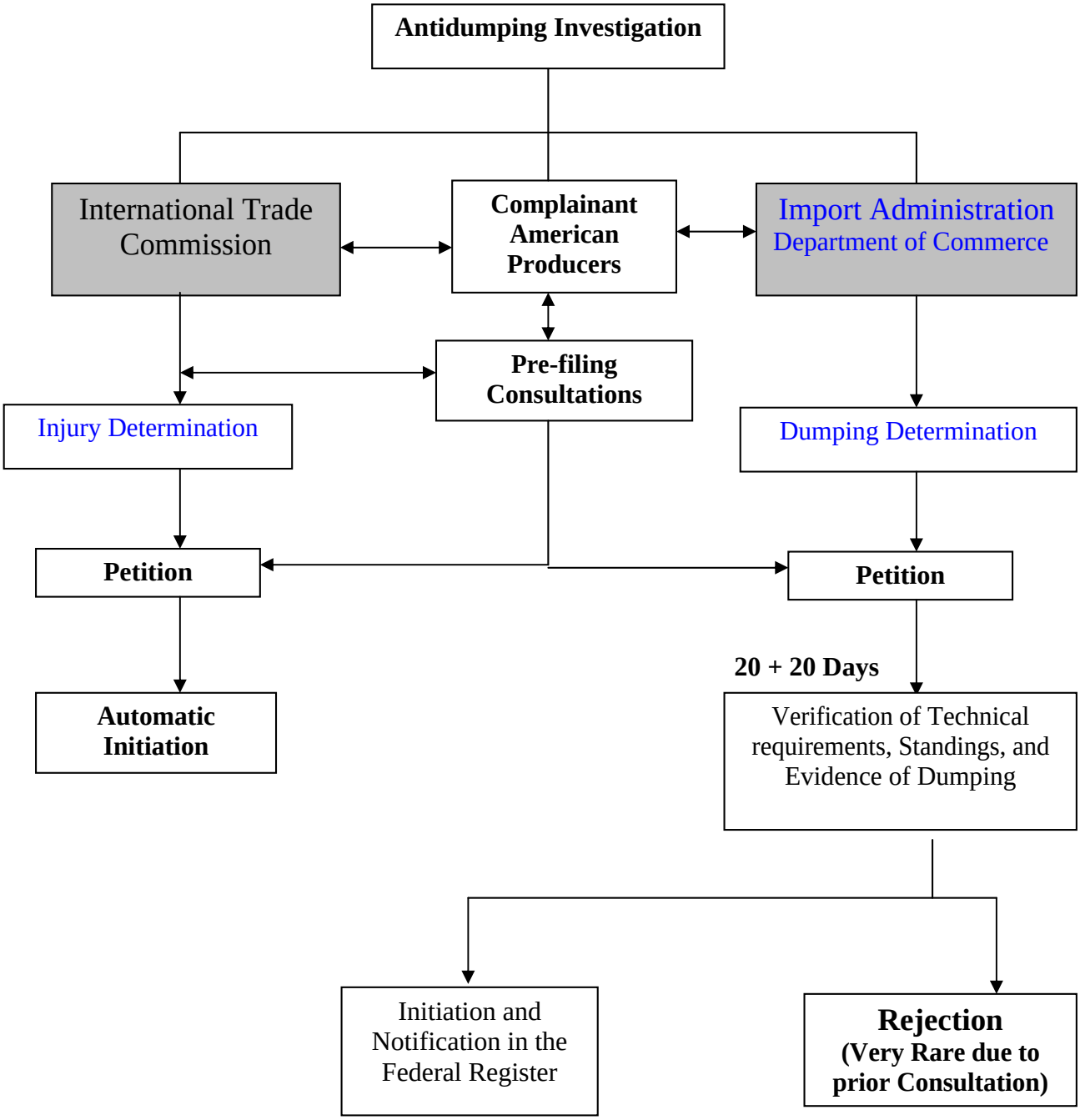


Chart 9

Antidumping Process Flow Diagram: India

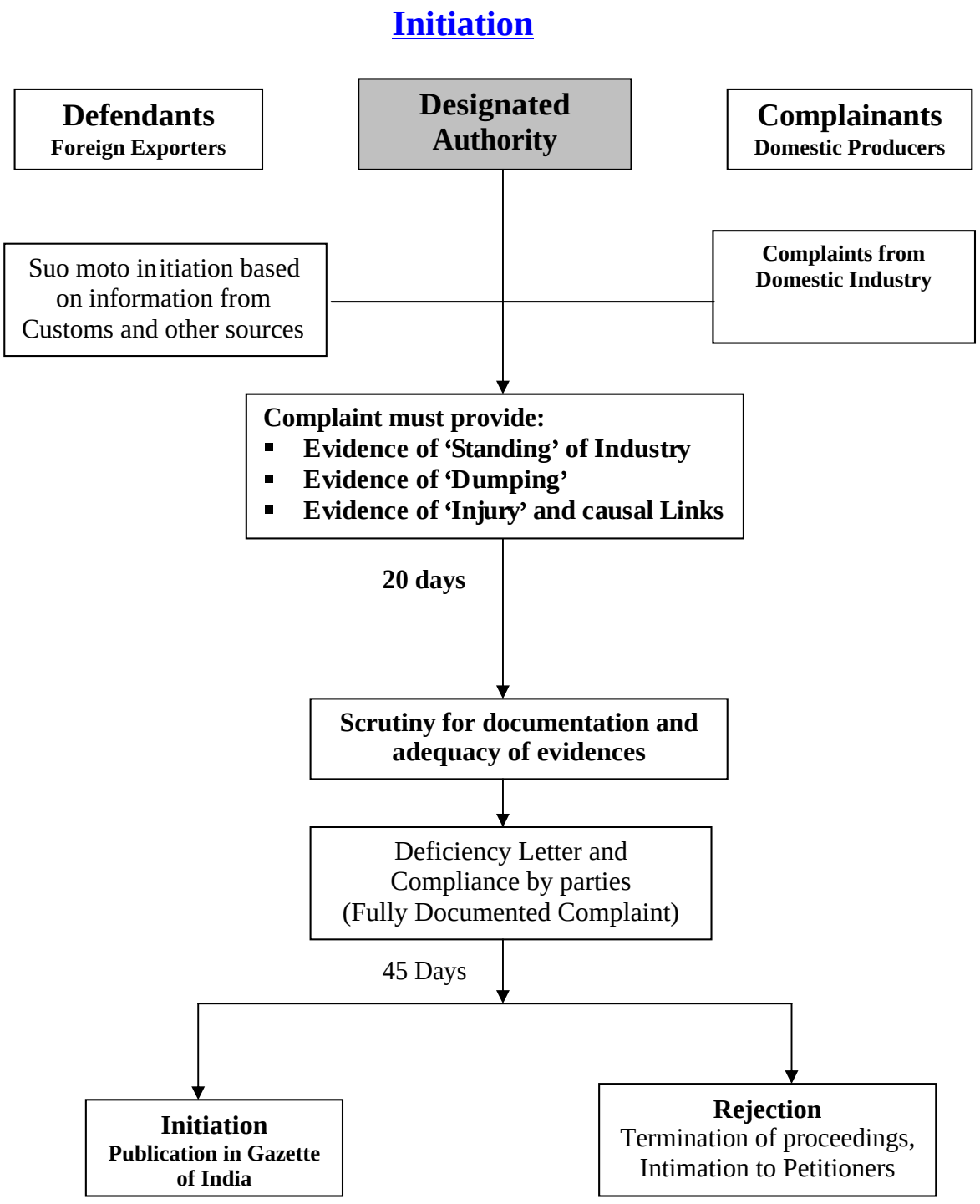


Chart 10

EU Antidumping Process Flow Diagram

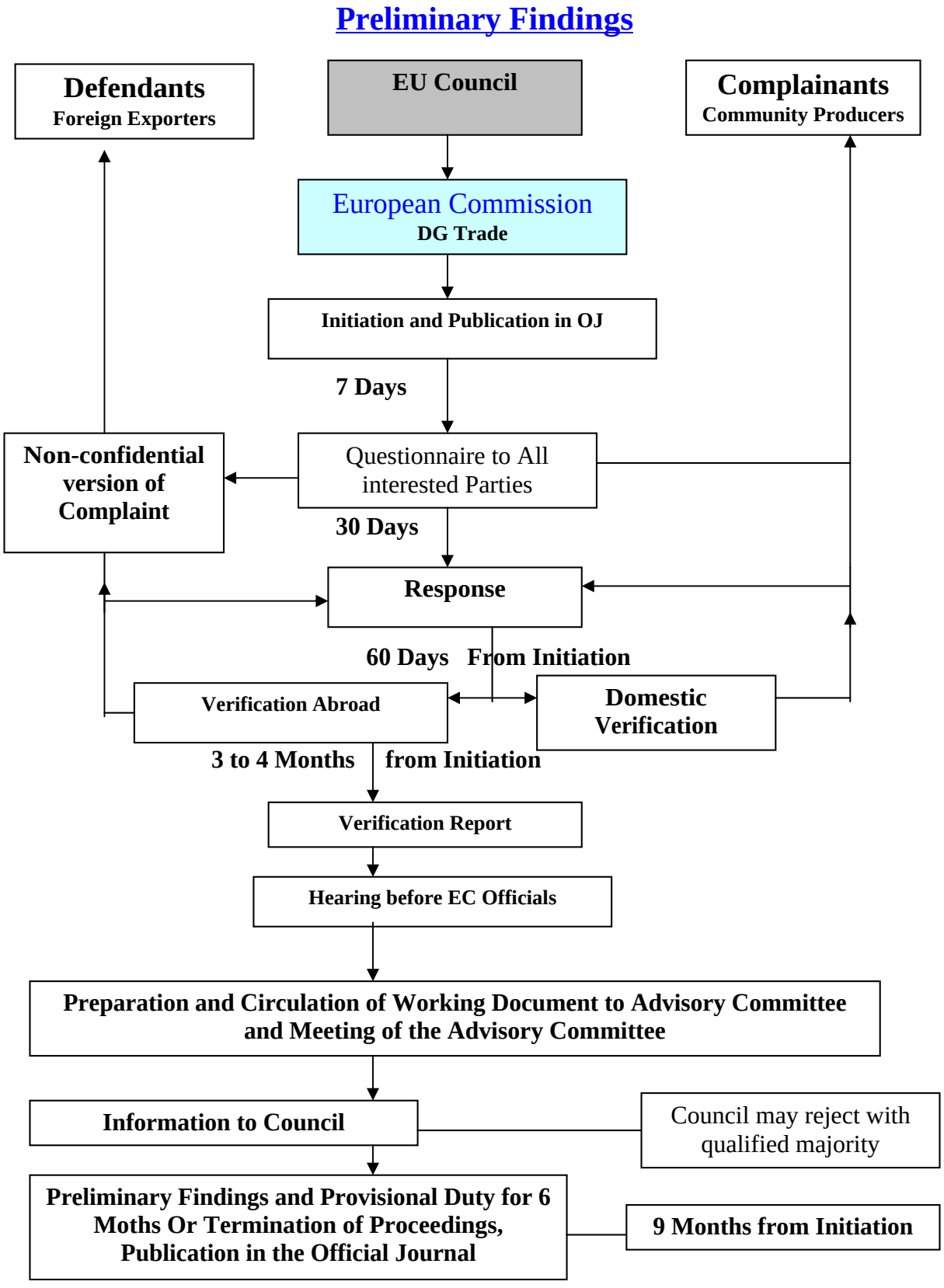


Chart 11

The US Preliminary Determinations

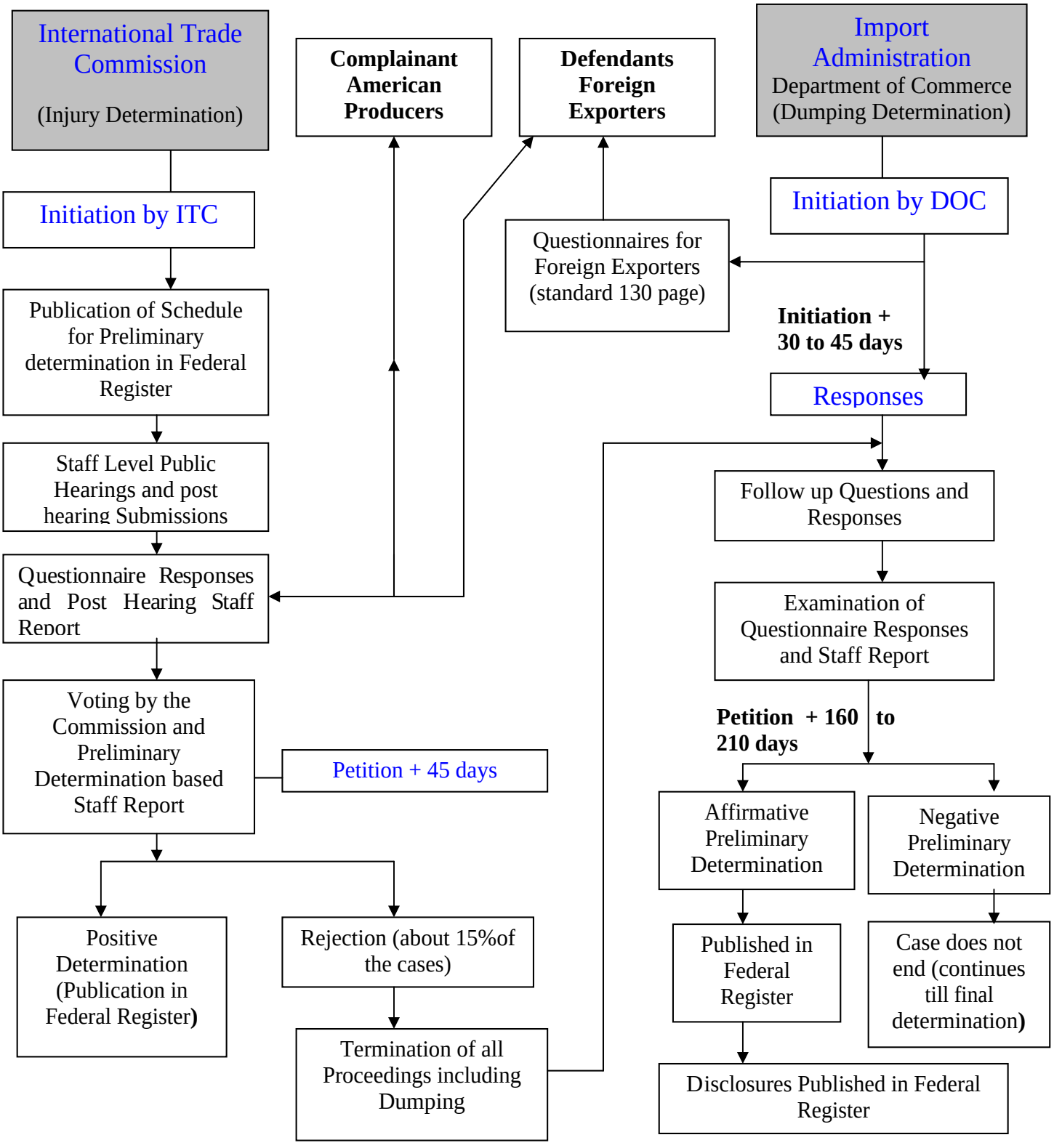


Chart 12

Antidumping Process Flow Diagram: India

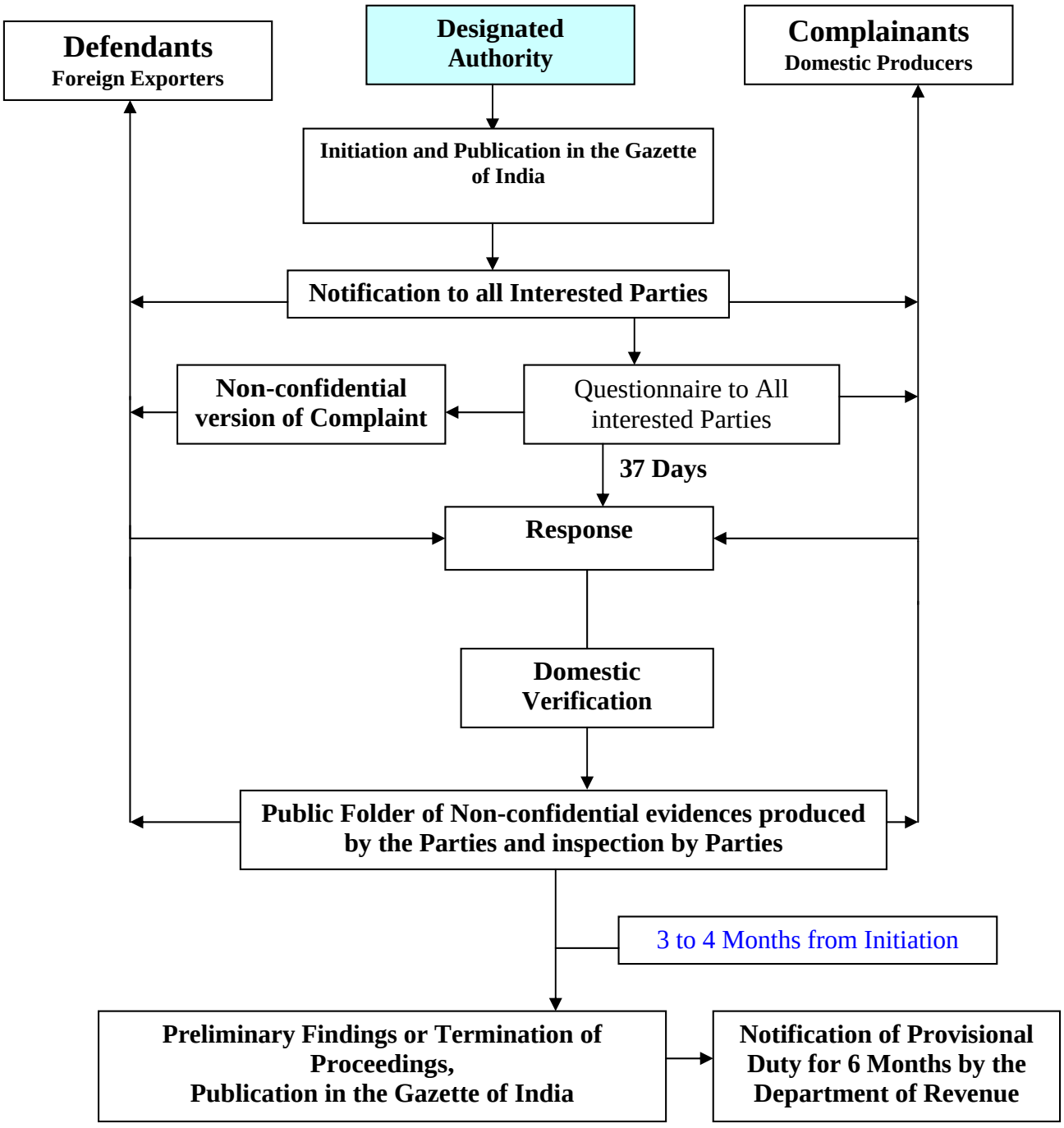


Chart 13

EU Antidumping Process Flow Diagram

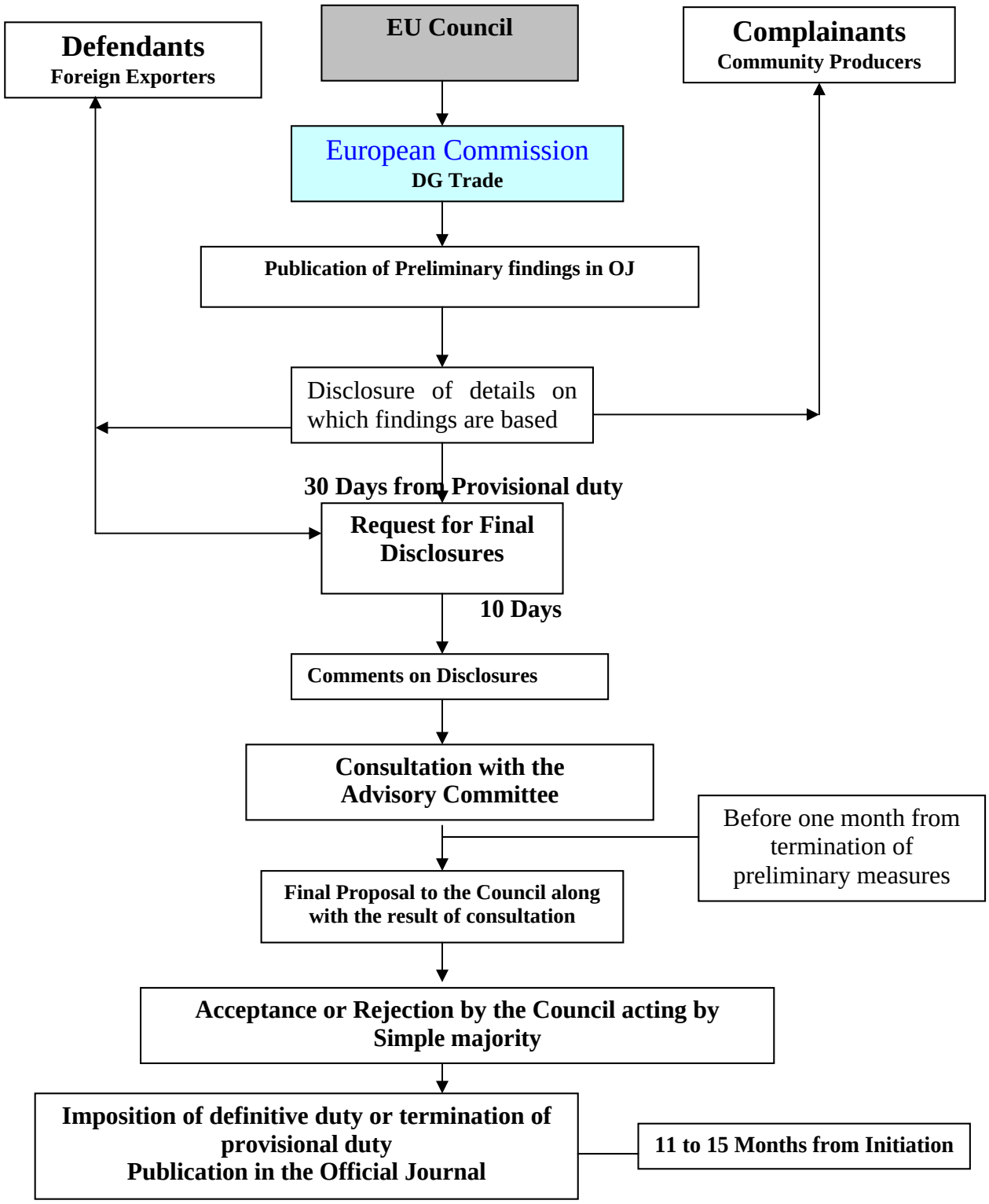


Chart 14

The US Final Determination Procedure

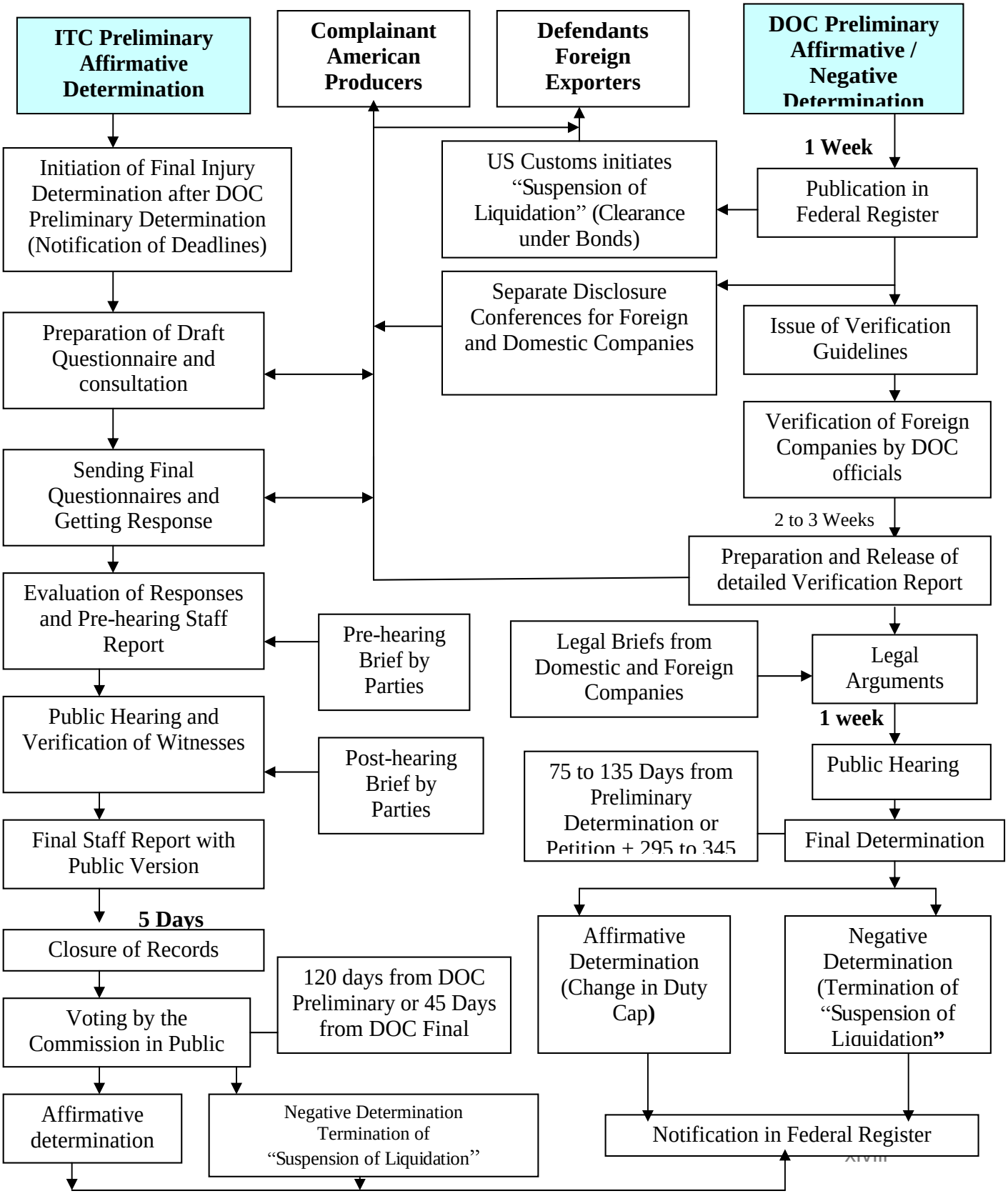


Chart 15

Antidumping Process Flow Diagram: India

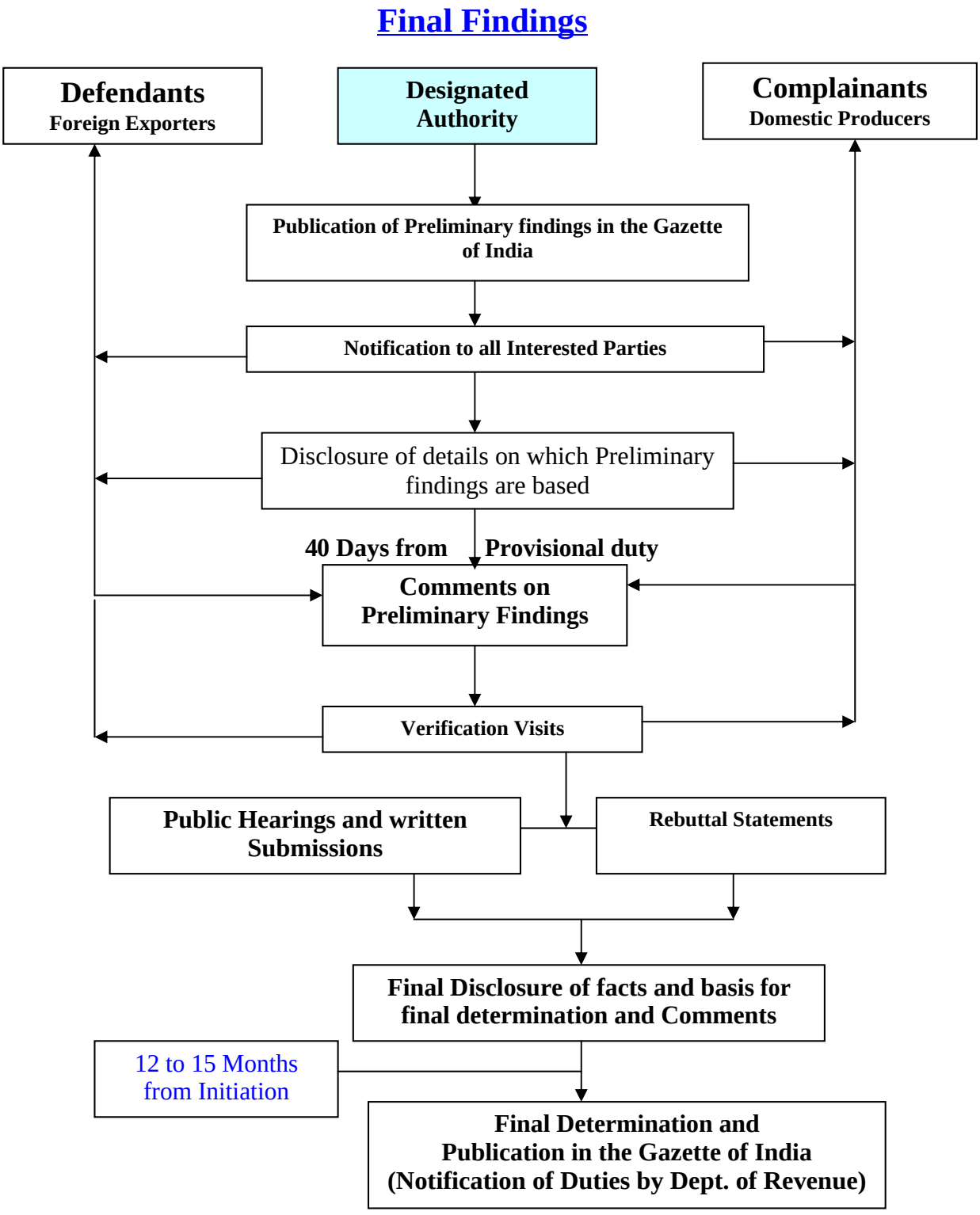


Chart 16

EU Antidumping Actions

Administrative Reviews

Definitive Action remains in force for 5 years. But actions are subject to following administrative reviews:

1. **Interim Review**
   - **Suo moto or at the request of a member country**
   - **Or after one year of imposition of the measure on request of EC importers/ Producers/ Foreign Exporters**
2. **New Comer Review**
3. **Expiry Review**
4. **Anticircumvention Review**
5. **Antiabsorbson Review**

Judicial Reviews

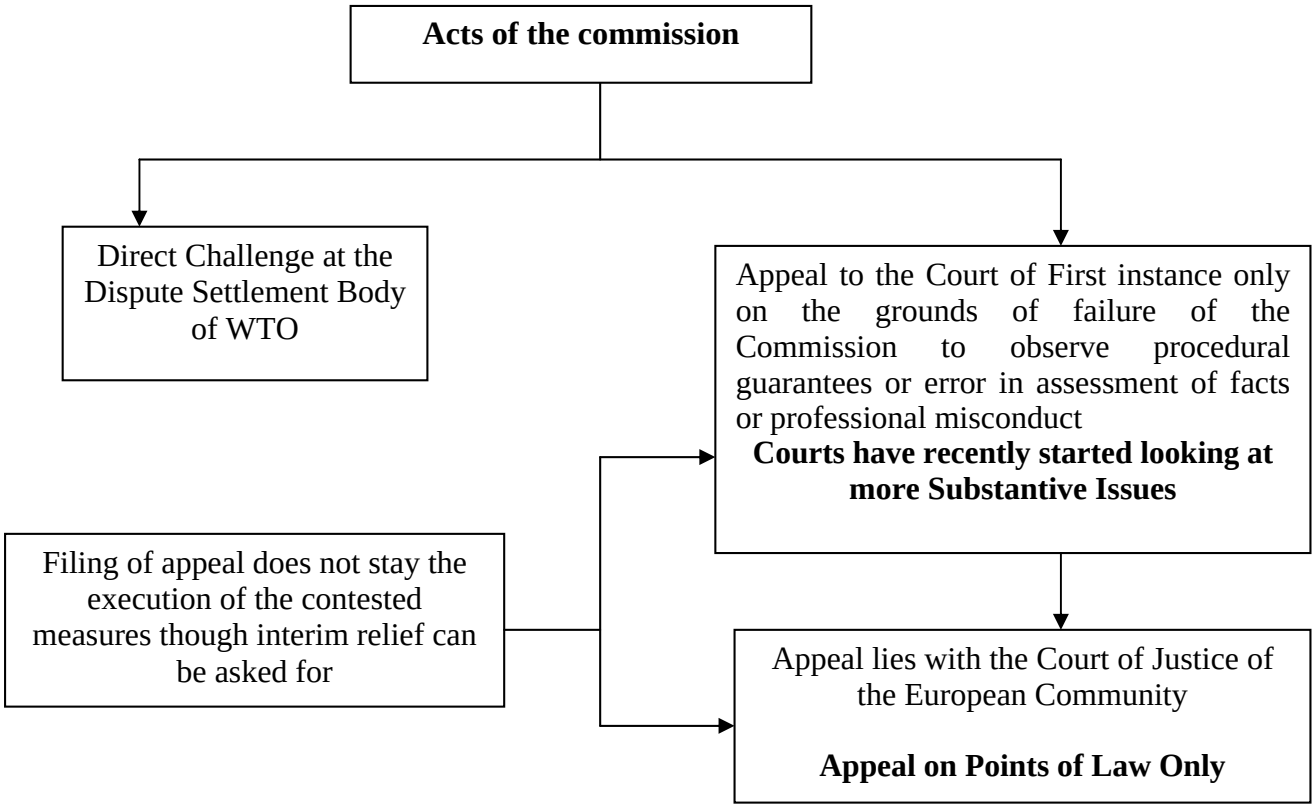


Chart 17

The US Antidumping Investigation Time Table

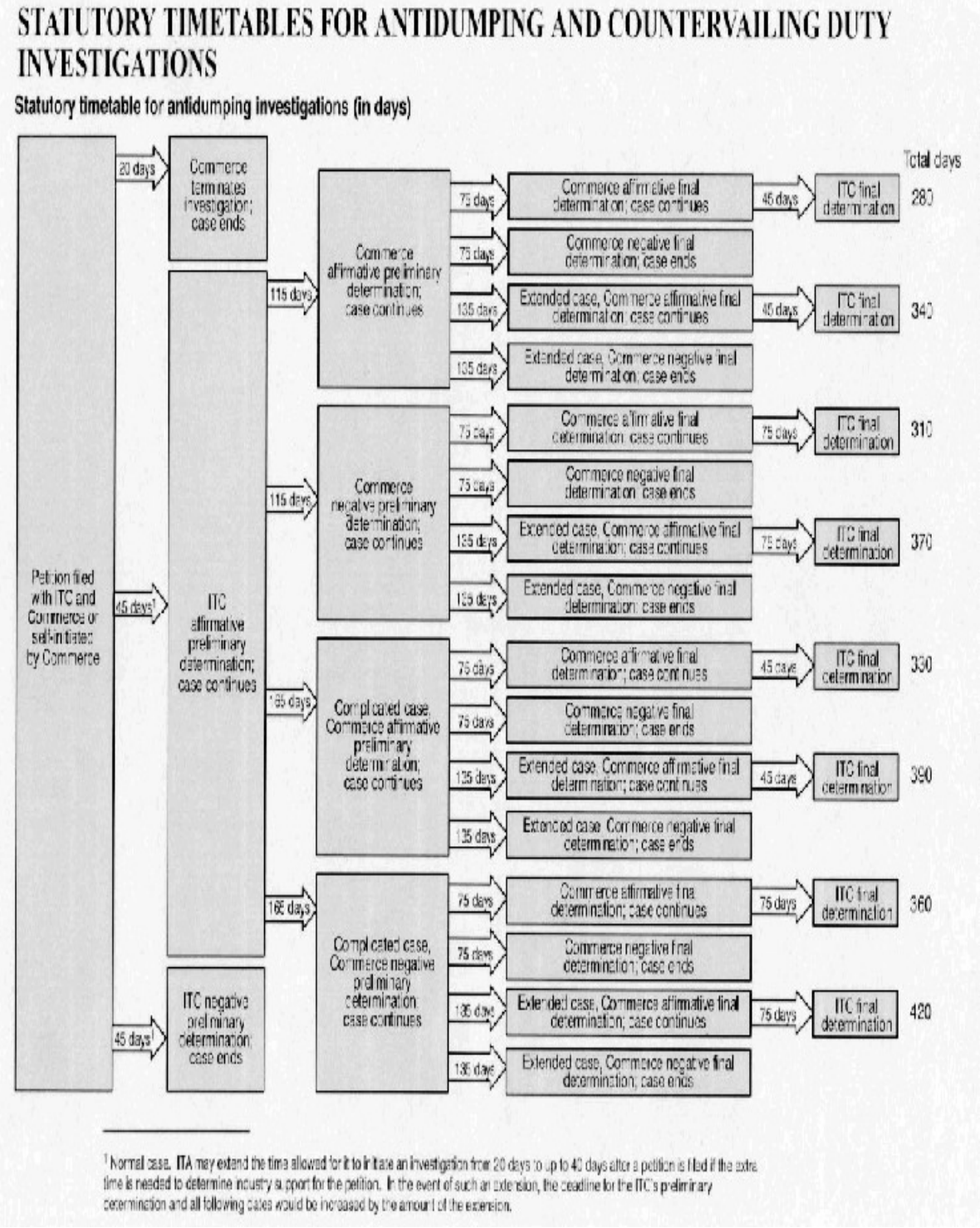
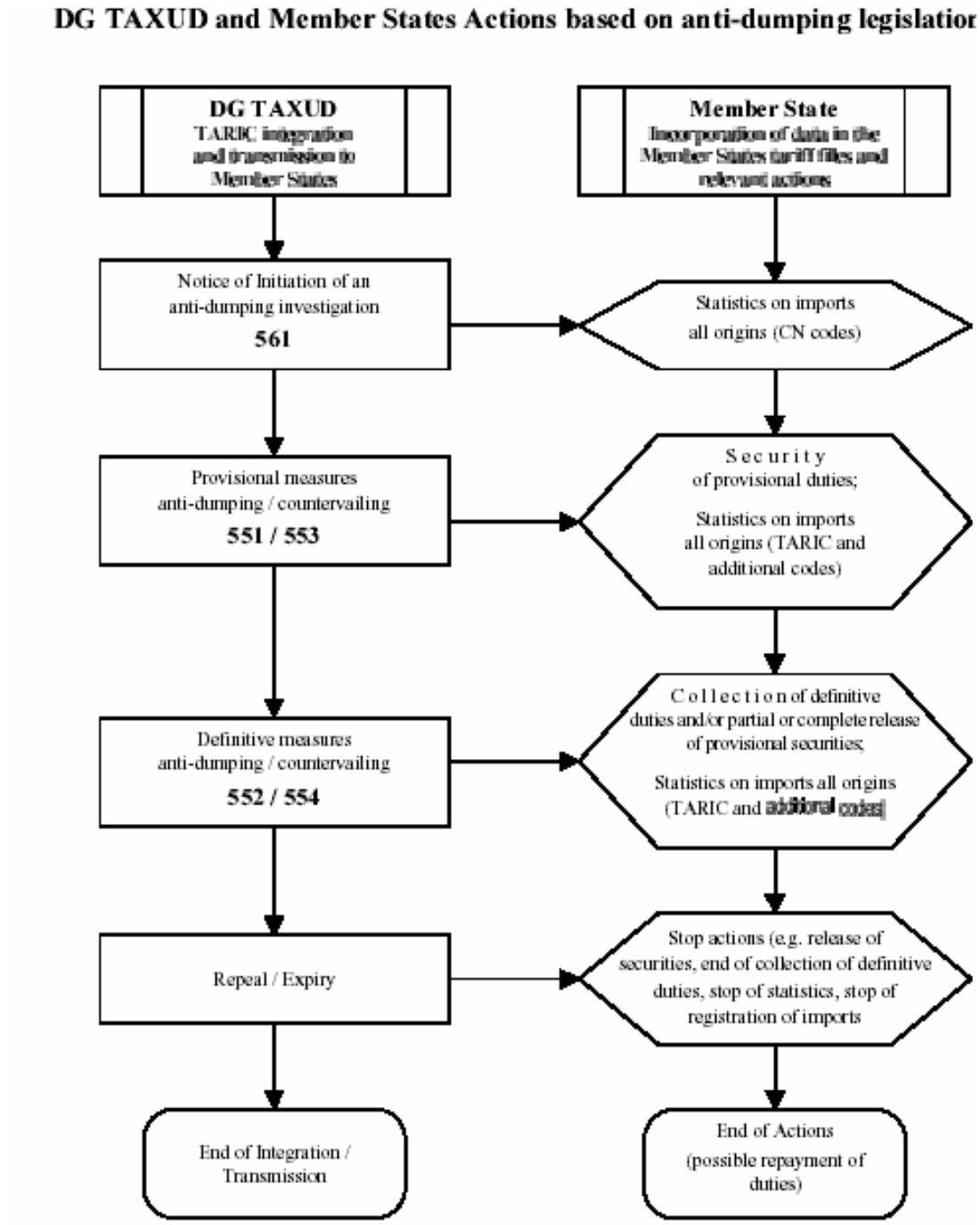


Chart 18

The EU AD Action and Member States Coordination



Source: EU DG Trade Web site

Annexure-7

Special Provision for Non-market economy countries and "surrogate country" cost of production:

The WTO Antidumping Agreement does not make any distinction between market economy and non-market economy countries for determining the home country normal value or for construction of the normal value. However, due to the typical market structure in certain countries where the domestic prices are not determined by market forces and government intervention in various forms decide or affect the cost of production and sales the domestic price does not reflect the true price of the product. The broad provisions under Art 2.2.1.1 enable the Members to treat such country's exports differently and work out the 'normal value' through an indirect method. An important method for determining the dumping margin if the imported goods are from the presumed command economies is to substitute sales in some "surrogate country" for home market sales. In Mexico this method is applied in 25% of all cases (in particular to imports from China), In the US in at least 7% cases this method is applied. The surrogate country method first adopted by US treasury in 1970s, in the case of Electric Golf Carts from Poland (known as Polish Golf Cart Rule), became the watershed in the trade relation between the non-market economies and the western GATT members (Ehrenhaft, 1995).

1 The EC treatment of Non-market economy exports:

The EC Antidumping Regulation categorizes a large number of countries as "traditional" non-market economies. These countries, decided by the Council of the European Union, include Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldava, Mangolia, Tajikistan, Turkemenistan, and Uzbekistan. In recognition of the economic and political reforms undertaken in the Russian Federation, the People's Republic of China, Ukraine, Vietnam, Kazakhstan, Albania, Georgia and Kyrgyzstan, the EC Antidumping Regulation was amended in 1998 and 2000 to subject these countries to more flexible rules that may extend them market economy status. EC makes distinction between 'traditional' and 'special non-traditional' non-market economy countries. The special rule applies to "traditional non-market economy" countries only. For the special non-market economy countries, instead of automatic application of the special rules, the EC authorities will examine in respect of each exporter, who claims market economy treatment, whether he meets the criteria necessary to benefit from such treatment. If the exporter satisfies these criteria, market economy status will be allowed to him and special provision will not be applicable. For all others the special provision discussed below will apply. According to these special rules, normal value for non-market economy exporters will be determined in accordance with data in an 'analogue market economy third country' or a "Surrogate Country" and, in particular, on the basis of:

- The domestic price in the analogue market economy third country; or
- A constructed value in the analogue market economy third country; or

- The price from the analogue market economy third country to other countries including the EC; or
- Where the above methodologies are not possible, on any other reasonable basis, including the price actually paid or payable in the EC for the like product, duly adjusted if necessary to include a reasonable profit margin.

The procedure for determination of normal value and constructed value as applicable to home country will be applicable for determining either the normal value in the normal course of trade in the surrogate country or for price construction. However, no special rules apply for the determination of export price of exports originating in non-market economy countries. The export price is determined on the basis of the price actually paid or payable for the products exported to the Community, or may require constructing the export price if the exports are to the related parties. The EC may also base the export prices on the basis of facts available. In addition to the normal adjustment for taxes and levies, level of trades etc, available for a normal trade, the non-market economies do sometimes claim an adjustment to the normal value on account of natural comparative advantage enjoyed by them, which is not enjoyed by the "surrogate country" such as, lower labour cost etc. However, the EC considers only natural comparative advantages for adjustment and such adjustments are rare.

The crucial difference between market economy and non-market economy country treatments is the manner in which the dumping margin is determined. EC applies the 'single entity' concept to the non-market economy due to overwhelming government role in the economic activities and considers all imports emanating from the non-market economy to be from the single entity. Therefore, while in the case of market economy countries,

individual margins are calculated for each exporter, for the non-market economies a single average margin is calculated for all imports from the exporting country. Only the exporter found eligible for market economy status is considered for an individual margin. Single rate is also deemed necessary to avoid circumvention of duties, by channeling all exports through the exporter with lowest duty rate.

2 The U.S. Practice on Non-market Economy Imports:

The US Commerce Department's treatment of non-market economy imports is more complicated and more rigid. It applies the same logic of presence of government control on various economic activities rendering the standard 'normal value ' determination inadequate. It has elaborate criteria to decide whether a country is a NME or not. They are:

- The extent to which the currency is convertible into currencies of other countries;
- The extent to which wage rates are determined by free bargaining between labour and management;
- The extent to which joint ventures or other investments of firms from other countries are permitted;
- The extent of government control over the means of production;
- The extent of government control over the allocation of resources, prices, and output decisions, and
- Other factors the Department may deem as appropriate.

Once a country is deemed as a NME the status continues till the Department specifically revokes it. The NME status generally covers the geographic areas of the former

U.S.S.R and the Republic of China. However, following the transition of Russia to market oriented reforms DOC has removed Russia from the Non Market Economy list and extended the benefit of Market Economy for the purpose of normal value determination. For the non-market economy the Department does not use a price-to-price or constructed value calculation to derive normal value as in case of market economies. Rather it 'builds' the normal value using "factors of production" methodology. In this methodology it takes the input details of all factors of production including quantities required to manufacture the subject good in the NME country. But for the cost of production and pricing information of these factors, it uses the "surrogate Country". The surrogate country selected must be, to the extent possible, at a stage of economic development comparable to the NME country and a significant producer of comparable goods. In practice, the department uses the per capita GDP for determining the economic comparability. The antidumping law and the Department legislation do not detail any other aspect of surrogate country selection and it remains a hotly debated issue.

The department obtains questionnaire information about the input quantities from the NME and uses surrogate country cost data to determine the cost or value of each unit of the product by combining both the data sets. The surrogate country data is almost exclusively obtained from the publicly available data sources and past cases, and may not provide very accurate and contemporary data. If a particular data is not available from a surrogate country data set the DOC will use the US data sources for that factor. However, because the labour wage rates in comparable economies widely vary, use of the wage rate in the surrogate country may dramatically affect the final outcome. As far as the labour is concerned the Commerce has yet another set of rules. This new methodology value labour

in all NME cases using a regression-based wage rate- essentially an average of the wage rates in market economies viewed as being economically comparable to a particular NME.

Once the Department has 'built" a cost of manufacturing for one unit of subject merchandise, it adds to that cost an amount for factory overhead, depreciation, sales, general and administrative expenses (SG&A) and profit. These values are again obtained from the publicly available information for the surrogate country and for the comparable goods. After "building" a price for the like good through a surrogate country price and exporting NME factors details, the next step is to compare this price with the U.S. price. Here again the Department makes a lot of deductions and adjustments to the final price to the first unrelated U.S. customer, to derive an ex-factory constructed export price (CEP or export price (EP). There after the EP or CEP is compared with the ex-factory 'normal value' after adjusting for the freight and selling expenses from the normal value to take care of the level of trade. For domestic inland freight, department obtains detailed data from the NME exporter and makes adjustment.

But in the NME case the problem arises in separating the selling expenses from the SG&A taken from a surrogate country, and therefore ignored. But while calculating the CEP or EP the department does not deduct the direct selling expenses incurred in the US to ensure an apple-to-apple comparison. The US DOC also assigns a single rate to the NME treating it as a single entity using a 'rebuttal presumption' that all exporters or producers comprise a single producer under common government control. However, an individual exporter can file an application for individual rates if it can demonstrate that its export activities are both *de jury* and *de facto* basis, not subject to government control. For this it has to satisfy seven different criteria. If the DOC is then satisfied that the exporter is free from

de jury and *de facto* government control or the NME exporter is owned by a parent located outside the NME, it will calculate and assign a separate rate for the exporter. The department also applies its "market oriented industry" (MOI) test on an industry-wide basis, which is very tough for any NME industry to satisfy and very rare to make an affirmative MOI determination.

3 Non-Market Economy treatment in India:

The Indian Rule on non-market economy countries provides for determination of the normal value "on the basis of the price or constructed value in the market economy third countries, or the price from such a third country to other countries, including India or where it is not possible, any other reasonable basis, including price actually paid or payable in India for the like product, duly adjusted if necessary, to include a reasonable profit margin". The Indian statute on non-market economy status has undergone several changes in the past few years. Initial statute did not define or name any country as "non-market economy country" and also left it to the designated authority to decide an appropriate non-market economy third country in a reasonable manner. The statute was first amended in 1999[1] to incorporate the method of determination of normal value for a non-market economy without naming any country as NME. This deficiency was removed through an amendment to the statute in 2001, which provided a list of countries to be treated as NMEs for the antidumping investigation. The amended statute listed four detailed criteria for determination whether a

[1] Notification No 44/99 (NT) dated 15th July 1999. This amendment without naming the NMEs provided that in case of imports from non-market economy countries, normal value shall be determined on the basis of the price of constructed value in a market economy third country, or the price from such third country to other countries, including India, or where it is not possible, on any other reasonable basis, including the price actually paid or payable in India for the like product, duly adjusted if necessary, to include a reasonable profit margin. An appropriate third country shall be selected by the Designated Authority in a

country operates under market economy principles. In view of the transition of certain countries from non-market to market economy the statute was again amended in 2002 to delete the list of countries named as NMEs and a presumption clause was incorporated. It stated that if any WTO member has treated any country as non-market economy in the last three years prior to the investigation by Indian authority, India would also treat that country as a non-market economy. It also incorporated a rebuttal clause for the exporters to rebut this presumption with evidence on the four criteria specified. However, the same has again undergone a fundamental shift in 2003 and the statute has been amended again to remove the presumption and rebuttal clause and as the statute stands today, if any WTO member has treated any country as a market economy on the basis of complete examination of the four determinants listed in the statute, India would also extend the same treatment to that country. However, the provision is still adhoc. It does not provide how various adjustments for a non-market economy and the market economy third country prices are to be made. In practice Indian authorities have decided a large number of cases on non-market economy basis mostly for imports from China and CIS countries. Wherever, the designated decides NME status for a country or an individual exporter, it takes consumption norm of the raw materials in the country of exports and the domestic cost (in India) of factors of production as the basis for constructing the normal value under the 'best available information' provision. The export price is however, calculated on the basis of actual invoices or DGCIS data available for the period of investigation.

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reasonable manner keeping in view the level of development of the country concerned and the production

Annexure- 8

Factors and Indices for Injury Determination

Article 3.4 of GATT Antidumping Agreement

The examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of industry including:

1. Actual and potential decline in sales.
2. Profits,
3. Output,
4. Market share,
5. Productivity,
6. Return on Investments,
7. Utilisation of capacity,
8. Factors affecting domestic prices,
9. The magnitude of the margin of dumping,
10. Actual and potential negative effects on cash flow,
11. Inventories,
12. Employment,
13. Wages,
14. Growth,
15. Ability to raise capital or investments

The list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

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in question….

Annexure 9

U.S. Antidumping Action

Review Proceedings

The U.S. Antidumping system provides for two kind of Review processes:

- Administrative Reviews; and
- Sunset Reviews.

Administrative Review Process:

American system of imposition and collection of antidumping duty is structurally different from most other countries. In most other countries the definitive duty is prospective i.e. the duty is determined and notified after the final investigation and the duty is chargeable for the subject merchandise during the period in which the order is in force subject to revision during expiry reviews or mid-term reviews. However, American system offers a floating rate type of duty, subject to adjustment at the end of the year on completion of annual administrative review. U.S. law establishes final antidumping liability after the shipments have already been made. The system operates as follows:

- The original investigation by the Department of Commerce in an Antidumping proceeding only determines "estimated antidumping duty", setting the cash deposit amount applicable to imports after an antidumping duty order is passed.
- Actual duty chargeable is established during the Administrative Review Process under section 751 of the Tariff Act of 1930, usually referred to as "Section 751 reviews".

- The system in turn allows the foreign exporter to revise its export prices upward so as to adjust it for a lower duty during the review or in other words eliminate dumping.
- Review begins each year in the anniversary month of the antidumping order, after one year from the final duty order is issued.
- Review was earlier automatic. But recent amendments require one of the parties to require for a review. Otherwise, the department would use the estimated duties from the preceding investigation as the basis for actual levy.
- Reviews will always be based on facts for a different period of time and cash deposit rate will have little relationship with the actual amount of antidumping duty ultimately assessed.
- During reviews the DOC applies different *de minimis* criteria from dumping than the 2% criteria laid down for the original investigation. It has applied 0.5% *de minimis criteria* in certain cases.
- Review continues indefinitely (subject to a "Sunset review" every five year) until the exporter satisfies the requirements for termination of the order.
- Administrative reviews involves action by DOC only, whereas Sunset review requires both dumping and injury review by DOC and ITC respectively.
- The review process follows the same investigation process and rules as in the original investigation and is equally time consuming. It takes about one year to complete the review process and publish the results.
- After completion of the review process, if the final determination in the administrative review works out to be lower than the definitive duty order, U.S. Custom would refund the difference amount of the cash deposit taken during the review period, along with applicable interest.

Sunset Review to terminate AD measures:

Pre-Uruguay Round U.S. Antidumping Law permitted indefinite continuation of antidumping orders through administrative review mechanisms. GATT Agreement on Antidumping brought a specific provision, calling for revocation of an order after it has been in force for five years. An order may continue after this period if a review conducted by the authorities produces a positive determination that " termination of the antidumping duty order would be likely to lead to continuation or recurrence of both dumping and injury".

Commerce and ITC Sunset reviews are separate proceedings. An antidumping duty order can be revoked by negative finding of either agency regardless of the outcome of the other agency's proceedings. In addition to the review process for finding whether the revocation would result in recurrence in dumping DOC also determines what will be the future dumping margin and duty applicable. DOC Policy Bulletin of 1998 provides the DOC's approach to sunset review.

DOC generally does not undertake very serious analysis and rather establishes the likelihood of recurrence of dumping under certain presumptions. DOC will normally determine that dumping would likely occur if any of the following three scenarios exists:

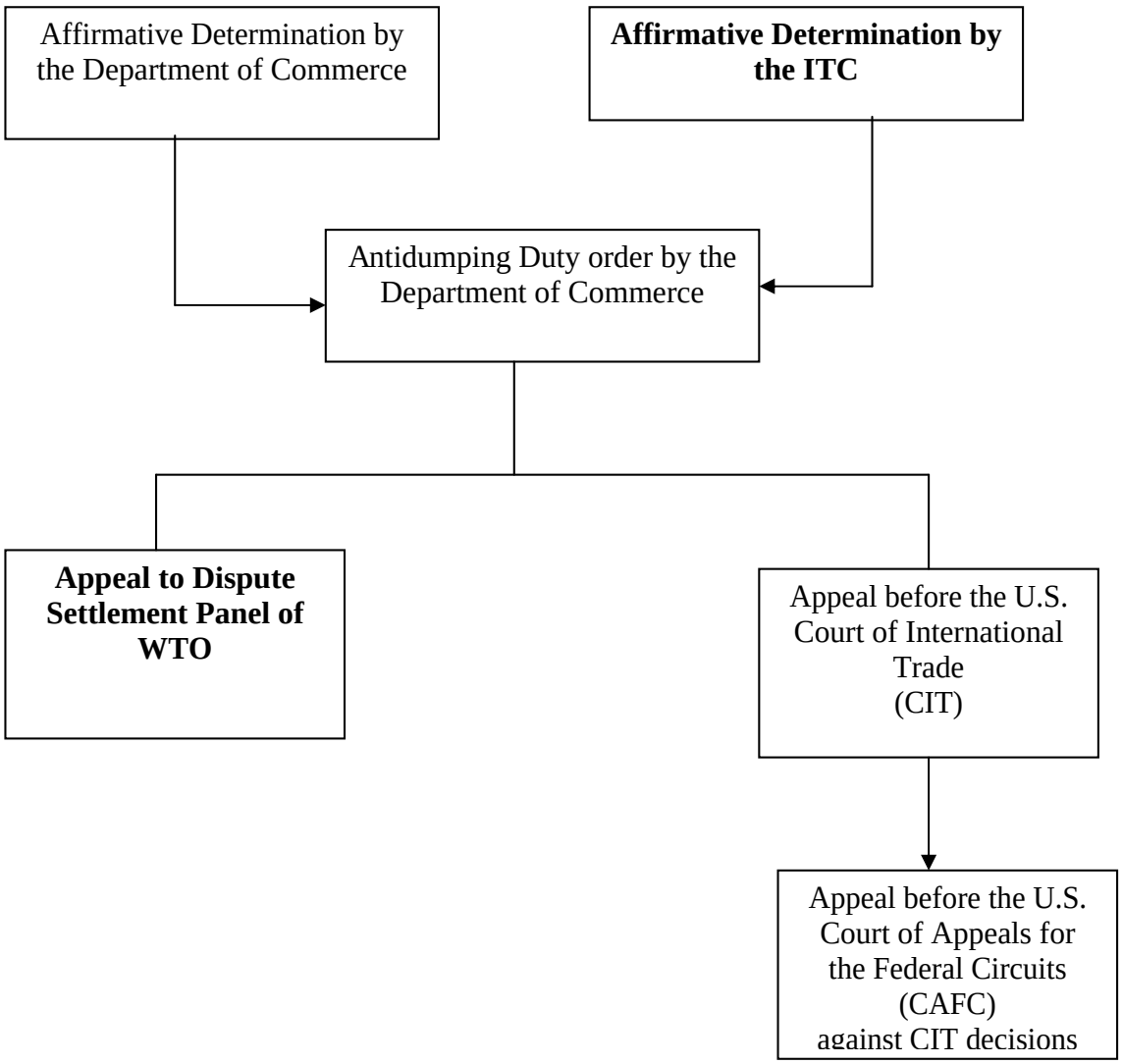
- Dumping continues at any level above a *de minimis* level of 0.5% after the original antidumping duty orders were issued;
- Import of subject merchandise ceased after issuance of the order; or
- Dumping was eliminated after the issuance of the order or suspension agreement, and import volume declined.

ITC sunset review procedures are different. It examines whether revocation of the antidumping order would likely lead to continuation or recurrence of material injury. Unlike DOC ITC takes sunset review seriously. The sunset law requires the ITC to:

- Determine which product manufactured in the United States is "like" the imported product under review;
- Define the composition of relevant domestic industry producing the product "like" the imported product under review; and
- Determine whether that domestic industry is materially injured by reason of imports under investigation.

In making this determination, the ITC examines "the like volume, price effect, and impact of imports of the subject merchandise on the industry, if the order is revoked."

The US Judicial and WTO Reviews



Annexure-10

Judicial, Arbitral or Administrative Reviews

Judicial Review process is an integral part of the antidumping action as envisaged under the GTT Agreement on Antidumping. Article 13 of the Agreement provides for review of the measures imposed by the administrative authorities, by judicial, arbitral or administrative tribunals or procedures, independent of the authorities responsible for final determinations and reviews of such measures. The national legislation of the members dealing with antidumping measures are required to contain provisions for setting up such independent judicial, arbitral or administrative tribunals or procedures for prompt review of final definitive measures, including administrative reviews undertaken under article 11 of the Agreement.

Such reviews examine the legality and procedural soundness of the investigation procedure and their conformity with national laws as well as the framework agreement. Judicial reviews take place at two levels i.e. by the national judiciary having jurisdiction over the matter and the WTO panels set up for this purpose. Article 13 of the Agreement deals with the judicial review mechanism in the national laws of member countries.

For the shake of clarity and understanding the need for a consultation process to improve the provisions of review under the agreement, legal provisions and practices in the

three leading users of the AD mechanism have been discussed here, before some proposals are highlighted for further discussion.

Judicial Review in the EU:

Antidumping action under the EU regulation requires final approval of the 15 member European Council. 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. However, the filing of an application does not stay the execution of the contested measure.

The Courts 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. Courts were in general unwilling to tackle more substantive issues, referring to the discretionary powers of the Commission to assess "complex economic issues". But the judicial process in the Court of First Instance and European Courts of Justice is an extremely complex and time consuming process and sometimes become irrelevant by the time judgement is pronounced. Therefore, WTO dispute settlement mechanism often becomes a more viable option against antidumping actions of EC authorities and in fact large number of cases involving EC in the DSB explains this phenomenon.

Judicial Reviews in the US

The US **Court of International Trade** (CIT) has jurisdiction to hear appeals arising out of the antidumping determinations of the Department of Commerce and ITC. The Court of Appeals for Federal Circuit (CAFC) and the US Supreme Court hear appeals against the decisions of CIT. Except for certain circumstances involving merchandise from Canada or Mexico, the CIT has exclusive jurisdiction to review the determination of DOC and ITC, meaning that no other court may hear such cases. 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. The CIT will review the agency's final determination to determine whether it is supported by substantial evidence on record and otherwise in accordance with law. However, because of the unique system of administrative review process the judicial proceedings in the US are far less effective. The proceedings before the Court of International Trade is generally lengthy and looses its value because, by the time court decide 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.

1979 amendment to the US Antidumping Law expanded the right to judicial review of antidumping duty order and the underlying determinations. Decisions by the Department not to initiate an investigation and negative preliminary determinations by the ITC are also reviewed by the CIT to determine if they are "arbitrary, capricious, or an abuse of discretion

or otherwise not in accordance with law. However, the process is extremely complicated and time consuming. Once DOC publishes notice of its determination or Commerce publishes notice of antidumping duty order, a party has 30 days to initiate a challenge to that determination with the CIT. Among its powers, the CIT has authority to issue injunctions to prevent the liquidation of an interested party's entries in many circumstances. The Court of International Trade, which is the court of first instance, has the freedom to set its own time schedule and there is no ultimate deadline. Because of this the CIT litigation can drag on for years after the Department of Commerce and ITC final determinations. The process is more formal and begins with filing of a **Summon** by an interested party, indicating a statement of intent to start an appeal. Under the US law the appeals is limited to those issues raised by the appellant only and puts the non-appellant parties, at a disadvantage as the other parties are forced into an appeal but are not allowed to raise other issues of their interest. This sometimes forces the non-serious parties also into an appeal. Within 30 days after summon, (generally a "protective summon" is filed) the appealing party must file a **complaint**, covering the issues to be raised, without giving detailed arguments. Within 40 days after filing of the complaints DOC or ITC files the "**administrative record**" of the proceedings before them, with the court. These administrative records form the basis on which CIT make its decisions. CIT appeals are administrative litigation, and in most cases the court limits its considerations to the informations available in the administrative records and no new facts are taken into consideration at the appeal stage. No new discovery is allowed and courts do not allow the litigation to probe into the internal decision making process of DOC and ITC.

After filing of the administrative records in the CIT the appealing party files its motion for summary judgement containing all its factual and legal arguments and the other party gets 30 to 60 days to file its response brief containing all its arguments, both factual and legal. After another round of reply briefs and rebuttals, oral arguments takes place before the judges. Then the CIT delivers its decision. There is no deadline for this decision.

Generally, when a court or a NAFTA Panel determines that either the DOC or the ITC's determination was incorrect, it will "remand" or send the proceeding back to the agency to correct the error. Errors can be those of fact (a factual determination not supported by substantial evidence on record) or of law (i.e. that the determination was not in accordance with law). A remand from the court requires the agency to reopen the administrative process and make a decision consistent with court's decision. In remanding the decision in an administrative review, the court sometimes order the Department to recalculate the antidumping duty rates to be assesses when entries are finally liquidated and refund or recover the duties with interest, wherever necessary.

Decision of CIT can be appealed to the **Court of Appeal for the Federal Circuit** (CAFC). However, such appeals are rare as the CAFC seems to be historically more deferential to the agencies functioning and their technical expertise and do not wish to interfere much in their decision making processes. The standards of review limit the court to two situations. First, the court can reverse the decision where the agency action is contrary to law or ignores clear instructions of the statute. Second situation in which the courts reverse the decision of the agencies is where the agency action is not supported by "substantial evidence on record"- i.e. the decision is inconsistent with the factual information on record. The US courts generally tend to accept the interpretation of the

agency, if the agency's interpretation of the evidences is reasonable. However, of late the courts have started questioning the agency decision, methodologies and their interpretation of evidences. But due to the peculiar nature of US antidumping administrative review mechanism, which determines the actual duties owed, the courts do not have much role in original determinations, as any decision on the original determination, assessment of duties, or deposit rates have no legal effect. Only when the courts over turn the ITC final determination of injury and causal link, or lower the dumping margin below de minimis, the antidumping duty order is dismissed. However, the court order on administrative review orders are effective, as it determines the actual amount of duty liability on goods imported during the period of review.

This peculiar nature of judicial review mechanism and US antidumping practices makes judicial review in US less effective and the interested parties find it more convenient to challenge the decisions in WTO Panels.

Judicial Review in India

In terms of Sec 9C of the Customs tariff Act 1975 as amended, appeals against the decisions of the Designated Authority (of determination and review thereof) regarding the existence, degree and effect of any dumping of an article, lies with the **Central Excise Gold (Control and Regulation) Appellate Tribunal** (CEGAT) in the first instance. Only the final findings and reviews thereof, and the notification of the Department of the Revenue imposing the definitive duties can be challenged by any interested party i.e. importer, exporter or an user of the goods in question. Preliminary findings cannot be challenged in the CEGAT. After filing of an appeal in the Tribunal the Authority and the other interested

parties are required to file their reply and the Authority submits its record of investigation with the Tribunal. The special bench of the Appellate Tribunal consisting of a technical member and a judicial member may, after giving the parties an opportunity of being heard, pass such orders thereon, confirming, modifying or annulling the order appealed against. In principle the Tribunal may set aside a finding where it can be demonstrated that the Authority erred in law, violated a principle of natural justice or made it's findings in complete disregard of the facts. In practice however, CEGAT goes into substantial and technical issues of determination and reviews, besides the legal and procedural aspects. The tribunal also goes through the confidential informations submitted by the Authority in camera, including the disclosure statements, calculation methods adopted etc. to modify the orders wherever found necessary. This review process is quite elaborate and exhaustive and goes into more substantial issues involving determination and effects of dumping and injury. Unlike the US system where the Courts generally remand the cases back to the agency responsible for the finding to reopen the administrative process and make a decision consistent with court's decision, the Tribunal makes its own decision and even comes out with applicable duty rates. This probably explains why not a single case of India has been challenged in the WTO panels so far.

Appeal against the orders of the CEGAT lies with the Supreme Court of India on the points of law only. However, though the High Courts do not have specific jurisdiction over the proceedings under the Indian antidumping law, they also entertain appeals against Designated Authority's actions under their writ jurisdiction at any stage of the investigation. This process sometimes hampers the investigation process, as a stay of the proceedings is possible under the High Court's writ jurisdiction.

Issues for Discussion

The agreement seems to have left the issue of judicial review to the member countries to frame their own laws within their legal system. The basic premise appears to be that the members must place a proper judicial system to review the administrative actions of the authorities within the purview of national laws and framework agreements. However, considerable variation exists in the national judicial arrangements as discussed earlier in this section. While the members appear to have judicial systems in place to admit appeals against the administrative authorities decisions on dumping and injury, there appears to be severe limitation in terms of the scope of these reviews and the time factor, which most of the time render the judicial reviews ineffective.

Both the EU and the US have elaborate judicial system to review the decisions of EC and DOC & ITC respectively. But the judicial system to review the administrative action in these countries seem to depend heavily on the technical expertise of the same administrative authorities and limit court's jurisdiction to points of law and facts on record only. This results in large number of cases involving these countries being challenged in the DSB. The Indian review mechanism appears to be more effective in the sense that the Tribunal tends to go into more substantive issues involving determination of dumping and injury and extent of duties levied and modifies the findings in more substantive manner. The process is also reasonably fast and it is also possible to get an interim relief during the pendency of the appeal before the Tribunal. That may be the reason why non-of the cases involving India have been challenged in the DSB.

Issues for Discussion/Consultation:

In order to promote openness and procedural fairness, and effective review of the administrative actions of investigative authorities, the issue for consultation and discussion should focus on the following issues:

- Whether there is a need for uniformity in approach in the judicial review process, by the individual member countries, while operating within their own judicial systems;
- Is there a need to specify the type and nature of the judicial body most suitable for such reviews;
- Is there a need for specifying the procedure and timeframe for these review processes;
- Whether the appellate authority is required to confine its reviews to the points of law, issues of natural justice and miscarriage of justice only, and accept the interpretation of the administrative authorities on technical issues;
- The degree and extent to which the appellate/ judicial authorities should be allowed to go into the substantive issues of determination and quantum of duties;
- Should the DSB appeal be allowed only after the judicial review process has been completed and where substantial issues of interpretation and ambiguities of the framework agreement is involved, or where substantial inconsistency between the national law and the Agreement exists. In such a case what would be a proper test for setting up a WTO Panel;
- The role and responsibility of the administrative authorities investigating dumping and injury in the review process. Can the internal decision-making process of the authorities be subjected to judicial scrutiny;
- Status of confidential informations in a judicial review process;

Some Suggestions:

- Information on the judicial system of review of antidumping cases in Member countries is sketchy. To start with the Members should provide complete information on procedures within their respective legal system dealing with antidumping duty cases. For example, Members could identify the court or other judicial system they have put into place and explain how that legal system operates. Such information should be updated regularly so that all parties are aware of the current legal regime and process.

- The appellate authority hearing the first appeal against the administrative actions should go into substantive issues also and the process must be completed in a expeditious manner and in a time bound schedule, preferably within 6 months from the date of appeal. However, new facts should not be admitted at the appeal stage as that might encourage short-circuiting the main investigation process itself.

- The second appeal should confine to points of law and procedural fairness issues only.

- However, recourse to WTO panel on any issue should remain independent of the judicial review system of a Member country in order to provide a parallel means of redressal of legal issues arising out of interpretation of the national laws and agreement.