

**Manual on**  
**Anti –dumping duties,**  
**Countervailing duties and Safeguard**  
**measures**

**For Manufacturers, Traders, Importers &Exporters**

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## **I. Introduction**

### **1. Introduction to trade remedy measures**

The fundamental principles of the GATT/WTO system are reciprocity and non-discrimination. However, a number of exceptions to GATT's non-discrimination rule exist, like trade remedies measures, government procurement, and regional trading agreements. This book deals with trade remedies measures. The trade remedies measures refers to trade restrictions, which can be introduced under specific circumstances,

providing protection from imports beyond the protection granted by the tariff schedules negotiated as part of GATT. These measures thus represent an exception to the GATT/WTO fundamental principles of reciprocity and non-discrimination.

Temporary restrictions allowed by the WTO are anti-dumping duties, countervailing duties, and safeguard measures, (tariffs to assist with balance of payments problems, tariffs to protect infant industries, or tariffs for emergency protection). Permanent exceptions are general waivers from binding obligations, which –in contrast with the other mechanisms – must be formally approved by the WTO Council.

Countervailing duties and anti-dumping duties are special offsetting import taxes allowed by the WTO under specific circumstances of unfair competition (export subsidies or dumping on the part of trading partners), conditional on a detailed investigation showing that the domestic industry is being hurt. These are discriminatory measures, in that they are just applied against one trading partner. Safeguard measures are temporary trade restrictions protecting an industry from fair competition, beyond the protection afforded by tariffs negotiated as part of GATT. They are non discriminatory measures as they are applied to all trade partners.

Table 1.1 summarises the measures of trade protection measures regulated by the WTO and their purposes.

Table No.1.1	
<i>Temporary Measures</i>	<i>What are they for?</i>
Anti-dumping	Antidumping actions are duties to offset <i>unfair competition</i> from foreign exporters, only applied to dumping firms.  <i>Discriminatory measure</i>
Countervailing duties	Countervailing duties are duties to offset export subsidies granted by the government

	of an exporting country.  <i>Discriminatory measure</i>
Safeguards	Safeguards Tariffs or quota to offset <i>fair competition</i> from imports causing damages to the domestic industry  <i>Non discriminatory measure</i>

## 2. Definition

### 2.1 Anti-dumping duties -What are they?

In economics, "**dumping**" is understood as any kind of predatory pricing, and a form of price discrimination. The word dumping is now widely used in the context of international trade, where dumping is defined as the practice of selling a good in other country at a lower price than in the domestic market or for a lower price than its cost of production. The term, on one hand has negative connotation for few, but on the other hand it is seen as beneficial for consumers by advocates of free market who believe that use of protectionism to prevent ‘dumping’ would have *net* negative consequences. Advocates for workers and laborers however, believe that safeguarding businesses against predatory practices, such as dumping, help alleviate some of the harsher consequences of free trade between economies at different stages of development.

The most widely accepted definition of dumping is - an act of charging a lower price for a good in a foreign market than one charges for the same good in a domestic market, such that the foreign market is "injured". This is referred to as selling at less than “fair value”.

If a company exports a product at a price lower than the price it normally charges for the same product in its own home market, it is said to be “dumping” the product.

Anti-dumping duties are tariffs imposed by an importing country on imports of a product that has been dumped into its domestic market by some exporting firms. Such tariffs are supplementary to those agreed within the GATT and only applied to dumping firms; they thus represent an exception to the WTO fundamental principle of non-discrimination. These measures retaliate against actions carried out by individual firms rather than countries, contrary to the case of countervailing duties. In very general terms, dumping is the practice of selling exports at an ‘unfairly’ low price, which is a situation where an exporting firm sells its production in the importing country at a price below those applied to identical or ‘like’ products in the country of the exporter. Specifically, if the firm sells in the importing country at an average price below a benchmark related to either the price or the average costs of production in the home country, the exported product is said to be ‘dumped’. In principle, antidumping duties are measures against unfair competition.

## **2. Countervailing duties-What are they?**

The terms ‘Subsidies and countervailing duties’ are used together as the measures of countervailing duty that are taken against the subsidies available to exporters of foreign countries.

Countervailing duties (duties offsetting subsidies) do two things: they discipline the use of subsidies, and regulate the actions that countries can take to counter the effects of subsidies.

Subsidy generally means money or facility granted by the state or a public body to keep down the prices of the commodities .Subsidy may be in the nature of direct or indirect grant on production or exportation of goods and also includes any special subsidy on transportation of any particular product.

Article 1.1 of Agreement on Subsidies and Countervailing Measures defines Subsidy as “a means of financial contribution by Government or any public body within the territory

of the member in form of direct transfer of funds, potential direct transfer of funds or liabilities or Government revenue which is due but is foregone or not collected or provides goods or services other than general infrastructure or purchase goods”. Subsidy shall also be deemed to exist if the Government entrusts or directs private entities to carry out these functions or makes payment to funding mechanism which supports a manufacturer or producer who is an exporter.

Agreement on Subsidies and Countervailing Measures further divides subsidies into

- a. Prohibited subsidies
- b. Actionable subsidies
- c. Non-actionable subsidies which are summarily dealt with in Part-II, Part-III and Part-IV of the Agreement on Subsidies and Countervailing Measures.

The term countervailing means to offset the effect of (something) by countering it with something of equal force.

In international trade the term that is commonly used is ‘Countervailing measures’. The effect which are required to be offset are the effects of subsidy bestowed upon by any country or territory directly or indirectly upon the manufacture or production of their country which, on export, adversely hurts the domestic manufacturers and producers. The countering of the effect of the threat of injury and injury is carried on by imposition of countervailing duty in terms of domestic laws based upon policies and guidelines laid down in GATT.

Subsidies are implicit or explicit payments by a government to the private sector in return for some activity that it wants to reward encourage or assist. Under WTO rules, subsidies may be prohibited. Countervailing duties (CVDs) are tariffs applied to offset (countervail) the impact of export subsidies granted by the government of an exporting country. Supposedly, CVDs should level the playing field for international competition and mitigate distortions. It is possible; however, that such remedy for subsidies is more harmful than the subsidies themselves. CVDs are often applied to appease sectoral interests rather than discouraging or offsetting the threat or the implementation of subsidies. Dumping and subsidies —together with anti-dumping measures and

countervailing duties (CVD) —share a number of similarities. Many countries handle the two under a single law, apply a similar process to deal with them and give a single authority, the responsibility for investigations. Occasionally, the two WTO committees responsible for these issues meet jointly. The main difference between them is that dumping is an action carried out by a firm, while subsidies are actions undertaken by governments. Because the WTO is an organization of countries and it cannot regulate actions undertaken by firms —such as dumping— the Anti- Dumping Agreement only concerns the actions governments take against dumping – antidumping actions. The Subsidies Agreement, instead, disciplines both the granting of subsidies and the countervailing actions.

### **2.3 Safeguards measures -What are they?**

The term safeguard is made up of two independent terms ‘safe’ and ‘guard’. It is something that acts as a guard or protection or defense.

A safeguard measure is a temporary tariff or quota used to protect a domestic industry from foreign exporters.

WTO allows, through its safeguard clause, to impose temporary and nondiscriminatory safeguards measures on imports that are causing injury. GATT agreement envisages the circumstances of invocation of emergency provisions. The situation for which the invocation of defensive and protective measures termed as ‘Safeguard measure’ have been provided for, are in cases where the increase in import of any commodity is in such increase and under such conditions which causes or threaten to cause serious injury to domestic producers of similar or directly competitive products.

The difference between anti-dumping duties and safeguard measures is that the former may only be imposed when foreign exporters are engaged in anti-competitive practices while the latter may be imposed on exporters that have a ‘*fair*’ competitive advantage. It is not that the safeguards are non-discriminatory measures, as they are equally applied to all the trade partners.

### **3. Anti-dumping and countervailing duties –Similarities and differences**

While discussing the SCM agreement, one should distinguish clearly between Antidumping Duties (AD) and Countervailing Duties (CVD). Sometimes AD and CVD are referred to at the same time. This is because they share a number of similarities and also many countries handle the two under a single law, apply a similar process to deal with them and give a single authority responsibility for investigations. However, these are two different trade defense mechanisms available to WTO members and are addressed by two different WTO Agreements. If a company exports a product at a price lower than the price it normally charges in its own home market, it is said to be "dumping" the product. It is therefore a situation of international price discrimination. The Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement (ADA), provides elaboration on the basic principles set forth in Article VI of GATT, to govern the investigation, determination, and application, of anti-dumping duties. The WTO Agreement on Subsidies and Countervailing Measures (SCM) on the other hand disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. The fundamental difference between the two is while dumping is an action by a company, for subsidies, it is the government that acts either by granting subsidies directly or by requiring companies to subsidize certain customers.

Another important feature of AD and SCM is that the GATT agreements allow that the injured domestic industry is permitted to file for relief under the anti-dumping as well as countervailing duties. However, simultaneous imposition of both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidization is not allowed. Article VI.5 of GATT clearly specifies, "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization".

#### **4.To whom do these measures apply?**

Anti-Dumping duties are discriminatory duties imposed against (a) individual exporters and (b) against any country found to be engaged in dumping practices after due compliance of investigation procedures as laid down under the domestic laws .

The relief to the domestic industry against dumping of goods from a particular country is in the form of anti dumping duty imposed against those country/countries, which could go upto the dumping margin. Such duties are exporter specific and country specific.

The targets of anti-dumping duties are either the exporters, the foreign producers of the like articles which are the subject to investigation or the Government of the exporting country/ countries.

Countervailing duties are duties to offset export subsidies granted by the government of an exporting country and are imposed against imports of specific products and imports from specified countries. .

## **5.Authorities regulating and implementing these measures.**

The basic principles of the Safeguards, Countervailing and Anti-Dumping measures are provided in the Article of GATT 1994.

Article VI: Anti-dumping and Countervailing Duties

Article XIX: Emergency Action on Imports of Particular Products

Article XVI: Subsidies

There are separate multilateral agreements entered into by WTO member Countries which provide for the basic frame work for the implementation of the principles laid down under the GATT agreements. The member Countries have also drafted their domestic laws in consonance of the multilateral agreements with respect to Safeguards,

Countervailing and Anti-Dumping duties .India being one of the founder member of the erstwhile GATT has drafted its Statutes/amended its pre-existing Statutes for imposition of Safeguards, Countervailing and Anti-Dumping measures in compliance of the Multilateral Agreements .The multilateral Agreements entered into by the member countries on Safeguards, Countervailing and Anti-Dumping duties are as follows-

1. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994(Agreement on anti-dumping measures)
2. Agreement on Subsidies and Countervailing measures and
3. Agreement on Safeguards.

Article 16 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, and Article 24 on Agreement on Subsidies and Countervailing measures and Article 13 on Agreement on Safeguards provides for the formation of respective committees under each of the agreements.

**1. Committee on Anti-Dumping Practises** under Article 16 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

Committee shall be comprised of representative from each of the member Countries. The WTO Secretariat shall act as the secretariat of the committee. The committee shall elect its own Chairman and shall meet not less than twice a year or as envisaged by the agreement at the request of any member.

The committee shall have the power to set up such subsidiary bodies as appropriate for its functioning.

Committee and subsidiary body under it may seek information from any source it may deem appropriate but it shall inform the member country from whose jurisdiction the information is collected.

Member shall report without delay all preliminary and final dumping action taken to the committee.

Each member shall notify the committee

- (a) as to which of its authorities are competent to initiate and conduct investigation under the Agreement

(b) its domestic procedures governing the initiation and conduct of anti-dumping investigations.

**2. Committee on Subsidies and Countervailing Measures** and Subsidiary bodies under Article 24 on Agreement on Subsidies and Countervailing measures.

Committee shall be comprised of representative from each of the member Countries. The WTO Secretariat shall act as the secretariat of the committee. The committee shall elect its own Chairman and shall meet not less than twice a year or as envisaged by the agreement at the request of any member.

The committee shall have the power to set up such subsidiary bodies as appropriate for its functioning.

The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the field of subsidies and trade relations.

Member shall report without delay all preliminary and final dumping action taken to the committee.

The experts will be elected by the committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4 (The PGE may be required to review the evidence by a member of the use of a prohibited subsidy and make recommendation to the Dispute Settlement Board). The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

The PGE may be consulted by any Member for an advisory opinion on the nature of any subsidy proposed to be introduced or currently maintained by that Member. But such an opinion will be confidential and may not be invoked in proceedings under Article 7.

Committee and subsidiary body under it may seek information from any source it may deem appropriate but it shall inform the member country from whose jurisdiction the information is collected.

**3. Committee on Safeguards** under Article 13 on Agreement on Safeguards. Committee under the Agreement on Safeguards has been given a more significant and a broader role than the committees under Anti-dumping and CVD.

The Committee will have the following functions:

- (a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;
- (b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;
- (c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;
- (d) to examine measures covered by Article 10 and paragraph 1 of Article 11, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;
- (e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;
- (f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and
- (g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.

### **Administration of Safeguards, Countervailing and Anti-Dumping measures under domestic Laws**

All these three measures are administered by the Central Government by the following two authorities:

1. Director General (Safeguard), officer under Department of Revenue, Ministry of Finance, Government of India, and
2. Directorate General of anti-dumping and Allied Duties (DGAD) functioning under the Dept. of Commerce in the Ministry of Commerce and Industry. The anti-dumping & countervailing measures are administered in India by the Directorate General of Anti-dumping and Allied Duties which was set up on 13th April 1998.

Under the Domestic Law the Central Government has the power to impose Safeguards, Countervailing and Anti-Dumping duties. Central Government under Section 8B has the power to impose safeguard duty, power to impose Transitional product specific safeguard duty on imports from People's Republic of China under Section 8C, power to impose Countervailing duty on subsidized articles by way of Notification in the Official Gazette under Section 9 and power to impose Anti-dumping duty on dumped articles by way of Notification in the Official Gazette under Section 9A of The Custom Tariff Act, 1975

In exercise of the powers conferred by sub-section (5) of section 8B of the Customs Tariff Act, 1975 (51 of 1975) the Central Government had notified The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997. **Rule 3** provides for the appointment of Director General (Safeguard) by Central Government by notification in the official Gazette. Government may appoint an officer not below the rank of a Joint Secretary to the Government of India or such other officer as it may think fit as the Director General (Safeguard). Director General (Safeguard) is an officer under Department of Revenue, Ministry of Finance, Government of India.

In exercise of the powers conferred by sub-section (7) of section 9 and sub-section (2) of section 9B of the Customs Tariff Act, 1975 (51 of 1975) the Central Government had notified Customs Tariff (Identification and Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995. **Rule 3** provides for the appointment of designated authority by Central Government by notification in the official Gazette. Government may appoint an officer not below the rank of a Joint Secretary to the Government of India or such other officer as it may think fit as the designated authority for the purpose of these rules.

Similarly in exercise of the powers conferred by sub-section (6) of section 9A and sub-section (2) of section 9B of the Customs Tariff Act, 1975 (51 of 1975) and in suppression of the Custom Tariff (Identification and Assessment and Collection of Duty or Additional Duty on Dumped Articles and for Determination of Injury) Rules, 1985 had made the Customs Tariff (Identification and Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995. **Rule 3** provides for the appointment of designated authority by Central Government by notification in the official Gazette. Government may appoint an officer not below the rank of a Joint Secretary to the Government of India or such other officer as it may think fit as the designated authority for the purpose of these rules.

Both Anti-dumping and anti subsidies & countervailing measures in India are administered by the Directorate General of anti-dumping and Allied Duties (DGAD) functioning in the Dept. of Commerce in the Ministry of Commerce and Industry and the same is headed by the "Designated Authority". The Designated Authority's function, however, is only to conduct the anti-dumping/anti subsidy & countervailing duty investigation and make recommendation to the Government for imposition of anti-dumping or anti subsidy measures.

## **World Trade Organization (WTO)**

The World Trade Organization (WTO) provides the institutional and legal foundation for the multilateral trading system. It came into force on January 1, 1995. The Agreement that sets out its role, structure and powers is the first text in the package of Uruguay Round Agreements that were signed in Marrakech on 15 April 1994. A new international organization was created to oversee and coordinate the functioning of the multilateral trading system. The result of the Uruguay Round Trade Negotiations was the transition from GATT to WTO. The result was the WTO, established by a brief Agreement of sixteen Articles and four annexes that contain all the other agreements reached in the Uruguay Round Agreements as well as many of the earlier GATT provisions and understandings that have been carried over to the new system of multilateral trade relations.

The Annex 1A to the Agreement establishing World Trade Organization *inter alia* contains the earlier Agreements entered into for the implementation of the Article of GATT, 1994 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Agreement on anti-dumping measures), Agreement on Subsidies and Countervailing measures and Agreement on Safeguards.

### **Structure and Basic Functions**

The WTO is headed by a Ministerial Conference, composed of all WTO members, which meets at least once every two years. It is, however, the General Council (GC) - also made up of the full membership of the WTO - that is in effect responsible for the continuing management of the organization. The General Council has also two additional specific tasks: it acts as the Dispute Settlement Body and the Trade Policy Review Body, as requested.

Three separate sets of subsidiary bodies report to the GC. The first and most important set consists of three Councils which supervise the work arising from the obligations of member countries under the agreements on trade in goods, trade in services and trade-

related aspects of intellectual property rights. A second set of subsidiary bodies is responsible for broad functions that cut across sectoral responsibilities. The third group consists of bodies established under the Plurilateral Trade Agreements (these are agreements that are binding only for those countries that elect to sign them).

### **Functions**

Article III of the WTO Agreement defines five functions for it:

- to facilitate the implementation, administration and operation and further the objectives of the multilateral and plurilateral trade agreements;
- to provide a forum for multilateral and plurilateral trade negotiations;
- to settle disputes that may arise between members
- to conduct trade policy reviews;
- to cooperate with the World Bank and the IMF in order to achieve coherence in global economic policy making.

## **II. WTO and GATT on Anti-dumping and countervailing duties and Safeguards measures**

### **1. Introduction**

The number of Multilateral and Plurilateral are an important and basic building blocks of WTO, each dealing with different matter of Trade and Services. These agreements collectively seek international reform in multilateral trade , ensuring to establish free trade among the nations. In this regard, WTO has *inter alia* ensured that constant efforts are put by its member nations to reduce tariffs, seek substantial reduction of trade barriers and elimination of discriminatory treatment in international trade and further that these are equally applied to all its trading partners under the most-favoured nation treatment.

As a corollary to these efforts, member nations at the WTO, have signed agreements such as the Agreement on implementation of Article VI of GATT, 1994 (*more popularly called as the Anti-dumping Agreement*), the Agreement on subsidies and countervailing measures and so also the Agreement on safeguards. In fact, WTO has supported and even advocated these exceptions, rather it can be said that WTO has intentionally supported these exceptions. These exceptions have drawn their force from the WTO for the reason that where WTO upholds the principle of free trade.

Article VI of GATT, 1994 and so also GATT, 1947, lays down the principle for levy of anti-dumping duty. It states that the practice of exporting goods from one country to another at less than the normal value, should be strictly condemned if it causes or threatens to cause material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. In order to seek implementation of the said Article, member nations at WTO have entered into an agreement called the Agreement on implementation of Article VI and more-popularly referred to as the “Anti-dumping Agreement”.

The activity of throwing goods at less than their normal value into another country would be called dumping when, by virtue of it being thrown, it causes or threatens to cause material injury to domestic industry of the importing country. The action undertaken to counteract the said dumping, by the importing country, is called as ‘anti-dumping’. In this regard, the role of WTO is not to pass judgments on anti-dumping but it lays down the principles on how a Nation can or cannot react to dumping. Further, to establish dumping, it would be essential for a member country to prove that there should have been a material and genuine injury to its competing domestic industry, before in any manner, taking steps against dumping. Accordingly, the importing country would be allowed to take action against dumping, when:

- Dumping is not only said to have taken place but also shown to have taken place by the importing country;
- On the basis of the dumping which is shown to taken place, the importing country is able to establish from reliable information and considering all possible factors that

dumping has actually caused or could cause, material injury to its domestic industry;  
and

- Lastly, as a reasonable justification for any action against dumping, the importing country should be able to present the calculation stating the extent of dumping i.e. the difference between the export price and the normal price in the exporter's home country.

In case the above factors are satisfied, GATT and the corresponding Anti-dumping Agreement, allows a nation to take action against the dumping under and in the manner provided to in the said Agreement. Normally, anti-dumping is levied as a duty in addition to the duty of customs normally levied. The intention is to bring the price closer to the 'normal value' or to do such as would remove the injury to the domestic industry in the importing country.

WTO lays down principles for assessing whether a particular product is being dumped and also the extent of such dumping. The agreement also provides three methods to calculate a product's "normal value". The first method is based on the difference between the price in the exporter's domestic market (called normal value) and the price charged for export to the subject nation. In the absence of the price in the domestic market, the second method is to compare the price charged by the exporter for exports to another country that to the price charged on export to the subject nation. In the absence of such a comparable price, as a third alternative, the normal price in the exporting market is derived by considering the exporter's production costs, expenses and his normal profit margins, which is then compared to the price charged for export to the subject nation. In all the three methods, if the price charged for export to the subject nation is materially lower from the comparable price, then dumping is presumed to have taken place.

Once dumping is presumed, the anti-dumping action can be initiated only when such dumping is said to become injurious. Accordingly, upon the determination of dumping, as a further step, it needs to be established that dumping has caused or could cause

material injury to the domestic industry in the importing country. In this regard, a detailed investigation has to be conducted in terms of the specified rules. The investigation must evaluate all relevant economic factors that have a bearing on the state of the industry in question. If the investigation shows dumping has taken place and domestic industry is hurt, the exporting company can undertake to raise its price to an agreed level in order to avoid anti-dumping import duty. WTO provides for detailed procedure on how anti-dumping cases are to be initiated, how the investigations are to be conducted and the conditions for ensuring that all interested parties are given an opportunity to present evidence. Further, it is provided that any measure taken against dumping must normally expire within five years after the date of its imposition, unless further investigation on the matter, shows ending the measure would cause injury. In case the authorities determine that the margin of dumping is insignificantly small (defined as less than 2% of the export price of the product), then also anti-dumping investigations would need to end immediately. Similarly, the investigations would also need to end if the volume of dumped imports are negligible (i.e. if the volume from one country is less than 3% of total imports of that product — although investigations can proceed if several countries, each supplying less than 3% of the imports, together account for 7% or more of total imports). Procedurally, in terms of the agreement, a member country must inform the “Committee on Anti-Dumping Practices” about all preliminary and final anti-dumping actions, promptly and in detail. Further, periodically, member countries are required to report, twice every year, on all investigations initiated by them, whether preliminary or final.

Article XVI of GATT, 1994 and so also GATT, 1947, lays down the meaning of the term ‘subsidy’ and relating provisions containing countervailing measures against what is referred to in the agreement as ‘specific subsidies’, which are categorized further into ‘prohibited subsidies’ and ‘actionable subsidies’. The term ‘subsidy’ has been defined to mean any financial contribution provided by a Government or a Public Body in the form of transfer of funds, tax incentives, provision of goods or service or any other form of income or price support. Subsidies, by their very nature, can distort free international

trade. In order to seek discipline on the use of subsidies, member nations at WTO have entered into an agreement called the “Agreement on Subsidies and Countervailing Measures”, which regulates subsidies and also provides for counter actions against the effects of subsidies.

The WTO Agreement differentiates non-permissible subsidies into two broad categories i.e. prohibited subsidies and actionable subsidies. The Agreement also had originally contained a third category, namely non-actionable subsidies, which existed for five years, ending on 31-Dec-1999 and which did not get extended. The meaning of the terms prohibited subsidies and actionable subsidies are explained below:

- Prohibited subsidies: Subsidies that require the recipients to meet certain export targets or to use domestic goods instead of imported goods would fall under the category of prohibited subsidies. They are prohibited because they are specifically designed to distort international trade and are therefore likely to hurt trade between countries. They can be challenged in the WTO dispute settlement procedure where they are handled under an accelerated timetable. If the dispute settlement procedure confirms that the subsidy is prohibited, then the country providing such subsidy must withdraw them immediately and in the absence of which, the complaining country can take counter measures including imposition of countervailing duty when domestic producers are hurt by imports of subsidized products.
- Actionable subsidies: Subsidies which have an adverse effect on the interest of the complaining country would fall under the category of actionable subsidies. The complaining country need not be the importing country and may be any country whose interest is said to be affected adversely. WTO defines actionable subsidy to be of three types i.e. those which arise when any subsidy hurts the domestic industry of importing country or is such which has the effect of reducing the share of the competing country in the competing export market or is such which make the imported goods uncompetitive to domestic goods. On a complaint, if the dispute settlement body rules that the subsidy has an adverse effect, then the subsidy must be

withdrawn immediately or steps should be taken to remove its adverse effect. In the absence of any remedial steps, the complaining country can take counter measures

- including imposition of countervailing duty on import of subsidized goods.

Countervailing duty (*the parallel of anti-dumping duty*) can be charged after the importing country has conducted a detailed investigation similar to that required for anti-dumping action. WTO provides for detailed rules for deciding whether a product is being subsidized, the criteria for determining whether imports of subsidized products are hurting (“causing injury to”) domestic industry, the procedures for initiating and conducting investigations, and rules on the implementation and duration (normally five years) of countervailing measures initiated against subsidized articles.

Subsidies can play an important role for countries which are developing and also for transformation of centrally-planned economies to become market economies. Considering this, WTO has laid down the time table for the manner of their continuance or elimination. In this regard, WTO provides exemption from disciplines on prohibited export subsidies to least-developed countries and to developing countries with less than \$1,000 per capita GNP. As regards, developing nations having higher per capita, they were given time until 2003 to get rid of their export subsidies and until 2000 for eliminating import-substitution subsidies (i.e. subsidies designed to help domestic production and avoid importing). However, least-developed countries were given time until 2003 for seeking elimination of import-substitution subsidies. The reduction in import subsidization and export subsidies is subject to provisions of Articles 27.5 and Article 27.6 of the ASCM regarding export competitiveness. Under ASCM, countries are generally prohibited from granting export subsidies. However, there are certain exceptions to this general prohibition. Under Article 27.2 of the ASCM, the prohibition shall not apply to certain countries included in Annex VII of the Agreement. These countries are permitted to provide export subsidies. As India is one of the countries included in Annex VII, it can provide export subsidies. The flexibility to an Annex VII

country for providing export subsidies on a product is contingent on the country concerned not having reached export competitiveness in that product. In case export competitiveness in a product has been reached, Article 27.5 of the ASCM require that the export subsidies on it be phased out over a period of eight years.

After the phase-out period, the country concerned would be prohibited from granting export subsidies on the product concerned. However, the flexibility to grant export subsidies on other products, which have not reached export competitiveness, would not be affected by some other product having reached export competitiveness.

Article XIX of GATT, 1994 and so also GATT, 1947, lays down the provisions with respect to safeguards. WTO allows a member nation to restrict imports of a particular product when the domestic industry is injured or threatened with injury to be caused by the surge in imports of any product into its country. However, to justify any action (referred to as 'safeguard'), by the member nation against such surge in imports, the injury would need to be serious. In order to seek implementation of Article XIX and to provide the manner and use of safeguard measures, member nations at WTO have entered into an agreement called the "Agreement on Safeguards. However, the WTO discourages its member nations from entering into bilateral negotiations outside the auspices of GATT either by adopting to restrain exports 'voluntarily' or by agreeing to other means such as sharing of markets, etc.

The WTO agreement sets out the criteria for assessing whether "serious injury" was caused or threatened to be caused and the factors which must have been considered in determining the impact of imports on the domestic industry. The surge in imports may be considered to be either real increase in imports i.e. absolute increase in value or volume or it may be a relative increase in imports i.e. say an increase in the share of imports in a market which is shrinking. WTO provides that any safeguard measure when imposed should be applied only to the extent necessary, so as to prevent or give remedy to the serious injury which has been caused or is threatening to cause. Further, when quantitative restrictions (quotas) are imposed, the measure should be such as which

would not normally reduce the quantities of imports below the annual average for the last three representative years, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

The WTO agreement sets out the requirements for conducting safeguard investigations by national authorities. In this regard, it emphasizes the national authorities to be transparent and to follow established rules and practices, avoiding thereby, any arbitrary methods in safeguarding the interest of domestic industry.

Further, the authorities conducting investigations have to announce publicly when hearings are to take place and provide other appropriate means for interested parties to present evidence. The implementation of the safeguard measure should not in principle be targeted at imports from a particular country but quotas may be allocated among supplying countries in the manner described in the agreement, including in the exceptional circumstance. A safeguard measure which has been implemented by a member nation, should not last for more than four years, although the safeguard measure can be extended for a further period up to eight years, subject to a determination by competent national authorities that the safeguard measure are considered necessary in the interest of industry. Normally, when a country restricts imports in order to safeguard its domestic producers, it must give something in return to the exporting country. WTO provides the manner in which the imposing country needs to compensate the exporting country. However, WTO provides certain concessions to developing countries against imposition of safeguard actions. WTO has also constituted a Safeguards Committee to oversee the operation of the agreement and to also take the responsibility for surveillance of members' commitments. In this regard, member nations have to report each phase of a safeguard investigation and related decision-making for review by the said committee.

## **2.1 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994**

The Agreement is divided into 3 parts and contains 18 Articles and 2 Annexes.

Article VI of GATT 1994 authorizes the imposition of a specific anti-dumping duty on imports from a particular source, in excess of existing rates, when dumping causes or threatens injury to a domestic industry, or materially retards the domestic industry.

The Agreement on Implementation of Article VI of GATT 1994, also commonly known as the Anti-Dumping Agreement, further elaborates on the principles established in Article VI, to govern the investigation, determination, and application, of anti-dumping duties.

The Anti-Dumping Agreement establishes detailed procedural rules for the initiation and conduct of anti-dumping actions: the investigations, the imposition of measures, and the duration and review of measures. It defines dumping as the introduction of a product into the commerce of another country at a price below its 'normal value'. Normal value is defined as the comparable profitable domestic price, adjusted to an ex-factory level. If a domestic price is not available, or is not representative, the costs of production (plus a reasonable margin for sales, expenses and profit) or comparable export prices to third countries (adjusted to an ex-factory level) can be taken as the normal value.

When it has been established that the export price is less than the normal value, dumping has occurred. However, according to the Anti-Dumping Agreement, before being allowed to impose an anti-dumping duty the importing country has also to:

- determine the extent of the 'dumping margin', that is as to how much the exporter's domestic price exceeds the export price, and which is used as a base to compute the rate of antidumping duty;
- show that dumping is causing material injury in the domestic market.

Disputes in the anti-dumping area are subject to binding dispute settlement before the Dispute Settlement Body of the WTO. All WTO Members are required to bring their anti-dumping legislation into conformity with the Anti-Dumping Agreement, and to notify that legislation to the Committee on Anti-Dumping Practices. In addition, members are required to notify the Committee twice a year about all anti-dumping investigations, measures, and actions taken. Members are required to promptly notify the Committee of preliminary and final antidumping actions taken.

Duties imposed against dumping are also subject to reviews every five years. During this review, a duty is removed unless there is evidence that the targeted country continues to dump and this dumping is hurting domestic firms in the importing country. **(Article 11.3)**

This measure has become the most widely used defensive measure, because regulation within the WTO framework offers a number of advantages to industries seeking protection and also to the Government implementing such measures:

- Protection can be offered to individual exporters because the Agreement does not require multilateral application.
- The action is unilateral: no compensation or renegotiation to other parties outside or within the country starting the action is required.
- The effect of wrongness from a foreign body provides an excuse for protection.
- Only the investigation in itself serves to limit imports and keep it to the minimum, because exporters (or intermediaries in the importing country) bear significant legal and administrative costs and they face the uncertainty of having to pay backdated antidumping duties, once an investigation is completed.

## **2.2 Agreement on Subsidies and Countervailing Measures**

The Agreement is divided into 11 parts and contains 32 Articles and 7 Annex.

Subsidies which directly or indirectly affect trade flows are regulated by the WTO which defines what is a subsidy and which subsidies are forbidden and the countervailing measures to offset their effects.

The Uruguay Round of GATT negotiations produced the Agreement on Subsidies and Countervailing Measures (“SCM”). It also established separate rules for agricultural subsidies in the WTO Agreement on Agriculture, and took some minimal steps toward addressing subsidies issues in services industries within the General Agreement on Trade in Services (“GATS”).

The Agreement on Subsidies and Countervailing Measures disciplines the use of subsidies, and regulates the actions that countries can take to counter the effect of subsidies imposed by others. WTO disciplines relating to subsidies have a two fold objective: -

Firstly, to establish rules that avoid or reduce adverse effects on members, and prevent the use of subsidies to nullify or impair concessions and,

Secondly, to regulate the use of countervailing duties by members seeking to offset the injurious effects of foreign subsidization of products.

The structure of the SCM Agreement is the following-

Part I defines the coverage of the discipline and provides a definition of the term ‘subsidy’.

Parts II, III and IV classify subsidies into categories and establish rules for dispute settlement and procedures.

Part V establishes the substantive and procedural requirements that must be fulfilled for the application by a Member of a countervailing measure against subsidized imports.

Parts VI and VII define the institutional structure and modalities for implementation of the Agreement.

Part VIII establishes special treatment rules for developing country Members.

Part IX contains transitional rules for developed country and economies in transition. Parts X and XI describe, respectively, a general dispute settlement provision and final provisions.

According to the Agreement's definition, a subsidy entails a "financial contribution by a government," in the form of:

- (a)  a direct transfer of funds
- (b)  a decision to forego revenue that is "otherwise due,"
- (c) the provision of goods and services
- (d)  an income or price support scheme, if the financial contribution confers a "benefit."

The definition of subsidy as a financial contribution establishes that not all government programs are subsidies. Only contributions that distort the incentive to trade in a major way are regulated as subsidies by the WTO. If a government provides goods and services at market prices, for example, no benefit arises and thus no subsidy exists. Also, financial contributions that can be justified on market failure or non-economic grounds are unconstrained.

The Agreement distinguishes between two types of subsidies: prohibited and actionable.

**Prohibited subsidies** are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other countries' trade. An illustrative list of export subsidies, attached to the Agreement, mentions the provision of products or services (including transportation) for use in export production on terms more favorable than for domestically consumed goods. It also lists export credits and guarantees or insurance at a cost that does not cover long-term operating costs. All export subsidies are deemed specific, that is available only to an enterprise, industry or group of industries. Specific subsidies can be challenged in the WTO dispute settlement procedure where they are handled under an accelerated timetable; if the procedure confirms that the subsidy is prohibited, it must be withdrawn immediately. Otherwise, the complaining country can take counter measures. If domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed.

**Actionable subsidies** are measures that are permitted but may give rise to a consultation or to the imposition of countervailing duties if the complaining country can demonstrate that the subsidy has damaged its interests. The agreement defines three types of damage:

- damage to a domestic industry in an importing country;
- damage to rival exporters from another country when the two compete in third markets;
- damage to exporters trying to compete in the subsidizing country's domestic market.

Three types of adverse effects can be challenged multilaterally:

- Injury to domestic industry.
- Serious prejudice. This type of adverse effect can arise when a subsidy causes:
  - 1) displacement of exports, even in a third country market;
  - 2) significant price reductions or loss in sales
  - 3) an increase in the subsidizing member's share of world market
- Nullification or impairment of benefits accruing under the GATT 1994.

Part V of the SCM Agreement establishes detailed rules regarding the initiation and conduct of countervailing investigations, the imposition of preliminary and final measures, and the duration of measures. Most of the procedural rules of the SCM Agreement are the same as those in the Anti-Dumping Agreement.

If the Dispute Settlement Body rules that the subsidy does have an adverse effect, the subsidy must be withdrawn or its adverse effect must be removed immediately. Again, if domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed provided that the importing country proves that the import subsidy exists, that the domestic industry has been injured and that there is a causal link between the two. The subsidized exporter may agree to raise its export prices as an alternative to being charged countervailing duties on its exports.

WTO members are required to notify their subsidy programs to the WTO secretariat each

year, giving information on the type of subsidy, the amounts involved, duration, their policy objective as well as statistics allowing their trade effect to be determined.

With regard to countervailing measures, members are required to report legislation and regulations, all actions taken as well as competent authorities and domestic procedures.

Members must also submit semi-annual reports on countervailing duty actions taken.

Special exemptions were granted to developing countries and economies in transition. Least developed countries and developing countries with less than \$1,000 per capita GNP are exempted from disciplines on prohibited export subsidies; other developing countries had to remove export subsidies by 2003. Import-substitution subsidies<sup>6</sup> had to be eliminated by 2003 in least-developed countries and by 2000 in other developing countries. Transition economies had to phase out subsidies by 2002.

### **2.3 Agreements on Safeguards.**

This Agreement contains 14 Articles and 1 Annex.

Safeguard protection is an Import protection provided under the Safeguards Clause, that is Article XIX of the GATT. This article permits countries to restrict imports causing injury through temporary and nondiscriminatory restrictions. The Agreement on Safeguards ("SG Agreement") illustrates the rules for application of safeguard measures relative to Article XIX of GATT 1994.

The WTO Agreement defines safeguard measures as “emergency” actions with respect to increased imports of particular products, when such imports have caused or threaten to cause serious injury to the importing Member's domestic industry. Such measures can

consist of quantitative import restrictions or of duty increases to rates higher than those agreed within the WTO.

The guiding principles of the Agreement are that

- measures must be temporary
- they may be imposed only when a surge in imports is found to cause or threaten serious injury to a competing domestic industry
- that they (generally) be applied on a non-discriminatory way
- and that the Member imposing them (generally) must pay compensation to the Members whose trade is affected

The agreement sets out criteria for assessing whether “serious injury” is being caused or threatened, and the factors which must be considered in determining the impact of imports on the domestic industry. GATT rules establish that safeguards should only be used when imports increase unexpectedly. The WTO’s Safeguards Committee oversees the operation of the Agreement.

A safeguard measure should not last more than four years, even though it can be extended up to eight years, subject to a determination by competent national authorities that the measure is needed and that there is evidence the industry is adjusting. Measures imposed for more than a year must be progressively liberalized.

Thus, safeguard measures, unlike anti-dumping measures:

- do not require finding evidence of "unfair" practices;
- generally must be non discriminatory;
- generally must be "paid for" by the Member applying them.

Because they are non discriminatory, and they are costly for the country applying them, they are safeguards are general less distortive than other contingent measures and when applied their effects on the whole national economy is generally taken into account.

To some extent developing countries' exports are shielded from safeguard actions because importing countries can apply safeguard measure to a product from a developing country if the developing country is supplying a significant share of the imports of that product.

The use of safeguards first began in the 1940s when the U.S. began to pursue a liberal trade agenda. Fearing that the lowering of a tariff on some particular good as part of a trade agreement could result in a larger than expected import surge that would hurt domestic firms, the U.S. government insisted that a safeguard provision be part of every trade treaty that it signed.

Prior to the Uruguay Round's revisions to the safeguard rules in 1994, the use of a safeguard measure was subject to measured retaliation. As part of the Uruguay Round reforms, the safeguard rules changed so that safeguards are no longer subject to retaliation for the first three years they are in effect. This modification was intended to make nondiscriminatory safeguards more attractive for protection-seeking governments relative to discriminatory antidumping duties.

### **III. Dispute Settlement**

The power to settle international disputes with binding authority distinguishes the World Trade Organization from most other intergovernmental institutions. The Understanding on Rules and Procedures Governing the Settlement of Disputes gives the WTO unprecedented power to resolve trade-related conflicts between nations and assign penalties and compensation to the parties involved.

Dispute settlement is administered by a Dispute Settlement Body (DSB) that consists of the WTO's General Council. The DSB has the authority to "establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations." The Dispute Settlement system aims to resolve disputes by clarifying the rules of the multilateral trading system; it cannot legislate or promulgate new rules.

When a Member believes that another party has taken an action that impairs “benefits accruing to it directly or indirectly” under the Uruguay Round Agreements, it may request consultations to resolve the conflict through informal negotiations. If consultations fail to yield mutually acceptable outcomes after 60 days, Members may request the establishment of a panel to resolve the dispute. Panels typically consist of three individuals with expertise in international trade law and policy; these panelists hear the evidence and present a report to the DSB recommending a course of action within six months. The panel can solicit information and technical advice from any relevant source, though it is not required to do so. Only submissions from Members are guaranteed to be heard, although in rare cases, panels have consulted submissions from interested non-governmental organizations. Third-party member nations may also involve themselves in the dispute settlement process. All deliberations and communications are confidential, and only the final panel reports become part of the public record.

Once panel reports have been prepared, they are presented to the Dispute Settlement Body, which either adopts the report or decides by consensus not to accept it. Alternatively, if one of the parties involved decides to appeal the decision, the report will not be considered for adoption until the completion of the appeal.

In the case of an appeal, a three-person Appellate Body chosen from a standing pool of seven persons will assess the soundness of the panel report’s legal reasoning and procedure. An Appellate Body report is adopted unconditionally unless the DSB votes by consensus not to accept its findings within 30 days of circulation to the membership.

The primary goal of dispute settlement is to ensure national compliance with multilateral trade rules. Accordingly, the Dispute Settlement Body encourages Members to their make best possible efforts to bring legislation into compliance with the panel ruling within a “reasonable period of time” established by the parties to the dispute. If a Member does not comply with rulings, the DSB can authorize the complainant to suspend commitments and concessions to the violating Member. In general, complainants are encouraged to suspend concessions with respect to the same sector as the subject of the

dispute; however, if complainants find this ineffective or impracticable, they may suspend concessions in other sectors of the same Agreement or even under separate Agreements. Ecuador, for example, suspended its TRIPs commitments to the European Union in retaliation against the EU's non-compliance with panel rulings in the goods-based Banana dispute.

In on of the latest meeting of WTO's Dispute Settlement Body (DSB), a panel was established at India's request to examine the US customs bond directive for merchandise subject to anti-dumping/ countervailing duties. India had formally lodged a complaint on June 6 this year against USA as US Commerce Department had imposed 10.17 percent anti - dumping duty on shrimp imported from India without adhering to 'zeroing' principles of anti -dumping duty. Talks between the two countries failed, leaving India with no other option but to bring it to the DSB, and though the US rejected India's first request, the DSB automatically established it in the second instance.

India's complaint to DSB is that the and laws and regulations of the US imposed on importers of certain warm water shrimp from India are arbitrary and discriminatory in nature and are inconsistent with several provisions of the Anti-Dumping Agreement, the Subsidies and Countervailing Measures Agreement and the GATT.

#### **IV.Rules of Origin**

Rules of origin" are the criteria used to define where a product was made. They are an essential part of trade rules because a number of policies discriminate between exporting countries: quotas, preferential tariffs, anti-dumping actions, countervailing duty (charged to counter export subsidies), and more. Rules of origin are also used to compile trade statistics, and for "made in ..." labels that are attached to products. This is complicated by globalization and the way a product can be processed in several countries before it is ready for the market.

The Rules of Origin Agreement contains 9 Rules divided into Four Parts and has 2 Annex to it. The Rules of Origin are also referred to as ROR on short. The Rules of Origin Agreement requires WTO members to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner; and that they are based on a positive standard (in other words, they should state what does confer origin rather than what does not)

The Agreement on Rules of Origin aims at harmonization of non-preferential rules of origin, and to ensure that such rules do not themselves create unnecessary obstacles to trade. The Agreement sets out a work programme for the harmonization of rules of origin to be undertaken after the entry into force of the World Trade Organization (WTO), in conjunction with the World Customs Organization (WCO).

Article 1 of the Agreement defines rules of origin as those laws, regulations and administrative determinations of general application applied to determine the country of origin of goods except those related to the granting of tariff preferences. Thus, the Agreement covers only rules of origin used in non-preferential commercial policy instruments, such as MFN treatment, anti-dumping and countervailing duties, safeguard measures, origin marking requirements and any discriminatory quantitative restrictions or tariff quotas, as well as those used for trade statistics and government procurement. It is, however, provided that the determinations made for purposes of defining domestic industry or “like products of domestic industry” shall not be affected by the Agreement.

ROOs play a fundamental role in determining the origin of a product and are very important in FTAs. In an FTA, a country gives preferential treatment (in terms of tariff concessions) to the products originating from the partner country. Therefore, ROOs are used as a discriminatory trade policy tool.

India signed its first bilateral trade agreement with Sri Lanka in 1998. It has since then signed an early harvest scheme (EHS) with Thailand, which is an integral part of the Indo-Thai FTA and the first comprehensive economic cooperation agreement (CECA) with Singapore in June 2005.

In the CECA, with Singapore one of the key issues was the ROOs which took much time to resolve and negotiate before India and Singapore could arrive at a common position on ROOs in the agreement.

## V. Legislative Framework for implementation and administration of trade protection measures in India

The provisions governing the levy of anti-dumping, countervailing and safeguard duty are contained in the Customs Tariff Act, 1975 (*hereinafter referred to in this section as 'Act'*) and the Rules made there under. These can be summed up as in the Table number 5.1 given below:

Duties	Customs Tariff Act, 1975-Provisions	Rules governing trade remedies measures	Notifications Number	Notification Issued under rules	
Anti-dumping	Section 9A	Section 9C	Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995		
	Section 9AA				
	Section 9B				
Countervailing duties	Section 9	Section 9C	Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995	No. 1/95 – Cus (NT), dated 01-01-1995	
	Section 9B				
Safeguards measures	Section 8C		The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules 1997	No. 35/97 – Cus (NT), dated 29-07-1997	No. 80/2005 – Cus (NT), dated 29-07-1997
	Section 8B		Customs Tariff (Transitional Products Specific Safeguard Duty) Rules, 2002	No. 34/2002 – Cus (NT), dated 11-06-	No. 80/2005 – Cus (NT), dated 20-09-

				2002	2005
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The provisions governing the levy of anti-dumping duty are contained in the Customs Tariff Act, 1975 and the Rules made there under. Section 9A of the Act, provides for levy and collection of anti-dumping duty on import of articles considered as being dumped into India from a country outside India. In this regard, the Government has issued Notification No. 2/95 – Cus (NT), dated 01-01-1995, providing for Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 to determine the manner in which the articles liable for anti-dumping duty are to be identified, the manner in which export price, normal price, the margin of dumping is to be determined and the manner in which the duty is to be collected and assessed under the Act.

The Act contains separate provisions providing for refund in certain circumstances, the circumstances under which levy under Section 9A would not be applicable and the procedure for appeal. These are contained in Section 9AA, Section 9B and Section 9C of the Act, respectively. Accordingly, Sections 9A, 9AA, 9B and 9C together with the rules referred to above, contain the provisions governing Anti-dumping in India.

The provisions governing the levy of countervailing duty is contained in the Customs Tariff Act, 1975 and the Rules made there under. Section 9 of the Act, provides for levy and collection of countervailing duty on import of subsidized articles into India from a country outside India. In this regard, the Government has issued Notification No. 1/95 – Cus (NT), dated 01-01-1995, providing for rules to determine the manner in which the subsidized articles liable for countervailing duty are to be identified, the manner in which subsidy provided is to be determined and the manner in which the duty is to be collected and assessed under the Act. These rules are called Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995.

The Act contains separate provisions for the circumstances under which the levy under Section 9 would not be applicable and the procedure for appeal. These are contained in Section 9B and Section 9C of the Act, respectively. Accordingly, Sections 9, 9B and 9C together with the rules referred to above, contain the provisions governing Countervailing Duty in India.

The domestic law to implement the provisions of the Agreement on Safeguards has been enacted under Section 8B which provides for levy and collection of safeguard duty on import of articles from a country outside India to protect its domestic from serious injury and Section 8C which provides for levy of specific safeguard duty on imports from the Republic of China, where the imports cause or threaten to cause market disruption to domestic industry, of the Customs Tariff Act, 1975. The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 and Customs Tariff (Transitional Products Specific Safeguard Duty) Rules, 2002 issued by Central Government vide Notification No. 35/97 – Cus (NT), dated 29-07-1997, provide for rules governing the procedural aspects of Safeguard duties. Two other Notifications are First Notification No. No. 80/2005 – Cus (NT) dated 20-09-2005 issued under The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 and Second Notification No. 80/2005 – Cus (NT), dated 29-07-1997 issued under Customs Tariff (Transitional Products Specific Safeguard Duty) Rules, 2002

## **VI. Anti-dumping duties**

The provisions governing the levy of anti-dumping duty are contained in the Customs Tariff Act, 1975 (*hereinafter referred to in this section as 'Act'*) and the Rules made there under. Section 9A of the Act, provides for levy and collection of anti-dumping duty on import of articles considered as being dumped into India from a country outside India. In this regard, the Government has issued Notification No. 2/95 – Cus (NT), dated 01-01-1995, providing for rules to determine the manner in which the articles liable for anti-dumping duty are to be identified, the manner in which export price, normal price, the margin of dumping is to be determined and the manner in which the duty is to be

collected and assessed under the Act. These rules are called Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (*hereinafter referred to in this section as 'Rules'*).

The Act contains separate provisions providing for refund in certain circumstances, the circumstances under which levy under Section 9A would not be applicable and the procedure for appeal. These are contained in Section 9AA, Section 9B and Section 9C of the Act, respectively. Accordingly, Sections 9A, 9AA, 9B and 9C together with the rules referred to above, contain the provisions governing Anti-dumping in India.

Principles governing the determination of Normal value, export price and margin of Dumping are laid down under Annexure I to the Customs Tariff (Identification and Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995. The understanding of the anti-dumping practices and procedures is not feasible without understanding the terms Normal value, export price and margin of Dumping

Dumping occurs when the export price of goods imported into India is less than the Normal Value of 'like articles' sold in the domestic market of the exporter. Imports at cheap or low prices do not per se indicate dumping. The price at which like articles are sold in the domestic market of the exporter is referred to as the "Normal Value" of those articles. [Sec 9A(c)]

### **1 Normal Value [Sec 9A(c)]**

The normal value is the comparable price at which the goods under complaint are sold, in the ordinary course of trade, in the domestic market of the exporting country or territory. If the normal value cannot be determined by means of domestic sales, the Act provides for the following two alternative methods:

1. Comparable representative export price to an appropriate third country.

1. Cost of production in the country of origin with reasonable addition for administrative, selling and general costs and for profits.

‘Normal Value’ is one of the most important factors in determination and assessment of level of dumping. In any anti-dumping investigation it is the normal value which when compared with the export price determines the margin of dumping.

## **2 Export Price [Sec 9A (b)]**

The export price of goods imported into India is the price paid or payable for the goods by the first independent buyer.

## **3 Constructed Export Price [Sec 9A (b)]**

There may be a situation where the domestic sales or third country sales of like product are not in the ordinary course of Trade or the sales in the domestic market of the exporting country are very low in volume. If there is no export price or the export price is not reliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer. If the articles are not resold as above or not resold in the same condition as imported, their export price may be determined on a reasonable basis.

## **4 Margin of Dumping**

Margin of dumping refers to the difference between the Normal Value of the like article and the Export Price of the product under consideration. Margin of dumping is normally established on the basis of:-

- a comparison of weighted average Normal Value with a weighted average of prices of comparable export transactions; or
- comparison of normal values and export prices on a transaction to transaction basis.

A Normal Value established on a weighted average basis may be compared to prices of individual export transactions if the Designated Authority finds a pattern of export prices that differ significantly among different purchasers, regions, time period, etc. It is significant to note that the alternative method of comparing the normal values and export

prices is a major change introduced after the Uruguay Round. The margin of dumping is generally expressed as a percentage of the export price.

## **5 Factors Affecting Comparison of Normal Value and Export Price**

The export price and the normal value of the goods must be compared at the same level of trade, normally at the ex- factory level, for sales made as near as possible in time. Due allowance is made for differences that affect price comparability of a domestic sale and an export sale. These factors, inter alia, include:

- Physical characteristics
- Levels of trade
- Quantities
- Taxation
- Conditions and terms of sale

It must be noted that the above factors are only indicative and any of the factors which can be demonstrated to affect the price comparability, is considered by the Authority for the purpose of comparison.

## **6 Like Articles**

Dumping can be a subject matter of anti-dumping regulation only where the product alleged to be dumped is produced or a product of a like nature is produced in India. Anti-dumping action can be taken only when there is an Indian industry which produces “like articles” when compared to the allegedly dumped imported goods. The article produced in India must either be identical to the dumped goods in all respects or in the absence of such an article, another article that has characteristics closely resembling those goods.

## **7 Injury Analysis**

The Indian industry must be able to show that dumped imports are causing or are threatening to cause material injury to the Indian ‘domestic industry’. Material retardation to the establishment of an industry is also regarded as injury. The material injury or threat

thereof cannot be based on mere allegation, statement or conjecture. Sufficient evidence must be provided to support the contention of material injury. Injury analysis can broadly be divided in two major areas:

#### **The Volume Effect**

The Authority examines the volume of the dumped imports, including the extent to which there has been or is likely to be a significant increase in the volume of dumped imports, either in absolute terms or in relation to production or consumption in India, and its affect on the domestic industry.

#### **The Price Effect**

The effect of the dumped imports on prices in the Indian market for like articles, including the existence of price undercutting, or the extent to which the dumped imports are causing price depression or preventing price increases for the goods which otherwise would have occurred. The consequent economic and financial impact of the dumped imports on the concerned Indian industry can be demonstrated, inter alia by:

- decline in output
- loss of sales
- loss of market share
- reduced profits
- decline in productivity
- decline in capacity utilization
- reduced return on investments
- price effects
- adverse effects on cash flow, inventories, employment, wages, growth, investments, ability to raise capital, etc.

Injury analysis is a detailed and intricate examination of all the relevant factors. It is not necessary that all the factors considered relevant should individually show injury to the domestic industry but the ascertainment of injury or threat of injury on any of the relevant factor can be a consideration in the investigation carried out for the purpose of anti-dumping.

### **8 Non-injurious Price in relation to injury margin**

Non-Injurious Price (NIP) is that level of price, which the industry is, expected to have charged under normal circumstances in the Indian market during the Period defined. This price would have enabled reasonable recovery of cost of production and profit after nullifying adverse impact of those factors of production which could have adversely effected the company and for which dumped imports can't be held responsible.

Besides the calculation of the margin of dumping, the Designated Authority also calculates the Injury Margin for the Domestic Industry. The Injury Margin is the difference between the Non-Injurious Price due to the Domestic Industry and the Landed Value of the dumped imports.

Landed Value for this purpose is taken as the assessable value under the Customs Act and the applicable basic Customs duties except CVD, SAD and special duties.

For calculating Non-Injurious Price, the Authority calls for costing information from the domestic industry in the prescribed proforma for the period of investigations and for three previous years. Accounting records maintained on the basis of Generally Acceptable Accounting Principle (GAAP) form the basis for estimating Non-Injurious Price. In the estimation of Non-Injurious Price for the Domestic Industry, the Authority makes appropriate analysis of all relevant factors like usage of raw material, usage of utilities, captive consumption etc. and the actual expenses during the Period of Investigation including the investments, the capacity utilisation etc. The Non-Injurious Price for Domestic Industry is determined considering the reasonable return on the capital employed.

The Supreme Court of India has held that the computation of non-injurious price (NIP) under the country's antidumping law must apply for an entire industry and not to only particular companies or enterprises. The court was ruling on a petition filed by Reliance Industries Ltd (RIL) against an order of the Designated Authority (DA) for anti-dumping in the Ministry of Commerce.

RIL, the sole producer of pure terephthalic acid (PTA) in India, had sought imposition of anti-dumping duty on PTA imported from Japan, Malaysia, Spain and Taiwan. The DA had recommended a duty of Rs 521 per metric tonne on PTA originating only from Spain. The DA had not recommended duty on imports from Japan and Malaysia on the grounds that they were "above the non-injurious price".

The SC bench of judges Ashok Bhan and Markandey Katju said: “The DA has clearly erred in law because it was required to carry out the determination of injury and computation of NIP for the domestic industry as a whole and not in respect of any particular company or enterprise.”

The bench noted that the purpose of the antidumping law was prevention of “destruction” of domestic industries. “The antidumping law is extremely important for the country’s industrial progress and hence there should be total transparency and fairness in its implementation,” the bench said.

## **9 Causal link**

A ‘causal link’ must exist between the material injury being suffered by the Indian industry and the dumped imports. In addition, other injury causes have to be investigated so that they are not attributed to dumping. Some of these are volume and prices of imports not sold at dumped prices, contraction in demand or changes in the pattern of consumption, export performance, productivity of the domestic industry etc.

## **10 Who can file an application?**

A dumping investigation can normally be initiated only upon receipt of a written application by or on behalf of the “Domestic Industry”. In order to constitute a valid application, the following two conditions have to be satisfied:

- 1 .The domestic producers expressly supporting the application must account for not less than 25% of the total production of the like article by the domestic industry in India; and
2. The domestic producers expressly supporting the application must account for more than 50% of the total production of the like article by those expressly supporting and those opposing the application.

## **11 Domestic industry**

Domestic Industry Domestic industry means the Indian producers of like articles as a whole or those producers whose collective output constitutes a major proportion of total Indian production.

Producers who are related to the exporters or importers or are themselves importers of the allegedly dumped goods shall be deemed not to form part of the domestic industry. The term “domestic industry” is defined under sub-rule (b) of Rule 2.

## **12 Investigation for Anti-Dumping duties**

The investigation authorities are required to follow the prescribed procedure and are required to follow various time limits as provided for in the Agreement for Anti-dumping and Agreement on Subsidies and Countervailing Measures. The agreements provide broad guidelines for the procedure to be followed while taking anti-dumping measures. These procedures have been adopted and inculcated in domestic laws of the countries and are used for taking anti-dumping measures. Article 5 of the Agreement on Anti-Dumping provides for the broad guidelines to be followed for initiation and proceeding with investigation for anti-dumping measures.

### **I. Initiation upon a written application by or on behalf of the domestic industry. .**

#### **[ Rule 5(1) of the Anti Dumping Rules]**

1. Contents of Application

2. Authorities shall examine the accuracy and adequacy of the evidence in the application to justify any investigation.

3. An investigation shall not be initiated unless the authorities have determined the degree of support for, or opposition for the alleged dumping.
4. Publication of the application for the initiation of an investigation to be avoided till the time authorities had taken a decision to initiate investigation.
5. The authorities shall notify the government of the exporting Member concerned after receipt of a properly documented application and before proceeding to initiate an investigation.
6. The authorities to consider dumping and injury simultaneously in the decision whether or not to initiate an investigation, and also for of the investigation into alleged dumping.
7. An application shall be rejected and investigation terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury and where margin of dumping is *de minimis*, or volume of dumped imports, or the injury, is negligible..
8. An anti-dumping proceeding shall effect customs clearance.
9. Investigations shall be concluded within one year, and in no case more than 18 months, after their initiation except in special circumstances

**II. *Suo moto* initiation of investigation by the authorities if they have sufficient evidence of dumping, injury and a causal link as prescribed in the suitable agreements.[ Rule 5(4) of the Anti Dumping Rules]**

Though the Designated Authority initiates the proceedings for anti dumping action on the basis of a petition received from the domestic industry alleging dumping of certain goods and the injury caused to it by such dumping. However, **Rule 5(4)** of the Anti Dumping Rules provides for *suo-motu* initiation of anti dumping proceedings by the Designated Authority on the basis of information received from the Collector of Customs appointed under the Customs Act, 1962 or from any other source. In such circumstances, the Authority initiates the anti dumping investigation on its own without any complaint/petition filed in this regard provided the Authority is satisfied that sufficient evidence exists as to the existence of dumping, injury and causal link between the dumped imports and the alleged injury. It is further clarified that after initiation, the *suo-motu* investigation follows the same procedure as the one based on a petition as mentioned in the Anti Dumping Rules.

Essential requisites for the initiation of an investigation for the purpose of Anti-dumping are as follows:-

(a) Sufficient evidence to the effect that ;

- i . there is dumping
- ii. there is injury to the domestic industry; and
- iii there is a causal link between the dumping and the injury, that is to say, that the dumped imports have caused the alleged injury.

(b) There shall be domestic producers expressly supporting the anti dumping application. must account for not less than 25% of the total production of the like article by the domestic industry.

### **13 Levy of anti-dumping duty**

Anti-dumping duty can be levied on a retrospective basis in case it is found that

- there is a history of dumping which caused injury or that the importer was, or should have been aware that the exporter practices dumping and that such dumping would cause injury; and

- the injury caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied.

However, the anti-dumping duty cannot be levied retrospectively beyond 90 days from the date of issue of Notification imposing duty.

While the Designated Authority (in the Department of Commerce) recommends the anti-dumping duty, provisional or final, it is the Ministry of Finance, Dept. of Revenue which acts upon such recommendation within three months and imposes/levies such duty.

#### **14 Difference between anti dumping duty and normal customs duty**

Anti dumping duty is levied and collected by the Customs Authorities, like a normal custom duty but it is entirely different from the Customs duties both in its theory and substance, and also in its purpose and operation. The following are the main differences between the two: -

Theoretically, anti dumping and the like measures in their essence are linked to the notion of fair trade. The object of these duties is to guard against the situation arising out of unfair trade practices while customs duties are there as a means of raising revenue and for overall development of the economy.

Customs duties fall in the realm of trade and fiscal policies of the Government while anti dumping and anti subsidy measures are there as trade remedial measures.

The object of anti dumping and allied duties is to offset the injurious effect of international price discrimination while customs duties have implications for the government revenue and for overall development of the economy.

Anti dumping duties are not necessarily in the nature of a tax measure inasmuch as the Authority is empowered to suspend these duties in case of an exporter offering a price undertaking. Thus such measures are not always in the form of duties/tax.

Anti dumping and anti subsidy duties are levied against exporter / country in as much as they are country specific and exporter specific as against the customs duties which are general and universally applicable to all imports irrespective of the country of origin and the exporter.

Thus, there are basic conceptual and operational differences between the customs duty and the anti dumping duty. The anti dumping duty is levied over and above the normal customs duty chargeable on the import of goods in question.

## **2. Countervailing duties**

The provisions governing the levy of countervailing duty (*as it is referred to*) is contained in the Customs Tariff Act, 1975 (*hereinafter referred to in this section as 'Act'*) and the Rules made there under. Section 9 of the Act, provides for levy and collection of countervailing duty on import of subsidized articles into India from a country outside India. In this regard, the Government has issued Notification No. 1/95 – Cus (NT), dated 01-01-1995, providing for rules to determine the manner in which the subsidized articles liable for countervailing duty are to be identified, the manner in which subsidy provided is to be determined and the manner in which the duty is to be collected and assessed under the Act. These rules are called Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 (*hereinafter referred to in this section as 'Rules'*).

The Act contains separate provisions for the circumstances under which the levy under Section 9 would not be applicable and the procedure for appeal. These are contained in Section 9B and Section 9C of the Act, respectively. Accordingly, Sections 9, 9B and 9C together with the rules referred to above, contain the provisions governing Countervailing Duty in India.

### **1 Subsidy, its meaning**

The term 'subsidy' has been defined to mean any financial contribution provided by a Government or a Public Body in the form of transfer of funds, tax incentives, provision of goods or service or any other form of income or price support. Subsidies, by their very nature, can distort free trade, accordingly the law provides for levy of countervailing duty on import of subsidized articles. Under the law only certain types of subsidy are considered to distort trade and therefore only those articles enjoying such subsidy would become subjected to the levy of countervailing duty on their imports into India. Essentially, these restricted subsidies are of two types, namely prohibited subsidies and actionable subsidies, which are explained below:

- Prohibited subsidies: Subsidies that require the recipients to meet certain export targets or to use domestic goods instead of imported goods would fall under the category of prohibited subsidies. They are prohibited because they are specifically designed to distort international trade and are therefore likely to hurt trade between countries.
- Actionable subsidies: Subsidies which have an adverse effect on the interest of the complaining country would fall under the category of actionable subsidies. The complaining country need not be the importing country and may be any country whose interest is said to be affected adversely. An actionable subsidy may be of three types i.e. those which arise when any subsidy hurts the domestic industry of importing country, or is such which has the effect of reducing the share of the competing country in the competing export market, or is such which make the imported goods uncompetitive to domestic goods.

Subsidies which would be liable to countervailing duty are those which are specifically provided to an enterprise or industry or group of enterprises or industries. The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to discipline. In case a subsidy is widely available within an economy, then such a distortion in the allocation of resources is presumed not to occur. Thus, only 'specific subsidies' would be subjected to the levy of countervailing duty. In this regard, normally there are four types of specific subsidies:

<b>Specific Subsidy</b>	<b>Particulars of Subsidy</b>
Enterprise	Government targets a particular company or companies for subsidization
Industry	Government targets a particular sector or sectors for subsidization
Regional	Government targets producers in specified territory for subsidization
Prohibited	Government targets export goods or to using domestic inputs for subsidization

Further, there are certain exceptions which have been provided even in case of specific subsidies. **(Rule 11)** In this regard, the following subsidies have been exempted even when they are specific:

- (i) research activities conducted by or on behalf of persons engaged in the manufacture, production or export; or
- (ii) assistance to disadvantaged regions within the territory of the exporting country; or
- (iii) assistance to promote adaptation of existing facilities to new environmental requirements

The term “subsidy for research activity” has been defined to mean assistance for research activities conducted by commercial organizations or by higher education or research establishments on a contract basis with the commercial organizations if the assistance covers not more than seventy five per cent of the costs of industrial research or fifty per cent of the costs of pre-competitive development activity and provided that such assistance is limited exclusively to -

- (i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);
- (ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

- (iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought in research, technical knowledge, patents, etc.;
- (iv) additional overhead costs incurred directly as a result of the research activity; and
- (v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

The term “subsidy for assistance to disadvantaged regions” has been defined to mean assistance to disadvantaged regions within the territory of the exporting country given pursuant to a general framework of regional development and such subsidy has not been conferred on limited number of enterprises within the eligible region:

Provided that -

- (a) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;
- (b) the region is considered as disadvantaged on the basis of neutral and objective criteria, indicating that the region’s difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;
- (c) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors -
  - (i) one of either income per capita or household income per capita, or Gross Domestic Product per capita, which must not be above eighty-five per cent of the average for the territory concerned;
  - (ii) unemployment rate, which must be at least one hundred and ten per cent of the average for the territory concerned, as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

The term “subsidy for assistance to promote adaptation of existing facilities to new environmental requirements” has been defined to mean assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on commercial organizations:

Provided that the assistance -

- (i) is a one-time non-recurring measure;
- (ii) is limited to twenty per cent of the cost of adaptation;
- (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by commercial organizations;
- (iv) is directly linked to and proportionate to a commercial organization’s planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
- (v) is available to all firms which can adopt the new equipment and/or production processes.

## **2 Initiation of Investigation**

Countervailing duties would mean levy of countervailing duty on import of specified subsidized articles into India. The countervailing duties would be resorted only when the subsidizing nation refuses to remove/ withdraw the specific subsidy. The investigations against alleged subsidy are normally initiated on the basis of a written request submitted "by or on behalf of" a domestic industry. In this regard, the application would be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion in the domestic industry, either expressing supporting or opposing the application. However, the investigation would not be initiated when domestic producers expressly supporting the application account for less than 25% of total production of the like product produced in the domestic

industry of the importing country. In this regard, the Application is required to include evidence of (a) subsidy and if possible, its amount, (b) injury within the meaning of Article XVI of GATT 1994 and (c) the causal link between the subsidized imports and its alleged injury. Further, the application should submit reasonable evidence and it should not be a simple assertion or of evidence, that is unsubstantiated. The application is required to contain the following information, for consideration by the investigation authorities:

- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) evidence with regard to the existence, amount and nature of the subsidy in question;
- (iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry.

On receipt of the application the investigating authorities would examine the accuracy and adequacy of the evidence provided for determining whether there is sufficient evidence to justify the initiation of an investigation. On being satisfied with the

documents presented but before initiating the investigation, the investigating authorities would be required to notify the exporting country of its intended investigation. The investigating authorities can also initiate the investigation suo moto i.e. on their own, if they consider that they have sufficient evidence of the existence of subsidy, its injury and the causal link. In order to ensure that investigations without merit are not continued, it is provided that the investigation should be terminated immediately if it found that the amount of subsidy is less than 1%, ad valorem (for developing nations, it is 2%) or the volume of subsidized imports from a country or the actual or potential injury, is negligible (for imports from developing nations, the volume of imports should be less than 4% when taken individually or 9% when considered collectively). Further, in order to minimize the trade-disruptive effect of investigations, it is specified that the investigations should be completed within one year and in no case, more than 18 months after initiation of investigation.

### **3 Conduct of Investigation**

The investigation authorities are required to guarantee the confidentiality of sensitive information and verify the information on which determinations are based. At the same time, in order to ensure that there is transparency in proceedings, the authorities are also required to disclose the information on which determinations are to be based, to all interested parties and to provide them with adequate opportunity to make or provide their comments. In this regard, the term ‘interested party’ has been defined to include (i) an exporter or foreign producer or the importer 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 product; and (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member. The definition of ‘interested party’ is meant to be inclusive and not exhaustive. Accordingly, it may be possible to include persons other than those specified above as interested in the investigation process. The law establishes the rights of parties to participate in the investigation process including the right to meet with parties with adverse interests, for instance in a public hearing.

#### **4 Determination of injury and casual link**

The determination of injury for purposes of levy of countervailing duty against subsidy shall be based on positive evidence, which would normally involve an objective examination of (a) the volume of the subsidized imports and the effect it has on the prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such products.

The term "domestic industry" has been defined to mean "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". In certain circumstances, it may not be appropriate to include all producers of the like product in the domestic industry. In this regard, it would be considered as appropriate to exclude from the domestic industry, producers who are related to the exporters or importers of the product under investigation and producers who are themselves importers of the allegedly subsidized goods. In this regard, a producer can be deemed as "related" to an exporter or importer of the allegedly subsidized goods if there is a relationship of control between them and if there is reason to believe that the relationship causes the domestic producer to behave differently from non-related producers.

Further, there are also special rules that allow in exceptional circumstances, consideration of injury to producers comprising a "regional industry". A regional industry may be found to exist in a competitive market if producers within that market sell all or almost all of their production of the like product in that market, and demand for the like product in that market is not to any substantial degree supplied by producers of the like product located outside that market. In such cases, it may be possible that this regional industry gets materially injured by supply of the subsidized article in its market, even if a major proportion of the entire domestic industry including producers outside that region may not be materially injured. Accordingly, a finding of injury to the regional industry would be allowed only if (1) there is a concentration of subsidized imports into the market

served by the regional industry, and (2) subsidized imports are causing injury to the producers of all or almost all of the production within that market. In the event that the investigation leads to the conclusion that the regional industry has been materially injured by the import of subsidized articles into its territory, then the investigating authorities determine to levy countervailing duty on subsidized articles on imports of the product, without limitation to the territory. In this regard, before imposing to levy countervailing duties on subsidized articles, the investigating authorities must offer the exporters an opportunity to cease exporting the subsidized article into the said region or territory.

## 5 Determination of Injury

Principles governing the determination of injury for the purpose of countervailing duties are contained in Annexure I to the Rules. The determination of injury to domestic industry of the importing country is an essential pre-requisite for levy of protective countervailing duty on subsidized articles. In this regard, the term "injury" has been defined to mean either

- (i) material injury to a domestic industry,
- (ii) threat of material injury to a domestic industry, or
- (iii) material retardation of the establishment of a domestic industry.

The designated authority shall take into account *inter alia*, the following principles while determining injury :-

The basis of injury determination should be positive evidence and involve an objective examination of both in terms of-

(a).**Volume:** The subsidized imports as measured in terms of volume and the effect that effect that the subsidized imports has on prices in the domestic market for like products.

With regard to the volume of the subsidized imports, the (2) designated authority shall *inter alia* consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in India.

With regard to the effect of the subsidized import on prices,

(b).**Effect:** The resulting impact of these imports on the domestic producers of such products.

3) the designated authority shall, consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like article in India, or whether the affect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree.

Where imports of a product from more than one country are (4) simultaneously subject to countervailing duty investigations, the designated authority may cumulatively assess the effect of such imports only if it determines that (a) the amount of subsidization established in relation to the imports from each country is more than one per cent *ad valorem* and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the like domestic product.

The designated authority while examining the impact of the (5) subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital investments and, in the case of agriculture, whether there has been an increased burden on government support programmes.

It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury. The demonstration of a casual relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the designated authority. The designated authority shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices on non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers,

developments in technology and the export performance and productivity of the domestic industry.

The effect of the subsidized imports shall be assessed (2) in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

A determination of a threat of material injury shall be 3. based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the designated authority shall consider, *inter alia*, such factors as :

- (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- (ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
- (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to Indian market, taking into account the availability of other export markets to absorb any additional exports;
- (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (v) inventories of the product being investigated.

Thus, there needs to be either an actual injury or a threat of an injury, in respect of an established domestic industry or injury significant enough to retard its establishment. However, the law is silent on the manner of evaluating and establishing as to how the domestic industry can be said to be materially retarded from being established. Further,

the law also does not define the term ‘material’, in the context of ‘injury’. Nevertheless, these terms have to be understood in their general sense.

The determination of injury must be based on positive evidence i.e. there should be evidence in favor of material injury/ threat to the domestic industry. Further, the manner in which the evidence is examined against subsidized articles should be objective, considering

- (i) the volume of imports of the subsidized article in the domestic industry and the effect it has on the prices in the domestic market for like products, and
- (ii) the consequent impact it has caused or could cause to the domestic producers of the like product.

In this regard, detailed guidance on how these factors are to be evaluated or weighed or on how the determination of causal link is to be made, is not provided. However, it lays down certain factors to be considered in the evaluation of threat in respect of material injury. These include the rate of increase in the imports of subsidized articles, the capacity of the exporter(s), the likely effect it has on prices and inventories. But it does not make further elaboration on these factors are to be evaluated. Nevertheless, the determination of the threat in respect of material injury is required to be based on facts and not merely on allegation, conjecture, or remote possibility and moreover that the change in circumstances which would create a situation where subsidized imports would caused material injury must be clearly foreseeable and imminent.

## **6 Evaluation of Injury**

As regards evaluation of injury, the law does not provide decisive guidelines to the investigating authorities on the manner of evaluating the injury, which is based on volume and price, in respect of the import of subsidized but they specify that such factors need to be considered for investigation purposes. In this regard, the investigating authorities have to develop analytical methods for consideration of these factors which may be regarded as relevant in the light and circumstances of each case. As regards evaluating the impact on the domestic industry by the import of subsidized, it is provided that the investigating authorities are required to evaluate all relevant economic factors

having bearing upon the state of the domestic industry. In this regard, a number of factors have been listed such as actual or potential declines in sales, profits, output, market share, productivity, return on investments, utilization of capacity, actual or potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and the magnitude of the amount of subsidy. However, this list is not exhaustive and other factors may be deemed relevant. In this regard, it is provided that no single factor or combination of factors can necessarily lead to either an affirmative or negative determination, as regards the alleged subsidy. In evaluating the injury to the domestic industry, the investigating authorities are required to consider whether there has been significant price undercutting in respect of the subsidized imports as compared to the price of the like product in the domestic industry of the importing country. In this regard, the investigating authorities are also required to consider whether the purpose of the article being subsidized is to depress prices of like products in the domestic industry to a significant degree or to prevent the increase in price of such products, which otherwise would have occurred, to a significant degree.

## **7 Casual Link**

As regards the establishment of material injury, it needs to be demonstrated that there is a casual relationship between the article which is alleged as being subsidized and the injury it seeks to cause to the domestic industry manufacturing or producing like product. In this regard, the demonstration has to be based on an examination of all relevant evidence, though the particular factors which may be considered as relevant in evaluating the evidence of such casual link, is not specified. In this regard, the investigating authorities are required to consider for factors which can cause injury other than by virtue of it being subsidized. For eg. Factors such as change in technology, change in pattern of demand, etc., also cause injury but they may not be by virtue of the subsidy. Accordingly, analysis of such 'other factors' which may cause injury are important in the establishment of evidence against material injury, as they need to be excluded in evaluating the injury on account of import of subsidized article. In this regard, the investigating authorities are required to develop analytical methods for determining what evidence is or may be relevant in a particular case and for evaluating that evidence, to take into account other

factors which may also cause injury but not virtue of the subsidy. Accordingly, only those factors which may be said to have a casual link between import of subsidized goods and its consequent injury to the domestic industry are required to be factored, considered and evaluated.

- **Cumulative Analysis**

In certain cases, a subsidized article may be found imported from more than one country. In this regard, it is possible to undertake a cumulative analysis of import of the subsidized article from more than one country for assessing whether such article is causing material injury to the domestic industry. In this regard, it is provided that the authorities must be required to determine the amount of subsidy from each country and that such subsidy is not less than 1%, ad valorem for each country and that the volume of imports from each country is not negligible. Further, the investigating authorities are required to assess whether cumulative assessment is appropriate in light of the conditions of competition between the imported products per se and the conditions of competition between the imported products and the like domestic product.

## **8 Assessment of subsidy for countervailing duties**

### **Calculations of the amount of subsidy**

The law does not decisively specify the manner in which the amount of subsidy given by another country is to be computed, but it contains certain guidelines for calculating the amount of subsidy under different circumstances including an illustrative list of certain kinds of subsidies. In this regard, the following guidelines have been provided for the investigating authorities in calculating the amount of subsidy:

- (a) Government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
- (b) Loan given by the Government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the

Government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

- (c) Loan guarantee given by the Government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the Government and the amount that the firm would pay on a comparable commercial loan absent the Government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
- (d) The provision of goods or services or purchase of goods by a Government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

## **9 Procedural requirements for Countervailing Duties**

### **Provisional Measures**

The investigating authorities are allowed to take certain provisional measures in the form of levy of provisional countervailing duty on import of subsidized article. These provisional measures are allowed only when the following conditions are fulfilled:

- (i) The investigating authorities have initiated the investigation giving proper public notice and interested parties have been given adequate opportunities to submit information and make their comments;
- (ii) The investigating authorities have a preliminary affirmative determination in favor of subsidy and its consequent injury to the domestic industry; and
- (iii) The investigating authorities judge that such provisional measures are necessary to prevent injury being caused during the investigation period.

The investigating authorities can apply the provisional measures only after 60 days from the date when the investigations were initiated. Further, the provisional measures are required to be limited to as short period as possible but in no case can extend to a period beyond four months.

### **10 Price Undertakings**

The Central Government is empowered to accept price undertakings either from the subsidizing member nation or from the exporters of the article alleged as subsidized, in lieu of the imposition of countervailing duty on subsidies articles. In this regard, the term 'Price Undertaking' refers to a voluntary undertaking given by (a) the government of the exporting Member by agreeing to eliminate or limit the subsidy or take such other measures concerning its effects; or (b) the exporter agreeing to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. For this purpose, price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. However, the price undertakings from subsidizing member nation or the exporters, as the case may be, would be acceptable only after the investigation authorities have made a preliminary affirmative determination that subsidy exists and that consequent to the said subsidy, injury has also been caused to the domestic industry. This is for the reason that price undertakings are always to be linked with the quantum of subsidy and in the absence of affirmative evidence towards the quantum of subsidy, an undertaking of this kind, would not be judiciously acceptable in international transactions.

The investigating authorities are required to complete their investigation on the quantum of subsidy and its consequent injury, even when the price undertakings has been accepted, in the event it is desired by the exporting or the importing member or by the investigating authorities. In such a case, if the investigation leads to a negative determination of any subsidy or injury, then the price undertaking given shall automatically lapse and in the event that an affirmative determination of any subsidy or injury, then the price undertaking shall continue consistent with its terms and the provisions agreed upon.

## **11 Imposition and Collection of Duties**

The decision to impose countervailing duty on subsidized articles is made by the importing country based on the determination by the investigating authorities, either provisionally or finally, of the amount of subsidy and its consequent injury. In this regard, when countervailing duty on subsidized articles is imposed in respect of any product, then such duty shall be collected appropriately in each case and on a non-discriminatory basis on imports of such product from all sources found to provide subsidy and causing injury, except in cases where price undertakings have been accepted. In any case, the amount of countervailing duty on subsidized articles shall not exceed the amount of subsidy as has been established by the investigating authorities.

As regards the levy of countervailing duty on subsidized articles, the general principle is that both provisional and final duties would be applied only from the date on which the determinations of the amount of subsidy, its consequent injury and the establishment of casual link between the two, is made. However, recognizing that injury may have occurred during the period of investigation or that exporters may have taken actions to avoid the imposition of countervailing duty on subsidized articles, there is a provision for the retroactive (retrospective) imposition of countervailing duty in specified circumstances. In case the imposition of countervailing duty on subsidized articles is based on a finding of material injury, as opposed to threat of material injury or material retardation of the establishment of a domestic industry, the countervailing duty on subsidized articles may be collected as of the date when the provisional measures were imposed. In this regard, if provisional duties were collected in an amount greater than the amount of the final duty or if the imposition of duties is based on a finding of threat of material injury or material retardation, a refund of provisional duties is required. In specified circumstances, the investigating authorities may levy a definitive countervailing duty on subsidized articles on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures. In this regard, such duty can be levied when the injury is caused by massive imports of a product benefiting

from subsidies paid or bestowed inconsistently with GATT in a relatively short time, which in the light of the timing and the volume of the imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive countervailing duty on subsidized articles. In this regard, the concerned importers should be given an opportunity to comment.

In case the investigating authorities consider it necessary to levy the countervailing duty on subsidized articles retroactively, then in order to enforce such measure, the authorities may take measures such as withholding of appraisement or assessment of bill of entry or seek security in the form of cash deposit or bank guarantee, etc. However, in any case, duty cannot be levied retroactively on products which have entered for consumption prior to the date of initiation of the investigation. Accordingly, the duty if levied retroactively can be levied earliest from the date of initiation of investigation but not earlier.

### **12 Duration, Termination and Review of Duty**

The Agreement establishes rules for the duration of the countervailing duty on subsidized articles and the requirements for periodic review of the continuing need, if any, for its imposition. Limiting the period is considered essential on account of the practice of some countries to levy such duties indefinitely. The "sunset" requirement establishes that the countervailing duty on subsidized articles shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty may lead to continuation or recurrence subsidization and injury. This five year "sunset" provision also applies to price undertakings. The Agreement also provides for review of the need for continued imposition of the duty upon request from an interested party.

### **13 Public Notice**

In order to have transparency in the investigation process, the authorities are required to give public notice with respect to initiating investigations, preliminary and final determinations and with respect to the concerned undertakings. The public notice must disclose non-confidential information concerning the parties, the product, the amount of

subsidy, the facts revealed during the investigation and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers.

#### **14 Committee on Subsidies and Countervailing Measures**

WTO has formed Committee on Subsidies and Countervailing Measures, which meets at least twice a year, providing its Members an opportunity to discuss matters relating to the Agreement on Subsidies and Countervailing Measures. In this regard, the Committee also undertakes to review the national legislations notified by the members to WTO. This offers an opportunity to raise questions concerning the operation of national anti-subsidy laws and regulations and also questions concerning the consistency of national practice with the Agreement on Subsidies and Countervailing Measures. The Committee also reviews notifications of anti-subsidy actions taken by Members, providing them an opportunity to discuss issues raised therefrom. The Committee has created a separate body, called the Permanent Group of Experts, which may be consulted by any member on the nature of subsidy proposed or currently maintained. Thus, the committee focuses on building better practices concerning subsidies and countervailing related matters.

#### **15 Dispute Settlement**

WTO has established a Dispute Settlement Body under the Dispute Settlement Understanding entered into by all the members of the WTO. This is a binding dispute settlement authority of the WTO. Members are allowed to challenge the imposition of countervailing measures, whether preliminary or final and can raise all issues concerning compliance with the requirements of the Agreement, by doing so before a panel established under the DSU. As regards disputes under the Agreement on Subsidies and Countervailing Measures, a special standard of review is applicable providing for a certain amount of deference to national authorities in their establishment of facts and interpretation of law and is intended to prevent dispute settlement panels from making

decisions based purely on their own views. The standard of review is only for anti-subsidy disputes and a Ministerial Decision provides that it shall be reviewed after three years to determine whether it is capable of general application.

## **16 Notifications**

In terms of the Agreement on Subsidy and Countervailing Measures, all WTO Members are required to bring their anti-subsidy legislation into conformity with the said Agreement and to notify their legislation to the Committee on Subsidies and Countervailing Measures. While the Committee does not "approve" or "disapprove" any Members' legislation, the legislations are reviewed in the Committee, with questions posed by Members and discussions about the consistency of a particular Member's implementation in national legislation of the requirements of the Agreement. In addition, Members are required to notify the Committee twice a year about all anti-subsidy investigations, measures, and actions taken. The Committee has adopted a standard format for these notifications, which are subject to review in the Committee. Finally, Members are required to promptly notify the Committee of preliminary and final anti-subsidy actions taken including in their notification certain minimum information required by Guidelines agreed to by the Committee. These notifications are also subject to review in the Committee.

## **5. Safeguards measures**

Article XIX of GATT read with Agreement on Safeguard (AOS) provides the ground rules for Safeguard action by countries which face a situation of increased imports of any commodity which causes or threaten to cause serious injury to domestic producers of like or directly competitive products. The safeguard action can include the imposition of tariff over and above the bound rates or Quota Restrictions or Tariff Rate Quota. The domestic regulations are based on Agreement on Safeguards which establishes Rules for application of Safeguard measures. The domestic regulations and its implementation are wholly consistent with both the letter and spirit of Article XIX of GATT 1994 and

Agreement on Safeguards, which has been appropriately reflected in the domestic regulations.

The domestic law to implement the provisions of the Agreement on Safeguards has been enacted under Section 8B which provides for levy and collection of safeguard duty on import of articles from a country outside India to protect its domestic from serious injury and Section 8C which provides for levy of specific safeguard duty on imports from the Republic of China, where the imports cause or threaten to cause market disruption to domestic industry, of the Customs Tariff Act, 1975 (*hereinafter referred to in this section as 'Act'*). The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 and Customs Tariff (Transitional Products Specific Safeguard Duty) Rules, 2002 issued by Central Government vide Notification No. 35/97 – Cus (NT), dated 29-07-1997, provide for rules governing the procedural aspects of Safeguard duties (*hereinafter referred to in this section as 'Rules'*).

The salient features of Section 8B of the Customs Tariff Act, 1975, which empowers the Central Government to impose Safeguard duty, *inter alia*, are:

If the Central Government, after conducting such enquiry as it deems fit, is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to domestic industry, then, it may, by notification in the Official Gazette, impose a safeguard duty on that article.

Provided that no such duty shall be imposed on an article originating from a developing country so long as the share of imports of that article from that country does not exceed 3% (three per cent) or where the article is originating from more than one developing countries, then, so long as the aggregate of the imports from all such countries taken together does not exceed 9% (nine per cent) of the total imports of that article into India.

Provided further that the Central Government may, by notification in the Official Gazette, exempt such quantity of any article as it may be specified in the notification, when

imported from any country or territory into India, from payment of the whole or part of the safeguard duty leviable thereon.

Section 8C which was introduced in Finance Act, 2002 provides for imposing safeguard duty on any article imported into India from the Peoples' Republic of China in such increased quantities and under such conditions so as to cause market disruption to domestic industry.

### **1 Critical circumstances**

Critical circumstances as defined under sub rule (b) to Rule2 means any circumstances in which there is clear evidence that imports have taken place in such increased quantities and under such circumstances as to cause or threaten to cause serious injury to the domestic industry and delay in imposition of provisional safeguard duty would cause irreparable damage to the domestic industry;

The safeguard measures can be applied when the following conditions are satisfied:

- The product has been imported into India;
- The import is in such increased quantities, absolute or relative to domestic production;
- The import is made under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products

There is serious injury or a threat of serious injury –

‘Serious injury’ is defined as a significant overall impairment in the position of a domestic industry. In determining whether serious injury is present, investigating authorities must evaluate all relevant factors having a bearing on the condition of the industry, including the absolute and relative rate and amount of increase in imports, the market share taken by the increased imports, as well as changes in level of sales,

production, productivity, capacity, utilization, profit and losses, and employment of the domestic industry.

‘Threat of serious injury’ means a clear and imminent danger of serious injury.

There must be objective evidence of the existence of a causal link between increased imports of the products concerned and serious injury. Injury caused to the domestic industry at the same time by factors other than increased imports must not be attributed to increased imports to the domestic industry.

‘Domestic industry’ means the producer -

- i. as a whole of the like article or a directly competitive article in India; or
- ii. whose collective output of the like article or a directly competitive article in India constitutes a major share of the total production of the said article in India.

Safeguard measures may be applied only following an investigation conducted by competent authorities in accordance with established procedures to ensure transparency. The Agreement on Safeguards sets out some rules for how the investigation process must operate but leaves the details for members to determine within their own territories.

## **2 Initiation of Investigation for safeguard duties.**

I. Initiation upon a written application by or on behalf of the domestic industry.

[ Rule 5(1) of the Safeguard Duty Rules]

II. *Suo moto* initiation of investigation by the authorities if they have sufficient evidence increased imports, serious injury or threat of serious injury and a causal link between increased imports and alleged injury or threat of serious injury as prescribed in the suitable agreements.[ Rule 5(4) of the Safeguard Duty Rules]

## **3 Determination of injury for safeguard measures**

The determination of injury for purposes of undertaking safeguard measures shall be based on positive evidence, which would normally be based on objective examination of all relevant factors and in quantifiable manner. The investigation authorities are required to determine whether the increased imports have caused or are threatening to cause serious injury to a domestic industry. The term "domestic industry" has been defined to mean "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". In certain circumstances, it may not be appropriate to include all producers of the like product in the domestic industry. In this regard, it would be considered as appropriate to exclude from the domestic industry, producers who are related to the exporters or importers of the product under investigation and producers who are themselves importers of the allegedly dumped product. In this regard, a producer can be deemed as "related" to an exporter or importer of the allegedly dumped product if there is a relationship of control between them and if there is reason to believe that the relationship causes the domestic producer to behave differently from non-related producers.

The determination of serious injury to the domestic industry of the importing country is an essential pre-requisite for undertaking safeguard measures. In this regard, the term "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry and the term "threat of serious injury" shall be understood to mean serious injury that is clearly imminent. The determination of the existence of a threat of serious injury must be based on facts and not merely on allegation, conjecture or remote possibility, which would mean positive evidence i.e. there should be evidence in favor of serious injury/ threat to the domestic industry. Further, the manner in which the evidence is examined should be objective, considering all relevant factors and the examination of the casual link between the imports, the injury and domestic industry. In this regard, detailed guidance on how these factors are to be evaluated or weighed or on how the determination of causal link is to be made, has not been provided. However, it lays down certain factors to be considered in the evaluation of threat in respect of serious injury. These include rate and amount of the increase in imports of the product

concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. But it does not make further elaboration on these factors are to be evaluated. Nevertheless, the determination of the threat in respect of serious injury is required to be based on facts and not merely on allegation, conjecture, or remote possibility.

#### **4 Application of safeguards measures**

In order to prevent serious injury to the domestic injury, duty may be levied as a safeguard measures only to the extent it is considered necessary and to prevent or remedy the serious injury. Upon determination, whether provisionally or as final, the duty is required to be levied on a non-discriminatory basis, with respect to all imports of the said article irrespective of the sources or the place from which they have been imported. In the event that the safeguard duty is collected based on provisional investigation and on final determination, it appears that the amount of duty collected is in excess of the duty collected, then such excess is required to be refunded to the importer.

#### **5 Provisional Measures**

The investigating authorities are allowed to take certain provisional safeguard measures in case it is considered that delay in enabling measures could cause damage which would be difficult to repair. The provisional measures may take the form of increase in the customs duty payable on import of goods that are considered to cause serious injury to the manufacturers of like goods in the domestic industry and would be allowed only when the following conditions are fulfilled:

- (i) The investigating authorities have initiated the investigation giving proper public notice and interested parties have been given adequate opportunities to submit information and make their comments;
- (ii) The investigating authorities have a preliminary affirmative evidence that increased imports have caused or are threatening to cause serious injury; and
- (iii) The investigating authorities judge that such provisional measures are necessary to prevent injury being caused during the investigation period.

The provisional measures are required to be limited to as short period as possible but in no case shall exceed a period of 200 days.

## **6 Duration, Termination and Review of Measures**

The Agreement provides that the safeguard measures shall be for a period as is considered necessary to prevent or remedy the serious injury. In this regard, the safeguard measures shall not normally exceed a period of four years unless it is considered that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting. However, the total period of application of a safeguard measure including the period of application of any provisional measure and any extension thereof, shall not exceed ten years (*it may be noted that the WTO Safeguard Agreement provides for a maximum period of eight years*). In case the duration of the measure exceeds three years, the Member nation applying such a measure is required to review the situation not later than the mid-term of the measure and if appropriate, withdraw it or increase the pace of liberalization.

## **7 Special Status**

The law provides for special status to export oriented units including units in free trade zone and in special economic zone. In this regard, the notifications issued for the purpose of levy of safeguard duty on import of articles would not be applicable when made by export oriented units unless the intention to levy on their imports is specifically stated in the notification. The meaning of the term 'export oriented units' would be the same as is assigned in Explanation 2 to sub-section (1) of section 3 of Central Excise Act, 1944. The meaning assigned to them under the Central Excise Act, is given below:

- (i) "free trade zone" means a zone which the Central Government may, by notification in the Official Gazette, specify in this behalf;
- (ii) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers

- conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act;
- (iii) “special economic zone” means a zone which the Central Government may, by notification in the Official Gazette, specify in this behalf.

## **VIII. Investigation**

### **1 Anti-Dumping and Countervailing measures**

#### **A. Making an Application: Who can file?**

A dumping investigation is normally initiated only upon receipt of a written application by or on behalf of the "Domestic Industry"

In order to constitute a valid application, the following two conditions have to be satisfied.

- (i) The domestic producers expressly supporting the application must account for not less than 25% of the total production of the like article by the domestic industry in India; and
- (ii) The domestic producers expressly supporting the application must account for more than 50% of the total production of the like article by those expressly supporting or opposing the application.

Applications can be made by or on behalf of the concerned domestic industry to the Designated Authority in the Ministry of commerce for an investigation of any alleged dumping. The Designated Authority may initiate an investigation when there is sufficient evidence that dumped imports are causing or are threatening to cause material injury to the Indian industry producing like articles or are materially retarding the establishment of an industry.

An application proforma has been devised by the Designated authority and the interested domestic industry can file their application in this Proforma . Application Proforma for

anti-Dumping initiation of investigation as prescribed by the Designated authority is available at the following link - <http://commerce.nic.in/Guide.PDF>

The application should be fully documented and Rule 5(2) states that the application shall be supported by the evidence of (a) dumping; (b) injury where applicable; and (c) where applicable, a causal link between such dumped imports and alleged injury.

## **B. Contents of Application**

The application should contain such information as is reasonably available to the applicant. The identity of the applicant, a description of the volume and the value of the domestic production of the like product by the applicant should be given in the application. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by listing all known domestic producers of the like product and to the extent possible provide details as regards the volume and value of domestic production of the like product accounted for by such producers.

The application should also contain a complete description of the alleged dumped product, the names of the country and countries of origin or export in question, the identity of all known exporters or foreign producers and a list of all known importers of the product in question. Information on prices at which it is consumed in the domestic market of the exporting country and at which it is exported, information on the volume of alleged dumped imports and its impact on the prices of the like product in the domestic market as well as the impact on the domestic industry.

In addition, an application for the **countervailing duty** investigation needs to contain information on evidence with regard to the existence, amount and nature of subsidy in question and evidence of alleged injury to the domestic industry caused by the subsidized imports.

If the Designated Authority finds any deficiency in the application in terms of the information that is required to be furnished, it issues a deficiency letter asking the applicant to submit the required information. After satisfying itself with the adequacy of evidence for initiating investigation, the Designated Authority informs the Embassies/ Foreign Offices of the concerned countries/territories in India about the intention on its part to initiate investigations into the alleged dumping of the like product from their country/territory in terms of Rule 5(5) of the Anti-dumping Rules.

### **C. Preliminary screening.**

On receiving the application, the Authority examines and screens the same to satisfy itself that the application fulfills the requirements enumerated under Rule 5(3). Rule 5, sub-rule (3)(a) enjoins upon the Designated Authority to assess the standing of the domestic industry on the basis of the degree of support for or opposition to the application expressed by the domestic producers of the like product. In addition to the standing of the domestic industry, the preliminary screening also involves examination of the accuracy and adequacy of the evidence provided in the application regarding dumping, injury and causal link as stipulated under Rule 5 (3) (b) to justify the initiation of an investigation. Besides anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the Agreement.

### **D. Initiation of Investigation**

After receiving the application and examining the same, if the Designated Authority is satisfied with the information produced that sufficient evidence exists regarding dumping, injury and causal link to justify the initiation of an investigation, it initiates investigation by way of a Gazette Notification under Rule 5 of the Anti-Dumping Rules.

The notification normally contains adequate information on the product under investigation, the names of the exporting country / countries/territories, the date of initiation, the period of investigation, the basis on which dumping or subsidization is alleged in the application, a summary of factors on which the allegation of injury is based, the address to which representation by the interested parties should be directed and the time limits allotted to the interested parties for making their submission. Besides the Notification of the Initiation in the Official Gazette, which is available in the public domain; the Designated Authority also sends individually the notice of initiation to all the known interested parties to the case. The investigation is to be normally completed within a period of one year from the date of initiation. This period may be extended by six months under exceptional circumstances by the Central Government ( Department of Revenue).

#### **E. Submission and Analysis of Data**

Taking into account the WTO Agreement requirements and the allowance for postal communication, a period of 40 days is given to the interested parties for making their representations to the Designated Authority on the initiation of investigation. Any interested parties to the case may make their submissions on the initiation of investigations. This time limit is relaxed only in exceptional circumstances on the merits of each such request.

The Designated Authority has prescribed questionnaires. The questionnaires can be modified having regard to the need of specific information to suit the requirements of the case as regards the exporters, the importers and the domestic industry for submitting detailed information in the prescribed proforma. These questionnaires are sent out to the interested parties along with the notice of initiation for submitting the information required. On receiving all the Information from the interested parties, the Designated Authority thoroughly examines and analyses the data to investigate the extent of dumping and injury to the domestic industry.

Exporter's questionnaire is available at the following link - [http://commerce.nic.in/ad\\_guide.htm](http://commerce.nic.in/ad_guide.htm)

## **F. Treatment of Confidential Information**

On receipt of certain information which is claimed by an interested party as confidential and on being satisfied by the nature of such information the information is treated so by the Authority.

Rule 7 of the Anti-dumping Rules permits an interested party to furnish information on confidential basis.

Any information which is by nature confidential (for instance, information the disclosure of which would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information, shall be treated as such). Evidence relating to normal value, export price, costing, profitability, specific adjustments in pricing have been mentioned in para 6 of the Application proforma as examples of such information which is usually accepted by the Authority as confidential.

An interested party supplying information must ensure that the information supplied is clearly marked either "confidential" or "non-confidential" at the top of each page. Information supplied without any mark is treated as non confidential and the Authority is at liberty to allow the other interested parties to inspect any such non-confidential information.

If confidentiality is claimed on any other aspect, the applicant is required to give a brief statement of reasons as to why that particular information needs to be kept as confidential. In case such information is furnished on a confidential basis without recording any reasons for claiming it to be confidential, the Authority may disregard such information. The interested party claiming confidentiality of information needs to provide a non-confidential summary of the information so claimed if it is capable of summarization. If not, the reasons need to be recorded for non-summarization.

### **G. Preliminary Findings**

According to Rule 12 of the Anti-Dumping Rules, the Designated Authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record its preliminary findings regarding the export price, normal value, margin of dumping and injury to the domestic industry to facilitate preliminary determination of dumping and injury. The preliminary findings aim at providing quick relief to the domestic industry, where it is due; pending the completion of investigation and final determination. If the examination and evaluation of the information received from all the interested parties establishes the effect of dumping, injury to the domestic industry and a causal link between the dumping and injury, the Designated Authority may come out with its provisional findings pending the detailed investigation and final findings. There may be certain claims and allegations made by the interested parties which need to be further investigated and verified. However, if sufficient evidence is available to prove dumping and consequent injury, the Designated Authority may recommend imposition of provisional duties so that the domestic industry need not continue to suffer due to trade distortion caused by such dumping during the course of investigation. The Designated Authority publishes its preliminary findings in the Official Gazette and a copy is forwarded to all the interested parties for making their submissions on the same.

### **H. Imposition of Provisional Duties**

A provisional duty not exceeding the margin of dumping may be imposed by the Central Government on the basis of the preliminary finding recorded by the Designated Authority.

The provisional duty can be imposed only after the expiry of 60 days from the date of initiation of investigation.

The provisional duty will remain in force only for a period not exceeding 6 months, extendable to 9 months under certain circumstances.

### **I. Domestic and Exporters verification**

The Agreement on Anti-Dumping and Agreement on Subsidies and Countervailing Measures provide for the verification of the information furnished by various parties. The Designated Authority has to satisfy itself regarding the accuracy of information supplied by the interested parties as it forms the basis of the determination. The domestic industry verification is conducted to verify the accuracy of data provided by the petitioners regarding the product under consideration, its cost of production, the profit and loss account of the company and the apportionment of overheads in case of a multi-product company. The Investigating Officers not only familiarize themselves with the product under consideration and its manufacturing process but also verify from the domestic industry's records the impact of such dumping on various injury parameters as enshrined under the relevant Anti-dumping provisions. These verifications throw important light on the condition of the industry in terms of its machinery, capacity utilization and efficiency which is very important while assessing the injury caused to the domestic industry and the reasons thereof. The verification of information provided by the exporters is carried out in the exporting country only after the concurrence of the exporters. The exporter verification is conducted to verify the information and data furnished by the exporter in a given case. The verification is primarily conducted to verify the information and facts provided in respect of the normal value and export price. Special emphasis is given on examining the proof of various adjustments sought by the exporters while determining their normal value and export price. Normally, all the information that needs verification is first obtained from the interested parties by way of the questionnaires and special attention is given on verification of the information challenged by the other interested parties. Here, it may be noted that if the concerned exporters do not offer verification of the information provided by them, the Designated Authority cannot insist upon the same. In such cases the Designated authority may base its findings on the information available with it which may often be to the disadvantage of the exporters. While the domestic verifications are normally carried out before the issue of preliminary findings to determine the non-injurious price, the exporter verifications are generally undertaken after the preliminary findings and before the issue of the disclosure statement.

## **J. Public Hearing**

Interested parties who participate in the investigations can request the Designated Authority for an opportunity to present the relevant information orally. However, such oral information shall be taken into consideration only when it is subsequently reproduced in writing. The Authority may grant oral hearing anytime during the course of the investigation.

Besides the above, the Authority holds a public hearing inviting all interested parties to make their submissions before it. All oral submissions made during the hearing need to be reproduced in writing for the Authority to take the same on board.

#### **K. Disclosure Statement**

Based on these submissions and evidence gathered during the investigation and verification thereof, the Authority will determine the basis of its final findings. However, the Designated Authority will inform all interested parties of the essential facts, which form the basis for its decision before the final finding is made.

#### **L. Form of Anti-Dumping Imposed**

While the Agreement on Anti-Dumping provides for duty up to the dumping margin, the DGAD has been following the Lesser Duty Rule. The duty is imposed to remove the injury caused by dumping and it could be based on the dumping margin or injury margin – the lesser of the two. The duty could be imposed after the dumping margins have been worked out for individual exporters in the form of a fixed amount on per unit of imports of the product under consideration. Alternatively, the duty could be imposed by way of fixing a reference price, which is normally the non-injurious price at which imports would not hurt the domestic industry. If the imports are above the reference price, no duty will be levied. However, if the imports are at a price lower than the reference price, then the difference between the landed value and the reference price would be levied as anti-dumping duty. Thus, it becomes a variable duty, which takes into account change in customs duty also, that directly affects the landed value of imports. In India, we have adopted the fixed duties as well as variable duty. However, of late, variable duties with a reference price have been resorted to in a number of cases.

Rule 15 also provides for ‘**Price Undertaking**’ where an exporter gives a written undertaking not to export the product under consideration at dumped price. The Authority, however, has the discretion to accept or refuse the ‘Price Undertaking’ where the guiding factors are the practicability, e.g., grades of product involved and other administrative problems of monitoring, etc. The ‘Price Undertaking’ is considered after the Preliminary Findings have been issued and the dumping margins have been determined for the individual exporters. Normally, the ‘Price Undertaking’ is given before the Final Findings and the Authority may suspend the investigation for the concerned exporter once the ‘Price Undertaking’ has been accepted. The DGAD has been encouraging and accepting the ‘Price Undertakings’.

#### **M. Suo moto initiation**

Normally, an anti-dumping investigation is initiated on the basis of the petition filed by the domestic industry. However, under Rule 5(4), the Designated Authority may initiate an investigation suo moto if it is satisfied from the information received from the Collector of Customs appointed under the Customs Act, 1962 or from any other source that sufficient evidence of dumping and consequent injury exists.

#### **N. Appeal**

There is a provision for challenging the decision of the Designated Authority in the Customs Excise Gold (Control) Appellate Tribunal (CEGAT) in the first instance. An order of determination or review thereof can be challenged in the CEGAT. If the Designated Authority or the interested parties are not satisfied with the order of the CEGAT, the same can be appealed in the Supreme Court, either by the Designated Authority or any of the interested parties, as the case may be. There have been cases where the interested parties have also gone to the High Courts by invoking writ jurisdiction. Once all the available avenues of appeal have been exhausted in the country, the matter may be taken to the WTO Dispute Settlement Mechanism, if it is felt that some of the provisions of the Agreement on Anti-Dumping have been violated in a particular

case. But here, it is not an individual exporter, but the exporting country that can go to the WTO Dispute Settlement mechanism and similarly, it is not the Domestic Industry but the country that will defend the case in the Dispute Settlement Body. On acceptance of the request for a panel, the same is considered and constituted by the WTO and opportunity is given to the interested parties to defend their case. The decision of the panel can also be challenged in the Appellate Body under the WTO – Dispute Settlement Mechanism.

## **2 Safeguard duties**

### **A. Making an Application: Who can file?**

A safeguard investigation is normally initiated only upon receipt of a written application by or on behalf of the "Domestic producer"

Applications can be made by or on behalf of the concerned domestic producer to the Director General in the Ministry of commerce for an investigation of any alleged increased in imports.

Rule 5(2) of the Safeguard Duty Rules requires an application for safeguard investigation to be in the form as specified by the Director General. The Director General has issued a Trade Notice in this behalf prescribing the information to be provided in an application for safeguard investigation and the supporting documents required to be submitted therewith. The Trade Notice having been issued under the authority of the Rules has the force of law. The applicants need to abide by the provisions contained in the Trade Notice.

### **Trade Notice on Safeguard Applications**

1. Attention of the Trade and Industry is invited to Section 8B of the Customs Tariff Act of 1975 and the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 framed thereunder (Hereinafter referred to as the Safeguard

- Rules). In exercise of the powers conferred by sub-rule (1) of **Rule 3** of the Safeguard Rules, the Central Govt. has appointed the undersigned as the Director General (Safeguards), for the purpose of the said rules.
2. In accordance with the provisions of the Safeguard Rules, safeguard duty can be imposed on any product imported into the country, in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten serious injury to the domestic producers of like or directly competitive products, irrespective of the source of origin of the imported product.
  3. The safeguard duties can be imposed for a short duration with the immediate intention of preventing or remedying serious injury to the domestic industry. Such a measure would, however, also require the industry to adjust itself to the new situation of the competition offered by the increased imports. A safeguard measure can be imposed only after the Director General arrives at a finding, after due investigation, that the increased imports of particular product(s) are causing or are threatening to cause serious injury to the domestic producers of like- or directly competitive articles.
  4. An application for initiation of a safeguard investigation can be made by any aggrieved producer / manufacturer, trade representative body, firm or institution, which is representative of domestic industry. This application should be in the format and should include information as detailed in Annex to this Trade Notice alongwith all supportive evidence / data / annexes.
  5. **The following further requirements need to be fulfilled by all parties concerned.**
    - i. Information should be provided for the most recent period of three years (or longer) for which data is available.
    - ii. The details of the source of information must be provided along with copies of source document wherever practicable.
    - iii. Information provided on confidential basis, on cause being shown, be treated as Confidential Information. Confidential Information should be provided separately and not mixed up with the non-confidential information. Each page of the confidential information should be clearly

and distinctly marked 'Confidential' in bold letters both at the top right hand and bottom right hand side of the page

Non-confidential summary of confidential information may be provided by the supplier of the information. If the confidential information cannot be provided in a summarised or generalized form or non-confidential basis, such information may be disregarded unless it is demonstrated by the supplier of the information to the satisfaction of the investigating authorities from appropriate sources that the information is correct.

- iv. Applicant(s) shall submit initial two copies of the application together with all supportive enclosures, data and annexes. Once the application is found to be properly documented and complete in all respects, applicants will be required to provide sufficient number (number of interested parties + seven) of copies of the application alongwith all enclosures / annexes etc.
- v. If any application is found to be incomplete or deficient in any manner, it may be returned (after retaining one copy) to the applicant(s) for necessary action.
- vi. Documents which are not clearly legible and / or which are not authenticated by the submitter thereof, may be disregarded.
- vii. Subject to the provisions of rules in this regard, on cause being shown, a party to the investigation may be considered as an interested party.
- viii. Request received within 15 days of publication of a notice of initiation of investigation for inclusion of any party to the investigation as an interested party, may be considered by the Director General (Safeguards) and a list of interested parties shall be established by the Director General within 21 days of the publication of notice of initiation, a copy of which shall be sent to all interested parties.
- ix. A public file containing all relevant material (non-confidential) shall be available for inspection by all interested parties in the office of the Director General (Safeguards).

- x. Information presented orally by any interested party in a public hearing shall be submitted in writing by such party to the Director General within 5 days of the hearing or within such period as allowed by the Director General. Interested Parties may collect copies of such submissions on a day indicated by the Director General and submit rebuttals, if any, within such period as allowed by the Director General.
- xi. Any evidence or any other submissions made by any party shall be provided in sufficient number of copies (number of interested parties + seven) to the Director General.
- xii. All notices shall be displayed on the notice board of the Directorate General for a period of 10 days from the date of the notice.
- xiii. An English translation of any information provided in a language other than Hindi or English would need to be supplied simultaneously by the submitter of the information, failing which the information may be disregarded.
- xiv. All information / material should also preferably be provided on 3-1/2” (three and a half inch) floppy in Word for Windows compatible format.

All the Trade Associations and Chambers of Commerce and Industry are requested to bring the contents of this Trade Notice to the notice of their Members / Constituents.

## **B. Contents of Application**

Annex to Trade Notice Issued by the Director General of Safeguard provides for the details and content to be present in the application for investigation.

## **Table of Contents**

**Section 1** General Information

**Section 2** Product in respect of which Increase in Imports  
Noticed

**Section 3** Increased Imports

**Section 4** Domestic Production

**Section 5** Injury

**Section 6** Cause of Injury

**Section 7** Submissions

**Section 8** Annexes

**Section 1: General Information**

1. Date of Application
2. Applicant(s)

Provide name(s) and address(es) of the applicant(s).

3. Domestic Producers of the like or directly competitive products on whose behalf the application is filed (Give details of all domestic producers who support the application).
4. Information on production accounted for by the domestic producers of the like or directly competitive products (in respect of those domestic producers who support the application).
5. Information on the total domestic production of the product concerned of the like or directly competitive products (in respect of all producers whether they support the application or not).

**Section 2: Product in respect of which increase in imports alleged**

1. Name of the product
2. Description: Provide full description of the product including chemical formula, grade constituent materials / Components, process of manufacture in brief, uses and inter-changeability of various grades, etc.

3. Tariff classification: Provide the classification of the product under the HS classification as well as Indian customs Tariff Classification at 6/8/10 digit level.
4. Import Duty: Provide information relating to rates of import duty levied during the past three years. If the product enjoys any concessional or preferential treatment, provide details.
5. Country(ies) of Origin: Provide name(s) of country(ies) where the product has originated (where the country of origin is different then the country of export, the name of the country of origin should also be provided).
6. Provide a list of all known foreign producers, exporters & importers of the imported product, country-wise, together with names and addresses of concerned trade associations and user associations etc.
7. Information on major industrial users, organization of industrial users and representative consumer organisations. (In case the product is commonly sold at retail level).
8. Export Price: Details of export price of the imported Product exporter / country-wise and the basis thereof (provide the f.o.b. / c.i.f. price at which the goods enter into India).

### **Section 3: Increased Imports**

1. Provide full and detailed information regarding the imports of the said product in terms of quantity and value year wise for the last three years (or longer).
2. Provide break up of (1) above country wise in absolute terms as well as a percentage of the total imports of the said product.
3. Provide full and detailed information on the share of the imported products and the share of the domestic production of the like product and the directly competitive products in the total domestic consumption for the last three years (or longer) both in terms of quantity and value.
4. Provide information on factors that may be attributing to increased imports.

### **Section 4: Domestic Production**

1. Details of the like product end directly competitive products produced by the domestic producers. Information similar to II above i.e.
  - i. Name

- ii. Description
  - iii. Tariff classification both under the Central Excise Tariff as well as under the Customs Tariff.
  - iv. Details of domestic producers
2. Names and addresses of all known domestic producers and concerned trade associations and users associations etc.
  3. Details of production accounted for by each of the producers at 2 above.
  4. Details of total domestic production.
  5. Installed capacity, capacity utilization and fall in capacity utilization etc.

**Section 5: Injury or Threat of Injury**

1. Impact of increased imports on Domestic Industry: Detailed information on how the increased imports are causing serious injury or threat of serious injury to the domestic industry. This should, *inter alia*, include information on
  - a. Sale volumes, total domestic consumption and how the market share of domestic production has been affected.
  - b. Price undercutting / price depression / prevention of rise in prices. Information on costs of production and how the increased imports have affected the prices of domestic production needs to be provided.
  - c. Any significant idling of production facilities in the industry including data indicating plant closure or fall in normal production capacity utilization.
  - d. Loss of employment
  - e. Financial situation

Full information on the financial situation of the domestic industry including information on decline in sales, growing inventory, downward trend in production, profits, productivity or increasing unemployment needs to be provided.

2. Other Factors of Injury: Provide details of any other factors that may be attributing to the injury to the domestic industry and an explanation that injury caused by these other factors is not attributed to injury caused by increased

imports. (Information on injury caused due to dumping or subsidization, if any, needs to be specifically provided here. Also mention if any application for anti-dumping or countervailing duty investigation has been filed).

### **Section 6: Cause of Injury:**

Please provide an analysis of data presented above bringing out a nexus between the increased imports, either actual or relative to domestic production, and the injury or threat of injury caused to the domestic industry and the basis for a request for initiation of safeguards investigation under Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997.

### **Section 7: Submission**

- a. A statement describing the measure requested including:
  - Nature and quantum of safeguard duty requested.
  - Purpose of seeking the relief and how such objective will be achieved.
  - Duration for which imposition of safeguard duty is requested and the reasons therefore.
- b. If a request is made for provisional safeguard measures, full and detailed information regarding existence of critical circumstances and how delay would cause damage which it would be difficult to repair.
- c. If the safeguard measures are requested to be imposed for more than one year, details on efforts being taken and planned to be taken or both to make a positive adjustment to import competition with details of progressive liberalization adequate to facilitate positive adjustment of the industry.

### **Section 8: Annexes**

All supporting information can be provided as annexes to the application. (The main information must be provided at the appropriate places. The details of the information can be provided in annexes).

### **C. Issuance of Public Notice**

The Director General shall, after deciding to initiate investigation to determine the serious injury or threat of serious injury to domestic industry, consequent upon the

increased import of an article into India, issue a public notice notifying his decision there to. The public notice shall, *inter alia*, contain adequate information on the following namely: -

- i. the name of the exporting countries and the article involved;
- ii. the date of initiation of the investigation;
- iii. a summary statement of the facts on which the allegation of serious injury or threat of serious injury is based;
- iv. reasons for initiation of investigation.
- v. the address to which representations by interested parties should be directed; and
- vi. the time-limits allowed to interested parties for making their views known.

A copy of the public notice shall be forwarded by the Director General to the Central Government in the Ministry of Commerce and other Ministries concerned, known exporters of the article the increased import of which has been alleged to cause or threaten to cause serious injury to the domestic industry, the governments of the exporting countries concerned and other interested parties.

The Director General shall also provide a copy of the application referred to in sub-rule (1) of rule 5 to:

- i. the known exporters, or the concerned trade association,
- ii. the governments of the exporting countries; and
- iii. the Central Government in the Ministry of Commerce;

Provided that the Director General shall also make available, a copy of the application, upon request in writing, to any other interested party.

## **D. Submission and Analysis of Data**

After Issuance of Notice of Initiation of investigation the Director General may issue notice for a period of 30 days to the interested parties for making their representations to the Director General on the initiation of investigation. Any interested parties to the case may make their submissions on the initiation of investigations. This time limit is relaxed only in exceptional circumstances on the merits of each such request.

The Director General has prescribed questionnaires. The questionnaires can be modified having regard to the need of specific information to suit the requirements of the case as regards the exporters, the importers and the domestic industry for submitting detailed information in the prescribed proforma. These questionnaires are sent out to the interested parties along with the notice of initiation for submitting the information required. On receiving all the Information from the interested parties, the Director General thoroughly examines and analyses the data to investigate the volume of imports and injury to the domestic industry.

Prescribed Formats & Questionnaires for Domestic producers ,Importers and Exporters are available at the following link - <http://dgsafeguards.gov.in/questionnaire.html#>

## **E. Treatment of Confidential Information**

On receipt of certain information which is claimed by an interested party as confidential and on being satisfied by the nature of such information the information is treated so by the Authority.

Rule 7 of the Safeguards Rules permits an interested party to furnish information on confidential basis.

Any information which is by nature confidential (for instance, information the disclosure of which would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information,

shall be treated as such). Evidence relating to normal value, export price, costing, profitability, specific adjustments in pricing have been mentioned in para 6 of the Application proforma as examples of such information which is usually accepted by the Authority as confidential.

An interested party supplying information must ensure that the information supplied is clearly marked either “confidential” or “non-confidential” at the top of each page. Information supplied without any mark is treated as non confidential and the Authority is at liberty to allow the other interested parties to inspect any such non-confidential information.

If confidentiality is claimed on any other aspect, the applicant is required to give a brief statement of reasons as to why that particular information needs to be kept as confidential. In case such information is furnished on a confidential basis without recording any reasons for claiming it to be confidential, the Authority may disregard such information. The interested party claiming confidentiality of information needs to provide a non-confidential summary of the information so claimed if it is capable of summarization. If not, the reasons need to be recorded for non-summarization.

## **F. Preliminary Findings**

According to Rule 9 of the Safeguard Rules, the Director General shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record its preliminary findings regarding serious injury or threat of serious injury to facilitate preliminary determination of Safeguard duty. The preliminary findings aim at providing quick relief to the domestic producers, where it is due; pending the completion of investigation and final determination. If the examination and evaluation of the information received from all the interested parties establishes the effect of imports, injury to the domestic producers and a causal link between imports and injury, the Director General may come out with its provisional findings pending the detailed investigation and final findings. There may be certain claims and allegations made by the interested parties which need to be further investigated and verified. However, if sufficient evidence is available to prove serious injury and threat of serious injury, the

Director General may recommend imposition of provisional duties so that the domestic industry need not continue to suffer due to trade distortion caused by such imports during the course of investigation. The Director General publishes its preliminary findings in the Official Gazette and a copy is forwarded to all the interested parties for making their submissions on the same.

### **G. Imposition of Provisional Duties**

A provisional duty may be imposed by the Central Government on the basis of the preliminary finding recorded by the Director General.

The provisional duty will remain in force only for a period not exceeding 200 days from the date on which it was imposed.

### **H. Public Hearing**

Interested parties who participate in the investigations can request the Director General for an opportunity to present the relevant information orally. However, such oral information shall be taken into consideration only when it is subsequently reproduced in writing. The Authority may grant oral hearing anytime during the course of the investigation.

Besides the above, the Authority holds a public hearing inviting all interested parties to make their submissions before it. All oral submissions made during the hearing need to be reproduced in writing for the Authority to take the same on board.

### **I. Disclosure Statement**

Based on these submissions and evidence gathered during the investigation and verification thereof, the Authority will determine the basis of its final findings. However, the Director General will inform all interested parties of the essential facts, which form the basis for its decision before the final finding is made.

### **J. Form of Safeguard duty Imposed**

The Director General shall, within 8 months from the date of initiation of the investigation or within such extended period as the Central Government may allow, determine whether,

- a. the increased imports of the article under investigation has caused or threatened to cause serious injury to the domestic industry, and
- b. a causal link exists between the increased imports and serious injury or threat of serious injury.

The Director General shall also give its recommendation regarding amount of duty which, if levied, would be adequate to prevent or remedy 'serious injury' and to facilitate positive adjustment.

The Director General shall also make his recommendations regarding the duration of levy of \_\_\_\_\_ duty:

Provided that where the period recommended is more than one year, the Director General shall also recommend progressive liberalization adequate to facilitate positive adjustment. The final findings if affirmative, shall contain all information on the matter of facts and law and reasons which have led to the conclusion.

The Director General shall issue a public notice recording his final findings.

The Director General shall send a copy of the public notice regarding his final findings to the Central Government in the Ministry of Commerce and in the Ministry of Finance.

The Central Government may, impose by a notification in the Official Gazette, upon the final finding of the Director General, a safeguard duty not exceeding the amount which has been found adequate to prevent or remedy serious injury and to facilitate positive adjustment.

If the final finding of the Director General is negative, the Central Government shall within thirty days of the publication of final findings by the Director General under rule 11, withdraw the provisional duty imposed, if any.

## **K. Suo moto initiation**

Normally, a safeguard duty investigation is initiated on the basis of the petition filed by the domestic producers. However, under Rule 5(4), the Director General may initiate an investigation suo moto if it is satisfied from the information received from the Collector of Customs appointed under the Customs Act, 1962 or from any other source that sufficient evidence of increased imports, serious injury or threat of serious injury and a casual link between increased imports and alleged injury or threat of injury..

## **IX. Important Websites**

1. Govt. of India Directory <http://goidirectory.nic.in/>
2. Ministry of Finance <http://finmin.nic.in/>
3. Central Board of Excise & Customs <http://www.cbec.gov.in/>
4. Ministry of Commerce <http://commerce.nic.in/>
5. Directorate General of Anti-Dumping [http://commerce.nic.in/ad\\_guide.htm](http://commerce.nic.in/ad_guide.htm)
6. Director General of Safeguards <http://dgsafeguards.gov.in/default.asp>
7. Investment and Technology Promotion <http://www.indiainbusiness.nic.in/>  
Ministry of External Affairs Government of India
8. Directorate General of CIS <http://www.dgciskol.nic.in/>
9. Confederation of Indian Industry (CII) <http://www.ciionline.org/>
10. Federation of Indian Chambers of
11. Commerce & Industry (FICCI) <http://www.ficci.com/ficci/index.htm>
12. The Associated Chambers of
13. Commerce & Industry (ASOCHAM) <http://www.assochem.org/>
14. World Trade Organisation <http://www.wto.org/>
15. Safeguard Measures – World Trade Organisation  
[http://www.wto.org/english/tratop\\_e/safeg\\_e/safeg\\_e.htm](http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm)

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|----------------------------------|---|
| 16. United Nations               | <a href="http://www.un.org/">http://www.un.org/</a>                           |
| 17. Centre for Trade Development | <a href="http://www.centad.org/gwa_2.asp">http://www.centad.org/gwa_2.asp</a> |
| 18. The World Bank               | <a href="http://www.worldbank.org/">http://www.worldbank.org/</a>             |

### **ABOUT THE BOOK**

Anti -Dumping, Countervailing, and Safeguard duties is not a strange phenomena for the importers, Exporters, traders & Producers. The usage of these trade protection measures has become a universal fact and no country or trader operating in the international market has remained immune from the operation of these measures in some or the other way. It has become the need of the hour for those involved in international trade transaction to be familiar with these trade protection measures.

This book is an endeavor to provide to provide the latest laws on the subject, both domestic as well as international, including the latest WTO decisions. Trade protection measures namely Anti -Dumping, Countervailing, and Safeguard duties require active initiatives by the domestic industry and require a pre-planned strategy for protection of trade from their foreign counterparts. This, I hope would prove to be informative in devising a strategy and a pre-emptive support for defending their interests as Manufacturers , Traders, Importers, Exporters and Professionals related with international trade.