CASE NO.:
Appeal (civil) 773 of 2001

PETITIONER:
Rishiroop Polymers Pvt. Ltd.

RESPONDENT:
Designated Authority & Additional Secretary

DATE OF JUDGMENT: 23/03/2006

BENCH:
ASHOK BHAN & G.P. MATHUR

JUDGMENT:
J U D G M E N T

With
Civil Appeal Nos. ......1703....... of 2006
(Arising out of SLP) Nos. 22905-22906 of 2003
Korea Kumho Petrochemicals Co.Ltd. ....Appellant
- Versus -
Union of India & Ors. ....Respondents

Civil Appeal Nos. 7159-7161 of 2004
Punit Resins Ltd. ....Appellant
- Versus -
Union of India & Ors. ....Respondents

Civil Appeal No. 7162 of 2004
Korea Kumho Petrochemicals Co. Ltd. ....Appellant
- Versus -
Ministry of Finance & Ors. ...Respondents

Bhan, J.

Leave granted in Special Leave Petition (Civil) Nos. 22905 - 22906 of 2003.

This judgment shall dispose of Civil Appeal No. 773 of 2001 against the final Order No. 22 of 2000-AD in Appeal No. C/330/97-AD dated 2.2.2000 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi [for short "the Tribunal"]; Civil Appeals arising out of SLP) Nos. 22905 - 22906 of 2003 against the final order No. 10/03-AD and Misc. Order No. 9/03-AD dated 13.6.2003 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in Appeal No. C/586/2001-AD with C/Misc./100/2002-AD; Civil Appeal Nos. 7159-7161 of 2004 against the final order Nos. 14-16/2004-NB(A) dated 1.7.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in Appeal Nos. C/260/2002-AD, C/596/2002-AD and C/687/2002-AD; and Civil Appeal No. 7162 of 2004 against the final order No. 17/2004-NB(A) dated 1.7.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi [for short "the Tribunal"] in Appeal No. C/14/2003-AD.

These appeals are interconnected and pertain to the same cause of action. Civil Appeal No. 773 of 2001 is against the final order imposing anti-dumping duty for a period of five years, Civil Appeals arising out of SLP) Nos. 22905-22906 of

2003 are directed against the orders passed in "Mid Term Review" and Civil Appeal Nos. 7159-7162 of 2004 are against the order passed for continuance of anti-dumping duty in the "Sunset Review" for another period of five years.

Common facts giving rise to the cause of action and the litigation are as follows:

Before adverting to the issues raised in these appeals it will be relevant to mention the historical background of the relevant statute and the Rules. Keeping in tune with the changing international economic scenario, the Government of India adopted the path of liberalization in its fiscal/economic policies. The focus changed from a closed economic setup to an open one. This shift in the focus invited foreign capital, goods, products etc., in now open Indian market. This resulted in stiff competition for the domestic industry which had to now compete with the foreign products both in terms of price as well as its quality. Although, the said process of liberalization had its positive side, i.e., making available foreign products to the domestic users, but it was also seen as having negative impact, which if not regulated properly, would have resulted in adversely affecting the domestic industry, thereby sometimes leading to closure of the same and/or retarding its growth leading to an economic crisis.

Though committed to the liberalization, the Government of India also simultaneously took enough speedy measures to ensure a level field playing for the domestic as well as foreign producers. The concern of the Government in this regard was translated into various amendments which were made in the Customs Tariff Act, 1975 [for short "the Tariff Act"] from time to time. During the year 1995 amendments were made to the Tariff Act. Section 9 (A), which is the charging section, was introduced whereby it became permissible for the Central Government to impose Anti-Dumping duty on importation of foreign articles which were found to be dumped in India at a price which was lower than the normal price of such imported goods in their country of manufacture/origin. It defines the margin of profit, normal value and export price. It also provides for duration of levy of anti-dumping duty, its review from time to time as well as its continuance for a further period of five years, , if the cessation of duty is likely to lead to continuance or recurrence of dumping and injury. This duty is over and above any other duty in force.

Section 9 (A) of the Tariff Act reads as under:
"9A. Anti-dumping duty on dumped articles. - (1) Where any article is exported from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the

importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

Explanation. - For the purposes of this section, -

(a) "margin of dumping", in relation to an article, means the difference between its export price and its normal value;

(b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where 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 may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);

(c) "normal value", in relation to an article, means -

(i) the comparable price, in the ordinary course of trade, for the like article when meant for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either -

(a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub-section (6):

Provided that in the case of import of the article from a country other than

the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined : -

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

(2A) Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), unless specifically made applicable in such notification or such imposition, as the case may be, shall not apply to articles imported by a hundred per cent export-oriented undertaking or a unit in a free trade zone or in a special economic zone.

Explanation:- For the purposes of this section, the expressions "hundred per cent export-oriented undertaking", "free trade zone" and "special economic zone" shall have the meanings assigned to them in Explanation 2 to sub-section (1) of section 3 of the Central Excise Act, 1944 (1 of 1944).

(3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that -

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

(ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other

circumstances is likely to seriously under-mine the remedial effect of the anti-dumping duty liable to be levied, the Central Government may, by notification in the Official Gazette, levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti-dumping duty under sub-section (2) but not beyond ninety days from the date of notification under that sub-section, and notwithstanding anything contained in any law for the time being in force, such duty shall be payable at such rate and from such date as may be specified in the notification.

(4) The anti-dumping duty chargeable under this section shall be in addition to any other duty imposed under this Act or any other law for the time being in force.

(5) The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:

Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension :

Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner in which articles liable for any anti-dumping duty under this section may be identified, and for the manner in which the export price and the normal value of, and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.

(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.
(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, relating to, the date for determination of rate of duty, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."
[emphasis supplied]

Method of determination of the injury and the procedure to be followed is provided in Section 9B of the Tariff Act, relevant portion of which is extracted below:

"9B. No levy under section 9 or section 9A in certain cases. - (1) Notwithstanding anything contained in section 9 or section 9A: \027

(a) .....

(b) the Central Government shall not levy any countervailing duty or anti-dumping duty -

(i) under section 9 or section 9A by reasons of exemption of such articles from duties or taxes borne by the like article when meant for consumption in the country of origin or exportation or by reasons of refund of such duties or taxes;

(ii) under sub-section (1) of each of these sections, on the import into India of any article from a member country of the World Trade Organisation or from a country with whom Government of India has a most favoured nation agreement (hereinafter referred as a specified country), unless in accordance with the rules made under sub-section (2) of this section, a determination has been made that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India; and
(iii) .....

(2) The Central Government may, by notification in the Official Gazette, make rules for the

purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner in which any investigation may be made for the purposes of this section, the factors to which regard shall be at in any such investigation and for all matters connected with such investigation."

Under the scheme a provisional levy of duty is contemplated which is preceded by preliminary findings regarding dumping and the consequent injury to the domestic industry. Under Section 9 (c) an appeal is provided against the determination or review thereof. This appeal is regarding the existence, degree and effect of any dumping in relation to any article by the designated authority from time to time.

In exercise of the power under the Tariff Act, the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 [for short "the Rules"] were framed. Rule 2 (b) defines the "domestic industry" to mean:

"(b) "domestic industry" means the domestic producers as a whole 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 except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case such producers may be deemed not to form part of domestic industry.

Provided that in exceptional circumstances referred to in sub-rule (3) of Rule 11, the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the producers within each of such market a separate industry, if -

(i) the producers within such a market sell all or almost all of their production of the article in question in that market; and

(ii) the demand in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory;

Explanation. - For the purposes of this clause, -

(i) producers shall be deemed to be related to exporters or importers only if, -

(a) one of them directly or indirectly controls the

other; or
(b) both of them are directly or indirectly controlled by a third person; or
(c) together they directly or indirectly control a third person subject to the condition that are grounds for believing or suspecting that the effect of the relationship is such as to cause the producers to behave differently from non-related producers.
(ii) a producer shall be deemed to control another producer when the former is legally or operationally in a position to exercise restraint or direction over the latter."

Under Rule 3, the Central Government by a notification can appoint a person not below the rank of Joint Secretary of the Government of India or such other person which the Government of India may think fit as designated authority for the purpose of said Rules. Under Rule 4, it is the duty of the designated authority to investigate as to the existence, degree and effect of any alleged dumping in relation to any import of any article and also to identify the article liable for anti dumping. The designated authority is also empowered to recommend to the Central Government as regards normal value, export price, margin of dumping and also give its findings on injury or threat of injury to the domestic industry. The date on which the duty is commenced is also to be recommended by the designated authority. The designated authority is also further empowered to review the need for continuance of any anti-dumping duty under Rule 23.

As per the procedure contemplated under Rule 5, the designated authority initiates an investigation regarding the existence, degree and effect of any alleged dumping, upon receipt of a written application by or on behalf of the domestic industry containing all relevant data, figures and details supported by evidence of dumping, injury and also the causal link between such dumped articles and the alleged injury. Over and above, under sub-clause 4 of Rule 5 of the Rules, the designated authority also has a suo motu power to initiate investigation, if it is satisfied from the information received from the Collector of Customs or from any other source regarding the dumping. The designated authority is also required to notify the Government of the exporting countries before proceeding/initiating any investigation.

If the decision is taken by the designated authority to initiate investigation, a detailed exercise involving participation by the domestic industry, the exporter, importer and all other interested parties, begins. Other interested

parties, who are likely to be affected by the duty are also heard and objections are invited from them within a period of 30 days. The representative of consumer organizations also sometimes are heard, depending on the situation. Under Rule 11 of the Rules, the designated authority is required to determine the injury to the domestic industry, threat of injury to domestic industry, material retardation to the establishment of the domestic industry, a causal link between the dumped imports and the injury. This is done by taking into account all relevant factors including the volumes of dumped imports, their effect on the price in the domestic market. The principles on which the determination are done is indicated in Annexure II to the Rules. Rule 11 reads:

"11. Determination of injury. - (1) In the case of imports from specified countries, the designated authority shall record a further finding that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

(2) The designated authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure II to these rules.

(3) The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if -

(i) there is a concentration of dumped imports into an isolated market, and

(ii) the dumped articles are causing injury to the producers of all or almost all of the production within such market."

After the initiation of investigation, followed by the preliminary findings, if any, Rules contemplate giving of the final findings by the designated authority under Rule 17 of the Rules. Such a final finding is to be given within a period of one year from the date of the investigation. The parameters are given in Rule 17. Rule 18 of the Rules provides that the Central Government may, within three months of the date of publication of the final findings by the designated authority under Rule 17, impose anti-dumping duty. The amount of the duty has to be an amount adequate to remove injury to the domestic industry. Apart from this,

other guidelines have also been provided for in Rule 18, which have to be considered while deciding the levy of the quantum of duty. Rule 23 provides for the review of levy and exemption of duty from time to time. The same reads:

"23. Review. - (1) The designated authority shall, from time to time, review the need for the continued imposition of the anti-dumping duty and shall, if it is satisfied on the basis of information received by it that there is no justification for the continued imposition of such duty recommend to the Central Government for its withdrawal.
(2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding twelve months from the date of initiation of such review.
(3) The provisions of rules 6, 7, 8, 9/10, 11, 16, 17, 18, 19, and 20 shall be mutatis mutandis applicable in the case of review."

Civil Appeal No. 773 of 2001.

This appeal is directed against the final order of the Tribunal upholding the final order passed by the Designated Authority under Rule 17, recommending levy of anti-dumping duty consequent upon which, the Central Government imposed anti-dumping duty under Rule 18.
Appellant is the sole agent of Acrylonitrile Butadiene Rubber [for short " NBR"] as manufactured by Korea Kumho Petrochemicals Limited [for short "KKPC"]. The subject goods are oil resistance rubber and are of various grades like:
KOSYN KNB 35 L
KOSYN KNB 35 LL
KOSYN KNB 35 LM
KOSYN KNB 35 LH
KOSYN KNB 0230
KOSYN KNB 0230 L
KOSYN KNB 0230 H

The subject goods are being imported into India for near about a decade. The appellant’s entire activities/trading activities and earning is from the sale of the subject goods as are imported from time to time in lawful manner subject to the policy laid by the concerned authorities.

The subject anti-dumping duty proceedings relate to NBR which is the commercially known name of the said type of goods. Broadly speaking NBR is a synthetic rubber mainly used in the manufacture of other rubber articles such as oil seals, hoses, automobile product, rice dehusking rolls etc.. NBR is a generic term. It has various grades and physical forms. Various grades have different purposes and are put to use as raw material for the production of various types of finished products.

The rubber industry in India is a vital

industry and has a bearing on the economic health of the country. The industry caters to a number of critical requirements including those of agriculture, defence, aviation and automobile sectors, among others. It provides employment, directly or indirectly to a large number of people in small, medium and large scale sector units, which are affected by adverse development in the industry.
Gujarat Apar Polymers Ltd. (GAPL), the name of which has been changed to M/s Apar Industries imited, hereinafter referred to Respondent No. 3, (amendment was allowed vide this Court's Order dated 19.1.2001 passed in I.A.No. 3), are the manufacturers of some grades of NBR. Respondent No. 3 by means of complaint dated 3.11.1995 addressed to the Additional Secretary being the designated authority under Section 9 of the Tariff Act in the Ministry of Commerce, stated that the import of bales of the said consignment from Germany is causing injury to its productions. Proceedings were initiated by the Public Notice dated 1.3.1995 against export of NBR from Germany and Korea. The period of investigation was 1.10.1994 to 31.3.1995. Responses were filed by the interested parties. Normal value was determined on the basis of weighed average ex-factory selling price in the domestic market. By taking into consideration the cumulative effect of imports from both the countries, the designated authority came to the conclusion that the injury was suffered by the domestic industry and as such gave a preliminary finding dated 30.12.1996 imposing anti-dumping duty. Thereafter, the designated authority confirmed its preliminary finding dated 30.12.1996. Union of India, accepted the final finding and issued a notification dated 17.7.1997 As per findings, duty was slightly enhanced in so far as Germany was concerned and partially reduced in so far as the export from Korea was concerned.

Section 9A provides that where any article is exported from any country or territory to India at less than its normal value then upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article. Export price in relation to an article has been defined to mean the price of the article exported from the exporting country and the normal price has been defined to mean the comparable price, in the ordinary course of trade, for the like article when meant for consumption in the exporting country. The designated authority after considering the entire data of facts came to the conclusion that the article NBR exported to India from Korea and Germany was not de minis as the difference in price in the local market (India) and the price at which it was sold in the country of export was more than 2% and further the total quantity exported from Korea was more than 3% of the total imports. That the injury was caused to the domestic industry. In so far as causal link

was concerned, it was held that because of the NBR exported to the country a material injury had been caused to the domestic industry. In determining whether the material injury to the domestic industry was caused by the dumped goods, the authority took into consideration the following facts:

"a) The imports of the product from the subject countries cumulatively increased significantly in absolute terms and relative to the production and consumption of the product in India. The share of the subject countries in the total imports also increased significantly. As a direct consequence, the domestic industry lost market to a significant level, which it would have otherwise gained;
b) The substantial imports of NBR from the subject countries force the domestic industry to sell its produce at unremunerative prices, resulting in financial losses;
c) The trend of various parameters indicating injury to the domestic industry establish that the reasons for the same are the imports from the subject countries.

In final conclusion the authority recorded the following findings:
"-- NBR originating in or exported from Germany and Korea RP has been exported to India below its normal value;
-- The domestic industry has suffered material injury;
-- The injury has been caused to the domestic industry by the exports originating in or exported from Germany and Korea RP."

In appeal, as noted by the Tribunal in para 5, the counsel for the appellant had confined his arguments on the point of injury, causal link and cumulation of imports from Korea and Germany while assessing injury. The Tribunal, after considering the submissions of the respective learned counsels for the parties, rejected the submissions raised on behalf of the appellant and held that the material injury to the domestic industry had been caused due to dumping and there was a causal link between them. The submission made by the counsel for the appellant that the injury, if any, caused to the domestic industry has been caused because of the extensive and voluminous of export from Japan, was rejected by holding that the present complaint pertains to the exports from Korea and Germany only. In so far as Japan is concerned, proceedings were initiated at the instance of Respondent No. 3 for the export made from Japan and an anti-dumping duty has already been imposed on the export made from Japan to India.

In para 14 of the impugned order, the Tribunal

has converted the anti-dumping duty in US dollar terms on its own volition even though there was no prayer by the appellant or a cross appeal/objection by any other party.

Learned counsel for the appellant did not press his arguments regarding the injury to the domestic industry, causal link and cumulation of imports from Germany and Korea for injury assessment during the course of arguments before us. The only argument pressed before us is regarding the conversion of anti-dumping duty from US Dollar terms by the Tribunal on its own volition even though there was no prayer by the appellant or a cross appeal/objection by the respondent. Another aspect highlighted by the learned counsel for the appellant is relating to violation of para (iv) of Annexure II of the Rules while assessing injury.

Shri A. Sharan, learned Addl. Solicitor General of India, after taking instruction from the Union of India conceded that the Tribunal erred in converting the anti-dumping duty in US Dollar terms in the absence of any appeal or cross appeal by the respondent. He conceded that the order passed by the Tribunal in converting the anti-dumping duty in US Dollar terms be set aside and order of the designated authority in imposing the anti-dumping duty in rupee term be restored. It is so ordered. Regarding non-consideration of the various parameters laid down in para (iv) of Annexure II, it was submitted by him that since this issue had not been raised before the appellate Tribunal the appellant cannot be permitted to raise the same for the first time in this Court as the finding recorded by the Designated Authority on this score is essentially a finding of fact based on appreciation of material placed before it by the interested parties. After going through the records, we find that the point regarding the violation of para (iv) of Annexure II to the Rules had not been raised either in the memorandum of appeal before the Tribunal or during the course of arguments. The point regarding the violation of parameters laid down in para (iv) of Annexure II to the Rules has also not been taken in the special leave petition. The finding recorded by the designated authority being essentially a finding of fact having not been questioned before the Tribunal cannot be permitted to be raised for the first time in this Court during the course of the argument. This Court in Shenyang Matsushita S. Battery Co. Ltd. Vs. Exide Industries Ltd, 2005 (3) SCC 39; and Bhilai Casting (P) Ltd. Vs. CCE, 2005 (10) SCC 492, has held that if a point or issue had not been raised before the appellate tribunal then it would not be permitted to be raised for the first time before this Court. Since the point regarding non-observation of parameters laid down in para (iv) of Annexure II to the Rules had not been raised before the Tribunal either in the memorandum of appeal or during the course of arguments before the Tribunal cannot be permitted to be raised for the first time before us and we decline to go into the same.

For the reasons stated above, this appeal is accepted only to the limited extent. The finding recorded by the tribunal in converting the anti-dumping duty for the period in question from rupee term to US dollar term without there being any appeal, counter appeal or objection by the respondent is set aside. The duty shall be payable in rupee term, in terms of the order passed by the designated authority. Except to the extent indicated above the appeal is dismissed without any order as to costs.

Civil Appeal Nos. ..... of 2006
(Arising out of SLP) Nos. 22905-22906 of 2003)
The instant appeals relate to the imposition of anti-dumping duty on the basis of "Mid Term Review" carried out under Rule 23 of the Rules.
Section 9 A of the Customs Tariff Act, 1975 is the charging section. It empowers the Central Government to impose an anti-dumping duty not exceeding the margin of dumping on an article exported to India at less than its normal value. However, this is subject to the provisions of Section 9B. Section 9B(1)(b)(ii) provides, that the Central Government shall not levy anti-dumping duty on articles imported from a specified country (members of the WTO and those with whom India has a Most Favoured Nation (MFN) agreement) unless in accordance with the Rules made under Section 9B(2) a determination has been made that the import of such article causes material injury to an industry in India. In terms of Rule 11 of the Rules framed under Sections 9A(6) and 9(B)(2), recording of a finding on material injury is sine qua non for imposition of the duty. Sub-rule (2) of Rule 11 provides that the Designated Authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure-II of these Rules, which reads thus:
"(iv) The examination of the impact of the dumped imports on the domestic industry concerned, shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including natural and potential decline in sales, profits, output, market share, productivity, return on investments or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital investments. "

Rule 23(1) empowers the Designated Authority to review the need for continued imposition of anti-dumping duty from time to time and, the Designated Authority, if satisfied on the basis of the information received by it that there is no justification for the continued imposition of such duty, can recommend to the Central Government for its withdrawal. Sub rule (2) of these Rules provides that the review initiated under sub-rule (1) shall be concluded within a period of not exceeding 12 months from the date of initiation of such review. Sub-rule(3) provides that the provisions of Rules 6, 7, 8, 9, 10, 11, 16, 17, 18, 19 and 20 shall be mutatis mutandis applicable in the case of review.

Counsel for the appellant contended that it is mandatory for the Designated Authority to evaluate all the relevant economic factors, more particularly, the factors specifically enumerated in para (iv) of Annexure-II following the word "including". According to him, all the listed parameters have to be evaluated and, in addition, any other relevant economic factor may also be considered. He emphasized that the evaluation of the 14 parameters mentioned in para (iv) of Annexure-II is mandatory and the Designated Authority has to consider and record a finding on each one of them. This is the only point raised by the learned counsel for the appellant in these appeals. As against this learned senior counsel appearing for the respondents contended that the scope of review inquiry by the Designated Authority is limited to the satisfaction as to whether there is justification for "continued imposition of such duty on the basis of the information received by it." The inquiry could be at the behest of the interested party or suo motu by the Designated Authority.

Before considering the rival submissions advanced by the counsel for the parties, it may be stated that the Designated Authority had considered the appellant to be a non-cooperative exporter and determined the normal value of NBR produced by it on "facts available basis". This finding of the Designated Authority has been confirmed by the Tribunal in the impugned order. The Tribunal has further held that in the facts and circumstances of the present case, the normal value arrived at by the Designated Authority was not required to be disturbed in the absence of reliable alternative basis provided by the appellant.

The Tribunal further observed that in respect of injury analysis, while the appellants may be right in maintaining that all the parameters stipulated in para (iv) of Annexure-II to the Anti-Dumping Rules were required to be considered by the Designated Authority, but Annexure-II does not stipulate a separate injury analysis for a review investigation, as the parameters mentioned therein were not a check list. It is not necessary to faithfully mention each of the criteria and an appropriate notation against each of them, but a

sound appreciation of the situation based on the relevant criterion.
We have considered the rival submissions put forth by the counsel for the parties. The Mid Term Review in the instant case was initiated suo motu after the domestic industry had withdrawn its application and the Review initiated at its instance was closed.

For the purpose of ascertaining whether there was justification for continued imposition of anti-dumping duty, all relevant information was asked for from the domestic industry as well as the appellant and other interested parties. The domestic industry supplied all the relevant material for the continued imposition of the anti-dumping duty whereas the appellant did not cooperate with the Designated Authority during the time of Mid Term Review but it took the stand that there was no dumping. Though before the Designated Authority the appellant had not raised a ground that all the 14 parameters given in para (iv) of Annexure-II relating to principles of determination of injury were required to be determined or had not been taken into account and that only some of the parameters were considered, in appeal before the Tribunal, the said ground was raised and findings were returned against the appellant. Before us it is submitted that the parameters mentioned in the Rules read with para (iv) of Annexure-II are mandatory, and the finding as to the injury to the domestic industry by the Designated Authority is perverse.

After going through the entire record with the assistance of the learned counsel for the parties, we are of the opinion that the contention raised by the appellant is clearly contrary to the facts on record. The Designated Authority in its findings in the Mid Term Review proceedings has categorically stated that all the factors have been taken into consideration while determining continuance of the anti-dumping duty. That apart, at the time of arguments, we had the advantage of going through the original records/documents (original/confidential file was produced in the Court) which had been placed before the Designated Authority, which shows that along with the information provided in the pro-forma, necessary information with respect to all the 14 parameters had been provided by the domestic industry and considered by the designated authority, after due corrections. In view of the foregoing consideration, the argument of the appellant that all relevant factors have not been considered has no factual foundation.

Otherwise also, we are of the opinion that scope of the review inquiry by the Designated Authority is limited to the satisfaction as to whether there is justification for continued imposition of such duty on the information received by it. By its very nature, the review inquiry would be limited to see as to whether the conditions which existed at the time of imposition

of anti-dumping duty have altered to such an extent that there is no longer justification for continued imposition of the duty. The inquiry is limited to the change in the various parameters like the normal value, export price, dumping margin, fixation of non-injury price and injury to domestic industry. The said inquiry has to be limited to the information received with respect to change in the various parameters. The entire purpose of the review inquiry is not to see whether there is a need for imposition of anti-dumping duty but to see whether in the absence of such continuance, dumping would increase and the domestic industry suffer.

It is of vital importance to note that in the initial imposition of duty, the appellant has accepted the position that determination of injury by the Designated Authority was proper and in conformity with the requirements of Annexure-II of the Anti-Dumping Rules. The appellant did not challenge the final finding of the Designated Authority before the Tribunal that parameters mentioned in para (iv) of Annexure-II had not been considered or satisfied. We have declined the permission to the appellant to raise this point before us in Civil Appeal Nos. 773 and 774 of 2001 which were directed against the final findings recorded by the Designated Authority based on which the Government of India had imposed the anti-dumping duty for a period of five years. Under Section 9A(1), the said initial imposition of anti-dumping duty is ordinarily contemplated to be continued and remain in effect for a full period of five years, at the end of which it would be subject to sunset review, the possible consequence of which would be the extension of the operation of the period of anti-dumping duty for another period of five years. This is subject to the provisions of sub-rule (1) of Rule 23 of the Anti-Dumping Rules, under which the Designated Authority is empowered to review the anti-dumping duty imposed from time to time. Having regard to the scheme of the above mentioned provisions of the statute, once anti-dumping duty has been initially imposed, it would be ordinarily continued for five years unless on a review it is found by the Designated Authority that there has been such a significant change in the facts and circumstances, that it is considered necessary either to withdraw or modify appropriately the anti-dumping duty which has been imposed. It is, therefore, clear that unless the Designated Authority suo motu or the applicant for review is in a position to establish clearly that there has been a significant change in th\e facts and circumstances relating to each of the basic requirements or conditions precedent for imposing duty, the finding given by the Designated Authority at the time of initial imposition of anti-dumping duty must be considered to continue to hold the field.

The final findings recorded by the Designated Authority at the time of initial imposition of anti-dumping duty on the existence of injury to the

domestic industry must be considered to continue to remain valid, unless it is proved to be otherwise, either by the Designated Authority in suo motu review or by the applicant seeking review. In the present case, the review had been initiated by the Designated Authority. Neither the Designated Authority nor the appellant had placed any material on record which could possibly displace the findings given by the Designated Authority at the stage of initial anti-dumping duty. In the absence of any new material, the Designated Authority is not required to apply afresh all parameters or criteria enumerated in para (iv) of Annexure-II, which had already been done at the initial stage of imposition of anti-dumping duty. There is no material on record to show that there was a change in the parameters or the criteria relating to the injury which would warrant withdrawal of anti-dumping duty. Nevertheless, the Designated Authority has still analysed the issue of injury in detail in the Mid Term Review findings and has considered all the criteria or parameters enumerated in Annexure-II. There is, therefore, no merit or substance in the appellant's contention regarding non-compliance with Annexure-II.

The Designated Authority in the Mid Term Review has reduced the anti-dumping duty from US dollar 264 per MT to US dollar 248 per MT. This again shows that all the relevant material facts had been taken into consideration by the Designated Authority while analyzing the injury caused to the domestic industry.

It would be pertinent to point out, that in the facts and circumstances of the present case, the Designated Authority had imposed duty in dollar terms and in the appeal before the Tribunal or this Court, the appellant has not challenged this part of the order of the Designated Authority. Hence, the same is confirmed.

For the reasons stated herein above, we do not find any merit in these appeals. Accordingly, they are dismissed with costs in favour of the Union of India.

Civil Appeal Nos. 7159-7161 and 7162 of 2004

These appeals relate to continuation of anti-dumping duty after the expiry of five years for a further period of five years.
The anti-dumping duty once imposed is valid for five years unless revoked earlier. Section 9A(5) empowers the Central Government to extend the period of such imposition for a further period of five years, if in a review, it is determined that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury. Accordingly, a sunset review was conducted. Period of investigation was from 1st April, 2000 to 31st March, 2001.

The Designated Authority, after analyzing the material placed before it, came to the conclusion

that the cessation of the duty is likely to lead to continuation or recurrence of dumping and injury and therefore it was necessary to continue with imposition of anti-dumping duty for another five years.

Aggrieved against the aforesaid order continuing the imposition of such duty, the appellant filed appeals before the Tribunal which were rejected. Against the order of the Tribunal upholding the above findings of the Designated Authority, the present appeals have been filed by the appellant.

The only challenge put forth in the instant appeals is to the non-evaluation of all the parameters listed in para (iv) of Annexure-II. This contention had not been urged either before the Designated Authority or the Tribunal and, therefore, cannot be permitted to be urged for the first time in these appeals. Further, the records produced before us unambiguously shows that all the relevant parameters had been considered.

In this view of the matter, we do not find any merit in these appeals and dismiss the same with costs in favour of the first respondent, i.e., the Union of India.