WORKING PAPER NO. 99

THE WTO ANTIDUMPING CODE: ISSUES FOR REVIEW IN POST-DOHA NEGOTIATIONS

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MAY 2003

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Foreword

This paper, 'The WTO Antidumping Code: Issues for Review in Post-Doha Negotiations' by Aradhna Aggarwal has been prepared under the guidance of Professor Anwarul Hoda. The study was part of the research programme on the WTO-related issues, funded by the Sir Ratan Tata Trust.

This paper addresses some of the issues concerning antidumping that need to be reviewed in the Post-Doha Negotiations to make the antidumping agreement (ADA) more precise and less discretionary. Specifically, the author tries to identify the provision of the ADA that need to be clarified and improved for *the perspective of India's interest*. The author covers a number of issues concerning dumping determination, injury findings, procedural aspects of the ADA and special and differential treatment for developing countries fairly extensively. While doing so, she draws on the experiences of Indian exporters in antidumping investigations carried out against them in the US and the EU and the rulings given by panels and appellate bodies in various antidumping cases in the Dispute Settlement Body.

I have no doubt that this paper will generate more debates on this very important and topical subject and will help clarify the issues that are in need of reform.

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May 2003

The WTO Antidumping Code: Issues for Review in Post-Doha Negotiations

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Introduction

According to the GATT principle of 'most favoured nation' treatment, trade must be conducted on the basis of non- discrimination between members of the WTO. 'Like products' must be taxed the same way and placed under similar entry conditions. However, in some circumstances, a country may *temporarily* break this principle and impose higher protection against import of one or more goods from one or more countries. This arrangement termed 'contingent protection' may be used by the governments to protect their domestic producers from unfair competition. Contingent protection measures fall under three categories – antidumping, countervailing and safeguard measures. Of these antidumping remains the most commonly used contingent protection measure. It proliferated in the 1990s and is now used extensively by developed and developing countries alike.

Broadly speaking a product is said to have been dumped if it is introduced into the commerce of another country at less than the normal value of the product and it causes/threatens material injury to an established industry of the country. Though the concept in itself appears to be simple, it is subject to several complexities at the operational level. There are ambiguities in the very definition of dumping and in every step of calculating dumping and injury margin and that such ambiguities facilitate dumping findings (see, Tharakan 1991, 1999 Tharakan and Waelbroeck 1994 among several others). The antidumping policies of most countries (developed and developing both) have been criticised by both lawyers and economists (Aggarwal 2002a, Murray and Rousslang 1989, Lindsey 2000, Araujo et. al 2001, Jackson and Vermulst 1989, Tharakan 1994,1995, Didier 2001, Hsu 1998, Almstedt and Norton 2000 among others). The present paper however argues that it is difficult to define general policy guidelines that would make antidumping more rational within the existing international rules. GATT rules are themselves in need of reform. This law is vague and that this vagueness has allowed the authorities to have their own interpretation of the law. It is therefore important to review legal provisions and conduct of the Antidumping Agreement (ADA) in order to see what provisions need to be clarified and improved. This is all the more so in view of the fact that the revision of the GATT ADA is on the agenda of the Post- Doha Negotiations.

Critics of the antidumping legislation argue that there is little economic argument that can support the practice of antidumping. Antidumping law is fundamentally flawed and its reform cannot be found in the details of its code. Further fine-tuning and refining of the antidumping policy is not the answer to prevent its (mis)use. They believe that the Doha Round would be a good occasion to take bold initiatives that aim at changing the basic framework of the AD mechanism (see, Aggarwal 2003 for a detailed discussion). One must however bear in mind that serious objections to any such efforts will come up as the decision of the Ministerial Conference of the WTO at Doha emphasises the

preservation of the basic concepts, principles and effectiveness of this agreement, its instruments and its objectives. Doha Declaration Article 28 mandates members to enter into 'negotiations aimed at clarifying and improving disciplines' under the SCM and Antidumping Agreement. This study therefore will address, within the perimeter of these limitations, some of the issues concerning antidumping that need to be reviewed in the Post-Doha Negotiations to make the ADA more precise and less discretionary. In particular, the objective of the study will be to identify the provisions of the Agreement that need to be clarified and improved from *the perspective of India's interest*. The study will heavily draw on three sources of information: one, antidumping investigations carried out *against Indian* exporters in the United States; antidumping proceedings against Indian exporters in the European Union (EU); and three, *Dispute Settlement cases* on antidumping, in general.

The study is organised in four parts. Part I dwells upon issues concerning dumping determination, Part II deals with injury-related provisions while Part III discusses provisions related with other procedural aspects of the ADA. Finally Part IV examines the issue of special and differential treatment for developing countries.

I. Dumping Determination

1. Like product

A proper identification of 'like product' based on economic considerations is the first step in calculating the normal value. The agreement (Art. 2.6) defines like product as a

> *'product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration'.*

This definition of like product leaves much to the discretion of the authorities. Several instances may be cited to illustrate this point. In the ***Sulphanic Acid*** case against India, the EC treated the technical and purified grades of the acid as one single product. Several parties claimed that the definition of the product concerned was incorrect. They argued that the technical and purified grades of the acid were substantially different in terms of their purity and had different properties and applications. Whilst the purified acid could be used in all applications, the same could not be said of technical grade acid because of the level of impurities that it contained. The authorities however argued that the purification process does not alter the molecular properties of the compound. Therefore technical and purified grades share the same chemical characteristics. The authorities did not consider the fact that interchangeability was only in one direction in certain applications, sufficient justification that purified and technical grades constituted different products. In the ***Polyster Staple Fibre (PSF)*** case exporting parties argued that a differentiation should be made between PSF types used for spinning applications and PSF used for non-spinning application because of different specific physical characteristics and limited interchangeability. The EC however did not find the available

evidence sufficient to allow a product differentiation on this basis. In the ***Polyethylene Terephthalate Film (PET film)*** case against India investigated by the EC, exporting producers argued that metallised PET film should be excluded from the product scope of the current proceedings on the ground that metallised PET film cannot be considered alike to base PET film since it had different physical and technical characteristics, required different production equipments and processes, being consequently more expensive to produce and thus sold at a higher price. These parties also argued that the use of metallised PET film is different from that of base PET film. The authorities however, felt that the metallisation process does not alter the basic physical technical and chemical characteristics and that base and metallised PET film are in many applications interchangeable and *may* have similar uses. It was noted that an additional production step required for the production of metallised PET film with resulting higher cost of production and sales price, is not an element which could justify per se the exclusion of a certain type of PET film from the scope of the product. Interestingly, United States' Department of Commerce (USDOC) in the AD investigation against ***PET film*** originating in India excluded from the scope of the investigation, metallised film and other finished films that had one of their surfaces modified by the application of a performance enhancing resinous.

In many cases, Indian exporters argued that the Community producers were producing more specialised product while Indian exporters were exporting mainly standardised products. They thus claimed that the product concerned which they produced and sold was not interchangeable and not comparable as such with the Community produced products**.** In the ***Hot –Rolled Flat Steel Products*** *(1758/2000)* case against India for instance, exporting producers claimed that the product concerned which they produced and sold was not interchangeable and not comparable as such with the Community produced product. They claimed that the production process of the Community producers was more advanced and even used different technology thus producing a higher quality product. They further pointed out that users sometimes had to re-roll the imported products before they could be processed further and thus claimed that their product was not a like product to that of the complaining community producers. The Commission admitted that the products were not identical but it argued that 'this cannot lead to the conclusion that hot-rolled coil imported from the countries concerned were not a like product to that produced by the community industry'. In the ***Steel Ropes and Cables (SWR)*** case Indian exporters argue that the community was producing more specialised SWR while exporters were exporting mainly commodity SWR. The community suggested that while SWR in the top end and in the bottom end are clearly not interchangeable, SWR in the adjoining groups are interchangeable. Given this overlap between groups, no clear dividing line could be established and therefore all SWR were considered to be one product.

The above instances suggest that within the existing framework the authorities enjoy wide discretion to define the scope of product under investigation. There is both the incentive and the opportunity to manipulate the category of like products in order to achieve specific goals. If 'like product' is defined in a too strict a way then it may lead to imposition of duties in cases where it should not. If, on the contrary, the relevant market

is defined too broadly then duties will not be applied when they should be (Hoekman and Mavroidis 1996). In the interest of legal certainty therefore the scope of manipulation should be limited. Rules need to provide a more rational and disciplined framework to define the scope of product under investigation.

The *market based approach* taken by the Panels and Appellate Body in the *Liquor Taxes cases* to the determination of like products in the context of Article III.2 could be useful for the determination of like product in the antidumping field. The *Liquor Taxes cases*[1] emphasised that what counts in defining like products is competition in the market place which is determined from the consumer's perspective. Products that do not compete simply cannot be like products. According to this view, showing that directly competitive and substitutable products are like products should be a starting point in the determination of like product. Products that are not in direct competition should be excluded from the definition of like products even though they might be physically similar. Thus the focus needs to be on substitutability.

Treating market factors as the starting point could provide a way for AD authorities to address the problem of high quality high priced imports that also fall into the same category as dumped imports. The famous '***Bed Linen Case'*** may illustrate this point. In this case, an Indian exporter of luxury bed linen was also subject to AD duties even though the bed linen he exported was at the top of the range and was many times more expensive than standard bed sheets and being so much more expensive consumers could not easily substitute between them. The use of market factors could therefore result in altogether different decision. Thus when quality differences translate to large price differences it will be possible to argue that the two products are not in direct competition with each other. It is therefore suggested that the definition of 'like products' needs reconsideration. A mere reference to similarities in physical characteristics or even 'uses' is not enough. Crucial is whether from a consumer's perspective 'like products' are sufficiently competitive or substitutable. Showing that products are directly competitive/substitutable could be a starting point for the 'like product' determination in antidumping. In that regard, the use of economic analysis and concepts including basic actors such as cross –price demand elasticities could prove to be useful (see, Hoekman and Mavroidis 1996).

Article 15.2 of Rules on Custom Valuation defines 'similar goods' as goods which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The WTO ADA may be amended along similar lines.

Adding '...directly competitive/substitutable product....' (added emphasis) to the definition of 'like product' and highlighting this element would be a welcome precision.

[1] Japanese Liquor Case II (1996) and Korean Liquor Taxes (1998).

2. Use of constructed normal value

Article 2.2 of the ADA establishes the framework within which an investigating authority is to determine the normal value to be compared with the export price. It establishes a presumption that normal value will be the representative market price in the exporter's country. It may not however always be possible to use the actual information on normal price and the investigating authorities may have to *construct* normal price. Article 2.2 lists three situations in which the investigating authorities may reject the use of sales in the domestic market of the exporter in the calculation of normal value. What follows are some major issues concerning these situations.

Five percent viability test

One situation in which normal values are constructed is when there is low volume of the sales in the domestic markets of the exporting country. Home market sales will normally be considered a sufficient quantity for the determination of the normal value when the similar product destined for the home market of the exporting country constitutes 5 % or more of the sales of the product under consideration destined for sale in importing country. The 5% criterion is an arbitrary one without any economic rationale behind it. However, any proposal to drop this provision is likely to meet a stiff opposition within the framework of the Doha mandate. The provision may therefore be reviewed and modified to make it less restrictive. Here we argue that this check may be performed at two different levels:

1. total domestic sales of like product vs total exports of like products
2. domestic sales of each particular model/type/category vs exports of that particular model/type.

The law does not specify which of the above two is preferable or is referred to. In the EC, the rule of 5% is applied at both these levels. Didier (2001) observed that in most cases the requirement fails to meet at the model/type level and this provides the authorities an opportunity to use constructed value. It may therefore be suggested that the 5% rule should not be applied at the model/type level. It requires a manufacturer to sell each model/ type of the like product exported on the domestic markets also, irrespective of the local demand. Thus, viability of the domestic sales needs to be assessed at the like product level only. In this context, *Report of the Appellate Body in the Bed linen case* from India has important implications. The *Appellate Body (AB)* noted that

> *...from the wording of Article 2.1 ,it is clear to us that the Anti-Dumping Agreement concerns the dumping of a* ***product.....***

While commenting on the calculation of dumping margins by the EC, the AB argued

> *'The European Communities clearly identified cotton-type bed linen as the product under investigation in this case. Having defined the product as it did, the European Communities was bound to treat that product consistently thereafter in accordance with that definition. We see nothing in Article 2.4.2 or in any other provision of the Anti-Dumping Agreement that provides for the establishment of*

"the existence of margins of dumping" for types or models of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the product that is subject of the investigation.'

This judgement has important implications for other AD provisions, as well, including the five percent viability test. For instance, footnote under Article 2.2 of the ADA states

*'Sales of the like product destined for consumption ..... shall normally be considered a sufficient quantity ..... if such sales constitute 5% or more of the sales of the **product** under consideration....'*

There is thus nothing in this provision to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreemen*t, nor to justify the distinctions made among *types or models* of the same product on the basis of these "two stages". Clearly, viability of the domestic market ought to be assessed at the like product level only.

In the light of the above AB judgement, it is important to review footnote 2 under article 2.2 of the ADA and amend it to provide that the 5% domestic sales shall be calculated against export sales of the like product (not model/type/category).

Sales in the ordinary course of trade

Where there are no sales of the like product *in the ordinary course of trade* in the domestic market of the exporting country, investigating authorities may choose to construct the normal value. Sales of the like products in the domestic markets of the exporting country at prices below per unit cost (plus administrative and selling costs) may be treated as not being in the ordinary course of trade and may be disregarded in determining normal value only if such sales are made within an extended period normally one year (but not less than six months) in substantial quantities (i.e. they represent not less than 20% of the total transaction volume) and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

According to the wordings of this provision (Article 2.2.1),

*' Sales of **the like product** ....may be treated as not being in the ordinary course of trade if .....such sales... are at prices which do not provide for recovery....'.*

Clearly, the condition applies to the product under investigation and not the type/model. The EC however makes model-wise comparison of the cost of production to the home market prices. The USDOC on the other hand compares the adjusted weighted average cost of production to the home market sales of the foreign like product in order to determine whether these sales have been made at prices below the cost of production. It is important to streamline the practice in the use of this provision. In the light of the Appellate Body ruling in the

Bed Linen Case Footnote to Article 2.2.1 should be clarified and amended as ' Sales of product (not type/model) (with emphasis added) below per unit costs are substantial if .....the volume of sales below per unit cost represents not less than 20% .....

In the context of Article 2.2.1, there is another peculiar practice adopted by the EC. In cases where per product type the volume of sales above unit cost represented 80% or more, the normal value was established on the basis of the weighted average price of *total domestic sales* transactions. In cases where per product type the volume of sales above unit cost represented less than 80% but more than 10% of the total sales volume, the normal value for this type was established on the basis of the weighted average price of *profitable domestic sales* transactions only. Where per unit cost represented less than 10% of total sales above the cost then all domestic sales are considered insufficient, price data on domestic sales are discarded and, the use of constructed normal value is made. This practice is contrary to the spirit of Article 2.2.1 which clearly states to disregard only those sales that are not in ordinary course of trade provided they constitute more than 20% of domestic sales. Wordings of Article 2.2.1 need to be tightened to restrain such practices that result into the use of constructed normal value.

Foot note to Article 2.2.1 may further be clarified by adding '...only sales not in ordinary course of trade are to be disregarded...'.

Sales to domestic related customers

The current AD agreement does not specifically address the issue whether home market sales to affiliates may be included in or excluded from the calculation of normal value. Article 2.2.1 sets forth a method determining whether sales between any two parties are within the ordinary course of trade however it does not address the more specific issue of sales to related parties. Article 2.3 directs investigating authorities to construct export prices at ex-factory level when exports take place via related importers. However, the law has no provision for adjustments in normal value when sales are made through affiliates (as discussed above). As a result, export prices constructed at the ex-factory level is generally compared with domestic sales prices to the first unrelated buyer without effective adjustments. This creates (as reported above also) asymmetry between the level of trade of the constructed export price and that of the normal value. Some illustrations may be given.

Under the EC interpretation, a product is sold in the ordinary course of trade on the domestic market only where sold to an unrelated domestic customer. Hence in many cases the reference price is the first resale price by a related distributor to unrelated customers. This gives upward bias to normal value as 'further downstream in the domestic distribution chain the reference price is taken the higher it is. Those who sell direct to the related consumers are better placed than those who sell via a captive network in domestic markets. Thus the structure of domestic sales affects the dumping margin calculations and in this process, the producers who sell through subsidiaries are penalised (See, Didier 2001). The US Commerce also ignores sales to affiliated parties in calculating normal value. Instead, it uses the first resale price by the distributor/dealer to unrelated consumer as the normal value. In the ***'Certain hot rolled steel products from Japan' case*** however Japan raised this issue at the WTO level. The Panel noted that downstream sales made by affiliates of exporters/producers though in the ordinary course of trade has no relevance because they are not sales of the exporters for whom normal value is calculated. The Panel found support for this view in Articles 2.2 and 2.3 of the

Anti-Dumping Agreement, which provide alternative methods of calculating, respectively, normal value and export price. While Article 2.3 expressly allows the use of downstream sales where the "export price is unreliable because of association", Article 2.2 is silent as to whether the use of downstream sales is a permitted alternative method of calculating "normal value ". (emphasis added) The Panel could "see no basis" for concluding that, because Article 2.3 allows the use of downstream sales to construct export price, it must also be possible to use a similar method to "construct" normal value. In other words, the Panel ruled to exclude sales to related parties as not being made in the ordinary course of trade. The ***Appellate Body*** however reversed the Panel judgement. In its view identity of the seller is no ground for precluding downstream transactions and that the authorities may make allowances under Article 2.4 to arrive at a price that is comparable with the export price. The AB therefore ruled that in the case of sales to a related party, domestic prices may be adjusted at the same level of trade as export prices. Thus the unfairness described above could be corrected by level of trade adjustments guaranteeing that domestic and export prices are comparable.

It is however observed that investing authorities are highly restrictive in granting level of trade allowances. Therefore, we suggest here that Article 2.2 should have a provision on the normal value of sales that are made through affiliated parties. This provision need to be complemented by a sentence that makes it clear that prices to related parties may be held as not being made in the ordinary course of trade only where authorities demonstrate that they are affected by the relationship. In this context, it is important to note that prices charged to related parties are generally assumed to be lower than the prices to unaffiliated customers. This is because those who sell directly to unrelated customers may have to incur costs in marketing functions while those who sell domestically via a captive network do not perform such functions themselves. USDOC carries out a test termed 'arm's length test or 99.5% test on the basis of this assumption, to determine whether home market sales to affiliates are made in the ordinary course of trade. If prices to the affiliated party are on average 99.5% or more of the price to the unaffiliated parties, the Commerce determines that sales made to the affiliated party are at arms' length. This practice has been used by the USDOC in all AD cases. Indian exporters have also been subject to this practice (see for instance, ***Certain Hot rolled carbon steel plates from India'*** case). In the ***certain hot rolled steel products case*** however Japan questioned this practice in the DSB. Their argument was : this law treats low prices as abnormal but ignores that high prices can also be abnormal skewing normal value upwards. The AB agreed with this argument and found the application of the 99.5% test inconsistent with the term ordinary course of trade due to the distortion that it is likely to introduce in the calculation of the normal value. It argued that Article 2.1 applies to any sales not in the ordinary course of trade and not just sales that lower normal value.

Thus, a provision may be appended stating that 'when domestic sales are not in ordinary course of trade because of association or a compensatory arrangement between the manufacturer and the domestic distributor or a third party, and the domestic price is demonstrated (emphasis added) to be affected by the relationship (resulting in high/low prices), the normal value shall be constructed on the basis of the price at which the products are first resold to an independent buyer by adjusting that for costs (including taxes

and duties) incurred between manufacturer's sales to distributors and resale and distributor's profits accrued'.

This however requires an appropriate definition of 'affiliation'. There is no clear definition of 'affiliation' in the ADA. Footnote 11 provides the definition of affiliation in the context of determining the domestic industry. The concept of related producers in the agreement depends on *control*. While defining 'control' the law stipulates that 'one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter'. The law is thus vague and does not provide any specific criteria to define control. The interpretation of this concept is at the discretion of investigating authorities. For instance, the EC continues to deem the existence of control even in the case of minimal shareholding of 1% to 5%. It is therefore important to provide a clear definition of affiliation for all practical purposes. *Article 15.4 of the 'Rules on Custom* Valuation' provides a comparatively more elaborate definition of affiliation for the purpose of that Agreement. For this agreement it states, persons shall be deemed to be related only if

(a) they are officers of one another's business;
(b) they are legally recognised partners in their business;
(c) they are employer and employee;
(d) any person directly/indirectly owns, controls or holds 5% or more of the outstanding voting stock or shares of both of them;
(e) one of them directly/indirectly controls the other;
(f) both of them are directly controlled by a third person;
(g) they are members of the same family.

The criteria provided in this provision (Article 15.4 of the Rules on Custom Valuation) may be reviewed and refined for the inclusion in the ADA.

3 Construction of the normal value

Alternative methods for constructing normal value have been provided in the ADA. *One,* the authorities may use the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. *Two,* the authorities may use the price of goods exported to third countries adjusted for the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importing countries and the like goods sold by the exporter to importers in the third country, in a prescribed manner. *Three,* in the absence of information on actual price and costs, investigating authority, for constructing normal values, rely on the best available information. All these methods are fraught with ambiguities and need reconsideration.

Use of cost of production methodology

Start up Operation and Non recurring items of costs

The ADA generally provides for costs adjustment for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations'. The provision is subject to different interpretations with regard to the treatment of the non-recurring costs, treatment in case of start up operations and the length of a start up operation. The law directs authorities to ignore when computing normal values abnormally high costs and or/ losses in domestic prices where production is in a start up phase. The Agreement provides that in case of start-up operations, the cost at the end of the start-up period will be taken into account, which generally would be the time when the cost of production in the new line would have stabilised. However, if the start-up period extends beyond the investigation period, the most recent cost will be taken into account.

No limit is made in the text with respect to the circumstances considered, the types of costs or the types of operations or the types of adjustments. It is thus not clear if this applies to start up losses due only to the new production facilities or the launching of new products within old facilities is also to be taken into account. It is also not clear what costs are included in this special regime? Does it include start up overheads or R&D expenditure? EC allows respondents to claim for adjustments for new production facilities only. Furthermore, it does not allow for R&D expenditures or start up sales expenses. The US legislation however allows adjustments for start up operations where a producer is using new production facilities or producing a new product where substantial investments are required and where production levels are limited by technical factors associated with the initial phase of production. These conditions are somewhat generalised and may allow for any number of start up scenarios. In several instances (such as ***Stainless wires case investigated by the EC***, ***Preserved Mushroom Case***, administrative Review by the USDOC) Indian exporting producers which sustained losses throughout the investigation period claimed that these losses had occurred during the start up phase and that this should be taken into account. However, the investing authorities rejected their claim. It is therefore important to clarify Article 2.2.1.1 in the light of the experience of different countries by examining ambiguities and their effects on the computation of dumping margins.

The USDOC has recently incorporated into the regulation concepts from the SAA 836-838 that help to define startup operations and explain startup adjustments. It includes definition of new products, new production facilities, as well as guidance whether improvement to products or expansion to facilities qualify for startup operations. SAA also provides guidelines on the determination of duration of start up period, adjustments for start up operations and amortisation of startup operations. These provisions may be examined to clarify Article 2.2.1.1.

Computation of sales and general administration expenses and reasonable profits

For constructing the normal value, investigating authorities adjust the cost data by a reasonable amount for administrative, selling and general costs and for profits. When the amounts for administrative, selling and general costs (SGA) and for profits cannot be determined on the basis of actual information, investigating authorities have a complete discretion to choose (i) profits and SGA either of the exporter in question in respect of production and sales in the same general category of product or (ii) of any other exporter/producer subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin or (iii) any other reasonable method. The EC frequently bases normal profits on the domestic profit made by (an) other manufacturer(s) of the like product.

Clearly, the current law under which the authorities have complete discretion may lead to substantial bias in the calculation of normal values. Moreover, this approach is often unfair as different producers of a like product often incur significantly different SGA/profits from each other either because they are selling different types of like products or because they have different cost efficiency. Lindsey (2000) has observed that the profit rates used by the US Commerce in constructed value are frequently much higher than any conceivable norm. He gave a few examples where he compared the profit rates actually used by Commerce to the average profit rates of the equivalent US industries during the year

Table 1. Comparison of USDOC profit rates and US industry profit rates: Some illustrations

Investigation	Commerce rate (%)	US industry rate (%)
Dinnerware from Taiwan	25.77	5.23
Brake drums and Rotors from China	12.50	5.93
Cut-to-length steel plate from China	10.14	3.43
Dinnerware from Indonesia	22.61	5.23
Collated roofing nails from China	20.50	7.20

Source: Lindsey (2000)

the respective initiations were made. He found that the difference between them ranged between 6.57% to as large as 20.7%. Thus, unrealistic normal profits and /or SGA costs, may introduce serious ambiguities in the calculation of constructed normal value. Another illustration is provided by the ***cotton bed linen*** case investigated by the EC. In this case the EC had constructed normal value for most exporters using for all of them a profit margin of 18.65% found to have been obtained by an Indian producer on his domestic sales for a limited volume of the product concerned. It is therefore important to impose an obligation to apply a separate reasonability test to methodologies set forth in Article 2.2.2 (i) to (iii). Our suggestion is that

Article 2(6) as a whole would need to be safeguarded by a general reasonability test such as has been foreseen only for Article 2(6)(iii) now. The definition of reasonable could be the same as that which has been implied in Article 2(6) (iii) itself i.e. profits should not exceed profits ***normally*** *realised by sales of other producers in the same general category of products on the domestic markets. If the methodologies set forth in Article 2.2.2 (i) to (iii) are by definition reasonable at most there is a rebuttable presumption that the results generated by these methodologies are reasonable*

One may note that leaving in 'any other reasonable method' in Article 2.2.2 (iii) even with the status of last priority will continue to cause problems. However, we do not propose to drop this provision altogether. In our view it is a residual method that may be used by the authorities when other methods fail.

Another gap in Article 2.2.2 that needs to addressed is the options provided in the Article have no preferential significance. In the ***Cotton linen dispute Case***, India argued that rather than using profits and SGA of any other exporter/producer subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin (Article 2.2.2 ii) the EC should have used profits and SGA of the exporter in question in respect of production and sales in the same general category of product (Article 2.2.2 i). The Panel however asserted that the provision does not entail any preference of one option over others, the mere order in which the options appear in this Article has no preferential significance. The Panel further noted '*Certainly we would have expected something more than simply a numbered list*' but concluded that under the present law Members have complete discretion as to which of the three methodologies they use in their investigations'. Against this background, it is suggested that

Article 2.2.2 of the ADA should be amended to set out an order of preference among different methodologies of approximating profits. The use of Article 2.2.2 (iii) which provides for 'any other reasonable method' without specifying such method needs to be given the last priority.

Constructed normal value - Use of Appropriate third country method

The law stipulates that the authorities may also use the price of goods exported to third countries to construct normal values adjusted for the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importing countries and the like goods sold by the exporter to importers in the third country, in a prescribed manner. Where the 'third country approach' is used it is usually the 'third country' suggested by the complainants that is retained by the investigating authorities for the calculations. In many cases therefore, finding dumping is a forgone conclusion. Moreover, price to any third country may not be a comparable representative price due to different market conditions and different demand elasticities. It is therefore important to have a well defined criteria for choosing 'appropriate third country'.

In this case also specific criteria in terms of economic parameters may be a welcome precision.

Constructed normal value - best available information

Article 6.8 states

'In the cases in which any interested party refuses access to or otherwise does not provide necessary information with a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative may be made on the basis of the facts available'.

Investigating authorities frequently rely on 'facts available' method for calculating dumping margins. This method increases the probability of finding dumping. Blonigen (2003) analysed all company-specific cases investigated between 1980 and 1995 to examine the methodology adopted by US Commerce in determining normal value. He found that affirmative findings were made for 631 companies in all over this period. Of these, 201 were based on 'the best available information'. Aside from this, 15 Indian exporters faced dumping charges. Affirmative findings for 11 of them were made on the basis of the 'best available information'.

Table 2. Summary of methodologies adopted for constructing normal value by USDOC: 1980-1995

	Best information		**CP**	**Export**	**NME**	**total**
	Complete	Partial				
Cases (company-wise) with affirmative Findings	195	6	33	19	84	631
Cases against India	11	-	1	1	-	15 (6cases)

Note: CP: cost of production method; Export : third country export data; NME : Non market economy
Sources: Blonigen (2003)

In another exercise, Lindsey (2000) examined all US Commerce company-specific AD investigations from 1995 through 1998. He found that Commerce made affirmative findings for 107 of the 141 companies investigated over this period. Of the 141 total determinations 36 were based on facts available . *What is more interesting to note is that in all the cases based on facts available , the Commerce made affirmative dumping findings. The success rate was 50% for those companies for which the Commerce used actual home market price .*

Table 3: Summary of dumping margin calculation methodologies used in AD investigations: 1995-98

Calculation methodology	Determination (affirmative only)	Average dumping margin for affirmative findings (%)
Best information	36 (36)	95.58
Constructed value	20 (14)	35.70
Third country price	1 (0)	0
NME	47 (28)	67.05
Home market price	4 (2)	7.36
Mixed	33 (27)	17.20
Total	**141 (107)**	**58.79**

Source: Lindsey (2000)

Thus there has been an overwhelming use of 'facts available' and this apparently introduces bias in favour of affirmative dumping findings.

The use of 'fact available' not only increases the probability of affirmative finding but also results in higher dumping margins. Baldwin and Moore (1991) find that the use of 'facts available' nearly doubles the average US dumping margin from around 35% to over 65%. Lindsey (2000) has shown that the average dumping margin in the cases based on facts available had been as high as 95.58% against the average 58.79% in all the affirmative findings. In contrast, in the four cases that were based on the actual price data, average margin was just 7.36%!

A review of the antidumping cases suggests that any failure by the foreign firms to respond to the authorities' onerous reporting requirements allows the authority to disregard all its data and instead use the best information available, which typically means data reported in the domestic firm's petition. *This may very well be illustrated by the **Steel plate case against India investigated by*** the US Commerce. Initially, the USDOC had problems with the originally submitted electronic databases which was formatted incorrectly and was incomplete. The Commerce issued several supplemental questionnaires. Though the subject firm did respond to all of them, the Commerce found it difficult to evaluate the responding exporter's (SAIL) selling practices . On product specific costs SAIL admitted that the company did not maintain costs on the product specific basis as required by the questionnaire but it did report different costs for different products using certain cost allocation. The Commerce however expressed its doubts over the reliability of these figures and finally, discarded all information provided by the exporter and used instead the information provided by the petitioners. The case was

referred to the Dispute Settlement Body (DSB). India argued that the US should have resorted to facts available only with respect to particular categories of information that were either flawed/not available. India asserted that the USDOC always applied total facts available in particular factual circumstances. The US argued that the Agreement permits an investigating authority to resort to facts available for all aspects of its determination if some necessary information is not provided without considering the information actually submitted. The Panel did not accept the US position and concluded that the authority must use every element of information submitted which satisfies the provision of Annex II and that members do not have unlimited right to reject all information submitted in a case where necessary information is not provided. In the ***Argentina- AD measures on Carton-Board imports from Germany and Ceramic floor tiles from Italy*** case the Panel concluded that the investigating authority may not disregard information and resort to facts available under Article 6.8 on the ground that a party has failed to provide sufficient supporting documentation in respect of information provided unless the investigating authority has clearly requested that party provide such supporting documents. In the ***US- AD measures on certain hot rolled steel products from Japan***, the AB clarified that the application of Article 6.8 is not confined to cases where there is no information available whatsoever and where the entire margin is established using only facts available. Authorities can have recourse to this Article for remedying the lack of any necessary information. The panel also defined the factors that may be taken care of while deciding whether information is submitted within reasonable period of time. In this case, the Panel and the AB also rejected the automatic recourse to 'facts available' where deadlines are missed. It stated

> *'..... a rigid adherence to such deadlines does not in all cases suffice as the basis for the conclusion that the information was not submitted within a reasonable period and consequently that facts available may be applied... particularly where information is submitted in time to be verified or actually could be verified ....it should generally be accepted.....*

In view of the fact that Article 6.8 has been referred repeatedly at the WTO level, clarifications in this Article could be brought to the effect *that the authorities would use facts available with respect to that element of information that has not been provided'.*

It may also be appropriate to append a footnote clarifying the term 'reasonable period of time'.

4. Estimation of export prices

Ex-factory export prices are arrived at after making numerous adjustments. These include adjustments for taxes, discounts and rebates actually granted and directly related to the sales concerned, packaging costs, costs relating to the export and transportation of the product, costs charged for the product's entry into the country, including transport, maintenance, insurance, loading and unloading and handling costs, and other unforeseen costs incurred from the commencement of transportation at the point of export until delivery to the buyer. Adjustments that are claimed by the exporters are examined by the Designated Authority. It is at the discretion of the authority whether to accept or reject

them. Some of the specific problems indicated in the calculation of the export price are as follows.

Constructed export price

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price has to be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine (Antidumping Agreement, Art. 2.3). The law stipulates that in such cases allowances for costs (including duties and taxes) incurred between importation and resale and for profits accruing should be made. When a manufacturer performs all export functions (for instance, administration of exports and networking etc.) in-house, his export price reflects these costs and is comparatively high. On the contrary, when he sells to a related importer who performs all these functions on his behalf then the price does not reflect this cost and is comparatively low. Adjustments made in the price in these cases therefore result in anomaly penalising exports via related importers.

This issue needs to be addressed as with increasing globalistion more and more exports are being undertaken via trading houses. Article 2.3 could thus be suitably amended, ***as suggested in the case of the normal value****, to accommodate the possibility that the association between the exporter and the importer does not affect the export price.*

5. Fair Comparison

Article 2.4 stipulates that 'a fair comparison shall be made between the export price and the normal value'. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, level of trade, quantities, quality, physical characteristics, currency conversion and any other differences which are also demonstrated to affect price comparability. There are however many instances where authorities apply unreasonable rules at the expense of fairness. The issues that have been repeatedly raised by Indian exporters in antidumping investigations against them relate to the *treatment of duty drawback, other indirect taxes and credit costs*.

Duty drawback

If any interested party demands price adjustments because of a difference in physical characteristics or quantity and condition of sales, he/she shall establish the fact that the difference directly affected the market price or on the manufacturing costs and that the difference is quantifiable. However the investigating authorities at time do not permit the required allowances on unreasonable grounds. One such allowance is duty

drawback claims. This problem is particularly serious for developing countries where import duties are higher than in developed countries. In the '***Synthetic Fibres Polyester*** (from India) Case (1992)' where the provisional dumping margins exceeded 100% as a result of the EC not taking into account duty drawback, the final margins reduced significantly when such allowances were made. However, in most cases authorities reject the claims for duty drawback adjustments.

Detailed guidelines for duty drawback scheme including effective monitoring systems and procedures are laid down in Annexes II and III of the SCM agreement. But the problem is that such monitoring systems and procedures are not considered adequate by investigating authorities in developed countries. They insist upon the producers positively establishing that domestically purchased raw materials have at no times been used in exported finished goods. The EC for instance insists that a duty adjustment is only granted provided two conditions are satisfied, first, it must be shown that import charges are borne by the like product and by materials physically incorporated therein and second, these import charges are refunded/ not collected when the product is exported to the community. Exporters' find it extremely difficult to conclusively provide evidence with regard to the first requirement. This has become one of the most contentious issues from India's perspective. There are several instances where duty drawback claims made by Indian exporters had been rejected by the EC. In fact, in 7 of the 13 cases currently in force, claims for duty drawback adjustment were rejected by the EC. In the case of '***Certain flat rolled products of iron or non-alloy steel'*** two Indian companies claimed an allowance for such charges. These requests were partially granted to the extent that the above two requirements were satisfied. In the ***Polyster Staple Fibre*** *case* against India, the EC rejected the claim at the provisional stage due to lack of evidence. One exporter before the final determination submitted new information to support duty drawback claim but the Commission did not consider this claim on the ground that it was not submitted in time. In the '***Certain Polyethylene Terephthalate case***, the EC rejected the claim made by Indian companies on the import duties refund. The companies argued that the findings of the AD investigations were in contradiction with the findings in the parallel anti-subsidy proceedings in which the DEPB scheme was considered as an export subsidy that benefited the companies. The EC however changed its stance and argued that since CVD will be deducted from AD duties, any adjustment made in the normal value would amount to double adjustment. There are several other cases in which importers claims on duty drawback were rejected. These are for instance, ***Steel fasterners, Polyethylene Terephthalate Film*** and ***Sulphanic acid*** cases also. In a recently concluded ***Polyster textured filament yarn*** (PTY) case against India, all the three investigated companies claimed a duty drawback adjustment. However the EC rejected the duty drawback adjustment claim made by all Indian exporters on the ground that there was no evidence that any import charge was borne by the like product when destined for domestic consumption. The exporters claimed the same adjustment under the Duty Entitlement Passbook Scheme on post-export basis. The EC rejected this claim as well on the basis that companies failed to demonstrate the DEPB /Advanced License Schemes affect price comparability and that customers consistently pay different prices on the domestic market because of the benefits of the above mentioned schemes. The EC also rejected the exporting producers argument that the requirement to demonstrate that

the input raw materials for production in the exporting country contains a duty component imposed an undue burden of proof. Two Indian exporters argued that in the context of the parallel anti-subsidy investigation the Commission had accepted the scheme as non-countervailable.. Therefore, in order to remedy this contradiction between the two proceedings the said allowance should have been granted. However the EC argued that each AD case is examined on the basis of its own factual circumstances which may differ from all other proceedings.

The US Department's practice is to evaluate duty drawback adjustment claims with a "two-part test" to determine (1) whether the import duty and rebate are directly linked to, and dependent upon, one another, and (2) whether the company claiming the adjustment can show that there were sufficient. Many a times exporters find is difficult to provide sufficient proof to satisfy both these requirements. In the ***Stainless Steel Wire Rod from India Case***, the Indian Exporter Viraj could not submit adequate evidence to meet these conditions in repeated administrative reviews. It was only when the company submitted all the documents which the Commerce requested to show a link between its claims for duty adjustments, its purchases of imported raw materials, its reported sales and its financial statements that it was granted duty drawback claim. The Commerce stated categorically that relying on the Indian government's predetermined import content for exported merchandise is an inadequate means of calculating and reporting duty drawbacks.

The above discussion indicates the importance of addressing this issue. It is important to have case-based information on the experience of exporters regarding certain allowances and examine how the law can be modified in the light of such experiences.

6. Dumping margin

The WTO agreement stipulates that, 'the dumping margin shall be the amount by which the normal value exceeds the export price'. The existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. *A normal value established on a weighted average basis might be compared to prices of individual export transactions* if the authorities find a pattern of export prices, which differ significantly among different purchasers, regions or time periods. Major problems noted in this stage of the calculation of dumping margin relate to zeroing of dumping margins and comparison of weighted normal value with individual export prices

Zeroing of dumping margins

In those cases in which margins of dumping during the investigation phase are established on the basis of a comparison of a weighted average normal value with export prices on a transaction-to-transaction basis or by a comparison of normal value and export prices on a transaction-to-transaction basis, average dumping margins are based on the average of all comparisons. However, in this process when the export price is substantially higher than the normal value i.e. dumping margin is negative, the authorities treat such sales as having zero dumping margin. By doing so, the authorities skew their calculations in favour of higher dumping margins. Prior to the conclusion of the Uruguay Round, it was standard practice of some WTO Members to apply this method. Because of pressure exerted by other WTO Members, Article 2.4.2 was adopted and WTO Members generally resorted to use of the weighted average method (comparing a weighted average normal value with a weighted average export price). However, within the weighted average method, some WTO Members applied a new type of zeroing: *inter-model zeroin*g. If, for example, model A was dumped while model B was not dumped, the Members would not allow the negative dumping of model B to offset the positive dumping of model A inflating the weighted dumping margin ascertained for the like product as a whole. In the ***Bed linen case*** against India, the Panel stated

> *'We recognise that Article 2.4.2 does not in many words prohibit zeroing. However this does not mean that the practice is permitted, if it produces results inconsistent with the obligations set forth in that Article as we believe it does. This is equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted '*

The Appellate Body supported this ruling. Dumping margins reduced significantly once the practice of zeroing was dropped and the EU had to withdraw AD duty on cotton bed linen originated in India.

In the *US-Stainless Steel from Korea Case,* the Panel ruled that the United States' use of multiple averaging periods in the *Plate* and *Sheet* investigations was inconsistent with the requirement of Article 2.4.2 to compare a weighted average normal value with a weighted average of all comparable export transactions. The United States had divided the investigation period for the purpose of calculating the overall margin of dumping into two averaging periods to take into account the Republic of Korea's won devaluation in the period November-December 1997, corresponding to the pre- and post-devaluation periods. The United States had calculated a margin of dumping for each sub-period. When combining the margins of dumping calculated for the sub-periods to determine an overall margin of dumping for the entire investigation period, the DOC had treated the period November-December, where the average export price was higher than the average normal value, as a sub-period of zero dumping—where in fact there was *negative dumping* in that sub-period. The Panel concluded that this was not allowed under Article 2.4.2

In view of the rulings given by various Panels, zeroing needs to be prohibited at all levels. Article 2.4.2, needs to be redrafted so as to provide that dumping margins should be based on comparisons, which fully reflect all comparable export prices.

Comparison of weighted normal value with individual export prices

A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices, which differ significantly among different purchasers, regions or time periods. A review of the antidumping proceedings indicates that in many cases export prices on transaction-to transaction basis are compared with one estimate of normal value. In this process the exporter may suffer yet another disadvantage from the method of comparison. In the following example, the weighted average normal value is $10 (15+10+5/3).

Table 4: Comparison of weighted normal value with individual export prices: An Illustration

Date of sale	Domestic price	Normal value	Export price	D.M.
1 August	15	10	16	0
10 September	10	10	12	0
22 December	5	10	8	2

Thus, 22 December exports though above the domestic price are nevertheless dumped because the export price happens to be less than the weighted average normal value. Along with zeroing, such practices also need to be reviewed and amended.

The foregoing contribution has attempted a broad overview of the issues related to the calculation of dumping margins. The analysis is primarily based on the problems faced by Indian exporters in antidumping proceedings carried out against them in the US and EU. It shows that the use of constructed normal values and export prices, imposition of unrealistic conditions for granting relevant allowances that need be made to ensure comparability between export and unfair comparisons between export and normal values create a high degree of risk of artificial dumping. There is need to strengthen the law to prevent its extensive misuse.

II. Injury

1. Domestic Industry

Support criterion

The AD authorities must identify the domestic industry before addressing the injury issues. Domestic industry is defined by Article 4.

> *It means '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' (Article 4).*

The law does not define the term 'major proportion'. An analysis of the injury determinations made by the EC and the USITC shows that non- complainant firms are generally reluctant to co-operate. In practice, therefore injury determinations are normally based on the data submitted by the complainants and the best available information. Since investigations may be initiated when domestic producers expressly supporting the application account for 25% or more of total production of the like product, injury analysis may also be carried out for producers who account for as low as 25% of the domestic production.

A footnote clarifying the term 'domestic industry' may be appended. For the purpose of injury analysis, domestic industry should be defined to include more than 75% of domestic production. 25% condition that is necessary for the initiation of AD investigations is not sufficient for the analysis.

Related parties

Scholars (see for instance Didier 2001) argue that the practice of excluding related party is less tenable where these affiliates no longer import the like product from a dumping country but produce it in the importing country only. In Korea, producers who imported six months prior to the date of receipt of the application and those whose import quantity is insignificant are included in the definition of domestic producers. In countries with substantial presence of FDI, a number of producers are likely to be excluded from the definition of domestic producers.

Captive production

The law does not have any provision regarding the treatment of captive production. Authorities therefore can exercise their discretion in the treatment of captive production. The US statue has 'captive production provision. Under this provision the USITC must focus its injury analysis on the free (merchant) market and potentially may find injury in the merchant market even if the industry as a whole is not experiencing injury. EC law has no captive production provision but in practice the EC normally excludes captive production from injury assessment. In the ***Hot rolled steel product originating in India*** case around 70% of the hot-rolled coils manufactured by EC producers was used in a captive market i.e. they were further transformed by the producers in an integrated process. The complainant claimed that two separate markets should be distinguished and only the hot-rolled coiled sold o the free market was subject to the complaint. Exporting producers however suggested that the assessment of the market should include the captive market and the free market taken together. In support of this claim reference was made to the GIMELEC judgement of the European Court of Justice. (Case no. C-315-90 of 27.11.1991). In this ruling the Court referred to the following factors to rule out the existence of two separate markets: (1) the product concerned was sold on the same market and used for the same purpose; (2) the community producers sold the product concerned both to related and unrelated customers and charged more or less the same price; companies on the downstream market used to

buy the product concerned not only from related Community suppliers but also from importers/unrelated producers. However, the Commission considered that the separation between the free and the captive market is in line with the requirement of the past practice. *Consequently the situation of the community industry in terms of the development of various economic indicators such as production, sales, market share and profitability was examined with respect to* ***the free market****.*

Japan however challenged the practice of ignoring captive production in injury analysis. In the ***US- AD measures on Hot rolled Steel Plates from Japan*** dispute case, Japan argued that the captive production provision of US law violates Article 3 and 4 of the ADA. The EC supported the US practice as a third party and argued that where a significant proportion of domestic production is for captive consumption, it is not inconsistent with the ADA to focus the analysis on the merchant market since it is there that the immediate injurious effect of the dumped imports takes place. Developing countries like Chile, Brazil and Korea however supported the argument given by Japan. The ***Appellate Body*** in this case ruled that Article 3.1 *does not entitle investigating authorities to conduct a selective examination of a domestic industry*. Rather where one part of an industry is the subject of separate examination other parts of the industry should also be examined in like manner. It thus ruled that the authorities need to examine both the captive and the free market separately and argued that the US acted inconsistently with the ADA by not analysing the data for the captive market.

It is therefore important to amend the agreement to categorically mention the treatment of captive production so that in future cases this loophole is not exploited in the injury analysis.

Exports vs domestic sales

Should exports be taken into account in the injury analysis? The EC does not think so. In one of the cases investigated by the EC, Indian exporters argued that limiting the analysis of the community's sales to the domestic sales in terms of volumes and prices does not comply with the provision of Article 3(4) of the WTO ADA on the ground that the agreement refers to total sales thus including exports. The Commission however argued that Article 3(4) in conjunction with Article 3(1) and (2) of the WTO clearly refers to the evaluation of the impact of dumped imports on prices in the domestic market and on the situation of the domestic industry. Injury of the Community industry must be found to exist on the domestic market only and that the situation w.r.t. exports is therefore irrelevant. The above AB judgement on the Captive production provision has important implications for the treatment of export sales and needs to be taken into account while negotiating on this issue.

Article 4 may be extended to include special provisions regarding treatment for the exports.

2. Injury indicators

Methods used for injury determination may be a matter of grave concern. There is no mathematical formula for determining the existence of injury. The decision whether

the standard of material injury has been satisfied is essentially a matter of judgement about which few general principles can be stated. In a pioneer study Finger et al (1982) observed that the injury decisions are primarily motivated by political factors. Their findings were supported by a number of studies (Anderson 1993, Moore 1992, Tharakan and Waelbroeck 1994, Hansen and Prusa 1996, 1997 among others). These studies suggest that political pressures matter a lot. For instance, two key House and Senate Subcommittees control the USITC's budget. Empirical evidence suggests that industries with production facilities in the district of oversight members fare better at the Commission. Political pressures can also take the form of bias against certain trading partners. For instance, these empirical studies suggest that cases against Japan and non market economies are far more likely to result in duties. Strong lobbies also affect the decisions. For instance, the steel industry in the US fares remarkably well in the AD investigations due to strong producers' lobby. Among economic factors, the larger the volume of imports and the larger the profit loss the greater is the chance of an affirmative decision. Thus, much depends on how the authorities argue. There is no scientific method of determining injury.

We analysed movement of 11 economic indicators as examined by the EC in 12 AD investigations against India. These are tabulated below. In almost all the cases, production, productivity, investment and capacity have gone up. Profits and employment are the two indicators that have shown downward trends in most cases. Apparently injury assessment means confirming employment and profits are down. There is no formal economic analysis. Kaplan (1991) in an analysis of the USITC decision making process reaches the same conclusion.

Table 5: Case-wise summary of injury-assessment: EC investigations against Indian exporters

Case	I	II	III	IV	V	VI	VII	VIII	IX	X	XI
Synthetic fibre ropes	up	N.C.	down		up	up	up	down	down	up	up
Steel fasteners	up	Up	down	up			down	down	up	up	up
Potassium Permengnate	down		up		up	up	up	down	down		up
Stainless steel wires					up	up		down			up
Steel ropes	up	Up	down	up	down	N.C.		down	down	up	up
Flat rolled Steel products	up		down	up	down	down	up	up	down		up
Certain PET			N.C.		up			down		up	
Cathod ray Colour TV	down		N.C.		down	up			down		
PSF			down						down		
PET Film	down	Up	down	up	up	up		down		up	N.C.
Sulphanic Acid	up	Up	up	N.C.		up	up	down	N.C.	up	N.C.
PTY	up	Up	N.C.	up	down	down	down	down	down	N.C.	down

I=Prices, II=Stocks, III =Market Share, IV=Capacity, V=Sale, VI=Production, VII=Capacity utilization, VIII=Profit, IX=Employment, X=Productivity, XI=Investment; N.C. : No Change
Source : Official Journals of the EU

Furthermore, Article 3.4 requires that the examination of the impact of the dumped 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 producing the like product in the importing country. It mentions 15 specific factors in this context. The scope of this obligation has been examined in four panel proceedings thus far. These are : Panel Report, Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Mexico – Corn Syrup) WT/DS132/R; Panel Report, Thailand-H-Beams; Panel Report, EC-Bed Linen; Panel Report, Guatemala-Cement II. All four Panels, strongly supported by the Appellate Body in Thailand-H- beams, held that the evaluation of the 15 factors is mandatory in each case and must be clear from the published documents. Every panel in the Agreement on Safeguards also has reached the same conclusion. It has thus been consistently held that the investing authorities are required to evaluate all the 15 factors described in Article 3.4.

Notwithstanding the importance attached to these factors, the wordings of the provision suggest that these are merely illustrative factors. The law states

> *'The examination of the impact of dumped products.....shall include an evaluation of all economic factors <u>including</u>..... The list is not exhaustive....'.*

In the light of the Panel rulings, it is important to review these factors carefully. Only those factors that can be meaningfully evaluated for the subject product need to be included. For this it is important that a framework is developed for injury analysis. In the ***US-AD measures on certain hot rolled Steel products from Japan dispute case***, the panel ruled that

> *'it would not be sufficient if the investigating authorities merely mentioned data for Article 3.4 factors without undertaking an evaluation of that factor.. '*

But an evaluation requires context and a well defined framework. The law however describes a wide array of economic factors without giving a proper framework as to how the authorities need to evaluate them. Many factors are systematically related. For instance, productivity may have negative relationship with employment. Similarly, the economic theory suggests that increased competition in the market results in fall in profits. This may not therefore be a sign of injury. Apparently, analysing 15 factors in a single framework is not practical. Furthermore, many of the Article 3.4 factors are applicable to the business enterprise as whole and cannot be examined product-wise in multi-product corporations (Bhansali 2002). These are for instance, employment, wages, growth, ability to raise capital and investment. Since dumping margin is calculated on the product basis, injury should also be product-specific. These problems can be tackled if a proper framework is developed for assessing injury.

In this context, some scholars suggest that the injury standard for antidumping cases should be brought closer to the antitrust standard, which takes into account the behaviour's effect on the competitive structure of the industry as a whole, rather than the material injury it causes to petitioner domestic firms. The factors that have implication for the competition should therefore be included and evaluated within a perspective of protecting competitive process.

However, there is little evidence of analogue between antidumping and competition laws (See Aggarwal 2002a for discussion). It is therefore a challenging task to evolve a suitable framework for injury assessment. Member countries may decide to set up a Working Committee to address this issue.

One suggestion is that the wordings of the law may be modified. Footnote 9 of Article 3 reads

> *The term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.*

It is suggested that Or could be replaced by and. It would result in stricter interpretation of injury. Injury would mean material injury that is likely to continue and would result in material retardation of the domestic industry. This will facilitate the evaluation of various economic indicators such as ability to raise capital, investments, stocks and productivity by providing context. Logically, antidumping duty imposition is justifiable if there is evidence that injury would persist and that this would retard the establishment of the industry. Showing injury during the investigation period alone cannot justify the imposition of ADD.

It would also prevent initiating AD investigations on the basis of threat of injury alone. The law permits the application of AD measures in cases where a domestic industry alleges that it is not yet suffering material injury, but is threatened with material injury, which will develop into material injury unless anti-dumping measures are taken. Article 3.7 offers special provisions for a threat case. These are : (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation; (ii) sufficiently freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports; (iii) 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 (iv) inventories of the product being investigated.

The **Mexico – Corn Syrup** case the Panel concluded that a threat analysis must also include evaluation of the Article 3.4 factors. The Panel was of the view that

> *'While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry….In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7.'*

Such statements are easy to make and any investigation based on threat of material injury will necessarily be speculative because it involves analysis of events that have not yet happened. It is therefore suggested that no injury decision should be based

on the 'threat of injury alone'. In the ***PET flm*** case, Indian exporters pointed out that the community industry's situation improved dramatically since the IP period and that the community was no longer suffering material injury. The EC argued that article 6(1) of the basic rule provides that information relating to a period after the IP should not normally be taken into account. On the basis of the jurisprudence of the Court, the commission examined developments in the PET markets during the nine months period following the IP. It was found that prices increased continuously. Market share and sales also increased. However, it was concluded that if the ongoing proceeding was terminated, it was likely that dumped imports would rapidly regain market share and thus the case was made for the injury. No evidence was given to support the argument. Such issues may be addressed by introducing the above change in the wordings of the law.

Price undercutting

Most countries including EC (Vermulst and Waer 1992), rely for estimating injury mainly on price undercutting by dumped imports. The methodology is to compare weighted average net sales price of the dumped imports on a model by model basis with the weighted average net sales price by community industry in the Community market. While calculating price undercutting, the EC practise zeroing practice on the model basis. Price undercutting are inflated because any negative amount by which the exporting producers' price undercut those of the community industry were not offset with any positive amounts. In the ***Steel Wires case against India*** 12.7.1999 Indian exporters raised this issue but did not get heard. In the ***Polyester Staple Fibre*** Case again Indian exporters argued that it was wrong to exclude negative price undercutting. The commission confirms this but since no further arguments were put forward, the claim was rejected. In the ***PTF case***, certain Indian exporters argued that the injury should be calculated on the like product and not on the comparable models. The arguement was based on the conclusions of the WTO Appellate body in ***the bed linen case*** (1.3.2001). The EC however argued that these conclusions were drawn in the context of dumping calculations and hence were not relevant in this case.

It is however felt that the AB ruling has a wide implication and that i*n the light of this ruling, zeroing practice on injury should also be reconsidered.*

3. Causation

Besides injury, it must also be demonstrated that the dumped or subsidized imports are, through the effects of dumping, causing injury. Disentangling various causes of injury to domestic industry and finding out that part of injury which could be ascribed to dumping is a complicated task. In ***the US- AD measures on certain Hot rolled steel production*** from Japan, *the Appellate Body* ruled that investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors. They must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. In the ***United States - Wheat Gluten Safeguard and United States - Lamb Safeguard case,*** where the Appellate Body interpreted Article 4.2(b) of the Agreement on Safeguards - which is

substantially similar to Article 3.5 of the Anti-Dumping Agreement - to mean that authorities must separate and distinguish the effects of other factors and assess the "bearing", "influence", or "effect" that each factor has on the overall situation of the domestic industry.

These rulings notwithstanding, there appears to be no serious attempt to disentangle the injurious effects of dumped imports from other sources. It has been recommended above to constitute a working committee to look into injury-related issues. The same committee may be entrusted with the task of the causal relationship-related issues.

A recommendation of the WTO Committee (WTO Committee on Anti-Dumping Practices - Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations - Adopted by the Committee on 5 May 2000, G/ADP/6 on Anti-Dumping Practices) provides that injury should preferably be analysed over a period of at least three years. This period is often called the injury investigation period [IIP]. Such a relatively long period is needed particularly because of the causation requirement. While the industry must be suffering material injury during the regular investigation period and detailed injury margin calculations in the case of application of a lesser duty rule will be based on the data existing during the regular investigation period, the analysis of injury and causation needs a longer period in order to examine trend factors, such as those mentioned in Articles 3.4 and 3.5 ADA. The new Committee should examine whether three years' period is sufficient for analyzing the causal relationship. There is evidence of positive relationship between economic downturn and the number of AD initiations in developed countries (see Aggarwal 2002b). Apparently, these countries accommodate import competition when the market is expanding but protect their market share when the rate of expansion slows. Thus injury may be associated with economic downturn. Three years period may fail to control for the business cycles. Aside from the injury period, the committee may also devise a formal economic analysis to disentangle the effect of various other factors in the trend analysis. What is required is some form of 'counterfactual estimate' which would show what the situation of the domestic industry would have been if there were no dumping and then to compare it with the actual situation. Work done by Boltuck (1991) and others have proposed methods for such an analysis. It is time that ADA incorporates the requirement for some form of counter-factual analysis in injury determination as a clarification to Article 3.5.

4. Cumulation

One of the most widely criticised provision in injury determination is that of cumulation. The WTO agreement *permits* an investigating authority to accumulate dumped imports of a product from more than one country that are simultaneously subject to antidumping investigations. Using this provision, the authorities aggregate all like imports from all countries under investigation and assess the combined effect on domestic industry. Though WTO agreement states that the authorities may cumulatively assess …., antidumping legislation in almost all countries states that the authority shall cumulatively assess the volume and effects of such imports, provided that the imports

compete amongst themselves and with products identical or alike to those imported which are manufactured in the country. In actual practice authorities follow the practice of cumulation in almost all cases.

Until 1984, the use of cumulation was discretionary in the US. Only 13 percent of the anti-dumping cases were subject to cumulation between 1980-84. Injury decisions were made on a country-by –country basis even if multiple countries were named. It meant that the authorities rarely found injury by reason of dumped imports unless the import volume was substantial. In 1984, due to aggressive lobbying by domestic industries, the US Congress amended the AD and CVD laws making it mandatory to cumulate imports across countries when determining injury. Rather than being rare cumulation became the norm. Obviously, in the post 1984 period, there was a dramatic increase in the use of cumulation provision. Between 1985 and 1994 75% of the ITC decisions involved cumulation (Table 6). In the Uruguay Round this provision was included in the ADA.

Table 6: Use of the cumulation principle: Analysis of USITC cases

	Final determinations		**Affirmative determinations**	
	No Cumulation	Cumulation	No cumulation	Cumulation
1980-84	205	30	22%	30%
1985-1994	123	367	40%	51%

Source Prusa (1998)

Cumulation increases the likelihood of affirmative findings. If the imports from individual countries are aggregated, the market share of investigated firms will rise and the impact of foreign impact will become more significant. This in turn will result in greater likelihood of affirmative findings. Table 6 shows that over the period from 1985 through 1994, affirmative findings were made in 51% of cases with cumulation while only 40% of the cases without cumulation were successful. Hansen and Prusa (1996) quantified the impact of this change in the statute by comparing outcomes in the pre 1984 (1980-84) and post 1984 (1985-88) period. After controlling for other factors they find that cumulated cases were about 30% more likely to result in duties than non-cumulated cases. Their findings suggest that more than 50% of USITC affirmative determinations from 1985 through 1988 would have been negative without cumulation.

Aside from this, cumulation also has what Hansen and Prusa (1996) called ‘supper Additivity effect’. They observed that even if the market share effect is controlled by holding the market share of defendant firms constant, aggregating over the exports of several countries itself increases the probability of an affirmative injury determination. Thus the greater is the number of small defendant firms (holding the market share constant), higher is the probability of a positive finding by the USITC. According to an example considered in Hansen and Prusa (1996), when 40 percent of imports are under investigation and a single country is involved, the probability of an affirmative injury finding is 0.60. But when the petition is filed against two countries with a cumulated market share of 40 percent, divided equally between them, the probability rises to .72. This change represents a 20 percent increase in the probability of affirmative action.

Extending the example to five countries, holding constant the market share of imports, the probability rises to .78 or by 30 percent. Tharakan, Greenaway and Tharakan (1998)) confirmed this finding for the EC injury determination as well. They provide similar examples using the estimates for the EC. The probability of an affirmative finding rises from .92 for two countries to .98 for 3 countries, holding constant the market share of imports under investigation. Gupta and Panagariya (2001) explained this empirical finding using a theoretical framework. They suggested that the presence of a large number of exporters exacerbates the free rider problem, which leads every firm to invest less on defence and results in super additivity effect. Thus, cumulation has played a significant role in yielding a positive injury determination not only by increasing the market share of defendant firms but also due to super additivity effect of cumulation. Naming a multitude of small countries with very small import market share raises the probability of gaining protection because it results in super additivity effect. This practice is likely to be primarily harmful for *developing countries* that constitute small fractions of the import market.

To examine the use of cumulation in the post Uruguay Round Period, we now analyse naming patterns in all AD duty orders currently in place in the US and EU. In the case of the US, several duty orders currently in effect are the result of pre-1995 period investigations. These cases are analysed separately. Table 7 shows that the WTO Agreement had a significant impact on the use of cumulation. While in the pre-WTO years multiple countries were named in around 25% of the cases initiated, in the post WTO period 39% cases had multiple countries. Furthermore, naming patterns also changed with increasing number of cases having more than 3 named countries. These patterns appear to be more pronounced in the EU where multiple countries were named in 58% of the cases and almost the same proportion of cases involved more than 3. There were cases which involved ten to twelve countries.

Table 7: Summary of naming patterns in the EU and US cases

No. of named countries	**United States**		**European Union**
	AD cases continued from the past	Initiated in post 1995 period	
2	11	7	8
3	4	5	6
4-7	4	9	14
8-12	2	3	5
Total cases naming multiple countries	21	24	33
Duties in effect (product-wise)	86	62	58

Source: Author's computations based on data provided on USITC and EU websites

Table 8 shows that in most US and EU cases involving India cumulation is applied. In the US, ten AD duties are in effect against India. In all these cases multiple countries were named in the investigation process. In the EU, 13 AD duties are in effect currently. Cumulation was applied in ten of these 13 investigations.

Table 8: Summary of naming patterns in cases involving India

Cases against India	US	EU
Multiple countries	10	10
Only India	0	3
Total	10	13

Sources: USITC and EU trade websites

Thus under cumulation naming more countries has become a profitable strategy, particularly against developing countries. It needs to be recognised a harmful practice.

The USITC generally considers four factors when deciding whether to cumulate : (1) interchangeability between imports from different countries and between imports and domestic product, (2) overlap between the domestic product and the imported product in four geographical markets of the US; (3) similar distribution channels and (4) simultaneous presence of imports. These conditions are rather easy to meet and regardless of whether one country's imports actually harm domestic producers, it can be lumped together with big exporters.

For elaborating on the conditions provided in Article 3.3, a sentence could be added stating that significant differences in market share/ export volume trends over past years from different exporting countries indicate a difference in the conditions of the competition and the inappropriateness of cumulation.

Besides, it calls for a SNDT provision for developing countries. We shall discuss it in Part IV.

III Other Procedural Issues

1. Initiation of antidumping case

Condition

The WTO agreement stipulates that an investigation shall not be initiated unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the petition expressed by domestic producers of the like product, that the application has been made "by or on behalf of the domestic industry." The petition will be considered to be made "by or on behalf of the domestic industry" if it is supported by 50% of the industry expressing opinion and 25% of the total domestic production. In practice however, the authorities examine the share of the petitioners in the total domestic production and if it is established that the petitioners constitute 25% of the domestic production, the case is initiated. There is no procedure whereby it is ascertained at the time of initiation whether there is dissemination of information regarding the petition among all the producers in the industry. No provision is made to

determine support/ opposition of producers in the industry before the case is initiated. Thus, only 25% of domestic producers can trigger protection affecting 100% of consumers.

In the second submission to WTO (TN/RL/W/26) India has argued that domestic industries that are fragmented and have a very large number of producers face an enormous problem in initiating AD investigations because they find it difficult to meet the standing requirement contained in Article 5.4. This is particularly true in the case of goods produced in industries in the unorganised sector. On the basis of the above argument India has recommended to apply the sampling rule (footnote 13) to 25% condition also.

To evaluate the significance of this argument, we have examined the market share patterns of all those firms that have filed AD cases in India from 1993 through 2001. Preliminary empirical evidence suggests that AD cases in India are filed by firms that are operating in highly concentrated domestic markets. In more than one-quarter of the cases, the industry had a sole producer. In around 80% of the cases , the industry had one to four producers. In only 11 cases, the industry had more than 6 producers. What is more striking is the level of concentration among petitioners. In 90% of the cases the number of petitioners was between one and three . In those cases where there was only one petitioner, his average market share was 89.7%,. In the cases where the number of petitioners was 2 and 3, average market share was 62.7% and 76.6 % respectively. Clearly, the petitioners were the dominant producers in their industry. In around 49% of the cases there was a sole petitioner and on an average his share was 89.7%. Of the 97 cases there were only 3 cases in which the number of petitioners exceeded 5.

Table 9: Domestic market structure of industries subject to AD investigations

No: of Producers/ Petitioners	No: of cases (producers)	No: of cases (petitioners)	Average market share*
1	23	47	89.7
2	11	22	62.7
3	9	18	76.6
4	12	4	59.3
5	13	3	67.8
6	3	0	-
More than 6	11	3	-
Total	82	97	-

Note: * this information is based 83 cases
Source: Government of India gazettes

Table 10 shows the distribution of petitioners' market share. This information was available for 83 cases. Of the 83 cases, 77 cases are such in which petitioners' market share is 50% or more.

Table 10: Distribution of petitioners' market share

Petitioners' Market	Number of	Average market

share	cases	share of petitioners
25-50	6	30.2
50-75	20	61.3
75-90	16	81.2
90-100	41	97.4

Source: Government of India gazettes

This is in contrast with the findings for the US where unconcentrated industries initiated more than 50% of all dumping cases; at most, only one-third were initiated by highly concentrated industries (Hyun Ja Shin 1998). Moreover, empirical evidence in the EU and US suggest that domestic industry concentration do not seem to have much influence on petition. It must however be observed that lobbying power is one of the most significant factor in determining affirmative finding.

Thus India's proposal may prove to be counter productive. It is likely to facilitate AD filing in developed countries where meeting necessary conditions for filing AD petition may be a contraint. In India, important constraints are very high legal cost of AD investigations, lack of expertise, weak lobbying power and free rider problem. Feinberg and Hirsch (1989) find that more firms in an industry tend to lower the likelihood of petition which supports the effects of free rider problem. The the conditions for domestic industry standing need to be tightened to protect Indian exporters in the foreign markets.

The current law may be abused where the non complaining firms do not express their opinion. Thus we propose that Article 5.4 may be modified (see also Didier 2001) by clarifying that

'the application shall be considered to have been made 'by or on behalf of the domestic industry ....if the domestic industry expressing either support or opposition to the application represents more than 75% of the total domestic production'. Domestic industry includes captive production, production for exports and production by parties related to exporters'.

25% condition and the sampling condition should go. Sampling technique is frequently resorted to by advanced countries. Any bias in the sample selection may have the immediate effect on the outcome.

Back to Back investigation:

Repeated/ Back-to-back AD investigations in some countries on the same product originating in the same countries is an important issue particularly from a developing country point of view and needs to be addressed. As an illustration one may cite the **synthetic fibre ropes case** investigated in EU**.** In June 1997 an antidumping proceeding concerning imports of synthetic fibre ropes originating in India was terminated without imposition of measures on the ground that a causal relationship between dumping and injury was not sufficiently established to justify the imposition of measures. In July of the same of the year, the Commission announced the initiation of a new AD proceeding against this product on the ground that information made subsequently available to the

Commission contained sufficient prima facie evidence that the situation of the Community industry may have further deteriorated as a result of continued dumped imports from India. The Indian exporter raised objections to the opening of the proceeding. They argued that compared with the negative finding on causation made in the previous proceeding concerning imports of synthetic fibre ropes originating in India there were no changed circumstances to explain a different finding in the present case on the causal link between dumping and injury. However, the EC was convinced that it had reliable information to establish a causal link between injury and dumping in the present case. There was evidence that the market share of the subject exporter declined in the period of investigation from 4.1% in 1995 to 3.4% in 1996. The authorities however owed it to the previous AD proceeding which coincided with the period of investigation in this period.

The EU is ready to agree to a separate provision in the draft implementation decision by making it harder for industry to bring back-to-back cases in a 365 days. However, we propose to have a separate provision in the Agreement to preclude the initiation of any investigation for a period of 365 days from the date of termination of a previous investigation on the same product from the same country.

2. Questionnaires

Replying to questionnaires, some of which extend to hundreds of pages, constitutes a major burden, particularly for small and medium-sized exporters from developing countries. Exporters find the questionnaires too time consuming and complicated. It has been observed that in traditional user-countries questionnaires have become more and more complicated over time. Long and detailed questionnaires have harassment value. This is one possible reason why these firms choose not to participate in the AD investigations against them and instead allow the case to proceed using 'facts available' which always means much larger tariffs. Baldwin and Moore (1991) finds that the use of facts available nearly doubles the average US dumping margin from around 35% to over 65%. It is therefore recommended to use simple questionnaires. This problem therefore needs to be addressed. The questionnaires should be as simple as possible, focusing only on the necessary information.

It is proposed here that consideration should be given to a standard questionnaire.

3. Disclosure of information

The WTO agreement stipulates that only non-confidential summaries of confidential information are available to the parties concerned. In principle this is to protect the companies' interest. However, this may be of little value to the defendants and complainants. Such a situation may lead to increased propensity to affirmative findings in dumping and injury determination. Tharakan and Waelbroeck (1994) argue that the EC is more susceptible than the USITC to non-economic factors due to the EC's strict confidentiality rules where little information is revealed to parties. This makes it easier for political factors to influence the Commission's decisions. The situation may

be tackled by abolishing the strict confidentiality rule and the use of more technically sophisticated and economically relevant injury determination methods.

The **Thailand- AD duties on Angles ...and H Beams** from Poland case brings out the important of a greater transparency in the system. In this case the **Appellate Body** ruled that there is nothing in Article 3.1 which limits an investigating authority to have an injury determination only upon non-confidential information. 'It permits an investigating authority making an injury determination to base its determination on all relevant reasoning and facts before it'. This ruling makes it all the more important to ensure a greater transparency in the system.

Some countries like USA and Canada have a system under which confidential information submitted by one interested party may be accessed by the attorneys of other interested parties under an Administrative Protective Order (APO). Under APO the counsel gets access to such information. However he is first required to provide strict undertaking of confidentiality (Tharakan1994). The attorneys cannot provide this information to their clients but they can use it to double check the correctness of the information as well as the use made thereof by the agency.

Some scholars (Vermulst 1997) argue that this system is difficult to maintain for developing countries and might create substantial problems if information were ever leaked. However, most experts observe that it is clearly preferable for a greater transparency.

4 Dispute Settlement Mechanism

Lifting any restrictions of the role of panels

Constraints of the role of panels distinguish the anti-dumping regime from other WTO regimes. Developed countries desperately required less interference with domestic decisions during the Uruguay Round. As a result, panels' role is strictly limited compared with normal Dispute Settlement Procedure. Panels can do nothing if establishment of facts is proper and evaluation of those facts is unbiased and objective.

A WTO panel in the ***Guatemala-Grey Portland Cement from Mexico case*** ruled

> *'We consider that it is not our role to perform a de novo review of the evidence which was before the investigating authority in this case. Rather, Article 17 makes it clear that our task is to review the determination of the investigating authorities. Specifically, we must determine whether its establishment of the facts was proper and the evaluation of those facts was unbiased and objective. In other words, we must determine whether an unbiased and objective investigating authority evaluating the evidence before it at the time of the investigation could properly have made the determinations made by Guatemala in this case. In our review of the investigating authorities' evaluation of the facts, we will first need to examine evidence considered by the investigating authority, and second, this examination is limited by Article 17.5(ii) to the facts before the investigating*

authority. That is, we are not to examine any new evidence that was not part of the record of the investigation.'

Finger and Fung (1994) observe that the GATT dispute settlement process seems unlikely to provide discipline against the increasing number of AD cases. Both the legal and bureaucratic momentum of dispute settlement are towards the innocuous findings of procedural errors that can be lifted without the AD order in question.

Another controversial issue is that the ADA allows different interpretations, which is against the Vienna Convention on the Law of Treaties. One of the expected benefits for developing countries joining the WTO is to take advantage of multilateral mechanism to avoid any unbalanced bilateral negotiations with their powerful trading partners. However, it is faded due to powerless panels. Article 17.6 (ii) was added into anti-dumping agreement in the Uruguay Round. Since developing countries more focus on world trade than before and more developing countries are expected to join the WTO in foreseeable period, there will be more anti-dumping cases submitted to the DSB.

It is therefore proposed to enhance the role of panels in the dispute settlement and reduce the discretion of importing countries' authorities. The restrictions of the role of panels in article 17.6 (ii) should be reviewed. Any dispute arising from anti-dumping issue should be solved under the normal procedure of DSU.

Compliance

After a ruling, the prospect of an Article 21.5 "compliance" panel review (and possibly appeal) and Article 22 "arbitration" panel increases the incentives for foot-dragging. ***Cotton bed case*** may illustrate this point. Following the DSB recommendations in March 2001 in this case, the EC withdrew ADD on bed linen originating in India by August 2001. While appreciating the steps taken by the EC, the Trade Commissioner of the EU said

'it shows the EU prudent use of the trade defence measures in particular against developing countries. This development dimension a constant and distinct feature of the EU trade policy is at the heart of the initiatives presented by the EU in the Doha Development Round... '.

However India was not satisfied with the implementation of the Panel ruling. She requested the establishment of Panel challenging the implementation of AB ruling. The World Trade Organisation (WTO) compliance panel however ruled in favour of the European Union. In February 2002, upon request by the Community industry a review had been initiated. India raised this issue as well. However, the panel upheld the partial interim review also initiated by the European Union. It ruled that the provision 21.2 does not impose any specific or general obligation on Members to undertake any particular action. The partial interim review is expected to recommend (Ministry of Commerce, India website www.tc.nic.in) imposition of higher duties on imports of cotton bed linen from India to the European Union. While the European Union had initially imposed definitive anti-dumping duty ranging from 2.6% to 17% on these imports from India, the partial interim review is likely to suggest imposition of duties of up to 26%. These rulings are likely to hit Indian exporters in a major way.

We therefore propose further reforms in the dispute settlement system that would limit post-ruling foot-dragging.

Special and differential treatment provisions in this regard are discussed in Part IV.

5 Sunset Reviews

Introduction of the 'sunset review' process of antidumping orders in the Uruguay Round was perhaps one of the most important reforms in the AD process. Pre-WTO GATT rules were relatively vague about when governments were required to terminate antidumping duties. This meant that duties could remain in place indefinitely. Under Article 11.3 of the WTO agreement all antidumping orders be terminated five years after their initiation unless the authorities determine in a review that the expiry would be likely to lead to a continuation of dumping and injury. Sunset review was originally deemed friendly to developing countries. However, developing countries gain little because the AD measures under the law can be extended for successive new terms of five years if the authorities determine that the expiry of the duty would lead to recurrence of dumping and injury. This has led traditional users to renew measures almost indefinitely and they have in fact got an overwhelming proportion of anti-dumping measures in force AD orders of which had been made several years ago. In the US, out of 305 sun set reviews only 143 have been revoked. This constitutes 47% of the total reviews. AD is continued in 53% of the cases. There are several cases that have been continuing since the 1970s. Table 11 provides a year-wise distribution of the US AD duties currently in force. Of the 278 duties currently in force, 161 (58%) were ordered before 1996. In other words, these duties have been in place for more than one term. Of the 161 cases, 98 (61%) cases are against non-OECD countries. Thus overwhelmingly large number of such cases are against non OECD countries.

Table 11: Year-wise distribution of the US AD duties (country specific) currently in force

Order date	No. of cases currently in force	No. of cases against non OECD
Before 1983	10	1
1983-86	22	20
1987-1989	37	18
1990-1992	35	25
1993-1996	57	34
1996-2002	117	98
Total	278	

In order to demonstrate fairness and massively reduce the anti-dumping cases in force in which developing countries are mainly the targets, it is important to make this code effective. Article 11.2 states

'....Interested parties shall have the right to request .....to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed..'

Under the current system the subject matter of the review investigation is only the likeliness or recurrence of dumping and injury. A WTO Panel in ***the US-DRAMS' from Korea*** case ruled

'....Mathematical certainty is not required but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to a prospect of recurrence of dumping as to one of present dumping'. With regard to injury the panel ruled 'Article 11.2 provides for a review of whether the injury would be likely to continue or recur if the duties were removed or varied (emphasis added). In conducting injury review the authority may examine the causal relationship between injury and dumping'. If the only injury under examination is future injury ....the authority must necessarily be examining that whether that future injury would be caused by dumping with a commensurately prospective timeframe'.

Thus the Panel indirectly upheld that the current system should be replaced by a requirement of a new proceeding all over again.

Article 11.3 could thus be amended by stating that continuation of AD measures is admissible only where all the three conditions for the imposition of definitive antidumping measures have been fulfilled.

6. Anti dumping duty: Lesser Duty Law

The decision whether the amount of the antidumping duty to be imposed shall be the full margin of dumping or less is to be made by authorities of the importing member. The agreement (Art. 9.1) expresses preference for a lesser duty ; however, it does not make it mandatory. Member countries therefore use wide discretion in this matter as well. While in Mexico, Brazil, Argentina and India this rule is not mandatory, the EU statue has made this rule mandatory. In the US and Canada, on the other hand, once injury is proved and its causal effect is established AD duty equivalent to the dumping margin is imposed. Many scholars however have expressed their preference for the lesser duty rule and have argued that it needs to become mandatory.

The lesser duty rule implies that dumping duties should be less than the dumping margin and only high enough to remove injury. WTO Members, which apply a lesser duty rule in accordance with Articles 8.1 and 9.1, have to calculate injury margins. The ADA does not give any guidance on such calculation and arguably leaves its Members substantial discretion. Normally, injury margin is calculated as the difference between the fair selling price due to the domestic industry and the landed cost of the product under consideration. Landed cost for this purpose is taken as the assessable value under the customs Act and the basic customs duties. More specifically,

Injury elimination level is = selling price of the community industry + the profit shortfall + reasonable level of profit – price of the dumped products.

This calculation of the extent of injury itself is subject to several ambiguities. There is ambiguity in the calculation of the fair domestic price. Fair domestic price is calculated by projecting the actual cost at the optimum level of capacity utilisation. In doing so, the authorities use the actual price data for the whole industry and not for the most efficient units. This method gives upward bias to the fair domestic price for two reasons. First, the calculations are based on the information provided by the domestic producers. Two, in many cases, the industry has highly inefficient cost structure due to wrong location, smaller size, obsolete technology, high cost of electricity and waste of raw materials. No account is taken of the fact that the price difference can be caused by a host of factors other than dumping such as competitiveness, better policies of the exporters, and difference in quality. The more inefficient the industry the greater is the likelihood of higher injury margins. Thus the system primarily protects inefficiency. The choice of profit shortfall and reasonable levels of profits are also at the discretion of the authorities. Injury elimination levels can be inflated by giving higher values to these two parameters. It is therefore quite possible that injury margins are higher than dumping margins and that even if the lesser duty rule is applicable, dumping duties are the full dumping margins. The effect of lesser duty rule is likely to be insignificant unless there is an unambiguous methodology of calculating injury elimination level.

Table 12: Summary of injury and dumping margins

Case	No. of exporters Investigated (incl. Residual category)	No. of exporters for whom injury margin > dumping margin	Column 3 as a percentage of col. 2
Synthetic fibre ropes	2	0	0
Steel fasteners	4	3	75
Potassium Permengnate	1	1	100
Stainless steel wires	11	8	73
Steel ropes	3	3	100
Hot-rolled Flat steel	2	0	0
Certain PET	5	1	20
Cathode ray Colour TV	1	1	100
PSF	3	2	67
PET Film	7	7	100
Sulphanic Acid	2	2	100
PTY	5	5	100
Total	48	33	

To test the above hypothesis, we examined injury and dumping margins in almost all the cases which were investigated in the EU against Indian exporters between 1998 and 2002 and which resulted into duties. Table 12 summarises the patterns. For 33 of the 48 firms[2] (69%) investigated in 12 cases, injury was found to be higher than the dumping margin. In 6 out of the 12 cases, injury levels were higher than dumping margins for all exporters. The rule appears to have benefited exporters in only three cases (Synthetic fibre ropes Hot-rolled Flat steel and Certain PET). One must also refer to Table 15 provided in Part IV below. It shows that the distribution of ADD imposed

[2] It included the category of residual exporter firms.

against Indian exporters in the EU is more highly skewed than that in the US. Apparently the lesser duty rule in the EU is not very effective.

The objective of this exercise is not to suggest that lesser duty rule should not be made mandatory. Rather, it suggests that in the absence of a non-ambiguous methodology for calculating injury elimination level, the lesser duty rule may not be effective.

IV Special and Differential Treatment (SNDT)

1. Introduction

The term 'special and differential treatment' refers to GATT rights and privileges given to developing countries, but not extended to developed countries. The concept of special and differential treatment in the GATT evolved from debates in the 1960's as to how the growth and development of developing countries was best facilitated by trade rules. The term itself derived from a reference in the 1973 Tokyo Round Declaration which recognized the importance of the application of differential measures in developing countries in ways which will provide special and more favourable treatment for them in areas of negotiation where this is feasible.

The inclusion of SNDT in GATT reflects a long history of calls by developing countries for special treatment in global trade arrangements. No principles applying specifically to developing countries existed in the GATT at the time of its inception. Moreover, GATT was dominated by the developed countries and these countries were not receptive to the idea of forging a link between trade and development. The first attempt to accommodate developing countries' concerns was made in 1954 through Article 18 (Whalley, 1999). Developing countries however felt that their trade concerns were not being effectively addressed in the GATT. In 1965 they succeeded in getting Part IV also incorporated into GATT articles. Part IV introduced a development dimension into GATT. It introduced the notion of non reciprocity in tariff negotiations for developing countries and thus made it possible to grant preferential treatment to developing countries in international trade rules. This was essentially an effort in the direction of making GATT more acceptable to developing countries.

Part IV of the GATT did not provide for a GATT Article 1 exception for developing country trade preferences, although it did contain the first formal statement in a GATT legal text of the principle of non-reciprocity. In 1968 the developing countries succeeded in establishing a Generalised System of Preferences (GSP) under the auspices of UNCTAD. In 1971, a GATT waiver from MFN obligations was granted after the US agreed to it. The 1971 Waiver from Article 1 (MFN) was a temporary arrangement, initially for a period of 10 years, under which developed countries could grant tariff concessions to developing countries on a non reciprocal basis.

In the *Tokyo Round (1973-1979),* developing succeeded in getting 'Enabling Clause'(1979) incorporated in the GATT. The Clause established the principle of differential and more favourable treatment to developing countries. It provided for: (i) the preferential market access of developing countries to developed country markets on a non

reciprocal, non discriminatory basis; (ii) 'more favourable' treatment for developing countries in other GATT rules dealing with non-tariff barriers (iii) the introduction of preferential trade regimes between developing countries; (iv) and the special treatment. This Clause made the 1971 GSP waiver permanent. It also introduced the idea that special and differential treatment is not a permanent right. Developing countries would at some point graduate from special and differential treatment as they grew and developed. In the Tokyo Round a number of the codes that were negotiated contained Special and differential treatment provisions. The declaration launching the *Uruguay Round* contained a clear and unequivocal reaffirmation of special and differential treatment as a principle of the trading system, It had become a part of the system of trade rules. While negotiating on complex WTO disciplines, developing countries sought comforts in this provision. Special benefits were offered in almost every agreement and were readily accepted by developing countries even if in many agreements they were ad hoc in formalisation.

Despite a long history of efforts by developing countries for SNDT, there has been an intense debate among scholars as to whether it really is worth the developing country effort to drive towards reinvigorating SNDT, or whether to focus negotiating efforts elsewhere. One school of thought suggests that SNDT provisions are not the best way to safeguard developing countries' interests and that any drive towards strengthening these provisions would involve huge opportunity cost in terms of sacrifice of substantial gains that may be achieved by focusing on more concrete negotiations. Some scholars belonging to this school opine that SNDT reflect token compensation offered to developing countries for their agreeing to complex WTO disciplines that are tailored to suit the interests of developed countries while others have expressed their doubts on the importance of these provisions. They have criticised these provisions on the theoretical grounds and have advocated to narrow them. In support of their argument they cite several studies that have examined the benefits that GSP schemes have yielded for developing countries. The picture that emerges is that benefits seem to be modest in aggregate, and are more important for some countries than others (see for instance, Karsenty and Laird 1987 and McPhee 1989). There are no serious studies on the post Uruguay Round SNDT provisions and the initial indications from the first five years of operation of Uruguay Round decisions still provide an incomplete picture both on use of SNDT provisions and their impact. However, it is felt (Footer 2001) that there has been a trend towards stricter and narrower interpretation of SNDT provisions making them ineffective in protecting developing countries' interests. These arguments notwithstanding several scholars (see for instance, Michlopolous 1998) argue that so long as there is a gap in economic capacities and levels of development of WTO members SNDT will be required. Giving more regards to developing countries is very important for world trade and world's stability. The challenge is to more carefully rationalize these provisions and to elaborate on them. Developing countries must defend their interests in the new round of multilateral trade negotiation. Leaving these provisions to the discretion of developed countries would invite skepticism to the benefits of these provisions.

2. Conceptual justification for SNDT in the Antidumping Agreement

There are several conceptual premises underlying the provision of SNDT in the WTO agreements. Several scholars have discussed theoretical underpinnings of SNDT arrangements in GATT in detail (see for instance, Michalopoulos 1998 , Whally 1999). This paper argues that there are special motivations for providing such treatment in the ADA.

A central problem for the developing countries in respect of possible AD measures against their exports is that their home market prices for domestically manufactured products are in most cases higher than those in their export markets. This home market price distortion is largely due to inefficient cost structures which result primarily from the production conditions under which firms in these countries operate. These include, high cost of capital, labour market conditions, labour laws, poor infrastructrual facilities and bad governance. It is, therefore, not a sound policy to rely on home market prices/ production costs as normal values in dumping investigations against developing countries. The normal value of all exports should be based on international prices for the goods concerned and not on home market prices / production costs. During the Kennedy Round the developing countries raised this issue and proposed a footnote to Article 2 (d) of the 1967 Code that would have allowed for reference to third country export prices instead of prices in their home country whenever they were alleged to be dumping. The proposal was however rejected due to strong objections by the developed countries who finally 'tailored the 1967 Code to suit their interests' (Kufuor 1998). In 1970 a GATT working committee was established to examine the special problem of the developing countries under the 1967 Code. Developing countries again raised the basic problem in adhering to the 1967 Code. Though the working Party admitted that a solution to the problem would have to be based on the recognition that in the case of the developing countries it was not reasonable to use home market prices/ production costs as normal values in AD investigations, it concluded that a compromise on that matter was not possible at the time. It also pointed out that under Article 2 (d) of the 1967 Code prices for like products exported third countries could be used for price comparison when there was an unusual market situation in the exporting country. In the final analysis it set out concession in Article 15. However, no elaborations on Article 15 were made in subsequent rounds. Against that background, it becomes important in the Development Round of negotiations to give due recognition to 'the special situation' of developing country members when considering the application of AD measures under this agreement.

Furthermore, empirical evidence suggests that though the cases reported by low and middle income countries have increased, the number of cases reported against them are still larger. Table 13 provides details on AD actions by targeted country group. It shows that in the early 1980s, around 60% of the reported cases were against OECD countries. Nearly 22% cases were reported against the upper income group of developing countries. Low and middle income country-groups together constituted around 12% of the cases. In the late 1980s, these patterns remained the same. In the early 1990s, however, there was a quantum jump in the number of cases initiated against low- and

middle-income countries. While in the late 1980s, only 17.5% of the cases were reported against them, in the early 1990s, their share doubled to 34%. It rose further to 40% in the late 1990s. More than 22% cases were directed against upper income developing countries. Taken together, developing countries were targeted in around 62% of the cases.

Table 13: Initiation of AD investigations by affected-country: 1980-2000

	Number of cases			
Year	1980-85	1986-90	1991-95	1995-00
Low	37	42	240	303
	(4.0)	(6.3)	(19.4)	(22.7)
Middle	70	75	183	232
	(7.5)	(11.2)	(14.7)	(17.4)
Upper	210	171	288	301
	(22.6)	(25.6)	(23.2)	(22.5)
OECD	553	302	441	398
	(59.5)	(45.2)	(35.5)	(29.8)
Non –OECD	60	78	88	101
	(6.4)	(11.7)	(7.1)	(7.6)
Total	930	668	1240	1335
	(100)	(100)	(100)	(100)

Table 14 shows the patterns of AD duties currently in force in the US and the EU. These patterns reveal the extent of victimisation of developing countries! While in the US, two-thirds of the AD duties currently in force are against developing countries, in the EU over 90% of such duties are against these countries. Antidumping has thus become properly speaking a developing countries' issue.

Table 14 : Patterns of AD duties currently in force : United States and European Union

(number)

	US	**EU**
Developed	94	10
Developing	184	184
Total	278	194

Source: Author's computation

The developing countries have embarked on structural reforms to their economies, in the recent past. The Uruguay Round further resulted in massive reduction of tariffs. These programmes could be seriously threatened by AD investigations targeted against them by developed countries. To protect the interests of developing county Members and help them integrating their economies globally, it is important to elaborate on constructive remedies that may be granted to them by this Agreement.

Restraining the use of AD measures by developing countries is yet another reason to grant special treatment to these countries. An empirical study carried out at ICRIER (Aggarwal 2002b) documents a positive relationship between the use AD measures against developing countries and AD filings by them. This suggests that AD actions against developing countries motivate them to use similar policies against their trading partners. The use of AD measures helps them in creating capacity to take such actions and thus posing retaliation threats to counter such activities against them. The capacity to retaliate may in turn have dampening effects on AD activities of trading partner. Blonigen and Bown (2002) in an empirical analysis of the determinants of the US AD behaviour, observed that retaliation capability of trading partners have had dampening effects on the US AD activity. In view of this, it may be argued that as long as the traditional users continue to use it against the developing countries, AD instrument will be used by developing countries to have the ability to hit back (see also Vermulst 1997). One may like to suggest that increased AD familiarity and ability across developing countries may ultimately help put the brakes on AD use by traditional users. However, this may also result in AD wars reversing hard won trade liberalisation gains. This may therefore prove to be a costly strategy to restrain the AD use. The use of AD actions is still not widespread among developing countries. If they continue to become targets of such activities irrespective of whether by developed or other developing countries, they will be motivated to use it themselves.

Finally, after MFA comes to an end in 2005, there is likely to be stupendous increase in AD cases against developing countries. It is therefore important to negotiate SNDT in the next Round to safeguard their interests.

3 SNDT Treatment and the Antidumping Agreement

The SND treatment in the ADA is enshrined in article 15. It reads,

> *'It is recognised that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of AD measures under this Agreement. Possibilities of constructive remedies provided for by this agreement shall be explored before applying antidumping duties where they would affect the essential interests of developing country Members.'*

Article 15 thus requires developed countries to give special regard to the situation of developing countries when considering the application of AD measures but does not make any specific provision for addressing how should they do it. It is therefore not surprising that the developing country members are of the view that developed Members do not comply with Article 15 when imposing anti-dumping duties. (G/ADP/W/416 dated 8 November 2000, G/ADP/M/15 dated 14 March 2000, G/ADP/M/16 dated 20 September 2000, G/ADP/M/17 dated 9 April 2001, G/ADP/M/18 dated 21 November, 2001). India raised this issue in both the DSB cases in which it was an affected party,.

The Panel in ***European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India*** admitted that Article 15 imposes no obligation to

actually provide or accept any constructive remedy that may be identified and/or offered. It also pointed out that Article 15 does not require that 'constructive remedies' must be explored but rather that the possibilities of such remedies must be explored and the explorations may conclude that no such possibilities exist. The Panel however suggested that the exploration of possibilities must be undertaken by the developed country members. It was thus of the view that 'Article 15 does impose an obligation to actively consider, with an open mind, *the possibility* of such a remedy prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country.' The panel however did not come to any conclusion as to what might constitute 'constructive remedies provided for under this agreement'.

The Panel in the ***'United States – Antidumping and Countervailing Measures on steel plates from India'*** opined that the first sentence of Article 15 imposes 'no specific or general obligation on developed country Members to undertake any particular action. The Panel did not agree with India that this 'mandatory provision does create a general obligation , the precise parameters of which are to be determined based on the facts and circumstances of the particular case'. The panel held that 'Members cannot be expected to comply with an obligation whose parameters are entirely undefined. The Panel also disagreed with India's view that special regard must be given throughout the course of the investigation. It was of the view that it refers to the final decision whether to apply a final measure.

The above discussion clearly suggests that Article 15 of the Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is operationally ineffective. Though it is a mandatory provision, the modalities for its application need clarification. SNDT is widely accepted by all Member States to deal with the vulnerability of developing countries in the free trading system. But this issue has not been well addressed in the anti-dumping regime. Article 15 is too general to be enforceable. Therefore, concretion of Article 15 should be solved in the next round of negotiation.

4. Suggestions

The Secretariat identifies two types of SNDT provisions in WTO agreements: These are as follows.

A. Exceptions to rule to which developing countries may take recourse to;

B. Conduct or actions to be undertaken by developed country Members for developing country members.

While A constitutes provisions of flexibility of commitment, actions, and use of policy instruments, B comprises of provisions under which WTO members should safeguard the interest of developing country member and provide them technical assistance. To make SNDT provisions effective in the antidumping regime it is important that there are negotiations on both types of provisions.

A. Exceptions to rule to which developing countries may take recourse to

De minimis level: Dumping margin

Deminimis dumping margin is fixed at 2%. Many scholars propose to raise it to 5% for developing countries and 8% for the least developed countries. To evaluate the impact of raising the *de minimis* dumping margin to 5% we examined dumping margin figures provided by the USDOC and EC in final determination of AD cases investigated in recent years. For the US, Lindsey (2000) provides a detailed database of company-specific Antidumping Duty rates in all final determinations from 1995 through 1998 and it may be recalled that ADD rates imposed by the USDOC are full dumping margins. For the EU, we had information on *country-specific* AD duties currently in force. In cases where there are more than one exporter, our database provided the duty range specifying the minimum and maximum duty for the exporters within the subject country. For our analysis we considered the maximum duty imposed in a given country. One must note here that in the EU lesser duty law is applicable which means that actual dumping margins could in fact be greater than ADDs. ADDs set lower limits for dumping margins and thus serve as a good proxy for dumping margins in this analysis. Table 15 summarises the available information. It shows that even if *de minimis* margin is raised to 10%, it will not have a significant impact on the use of AD measure. In the EU, in only 10 out of 113 country specific cases, ADD is less than 10%. In the US, less than one fifth of the exporters faced less than 10% ADD. In the EU, more than 50% of ADDs are above 25%. The distribution is more highly skewed in the US where 65% of the duties are above 25%.

Table 15: Structure of AD duties: European Union and United States

Duty upper limit	EU No. of country specific duties currently in force	US No. of company specific duties between 1995 and 1998
2%- 5%	2	10
5-10	8	10
10-25	46	17
Above 25	57	67
	113	104

Source: Author's computation based on the information provided by the EC and Lindsey (2000)

For examining the issue further, we examined dumping margins calculated for Indian companies by AD authorities in the EU and the US. Data on dumping margins was compiled from the official documents of these countries. Table 16 shows the distribution of company-specific dumping margins calculated by the EC and USDOC in cases investigated and found affirmative against India. In most cases , dumping margins are above 10%.

Table 16: Summary of dumping margins calculated by the USDOC and EC in AD investigations against Indian companies

Dumping margins	EU	US
2%- 5%	0	0
5-10	4	1
10-25	14	7
Above 25	28	7
Total	46	15

Source : Author's computation

This paper therefore argues that it is not appropriate for developing countries to spend time and energy in getting the de minimis *dumping margin raised.*

De minimis: import shares

De minimis import shares under the Antidumping Agreement are 3% and collectively 7%. Though the objective of introducing this condition is that the exporter accused of dumping should have a significant market share, experts criticise the law for such low standards of dominance. The threshold are much lower than those used by the competition authorities for defining 'dominant position' (30% or 40% in general). They argue that if dominance is defined in a specific way for domestic competition, the same criterion should be applied to foreign competition as well (Hoekman and Mavroidis 1996). No special or differential treatment is accorded to developing countries. As far as *de minimis* import shares under ASCM are concerned, developing countries enjoy 4% and collectively 9% while there is no accurate proportion for developed countries. As far as *de minimis* import shares under Agreement on Safeguard are concerned, developing countries enjoy 3% and collectively 9% while no *de minimis* provision for developed countries. One may like to argue therefore that SNDT should be granted to developing countries in the ADA also. There is however economic justification also for granting SNDT to developing in the threshold levels of imports shares. In general, individual shares held by exporting developing countries in developed country Members' markets are very small. Their import shares exceed the *de minimis* threshold due to the system of cumulation. SNDT provision in the *de minimis* in imports may therefore help in restraining the use of ADD against developing countries. Following the existing literature, we offer two suggestions in this regard.

One, the thresholds for executing negligible imports should be based on market share rather than on share of total imports.

Two, A sentence could be added to Article 5.8 of the WTO Agreement stating that 'no collective account will be made of dumped imports from developing country Members holding less than 3% of the importing members' consumption'.

This would mean that the countries with less than 3% of market share will automatically be excluded from the purview of AD investigations. This raises a pertinent question as to how effective will these reforms be? For addressing this question one needs to examine the individual market share of investigated firms from developing countries in developed country markets. Blonigen (2003) has complied a unique database on US antidumping investigations which provides firm-level data on all foreign firms that were involved in any U.S. antidumping investigation initiated from 1980 through 1995 and received at least a preliminary firm-specific antidumping (AD) duty. Most of the data come from *Federal Register* notices of the U.S. International Trade Commission (USITC) and the International Trade Administration (ITA) of the U.S. This database provides information on market share of US domestic producers, subject firms and other firms. We obtained this information and summarized in Table 17 below. It shows that in around 50% cases, the share of developing country firms had been less than 3%. One can therefore conclude that an introduction of this clause is likely to yield substantial benefit to developing countries.

Table 17: Distribution of market shares held by developing countries subject to AD actions in the US : 1980-1995

Market share (%)	No. of firms
0-3	54
3-9	20
Above 9	33
Total	107

Source : Blonigen (2003) and Author's computation

Prior consultation

It has been proven that anti-dumping investigations are harmful for parties affected no matter what final results are. There is evidence that AD petitions have a profound impact on imports even if they do not result in duties (Staiger and Wolak,1989;Prusa,1992). Staiger and Wolak (1994) found that imports fall dramatically during the investigation period regardless of the case 's ultimate outcome. Legal scholars often refer to this as the "harassment "effect of an AD investigation. Using extremely disaggregated trade data, Blonigen and Prusa (1998) found that AD actions have a very large effect on imports. When an AD dispute results in duties or is settled, on average import quantities fall by almost 70 percent and import prices rise by more than 30 percent. Interestingly, even when an AD dispute is ultimately rejected,the scrutiny has a significant impact on trade. The data reveal that even when the case is rejected imports fall by about 20 percent. The ***Synthetic Fibre Rope case*** against Indian investigated in the EU may illustrate this point further. In June 1997, an AD investigation concerning synthetic fibre ropes originating in India was terminated without imposition of measures. In July 1997 a new AD proceeding was initiated. The period of investigation in this proceeding was from 1 July 1996 to 31 May 1997 which coincided with the period of earlier proceeding. It was observed that even if no AD measure resulted from the earlier AD proceeding, importers of the Indian exporter had declined by 8%.

It is necessary to establish a mechanism to prevent such damages to developing countries since they can not afford them. Following the existing literature, it is recommended here that consultation before anti-dumping investigation is procedurally practical. Under this system, developed countries should inform the developing country involved of the facts of violation of anti-dumping laws and request them not to continue their violation prior to the initiation of investigations. As a response to the request from the complaining developed country, the developing country may correct its violation if it believes the claim of the complaining country is reasonable. If there is no agreement reached by two sides within a fixed period, the complaining country may set out investigation and follow what the authorities can do according to the existing procedure. This additional procedure will benefit both sides. Developing countries can get a chance to correct their aggressive conducts and possibly avoid an expensive lawsuit. Developed countries can solve dumping problems more efficiently and effectively.

B. Conduct or actions to be undertaken by developed country members for developing country member.

Institutional capacity

Greater emphasis on instruments to strengthen developing country institutional capacity. The main differences between developed and developing countries are not in the trade policies they should pursue but in the capacities of their institutions to pursue them. This means that S&D provisions related to technical and financial assistance as well as longer transition periods (which are linked to institutional reform and capacity building) should be emphasised. Explicit legally binding commitments regarding technical and financial assistance need to be obtained. Legal obligations developing countries have assumed in the WTO agreements need to be balanced by legal commitments of the developed countries to fund the assistance needed to implement them.

Financial support

Legal fees shall be conditionally shouldered by losing developed countries and expertise support should be available when developing countries face anti-dumping cases. Heavy financial burden is the root that developing countries have not been positively participating in anti-dumping lawsuits. If a developed country initiates an anti-dumping investigation against a developing country and finally the complaints are not justified, the legal fees in this case should be shouldered by the losing party. Generally it is fair and easy to be accepted by developed countries. If this proposal is adopted by the next round of negotiation, developing countries likely get rid of any hesitation to defend their lawful rights.

Professional training

The complex procedure of anti-dumping regime, like other regimes under the WTO, makes developing countries difficult to use it as both a complaining party and a

defending party. They are in sharp shortage of human resource and financial support. Not surprisingly their response rate is very low and their anti-dumping charges are always not justified according to the AAD 1994.

Providing professional expertise aid is critical developing countries to participate in anti-dumping actions. There should be a special training program for developing countries. Especially when they face anti-dumping actions or they intend to set up their own anti-dumping institutions, expertise support should be available.

Prioritization

The overall objective of the international community should be a more meaningful and real provision of S&D treatment through appropriate instruments to countries that truly need it. SNDT may be linked to the level of development in developing country. One possibility would be to extend SNDT for all low and lower middle income countries (based on the World Bank definition) while considering the rest on a case by case basis.

Legal assistance and dispute settlement

Most observers note that developing countries have been more active in WTO dispute settlement. Of the 10 AD dispute settlement cases so far, 7 have been initiated at the request of developing countries. This greater participation is typically traced to the legal reforms ushered in by the DSU, notably the "right" to a panel and automatic adoption of panel reports. However, econometric evidence suggests that developing countries have not won greater concessions (more favourable outcomes) under the WTO than under GATT. Developed country complainants have become significantly more likely to secure their desired outcomes under the WTO, while poor complainants have not. It is observed that the gap between developed and developing countries in winning concessions from a defendant owes to their differential rates of securing early settlement. In general, defendants tend to offer the greatest concessions in consultations, or at the panel stage prior to a ruling. It is at this stage that developed countries exact concessions and developing countries do not. It is not surprising therefore that they are panel more disputes notably against developed countries. We submit that more attention needs to be directed at helping developing countries make more of consultations, as well as more of negotiations at the panel stage prior to a ruling. Since developing countries are relatively disadvantaged in this regard due to lack of their capacity, they require assistance prior to litigation. This also constitutes a constructive remedy.

Enforceable SND treatment will significantly reduce anti-dumping cases against developing countries.

Conclusion

It would require drafting of regulations to fill gaps in the antidumping agreement, to address issues where the agreement explicitly offers members choices between

different approaches. Several ambiguities in the legal provisions such as a number of allowable adjustments with limited interpretation; the use of constructed normal and export values and unrealistic adjustments use of surrogate country methodology for non-market economies, asymmetrical comparisons between the export and normal values introduce bias in favour of finding positive dumping margins. Determination of injury margin is subject to even more severe ambiguities and is highly discretionary. The administrative procedure is considered highly confidential increasing the risk of its misuse. It is therefore necessary to introduce reforms in the system to minimise misuse of the law. The procedure of determining dumping should be made more transparent to minimise the risk of positive bias in favour of finding dumping. In addition, the injury standard for antidumping cases should be improved. Procedural aspects need be addressed and SNDT provisions should be strengthened. To minimise the manipulation of the law for protectionist purpose and to limit discretionary powers of the authorities, more explicit rules should be developed and definitions of different concepts used in the process should be given clearly.

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