



# Indian Anti-Dumping Law & Practice

A Handbook

# Contents

<b>Introduction</b>	<b>03</b>
<b>Anti-dumping in India</b>	<b>03</b>
<b>3 Pillars of Anti-Dumping</b>	<b>05</b>
Dumping	05
Injury	05
Causal Link	06
<b>Levy of Duty</b>	<b>08</b>
<b>Who can seek remedy</b>	<b>09</b>
<b>Definition of product</b>	<b>11</b>
<b>Investigation process</b>	<b>12</b>
<b>Review</b>	<b>13</b>
<b>Appellate Mechanism</b>	<b>14</b>
<b>Circumvention</b>	<b>15</b>
<b>Safeguard measures</b>	<b>16</b>
<b>Anti-subsidy measures</b>	<b>17</b>

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## Introduction

With advent of globalization, use of trade remedy actions has become more of a business and economic tool rather than a mere necessity measure. This is apparent from the spurt in investigations being conducted by countries to protect their interests yet maintaining the sanctity of free and fair trade. The recent trade tussle between the US and China PR is a classic illustration on this point.

India is no exception. With India committing itself to reducing customs trade barriers, Indian domestic industries have no option but to compete with imports from other countries.

Under the WTO regime, three types of trade remedies namely, antidumping duties, safeguard duties and countervailing duties are contemplated against injurious imports from other countries.



## Anti-dumping in India

Though India enacted its first provision dealing with the menace of dumping in 1982, the provisions were not in much use until the creation of WTO in 1995. Post alignment of domestic anti-dumping provisions with the WTO: Anti-Dumping Agreement, India has come a long way in using Anti-dumping measure as a trade remedy tool since 1995 with 26% of total world Anti-dumping measures being taken by India in 2011 from a modest 6% in 1995. This increase is a direct result of competition, which is forcing industries to avail as much benefit and protection under the law as permissible.

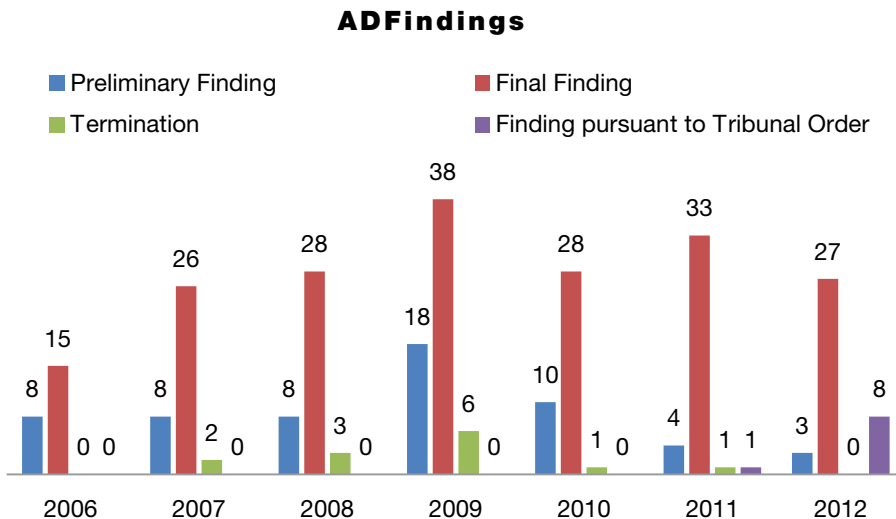
The use of anti-dumping remedy is seen as tilted towards benefitting the domestic industry, rather than being seen as a fair investigative process, giving equal weightage to both domestic industry and exporters. This is apparent from the judgment of Hon'ble Supreme Court in the case of *Reliance Industries vs Designated Authority [2006 (10) SCC 368]*, which stated as follows:

*"The Anti-dumping Law is, therefore, a salutary measure which prevents destruction of our industries which were built up after independence under the guidance of our patriotic, modern minded leaders at that time and it is the task of everyone today to see to it that there is further rapid industrialization in our country, to make India a modern, powerful, highly industrialized nation."*

It is to be noted that though the ultimate benefit is derived by the domestic industry of a country, the purpose of anti-dumping measure is not to protect any and every domestic

industry. The protection is limited to only such industries, who can demonstrate a nexus between the imports of products concerned and resultant injury caused to domestic industry by such imports.

Furthermore, protection under anti-dumping provisions can be availed for only such imports, which have been proved as being 'dumped' and have injured the domestic industry. Where



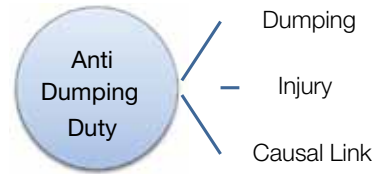
the domestic industry is getting affected purely due to sheer volume of imports, though fairly priced, the solution lies in taking recourse to Safeguard measures, not anti-dumping measures. Similarly, where the products are coming into the country at lesser prices only because of subsidy benefits given by the Government of such exporting country, protection can be availed under Anti-subsidy provisions.

In India, anti-dumping and anti-subsidy investigations are conducted by Directorate General of Anti-dumping and Allied Duties (DGAD), which is a separate department under Ministry of Commerce. Safeguard investigations, on the other hand, are conducted by Directorate General of Safeguards, which falls under the Ministry of Finance.

Present Handbook explains the fundamental principles and concepts involved in an anti-dumping investigation, the procedure involved and developed jurisprudence on the subject. The Handbook also briefly covers remedies available under Safeguard and Anti-subsidy provisions.

### 3 Pillars of Anti-Dumping

As mentioned above, remedy under anti-dumping provisions is available only in such situations, where dumping margin of goods from an exporting country into the importing country has resulted in injury to the domestic industry of that good in the importing country. Thus, imposition of AD duties involves detailed examination of 3 principal factors – Dumping, Injury and Causal Link.



#### Dumping

Rule 10 of the AD Rules states that an article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value. This means that 'dumping margin' is the difference between the 'normal' value of such product and its corresponding export price.

$$\text{Dumping Margin} = \text{Normal value} - \text{Export price}$$

Where,

Normal Value:

- Domestic price for the like product in the exporting country; OR
- Representative price of the like product when exported to any appropriate third country; OR
- Cost of Production + SGA + Profit

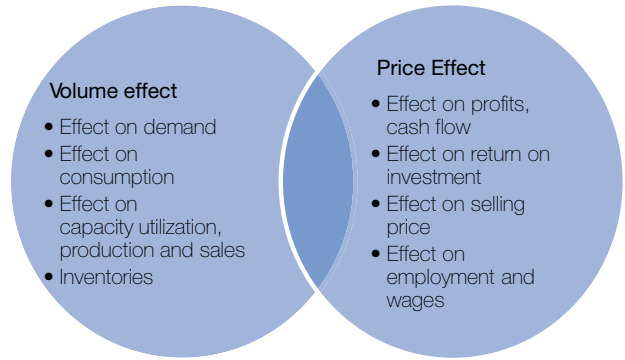
Export price : Price of the article exported from the exporting country or territory.

**Comment:** Comparison of normal value and export price is normally done at ex-factory level. Due allowances have to be made with respect to factors affecting fair comparison.

#### Injury

A domestic industry is said to be injured when its vital signs attributable to the product concerned, collectively show a significant deterioration. In terms of Section 9B, anti-dumping duties shall be imposed only when the dumped imports cause material injury to the domestic industry. The term 'material injury' includes threat of material injury and material retardation of the establishment of the domestic industry. While threat of material injury implies that domestic industry, though may not be suffering any injury at present, but injury is likely if unfair imports are allowed to enter into India without a check, material retardation on the other hand means injury to the domestic industry, which is at a nascent stage of its evolution and has not fully developed.

Injury to domestic industry is ascertained by DGAD by broadly examining two aspects – Volume effect and price effect of imports coming into India.



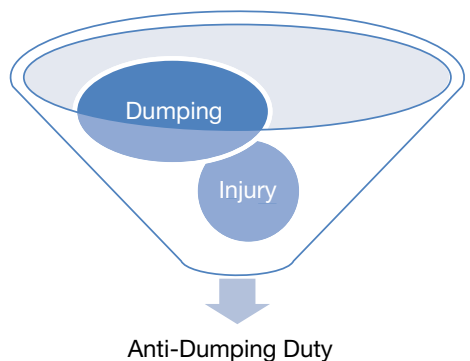
Once injury to domestic industry is established by examining all the relevant economic parameters, DGAD quantifies the extent of injury by arriving at an injury margin. Injury

margin is determined as the difference between the Non-Injurious Price (or Fair Selling Price) of the domestic industry and the landed value of imports coming into the country. This tells the extent to which the imported goods are 'underselling' as compared to the fair selling price of the domestic industry.

**Comment:** *In Bridge Stone Tire Manufacturing (Thailand) vs. DA [2011(270) E.L.T.696 (Tri-Del)], the tribunal discussed at length what constitutes 'injury'. It noted that the domestic industry was suffering losses even before the period of investigation (POI) and in fact the losses had come down to the lowest level during the POI. Further, despite the alleged price undercutting by imports and claimed potential decline in sales, a number of parameters such as capacity, production, capacity utilization, sales, selling prices and profitability of return on investment, wages, employment, productivity etc. recorded an improvement during the POI. Consequently, the conclusion of DA that the domestic industry was not growing at a higher rate was found not sufficient. The Tribunal pertinently concluded that in the absence of injury to the domestic industry, an ADD merely increases the prices of the imported goods for the domestic consumer and also provides a cushion to the domestic industry to increase their prices, while the ultimate sufferer is the domestic consumer. It was hence held that imposition of ADD in such a scenario cannot be considered to be in public interest.*

**Causal Link**

The third and final requirement in any antidumping investigation is the establishment of causal link between dumping and material injury to the domestic industry. It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury to the domestic industry. The demonstration of the causal relationship shall be based on an examination of all relevant evidence before DGAD. The use of the words

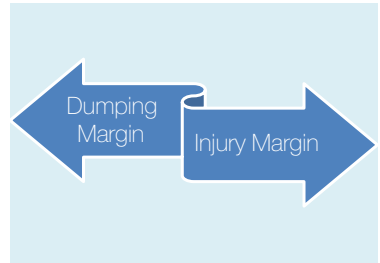


“through the effects of dumping” indicates a clear causal link between the dumped imports and the material injury. In *Agfa Gevaert A.G. vs. DA* [2001 (130) E.L.T. 741 (Tri. - Del.)], the Tribunal concluded that only if causal link between dumping of imported goods and injury to domestic industry is established, imposition of ADD can be resorted to. Thus, injury to domestic industry and causal link between that injury and dumped imports is a sine qua non for imposition of ADD.

**Comment:** *While determining a causal nexus, a question may arise as to whether dumped imports must be the only cause of injury or the dumped imports should be predominant cause of injury or is it enough if the dumped imports can be traced as a cause (howsoever small)? There is no guidance, either in WTO:ADA or the Indian legislation. The view of DGAD in all the investigations that had taken place so far is to see whether the status of the domestic industry deteriorated during the Period of Investigation as compared to the previous year/s. In particular, DGAD examines whether the price of the dumped imports had forced the domestic industry to match their price to that of the dumped imports and whether such a matching had caused material injury. The verdict on causal link has also been positive in all the cases except in a few cases of reviews.*

## Levy of Duty

Section 9A(1) of the Customs Tariff Act, 1975 empowers Central Government to impose anti-dumping duties, not exceeding the margin of dumping. This implies that anti-dumping duty determined by DGAD should be either equal to dumping margin or lesser amount, which is sufficient to redress injury. India follows a **'lesser duty'** rule, which in essence means lesser of dumping margin or injury margin.



ADD is imposed on a source (exporter) specific basis and can be expressed either on fixed basis, ad valorem or reference price basis. Specific/fixed duty is levied as a fixed monetary amount per unit of the material imported. Under the reference price method, a reference price is fixed and the duty would be the difference between the landed value and the said reference price. If the landed value exceeds the reference price, no duty shall be payable. Reference price form of duty is considered suitable for products, wherein large number of grades or types are involved. Ad valorem duty is levied as a percentage of the value of the goods imported.

**Comment:** Any exporter whose margin of dumping is less than 2% of the export price shall be excluded from the purview of ADD even if dumping, injury as well as the causal link are established. Further, investigations against any country are required to be terminated if the volume of the dumped imports from a particular country is found to be below 3% of the total imports. However, countries whose volume of imports individually is less than 3% of total imports but cumulatively account for more than 7%, imports from all those countries may be cumulated while determining injury.



## Who can seek remedy

An application for imposition of anti-dumping duty may either be initiated by DGAD suo-moto or upon an application filed by the domestic industry of the article concerned.



DGAD may initiate an investigation suo-moto, only where it is satisfied from the information received from Commissioner of Customs or any other source that sufficient evidence exists as to the existence of dumping causing injury [Rule 5(4)]. On the other

hand, for a domestic industry to file an application, there are certain conditions prescribed under the Anti-Dumping Rules. Rule 2(b) of the AD Rules defines “Domestic Industry” as the domestic producers, who are wholly engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article. However, there are some exceptions, wherein such domestic producers may become ineligible to be called as ‘Domestic Industry’ and may instead be considered as ‘rest of the producers’ only. These are:

- a. Where such producers are related to the exporters or importers of the alleged dumped article; or
- b. Where such producers are themselves importers thereof

Furthermore, the application should be supported by producers, whose collective production is atleast 50% of total production of producers who either express support or oppose the application. At the same time, producers supporting the investigation should expressly account for atleast 25% of total domestic production [Explanation to Rule 5(3)].

**Comment:** Numerous disputes have arisen challenging various aspects of domestic industry's definition and the definition under Rule 2(b) still remains a debatable issue. In brief, following jurisprudence has emerged from decisions of various Hon'ble Courts as well as Tribunal and DGAD/DGSD:

- i. *The applicant should actually produce the like article and mere processing of article or raw material is not sufficient.*<sup>1</sup>

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<sup>1</sup> Safeguard investigation concerning Unwrought Aluminium and Aluminium Scrap

- ii. *An applicant has to satisfy the “major proportion” test. DGAD has in the past applied major proportion test and terminated the investigation for lack of standing. But in numerous other investigations, DGAD has considered the applicants to be ‘domestic industry, even though they were holding less than 50% standing and also for the fact that such other producers did not take part in the investigation<sup>2</sup>.*
- iii. *DGAD has discretion to decide whether a domestic producer, who has also imported the subject goods into India or has a related exporter in subject country, can form a part of the term ‘domestic industry’ under Rule 2(b). [Nirma Ltd. vs. Saint Gobain Glass India Ltd.( 2012 (281) ELT 321)]*
- iii. *Imports by applicant-domestic producer from non-subject countries or insignificant imports do not entail exclusion from the standing.*
- iv. *Mere shareholding does not amount to control over the domestic producer by the parent company, which in turn may be related to the exporter<sup>3</sup>.*

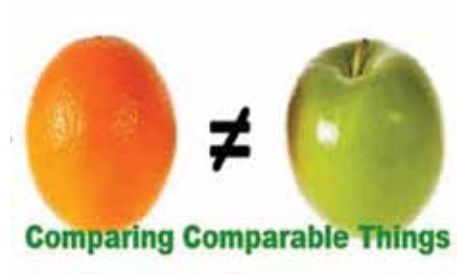
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2 Vitrified Porcelain Tiles from China and UAE

3 Circular Weaving Machine from China PR

## Definition of product

To impose anti-dumping duty, there has to be an article which is being imported into India and a similar "like article" being produced in India. Rule 2(d) of the Anti-Dumping Rules provides that such "like article", should be identical or alike in all respects or have characteristics closely resembling those of the articles under investigation. Thus, there has to be an 'apple to apple' comparison between the domestically produced article and the imported article, that is, the article produced by the domestic industry should be alike or identical to the product imported into the country. Normally, it is the domestic industry, which initially identifies the product and requests imposition of ADD, but in terms of Rule 4(b) of the AD Rules, it is the duty of the DGAD to correctly define the article under investigation.



**Comment:** *The issue of selecting the product is easy when there is one grade or type of that product and there are no comparable substitutes. However, complexities arise when the products comprise of different grades or types, not all of which are produced by the domestic industry itself. Courts have held as follows in this regard:*

- i. *Mere existence of capacity is not sufficient and domestic industry should be able to produce and sell the required grade in domestic market. [AD investigation on Hot Rolled Flat Products of Stainless Steel from European Union, Korea RP, South Africa, Taiwan and USA]*
- ii. *Articles not produced by the domestic industry cannot be included in the definition<sup>4</sup>*
- iii. *Mere substitutability of the product is not sufficient. Imported article and the like article should have characteristics closely resembling each other.<sup>5</sup>*
- iv. *Products with different techno-commercial market cannot be considered as like article<sup>6</sup>*

4 Indian Refractory Makers Association Vs. DA [2000 (119) E.L.T. 319 (Tribunal)]

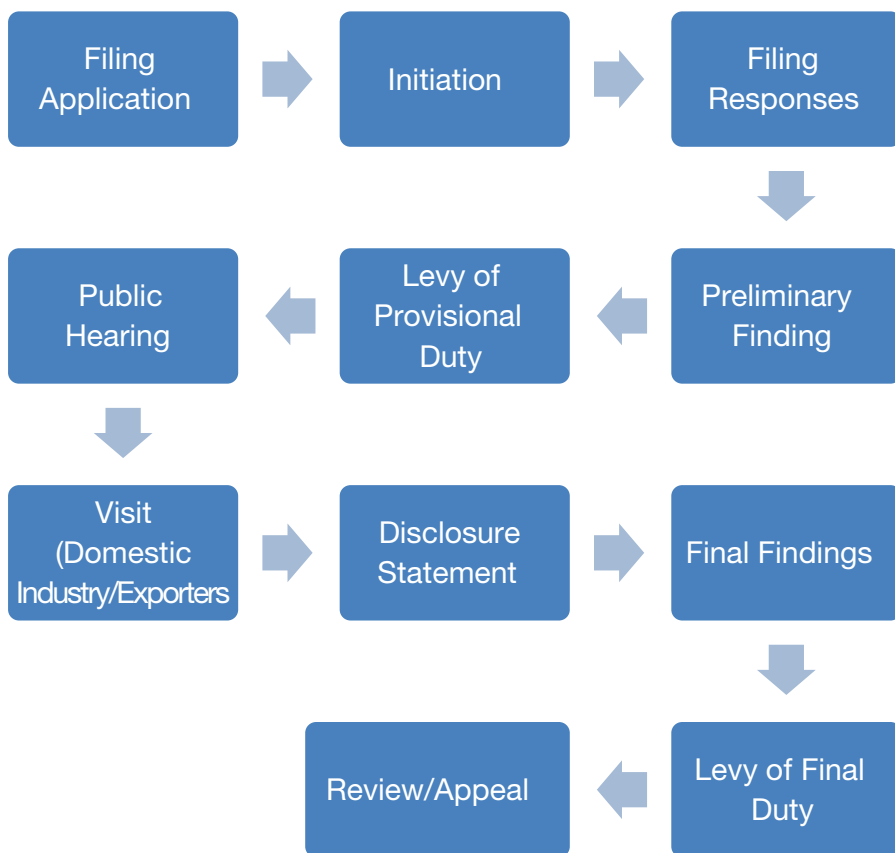
5 Oxo Alcohols Industry Association Vs. DA [2001(130) ELT58 (Tri-Del)]

6 Magnet Users Association Vs. DA [2003(157)ELT150(Tri-Del)]

## Investigation process

Rule 17 of the Anti-Dumping Rules requires that an anti-dumping investigation should be concluded within 12 months from the date of initiation of investigation. However, proviso to Rule 17 also provides that in certain exceptional cases, the Central Government may extend the period upto six months. Thus, maximum duration of an anti-dumping investigation is 18 months. It is to be noted that this period is only for conduct of investigation by DGAD.

Consideration of findings by Ministry of Finance before levying the anti-dumping duty is not covered under the said 12 month/18 month period. A brief investigation process is set out below:



## Review

As mentioned before, the purpose of anti-dumping duty is to counteract dumping. Section 9A(5) of the Customs Tariff Act provides that any anti-dumping duty imposed shall cease to have effect upon five years from the date of such imposition, unless extended further. However, such duty shall remain in force in operation only for so long as and to the extent necessary to counteract the said injurious dumping. Thus, in order to examine the necessity of continuing an existing duty or examining the need to modify the existing duties, the concept of reviews was developed. Under Indian AD Law, 3 types of review mechanisms are envisaged:



- a. **Sunset Review:** ADD imposed under the law shall be in force for 5 years from the date of imposition, unless revoked earlier. DGAD is required to conduct a review at the end of the 5 year period as to whether there is a need to continue imposition of ADD for a further period of 5 years.
- b. **Mid-term review:** DGAD also has the power to conduct an interim review from time to time, which may either be restricted to re-determine the scope of the product or it may be a full-fledged review to examine the need for the continued imposition of the ADD. Such a review can be done suo motu or on the basis of positive information received from an interested party in view of the changed circumstances.
- c. **New Shipper Review:** There may be a situation wherein an exporter did not produce or export the product concerned to India. As a result, such exporter could not be accorded a separate rate of duty. If such exporter thereafter wishes to claim a separate anti-dumping duty rate, he may do so by filing a new shipper review application. DGAD will thereafter review the need for determining margins of dumping for such exporter, provided that such exporter/ producer has not exported the product during the period of investigation and is not related to any of the exporters or producers who are already subject to ADD on the product.

**Comment:** DGAD has in the past also conducted a review specific only to the product under consideration, instead of doing a full-fledged review [Cold-rolled steel products with thickness upto 4 mm from EU, South Africa, Taiwan, Thailand and USA].

## Appellate Mechanism

To bring in line its anti-dumping legislation with the WTO: Anti-Dumping Agreement, India introduced Section 9C in the Customs Tariff Act 1975, which provides for an appeal mechanism. A statutory appeal can be made to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) against the orders passed by DGAD recommending imposition of Anti-Dumping Duty. Since in India, appeal is considered to be an extension of original investigation, which implies that the Appellate authority is entitled to give its verdict not only on the questions of law which are raised before it, but also on the questions of facts and the inferences drawn from these facts. The orders of the CESTAT may be challenged before the Honourable Supreme Court of India. In certain limited circumstances such as violation of the principles of natural justice, etc, the levy of duty may be challenged before the High Courts through an appropriate writ petition.



**Comment:** *Though there is a fixed time limit for completing the anti-dumping investigation, once the matter reaches appellate stage, time limits for coming out with a decision do not apply. Interestingly, time taken for obtaining a decision from the Hon'ble CESTAT works out, on average, to over 21 months and time taken for obtaining a decision upon 2nd Appeal takes about 33 months. In case of Writ appeals or appeals against High Court's decision, time taken to get a decision is comparatively less with an average time of about 7 months.*

## Circumvention

In 2011, India enacted anti-circumvention provisions, which placed India in a select group of countries having an anti-circumvention provision. While the enabling provisions were introduced in 2011, corresponding rules for conduct of anti-circumvention investigation were introduced in 2012. However, till date, India has not initiated any anti-circumvention investigation.



As per new rules, anti-circumvention can arise in three situations.

**Firstly**, when an article liable to anti-dumping duty is imported into India in an unassembled, unfinished or incomplete form and is assembled, finished or completed in India. Alternately, export from the countries subject to anti-dumping duty may be made in an unassembled, unfinished or incomplete form to any other country not subject to anti-dumping duty and the assembly, finishing or completion operation is carried out in that country from where the goods are imported into India. In both the cases, value addition in India or the third country concerned shall not be less than 35%.

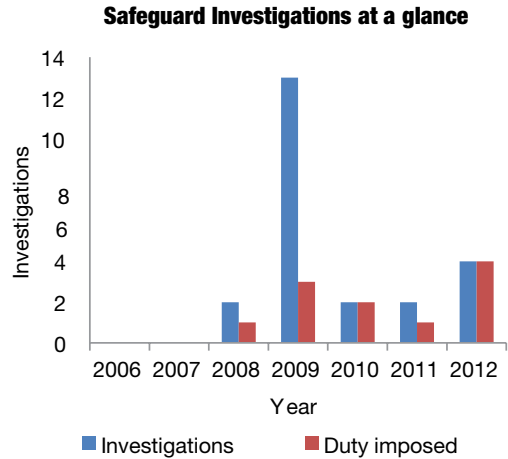
**Secondly**, the goods are held to be circumventing anti-dumping duty when even minor alteration in form or appearance of the article has been made when they are imported from countries earlier notified for the purpose of the levy.

**Thirdly**, when the goods are routed through any other exporter or country which was earlier not notified for such duty, the goods would be held as circumventing the duty if it is proved that the goods were so routed because of the change in trade practice or pattern. It has to be established that there was no justification, other than imposition of anti-dumping duty, for such changed trade pattern and that the remedial effect of the anti-dumping duty was undermined.

**Comment:** *The investigation procedure for anti-circumvention investigation contained in Rule 26 of AD Rules is akin to anti-dumping investigation procedure with similar provisions for initiation, time period, review, etc.*

## Safeguard measures

Imposition of safeguard duty is governed by Section 8B of the Customs Tariff Act, 1975 read with the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997. Section 8B provides that where the Central Government, after conducting such enquiry, is satisfied that any article is imported into India in increased quantities and under certain conditions so as to cause or threatening to cause serious injury to domestic industry, then, it may impose a safeguard duty on that article.



Safeguard duty is levied for a period of four years. If the Central Government is of the opinion that the domestic industry has taken measures to adjust to such injury or threat thereof and it is necessary that the safeguard duty should continue to be imposed, it may extend the period of imposition beyond four years. However, safeguard duty can be continued for a maximum period of ten years from the date on which it was first imposed.

Unlike anti-dumping and countervailing duties, which cover only specific countries alleged to be exporting dumped or subsidized goods, safeguard duty is normally imposed on all the imports coming into India, irrespective of the source. Safeguard duty is a temporary measure, which allows domestic industry to adjust to sudden increase in volume of imports coming into India. Exceptional case is with respect to imports from China PR, wherein WTO members can conduct a special Transitional Product Special Safeguard Measure on imports from China alone. Safeguard investigation against imports from China PR are conducted in terms of Section 8C of the Customs Tariff Act read with Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002. Safeguard duty under this special mechanism arises due to obligations entered into by China, while acceding to WTO membership. It may however be noted that this obligation will cease to have effect after 10th December 2013 in terms of Article 16 of China's Protocol of Accession to WTO.



## Anti-subsidy measures

India has enacted Section 9 to the Customs Tariff Act 1975 and has also established the required procedural provisions in the form of Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles And For Determination Of Injury) Rules, 1995 for levying countervailing duties on imports of subsidized articles that cause or threaten material injury to the Indian domestic industry. India has so far conducted only 1 countervailing duty investigation against imports of Sodium Nitrite from China PR (2009). However, the investigation was terminated and no countervailing duty was imposed.



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