# UNCTAD TRAINING MODULE
# ON
# ANTI-DUMPING

# PART I

# DRAFT
**(UNEDITED VERSION)**

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**Table of contents**

## Preface

This training module is published under the auspices of the Commercial Diplomacy Programme* and the Training and Dispute Settlement in International Trade, Investment and Intellectual Property.

This module is divided in two parts. The first part contains substantive materials related to the Anti-Dumping Agreement and detailed explanation of the dumping margin calculation. The second part relates to procedural issues, namely questionnaires.

Chapter I of this first part of the module gives an overview of the Anti-Dumping Agreement, as it has been interpreted by Panels and the Appellate Body over the last seven years. It will review both substantive and procedural rules. Since the entry into force of the ADA in 1995, ten WTO Panel reports have been issued interpreting ADA provisions, of which seven were appealed. These Panel and Appellate Body reports offer crucial interpretations of key provisions of the Agreement. Panel and Appellate Body finding form an important element of this handbook and will be discussed in tandem with the relevant provisions. This chapter takes into account reports issued until 31 August 2001.

Chapter II of this first part of the module, explains the methods of calculating dumping and injury margins on the basis of practical calculation examples. The objective is to give developing country governments and private enterprises a better understanding of the operation of anti-dumping legislation in practice. It is relatively easy to adopt anti-dumping legislation and, in fact, the Rules Division of the WTO has developed a model anti-dumping law that could be used for this purpose. However, it is much more difficult to conduct an anti-dumping investigation and to make dumping and injury margin calculations in conformity with the WTO rules. The simplified examples in this module hope to assist in this process.

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# CHAPTER I

# SETTLEMENT OF ANTI-DUMPING DISPUTES IN THE WTO: AN OVERVIEW

***What you will learn***
*In this section an overview will be provided of the history of international regulation of dumping and anti-dumping measures. Forms of dumping and injury are discussed. A summary overview of the Anti-Dumping Agreement [ADA] is provided and certain key terms in the ADA are explained.*

## 1. Introduction

### 1.1 History

Dumping occurs if a company sells at a lower price in an export market than in its domestic market. If such dumping injures the domestic producers in the importing country, under certain circumstances the importing country authorities may impose anti-dumping duties to offset the effects of the dumping.

National anti-dumping legislation dates back to the beginning of the 20th century. The GATT 1947 contained a special article on dumping and anti-dumping action. Article VI of the GATT *condemns* dumping that causes injury, but it does not prohibit it.

> The contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.
> ***Article VI:1 GATT 1994***

Rather, Article VI authorises the *importing Member* to take measures to offset injurious dumping. This approach follows logically from the definition of dumping as price discrimination practised by private companies. The GATT addresses *governmental* behaviour and therefore cannot possibly prohibit dumping by private enterprises. Moreover, importing countries may not find it in their interest to act against dumping, for example because their user industries benefit from the low prices.

Thus, GATT (and now the WTO) approach the problem from the other side, *i.e.* from the position of the importing Member. However, recognising the potential for trade-restrictive application, GATT (like WTO) law prescribe in some detail the circumstances under which anti-dumping measures may be imposed.

Since 1947, anti-dumping has received elaborate attention in the GATT/WTO on several occasions. Following a 1958 GATT Secretariat study of national anti-dumping laws, a Group of Experts was established that in 1960 agreed on certain common interpretations of ambiguous terms of Article VI.

An Anti-Dumping Code was negotiated during the 1967 Kennedy Round and signed by 17 parties. The Code was revised during the Tokyo Round. The Tokyo Round

Code had 25 signatories, counting the EC as one. Although the 1979 Code was not explicitly mentioned in the Ministerial Declaration on the Uruguay Round, fairly early in the negotiations a number of GATT Contracting Parties, including the EC, Hong Kong, Japan, Korea and the United States proposed changes to the 1979 Code.

## 1.2 CURRENT SITUATION

Article VI was carried forward into GATT 1994. A new agreement, the Agreement on Implementation of Article VI [ADA], was concluded in 1994 as a result of the Uruguay Round. Article VI and the ADA apply together.

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.
> ***Article 1 of the ADA***

## 1.3 OUTLINE OF ADA

THE ADA IS DIVIDED INTO THREE PARTS AND TWO IMPORTANT ANNEXES. PART I, COVERING ARTICLES 1 TO 15, IS THE HEART OF THE AGREEMENT AND CONTAINS THE DEFINITIONS OF DUMPING (ARTICLE 2) AND INJURY (ARTICLE 3) AS WELL AS ALL PROCEDURAL PROVISIONS THAT MUST BE COMPLIED WITH BY IMPORTING MEMBER AUTHORITIES WISHING TO TAKE ANTI-DUMPING MEASURES. ARTICLES 16 AND 17 IN PART II ESTABLISH RESPECTIVELY THE WTO COMMITTEE ON ANTI-DUMPING PRACTICES [ADP] AND SPECIAL RULES FOR WTO DISPUTE SETTLEMENT RELATING TO ANTI-DUMPING MATTERS. ARTICLE 18 IN PART III CONTAINS THE FINAL PROVISIONS. ANNEX I PROVIDES PROCEDURES FOR CONDUCTING ON-THE-SPOT INVESTIGATIONS WHILE ANNEX II IMPOSES CONSTRAINTS ON THE USE OF BEST INFORMATION AVAILABLE IN CASES WHERE INTERESTED PARTIES INSUFFICIENTLY COOPERATE IN THE INVESTIGATION. THE TEXT OF THE ADA IS REPRINTED AT THE END OF THIS VOLUME.

## 1.4 Actionable forms of dumping

GATT 1947 applied only to goods which implied that dumping of services was not covered. Indeed, the General Agreement on Trade in Services, negotiated during the Uruguay Round, does not contain provisions with respect to dumping or anti-dumping measures.

It has furthermore long been accepted that neither Article VI (nor the ADA) cover exchange rate dumping, social dumping, environmental dumping or freight dumping.

On the other hand, the reasons why companies dump are considered irrelevant as long as the technical definitions are met: Dumping may therefore equally cover predatory dumping,[1] cyclical dumping,[2] market expansion dumping,[3] state-trading dumping[4] and strategic dumping.[5]

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1. Dumping in order to drive competitors out of business and establish a monopoly.

Conceptually, the calculation of dumping is a comparison between the export price and a benchmark price, the normal value, of the like product. Depending on the circumstances in the domestic market, this normal value can be calculated in various manners. These will be discussed in Section 2 below.

## 1.5 LIKE PRODUCT

The term like product ('produit similaire') is defined in Article 2.6 ADA 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 has characteristics closely resembling those of the product under consideration. This definition is strict and may be contrasted, for example, with the broader term 'like or directly competitive products' in the Safeguards Agreement. In the context of the ADA, the term is relevant for both the dumping and injury determination.

Typical like product might be, for example, polyester staple fibres, stainless steel plates, or colour televisions [CTVs]. Such products can often[6] be classified within a Harmonized System[7] heading. Thus, polyester staple fibres fall under HS heading 55.03, stainless steel plates fall under HS heading 72.19 and CTVs under HS heading 85.28.

However, within the like product, there will invariably be many types or models. To give a simple example, in the case of CTVs, CTVs with different screen sizes (14", 20", 24") will constitute different models. Similarly, in the case of stainless steel plates, plates of different thickness would be different types. While many variations are possible, the underlying principle is that the comparison must be as precise as possible. Consequently, a variation that has an appreciable impact on the price or the cost of a product would normally be treated as a different model or type. For calculation purposes, authorities will then normally compare identical or very similar models or types.

## 1.6 Forms of injury

In order to impose anti-dumping measures, an authority must determine not only that dumping is occurring, but also that such dumping is causing material injury to the domestic industry producing the like product. Material injury in this context comprises present material injury, future injury (threat of material injury) and material retardation of the establishment of a domestic industry. These concepts will be explained in Section 3.

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2. Selling at low prices because of over-capacity due to a downturn in demand.
3. Selling at a lower price for export than domestically in order to gain market share.
4. Selling at low prices in order to earn hard currency.
5. Dumping by benefiting from an overall strategy which includes both low export pricing and maintaining a closed home market in order to reap monopoly or oligopoly profits.
6. Depending on the product definition, however, the product under investigation may sometimes cover several HS headings while at other times it may need to be defined further because the HS heading is too broad.
7. Harmonized Commodity Description and Coding System, developed by the World Customs Organization in Brussels.

## 1.7 Investigation periods

In order to calculate dumping and injury margins, the importing Member authorities will select an investigation period [IP]. This is often the one-year period, preceding the month or quarter in which the case has been initiated. Some jurisdictions, however, use shorter investigation periods, for example, six months. Extremely detailed cost and pricing data will need to be provided for this investigation period. On top of that, an injury investigation period [IIP], discussed in more detail in Section 3 below, will be selected, in order to determine whether the dumping has caused injury.

**Questions**

1. Under the WTO, are companies allowed to dump their products in export markets?

2. A domestic industry of a WTO Member alleges that the currency depreciation of another WTO Member allows the exporters of that Member to sell at dumped prices. Assuming that the other conditions have been satisfied, can the WTO Member initiate an anti-dumping investigation?

3. A company argues that it dumped because of a downturn in the business cycle. In other words, it did not intend to cause injury to the domestic industry in the importing country. Will this defence be accepted?

4. A domestic industry argues that while its financial situation is all right for the moment, it fears that dumped imports may cause it injury in the future. Is the importing country Government allowed to start an anti-dumping case on this basis?

5. Can coffee producers in a WTO Member bring an anti-dumping complaint against dumping by tea producers from another WTO Member?

## 2. The determination of dumping

***What you will learn***

*In this section, the dumping determination will be reviewed in detail. Concepts such as export price and normal value will be analysed and the need for a fair comparison as well as comparison methods between the two are addressed. The section concludes with several calculation examples designed to show how dumping margins are computed.*

### 2.1 Overview of Article 2

Article 2 of the ADA covers the determination of dumping. While Article 2 is lengthy, it sets out basic principles and leaves discretion to WTO Members with respect to implementation.

Article 2.1 provides that a product is to be considered as being dumped, *i.e.* introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. This is the standard situation.

Article 2.2 sets out alternatives for calculating normal value in cases when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison.

Article 2.3 covers the construction of the export price.

Article 2.4 contains detailed rules for making a fair comparison between export price and normal value.

Article 2.5 deals with transhipments.

Article 2.6 defines the like product, as we have seen already in the previous section.

Last, Article 2.7 confirms the applicability of the second supplementary provision to paragraph 1 of Article VI in Annex I to GATT 1994, the so-called non-market economy provision.

> Article 2 contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin.[8]
> ***Thailand-H-Beams, Panel***

[8]. Thailand-H-Beams, panel, para. 7.35.

## 2.2 The export price

According to Article 2.1 ADA, the export price is the price at which the product is exported from one country to another. In other words, it is the transaction price at which the product is sold by a producer/exporter in the exporting country to an importer in the importing country. This price is normally indicated in export documentation, such as the commercial invoice, the bill of lading and the letter of credit.

It is this price that is allegedly dumped and for which an appropriate normal value must be found in order to determine whether dumping in fact is taking place.

***Constructed export price***

In some cases, the export price may not be reliable. Thus, where the exporter and the importer are related, the price between them may be unreliable because of transfer pricing reasons.

Article 2.3 ADA provides that the export price then may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. In such cases, allowances for costs, duties and taxes, incurred between importation and resale, and for profits accruing, should be made in accordance with Article 2.4 ADA. Such allowances decrease the export price, increasing the likelihood of a dumping finding.

This was an important reason for a WTO Panel to interpret the relevant part of article 2.4 restrictively.

> The term "should" in its ordinary meaning generally is non-mandatory, *i.e.*, its use in Article 2.4 indicates that a Member is not *required* to make allowance for costs and profits when constructing an export price. We believe that, because the failure to make allowance for costs and profits could only result in a higher export price – and thus a lower dumping margin – the ADA merely permits, but does not require, that such allowances be made.
> …Article 2.4 provides an *authorisation* to make certain specific allowances. Allowances not within the scope of that authorisation cannot be made. [9]
> ***United States-Steel plate, Panel***

## 2.3 NORMAL VALUE

### 2.3.1 Standard situation: domestic price

Article 2.1 provides that a product is dumped if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. This is the standard situation: the normal value is the price of the like product, in the ordinary course of trade, in the home market of the exporting Member.

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[9]. United States-Steel plate, Panel, paras 6.93-6.94.

This definition presupposes that there are in fact domestic sales of the like product and that such sales are made in the ordinary course of trade. In this context, it is important to remember that, in the first stage, comparisons are made between identical or closely resembling models and that only later one weighted average dumping margin is calculated per producer/exporter. Thus, in the first stage, each exported model is matched to a domestic model, where possible, in order to determine whether a domestic price in the ordinary course of trade exists.

If this is found to be the case and if, for example, the domestic price of a model is 100 and its export price is 80, the *dumping amount* is 20 and the *dumping margin* is 20/80x100=25%.[10]

### 2.3.2 Alternatives: third country exports or constructed normal value

Article 2.2 provides that when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the dumping margin shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that the price is representative, or with the cost of production in the country of origin plus a reasonable amount of administrative, selling and general costs and for profits.

In other words, Article 2.2 envisages three special situations and provides two alternative methods for calculating normal value in such cases (often called: third country exports and constructed normal value). Some of these require a further explanation.

#### *SITUATION 1: NO DOMESTIC SALES IN THE ORDINARY COURSE OF TRADE*

It may occur that different models are sold in the domestic and the export market. In the case of CTVs, for example, some countries have the PAL/SECAM system while other countries use the NTSC system. Authorities may then decide that CTVs with different systems cannot be compared.

It is also possible that there are no domestic sales *in the ordinary course of trade*, notably because domestic sales (either of the like product or of certain types) are sold at a loss.

#### *SITUATION 2: UNREPRESENTATIVE VOLUME OF DOMESTIC SALES; 5% RULE*

It may also happen that a producer does not sell the like product on the domestic market in representative quantities.

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[10]. In order to calculate the dumping margin, most countries divide the dumping amount by the CIF export price because any anti-dumping duties imposed will be levied at the CIF level.

> Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.
> ***Footnote 2 ADA***

Thus, authorities will generally have to decide whether domestic sales of both the like product and individual models represent 5% or more of the export sales to the importing Member (at this stage sales below cost are included). This is sometimes called the home market viability test. If this is not the case, an alternative normal value must be found, either for the like product or for specific models.

***Second alternative method: constructed normal value***

In dumping investigations, importing Member authorities routinely request both price and cost information in order to check whether domestic sales are made below cost. A WTO Panel has upheld this practice.

> Nothing in these provisions prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost.[11]
> ***Guatemala-Cement II, Panel***

Most companies produce several products. Furthermore, costs must be calculated on a type-by-type basis. Cost calculations therefore invariably include cost *allocations*. Suppose, for example, that the product under investigation is polyester staple fibres [PSF]. The main raw materials used in the production of PSF are PTA (purified terephthalic acid) and MEG (mono ethylene glycol) which may be manufactured by the same producers. Producers of PSF may also produce other items such as partially oriented yarn and polyester textured yarn. These are all different products, but they may be produced in the same factory. PSF itself in turn can be broken down in various types, for example, on the basis of quality, denier, decitex, lustre, and silicon treatment. Each combination of these would constitute a separate type.

Allocation of costs is not only complex, but also may involve corporate choices, with which the investigating authority may not necessarily agree. In principle, however, the records of the producer under investigation prevail.

> …costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilised by the exporter or producer, in particular in relation to establishing appropriate amortisation and depreciation periods and

[11]. Guatemala-Cement II, Panel, para. 8.183.

allowances for capital expenditures and other development costs.
***Article 2.2.1.1 ADA***

Article 2.2 distinguishes three elements of constructed normal value:

- cost of production;
- reasonable amount for administrative, selling and general costs (often called SGA);
- reasonable amount for profits.

With respect to the calculation of the latter two cost elements, Article 2.2.2 sets out various possibilities.

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

***Article 2.2.2. ADA***

It is important to note that the qualiflier 'ordinary course of trade' in the chapeau of Article 2.2.2 is not repeated in sub-paragraphs (i) to (iii). The AB has held in *Bed linen* that, as a result, it cannot be read into sub-paragraph (ii). In the same case, the AB further ruled that Article 2.2.2(ii) cannot be invoked in situations where there is only one producer/exporter with domestic sales.

Reading into the text of Article 2.2.2(ii) a requirement provided for in the chapeau of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii)...

Therefore, we reverse the finding of the Panel in paragraph 6.87 of the Panel Report that, in calculating the amount for profits under Article 2.2.2(ii) of the ADA, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade. [12]

***Bed linen, AB***

To us, the use of the phrase "weighted average" in Article 2.2.2(ii) makes it impossible to read "other exporters or producers" as "one exporter or producer". First of all, and obviously, an "average" of amounts for SG&A and profits cannot be calculated on the basis of data on SG&A and profits relating to only one exporter or producer. Moreover, the textual directive to "weight" the average further supports this view

[12]. EC-Bed Linen, AB, para. 84.

because the "average" which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the "weighted average" relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase "weighted average" envisages a situation where there is more than one exporter or producer.[13]
***Bed linen, AB***

### 2.3.3 Special situations

***Exclusion sales below cost***

Where domestic sales of the like product and comparable models are representative, it often happens that *some* domestic sales are sold below cost of production. Article 2.2.1 provides that such sales below cost may be treated as not being 'in the ordinary course of trade' and may be disregarded, *i.e.* excluded from the normal value calculation, only where the investigating authorities determine that such sales are made within an extended period of time in substantial quantities at prices which do not provide for the recovery of all costs within a reasonable period of time. In practice, sales below cost are often excluded where the weighted average selling prices is below the weighted average per unit costs or where they represent more than 20% of the quantity of total domestic sales of the models concerned. Exclusion of sales below cost will increase the normal value and thereby makes a finding of dumping more likely, as the example below shows. In this example we suppose that the full cost of production is 50:

| Date | Quantity | Normal value | Export price |
|---|---|---|---|
| 1/8 | 10 | 40 | 50 |
| 10/8 | 10 | 100 | 100 |
| 15/8 | 10 | 150 | 150 |
| 20/8 | 10 | 200 | 200 |

In this example, involving four sales transactions of 10 units each, the domestic sales transaction made on 1 August at a price of 40 is lower than the cost of 50. As it represents 25% of domestic sales (> 20%), it may be excluded. As a result, the average normal value becomes (100+150+200/3=) 150. The average export price is (50+100+150+200/4=) 125. Therefore, the dumping amount is 100 and the dumping margin is 20%. If, on the other hand, the domestic sale of 40 would have been included, the average normal value would have been 122.5 and no dumping would have been found.

***Related party sales on the domestic market***

It may happen that domestic producers and distributors are related. Some WTO Members will then ignore the prices charged by the producer to the distributor on the ground that they are not arms' length transactions. Instead, they base normal value on

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[13]. EC-Bed linen, AB, para. 73.

the sales made by the distributor to the first independent customer. This price will be higher and is therefore more likely to lead to a finding of dumping.

In *United States-Hot rolled steel*, the AB considered the practice a permissible interpretation and reversed the Panel finding that it could find no legal basis for this practice in the ADA. However, the AB cautioned that in such cases special care must be taken to effect a fair comparison.

> The use of downstream sales prices to calculate normal value may affect the comparability of normal value and export price because, for instance, the downstream sales may have been made at a different level of trade from the export sales. Other factors may also affect the comparability of prices, such as the payment of additional sales taxes on downstream sales, and the costs and profits of the reseller. Thus, we believe that when investigating authorities decide to use downstream sales to independent buyers to calculate normal value, they come under a particular duty to ensure the fairness of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison.[14]
>
> ***United States-Hot rolled steel, AB***

***Transshipments***

In the typical situation, a product is exported from country A to country B. However, it is possible that more than two countries are involved in the product flow. Article 2.5 ADA deals with this situation. The basic rule is that where products are not imported directly from the *country of origin* but are exported from an intermediate country, the export price shall normally be compared with the comparable price in the *country of export* (country of transhipment).

By way of exception, Article 2.5 nevertheless allows a comparison with the price in the *country of origin*, if, for example, the products are merely transhipped through the country of export, such products are not produced in the country of export, or there is no comparable price for them in the country of export.

[14]. United States-Hot rolled steel, AB, paras 166-173.

## 2.4 Non-market economy dumping/surrogate country

GATT 1994, which was originally negotiated in 1947, contains a footnote to Article VI.

> It is recognised that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.
> ***Second Supplementary Provision to paragraph 1 of Article VI GATT 1947***

This provision has formed the basis for some GATT/WTO Members not to accept prices or costs in non-market economies as an appropriate basis for the calculation of normal value on the ground that such prices and costs are controlled by the Government and therefore not subject to market forces. The investigating authority will then resort to prices or costs in a third - market economy - country as the basis for normal value. This means that export prices from the non-market economy to the importing Member will be compared with prices or costs in this *surrogate/analogue country*.

It may be noted that for several systemic reasons the surrogate country concept tends to lead to findings of high dumping. To give an example: producers in the surrogate country will be competing in the market place with the non-market economy exporters and it is therefore not in their interest to minimise a possible finding of dumping for their non-market economy competitors.

## 2.5 Fair comparison and allowances

Article 2.4 lays down as key principle that a fair comparison shall be made between export price and the normal value. This comparison shall be made at the same level of trade, normally the ex-factory level, and in respect of sales made at as nearly as possible the same time. The ex-factory price is the price of a product at the moment that it leaves the factory. Thus, Article 2.4 envisages that costs incurred after that be deducted to the extent that they are included in the price.

If, for example, an export sale is made on a CIF basis, this means that the seller pays for the inland freight in the exporting country, ocean freight and insurance. Thus, these costs are included in the export price and must therefore be deducted to return to the ex factory level. If, on the other hand, the terms of the sale are ex-factory, no deduction will need to be made because the price is already at an ex-factory level.

Article 2.4 goes on to require that 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, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

It must be emphasised that the wording of Article 2.4 is open-ended and requires allowance for *any* difference demonstrated to affect price comparability.

The calculation examples provided at the end of this section explain in more detail how importing Member authorities may *net back* a market price to an ex-factory price.

**2.6 Comparison methods**

Where multiple domestic and export transactions exist, as will normally be the case, the question arises how these transactions must be compared with each other. This issue is addressed by Article 2.4.2 ADA. Article 2.4.2 contemplates two basic rules and one exception.

***MAIN RULES***

In principle, prices in the two markets should be compared on a weighted average to weighted average basis or on a transaction-to-transaction basis. A calculation example may be helpful. Assume the following:

| Date | Normal value | Export price |
|---|---|---|
| 1 January | 50 | 50 |
| 8 January | 100 | 100 |
| 15 January | 150 | 150 |
| 21 January | 200 | 200 |

Under the weighted average method, the weighted average normal value (500/4=125) is compared with the weighted average export price (idem), as a result of which the dumping amount is zero.

Under the transaction-to-transaction method, domestic and export transactions which took place on or near the same date will be compared with each other. In the perfectly symmetrical example above, the transactions on 1 January will be compared with each other and so on. Again, the dumping amount will be zero.

***Exception***

Exceptionally, weighted average normal value 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, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of one of the two principal methods.

If we apply the exceptional method to the example above, the result will be quite different:

| Date | Normal value WA basis | Export price T-by-T | Dumping amount |
|---|---|---|---|
| 1 January | 125 | 50 | 75 |
| 8 January | 125 | 100 | 25 |
| 15 January | 125 | 150 | -25 |
| 21 January | 125 | 200 | -75 |

Zeroing

***Thus, there is a positive dumping amount of 100 (75 and 25 on the first two transactions) and a negative dumping amount of 100 (-25 and –75 on the last two transactions). The negative dumping occurs because the export price is actually higher than the normal value. If the negative dumping can be used to offset the positive dumping amount, no dumping will be found to exist. However, it has been the practice of some WTO Members not to allow such offset and to attribute a zero value to negatively dumped transactions. This is known as the practice of zeroing. As a result of application of this method, in the example above the dumping amount will be 100 and the dumping margin: 100/500x100=20%.***

***Use of this method implies that if just one transaction is dumped, dumping will be found.[15] The method therefore facilitates dumping findings. Prior to the conclusion of the Uruguay Round, it was standard practice of some WTO Members to apply this method.[16] 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 (the first of the two main rules).***

***However, within the weighted average method, some WTO Members applied a new type of zeroing: inter-model zeroing. 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. In EC-Bed linen, the AB upheld the Panel finding that this practice was inconsistent with Article 2.4.2:***

> Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions. Here, we emphasise that Article 2.4.2 speaks of "all" comparable export transactions.
> …By "zeroing" the "negative dumping margins", the European Communities, therefore, did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did not establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the

15. If, on the other hand, all transactions are dumped, the weighted average method and the weighted average to transaction-to-transaction method will yield the same result. This, however, is relatively rare.
16. The EC practice was challenged unsuccessfully in the GATT by Japan in *EC-ATCs*.

> weighted average normal value with the weighted average of prices of all comparable export transactions – that is, for all transactions involving all models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[17]
> ***EC-Bed Linen, AB***

In *United States-Steel plate,* 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 US had divided the investigation period for the purpose of calculating the overall margin of dumping into two averaging periods to take into account the Korean won devaluation in the period November-December 1997, corresponding to the pre- and post-devaluation periods. The US 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—although the Article did not prohibit multiple averaging as such; multiple averaging could be appropriate in cases where it would be necessary to insure that comparability is not affected by differences in the timing of sales within the averaging periods in the home and export markets.

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[17]. EC-Bed linen, AB, paras 51-66.

## 2.7. Simplified calculation examples

TO FACILITATE THE READER'S UNDERSTANDING OF THE OPERATION OF THESE COMPLICATED RULES, A FEW SIMPLE CALCULATION EXAMPLES ARE PROVIDED BELOW.

**Example 1: Direct sale to unrelated customers**

| Normal value | Export price |
|---|---|
| Producer X --> unrelated customer | Producer X --> unrelated importer |
| Sales price: 100 | CIF sales price: 100 |
| - duty drawback: 5 | - physical difference: 5 |
| - discounts: 2 | - discounts: 2 |
| - packing: 1 | - packing: 1 |
| - inland freight: 1 | - inland freight: 1 |
| | - ocean freight/insurance: 6 |
| - credit: 5 | - credit: 2 |
| - guarantees: 2 | - guarantees: 2 |
| - commissions: 2 | - commissions: 2 |
| = ex-factory normal value: 82 | = ex-factory export price: 79 |

The dumping margin is: (82-79/100x100) 3%. This example illustrates that while the domestic and export *sales prices* are the same, there is nevertheless a dumping margin because the *ex factory* export price is lower than the *ex factory* normal value.

**Example 2: Direct sale to unrelated customers**

| Normal value | Export price |
|---|---|
| Producer X --> unrelated customer | Producer X --> unrelated importer |
| Sales price: 100 | CIF sales price: 100 |
| - duty drawback: 5 | - physical difference: 5 |
| - discounts: 5 | - discounts: 2 |
| - packing: 1 | - packing: 1 |
| - inland freight: 1 | - inland freight: 1 |
| | - ocean freight/insurance: 6 |
| - credit: 6 | - credit: 1 |
| - guarantees: 2 | - guarantees: 2 |
| - commissions: 2 | - commissions: 2 |
| = ex-factory normal value: 78 | = ex-factory export price: 80 |

The dumping margin on this transaction is: (78-80/100x100) -2. Invoking the exception of Article 2.4.2, last sentence, some countries may not give credit for the *negative* dumping in the computation of the weighted average dumping margin and attribute a zero value to it (zeroing). However, the CIF price will be taken into account in the denominator of the calculation of the weighted average dumping margin.

**Example 3: Construction of export price**

| Normal value | Export price |
|---|---|
| X ----------> unrelated customer<br>140 | X ---> related importer ---> unrelated retailer<br>100 140 |
| - duty drawback: 5 | - discounts subs.: 5 |
| - discounts subs.: 5 | - inland freight subs.: 0.5 |
| - inland freight subs.: 0.5 | - credit by subs.: 2 |
| - packing: 1 | - guarantees by subs.: 2 |
| - credit.: 4 | - net SGA subs.: 17 (12.14%) |
| - guarantees: 2 | - reasonable profit subs. (5%): 7 |
| -level of trade: 24 (17.14%) | - customs duties paid by subs.: 8.2 |
| | - constructed EP: 98.3 |
| | - ocean freight/insurance: 6 |
| | - inland freight: 1 |
| | - packing: 1 |
| | - physical difference: 5 |
| = ex-factory normal value: 98.5 | = ex-factory export price: 85.3 |

The dumping margin on this transaction is: (98.5-85.3=13.2/100x100=) 13.2%.

In this calculation example, we have made an adjustment on the normal value side for a difference in the level of trade equal to 17.14% or 24. Such a difference in levels of trade exists because the producer sells in both his domestic market and his export market to retailers. In the export market, his importer acts as a distributor. In the domestic market, however, the producer performs the distributor function in-house. An adjustment must be made for his indirect costs and profits relating to this function because, on the export side, the same costs and profits are deducted in the process of constructing the export price. The example assumes that, as the functions are the same in both markets, the costs and profits will be the same too (12.14% and 5%). In reality, the situation is often more complex and level of trade adjustments may give rise to heated arguments with claims sometimes being rejected on evidentiary grounds.

In *Hot rolled steel*, the AB emphasised in a comparable case involving domestic sales through an affiliate distributor that allowances must be made with extra care in order to effectively calculate the normal value at the ex-factory level and ensure fair comparison.

> If…price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.
> ***Article 2.4, in fine, ADA***

Last, it is noted that the ADA does not provide guidelines for calculating the 'reasonable profit' of the related importer.

**QUESTIONS**

1. A WTO Member initiates an anti-dumping investigation in which it only analyses price dumping. In other words, it does not examine cost dumping. Is this allowed?

2. A WTO Member decides to treat a non-market economy country as a market economy for purposes of its anti-dumping law and practice. Can it do so under the WTO?

3. In order to avoid taxation in the importing Member a multinational company sells to its related party in the importing country at an artificially high price. How can an investigating authority solve this problem?

4. An export-oriented company has only minimal sales in its home market. Can such sales be used as the basis for normal value? Are there alternative manners in which normal value may be established?

5. A company sells in its domestic market to a related distributor for a price of 100. The related distributor sells to a related retailer for a price of 140. The retailer sells to an (unrelated) end-user for a price of 190. Which price should an investigating authority use? Which allowances, if any, should be made?

## 3. The determination of injury

***What you will learn***

*The determination of injury consists of a determination that the dumped imports have caused material injury to the domestic industry producing the like product. These five elements will be discussed below. In addition, the calculation of injury margins for WTO Members applying the lesser duty rule will be discussed.*

### 3.1 Overview of Article 3

Article 3.1 is an introductory paragraph providing that the injury determination shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

Article 3.2 provides more detail on the analysis of the volume factor and the price factor.

Article 3.3 establishes the conditions for cumulation.

Article 3.4 provides the list of injury factors that must be evaluated by the investigating authority.

Article 3.5 lays down the framework for the causation analysis, including a listing of possible 'other known factors.'

Article 3.6 contains the product line exception.

Articles 3.7 and 3.8 provide special rules for a determination of threat of material injury.

### 3.2 The notion of 'dumped imports'

Throughout Article 3, the notion of 'dumped imports' is used. However, as we have seen in Section 2 above, many cases involve a mixture of dumped and non-dumped transactions. Furthermore, dumping determinations are normally made on a producer-by-producer basis and it is therefore possible that certain producers are found not to have dumped. A conceptual issue therefore is whether such non-dumped imports may be treated as dumped in the injury analysis. In the *EC-Bed linen* case, India argued that non-dumped transactions ought to be excluded from the injury analysis.

The Panel did not agree that the ADA required such specificity, but in an important *obiter dictum* opined that imports from producers found not to have dumped, should not be included in the injury analysis.

> It is possible that a calculation conducted consistently with the ADA would lead to the conclusion that one or another Indian producer should be attributed a zero or *de minimis* margin of dumping. In such a case, the imports attributable to such a producer/exporter may not be

considered as "dumped" for purposes of injury analysis. However, the panel lacks legal competence to make a proper calculation and consequent determination of dumping for any of the Indian producers – its task is to review the determination of the EC authorities, not to replace that determination, where found to be inconsistent with the ADA, with its own determination. In any event, the panel lacks the necessary data to undertake such a calculation. Thus, while the treatment of imports attributable to producers or exporters found to **not** be dumping is an interesting question, it is not an issue before the panel and the panel reaches no conclusions in this regard.[18]
***EC-Bed linen, Panel***

### 3.3 The like product/product line exception

In Section 1 we have explained that the definition of the like product plays a role in both the dumping and the injury determination because it is with respect to this product that dumping and injury must be established.

As an exception to the principle that it must be established that the domestic industry producing the *like product* must suffer injury by reason of the dumped imports, Article 3.6 provides that when available data do not permit the separate identification of the domestic production of the like product on the basis of such criteria as the production process, producers' sales and profits, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided. This is sometimes called the *product line* exception.

Suppose, for example, that the domestic industry brings an anti-dumping complaint against fresh cut red roses. It is possible that in such a case the domestic industry does not maintain specific data with regard to production processes, sales and profits of this product, but only with respect to the broader category of all fresh cut roses. In such a case, Article 3.6 would permit the investigating authority to assess the effects of the dumped imports with respect to all fresh cut roses.

### 3.4 The domestic industry

Article 4 ADA defines the domestic industry as 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. The ADA does not define the term 'a major proportion.'

There are two exceptions to this principle.

First, where domestic producers are related to exporters or importers or themselves import the dumped products, they *may* be excluded from the definition of the domestic industry under Article 4.1(i). Such producers may benefit from the dumping and therefore may distort the injury analysis. Exclusion is a discretionary decision of the importing Member authorities for which the ADA does not provide further guidance.

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[18]. EC-Bed linen, panel, para. 6.138.

Suppose, for example, that an investigation is initiated against PSF and that one of the targeted foreign producers has also established a factory in the importing Member, thereby qualifying as a domestic producer. This domestic producer might be opposed to imposition of anti-dumping measures on its related company and could therefore, for example, take the position that it is not injured by the dumped exports. Article 4.1(i) gives the investigating authority to exclude this producer from the injury analysis.

Second, a regional industry comprising only producers in a certain market of a Member's territory may be found to exist under Article 4.1(ii) if these producers sell all or almost all of their production in that market and the demand within that market is not to any substantial degree supplied by producers of the product located elsewhere in the territory. Injury may then be found even where a major portion of the total domestic industry is not injured, provided that there is a concentration of dumped imports into the isolated market and the dumped imports are causing injury to the producers of all or almost all of the production in that market. If the regional industry exception is used, anti-dumping duties shall be levied only on imports consigned for final consumption to that area. Where this is not allowed under the constitutional law of the importing Member, exporters should be given the opportunity to cease exporting to the area concerned or to give undertakings. Findings of the existence of a regional industry are relatively rare and tend to be confined to industries where transportation is a major cost item, such as, for example, cement.

Last, it is noted that the definition of the domestic industry is closely linked to the standing determination which importing Member authorities must make prior to initiation. This procedural issue is discussed in the next section.

### 3.5 Material injury

As we have seen, the determination of material injury must be based on *positive* evidence and involve an *objective* examination of the volume of the dumped imports, their effect on the domestic prices in the importing Member market and their consequent impact on the domestic industry. The Appellate Body has held that this determination may be based on the confidential case file and overruled a panel finding that it follows from the words 'positive' and 'objective' that the injury determination should be based on reasoning or facts disclosed to, or discernible by, the interested parties.

*An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the ADA, involves the collection and assessment of both confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the ADA must be based on the totality of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information...*
*We consider, therefore, that the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve an "objective" examination of the required elements of injury does not imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation. Article 3.1, on the contrary, permits an investigating authority making an injury determination to base its determination on all relevant reasoning and facts before it.*[19]
***Thailand-H-Beams, AB***

[However, the AB emphasised due process rights of interesting parties, emanating from Articles 6 and 12 ADA, against which the injury determination must be scrutinised. These will be discussed in Section 4 below].

### *Injury investigation period*

A recommendation of the WTO Committee on Anti-Dumping Practices provides that injury should preferably be analysed over a period of at least three years.[20] 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.

### *Volume and prices*

Article 3.2 provides more details on the volume and price analysis. It emphasises the relevance of a significant increase in dumped imports, either absolute or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authority must consider whether there has been a significant price undercutting by the dumped imports, or whether the effect of the imports has been to significantly depress prices or prevent price increases, which otherwise would have occurred.

The wording is understandably broad because injury can occur in many forms. Thus, for example, in the typical situation, there will be an absolute increase in the volume of imports over the IIP coupled to a decreasing trend in prices of the imports. Indeed, the simultaneous occurrence of these two trends will be a strong indicator not only of

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19. Thailand-H-beams, AB, paras 106-111.
20. 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 (16 May 2000).

injury but also of causation because it indicates that producers are gaining market share through aggressive pricing.

In many other cases, however, the situation will not be so clear-cut. It is possible, for example, that domestic producers cut back production, while foreign producers continue to export at steady levels. This would mean that the imports increase relative to production (but not in absolute terms). Similarly, with regard to prices, it is possible that, faced with increased costs for raw materials, domestic producers are precluded from increasing prices to pass on the price increase to their customers through the presence in the market of low-priced imports which are sold at the same price as before.

***Cumulation of dumped imports from various countries***

The principle of cumulation, contained in Article 3.3, means that where imports from several countries are simultaneously subject to anti-dumping investigations, their effects may be assessed cumulatively for injury purposes as long as they do not qualify for the *de minimis* or *negligibility* thresholds (see the next section) and a cumulative assessment is appropriate in light of the conditions of competition among the imports and between imports and the like domestic product. Many WTO Members apply cumulation almost as a matter of course as long as the thresholds are not met.

***Examination of the impact of the dumped imports on the domestic industry***

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 and then mentions 15 specific factors. Article 3.4 concludes that this list is not exhaustive and that no single or several of these factors can necessarily give decisive guidance.

> ***The 15 Article 3.4 injury factors:***
> actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization 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 or investments

The scope of this obligation has been examined in four panel proceedings thus far.[21] All four Panels, strongly supported by the AB 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.

> The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities…" We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the ADA.[22]
> ***Thailand-H-Beams, AB***

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21. Mexico-HFCS, Thailand-H-Beams, EC-Bed linen, Guatemala-Cement II.
22. Thailand-H-beams, AB, para. 125.

It appears that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely a factor cannot be evaluated without the collection of relevant data.[23]
***EC-Bed linen, Panel***

### *Threat of injury*

It may occur that 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.

However, because 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, Article 3.7 offers special provisions for a threat case. Thus, a determination of threat must be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

In making a threat determination, the importing Member authorities *should* consider, *inter alia*, four special factors.

***Special threat factors***
(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 additional imports; and
(iv) inventories of the product being investigated.
***Article 3.7, ADA***

No single factor will necessarily be decisive, but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur. The *Mexico-HFCS* Panel concluded that a threat analysis must also include evaluation of the Article 3.4 factors.

## 3.6 Causation/Other known factors

The evaluation of import volumes and prices and their impact on the domestic industry is relevant not only for the determination whether the domestic industry has in fact suffered material injury, but often will also be indicative of whether the injury has been caused by the dumped imports or by other factors. Thus Article 3.5 ADA, first sentence, refers back to Articles 3.2 and 3.4 ADA.

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[23]. EC-Bed linen, Panel, para. 6.167.

Furthermore, the demonstration of the causal link must be based on an examination of all relevant evidence before the authorities, which must also examine any known factors other than the dumped imports which are also injuring the domestic industry and the injury as a result of such other known factors must not be attributed to the dumped imports. Article 3.5 then provides a non-exhaustive list of other factors which may be relevant depending on the facts of the case.

***The Article 3.5 other known factors:***
*The volume and prices of imports not sold at dumped prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry*

In *HFCS*, for example, the Panel addressed the Mexican authorities' analysis of an alleged restraint agreement between Mexican sugar refiners and soft drink bottlers.

…the question for purposes of an anti-dumping investigation is not whether an alleged restraint agreement in violation of Mexican law existed, an issue which might well be beyond the jurisdiction of an anti-dumping authority to resolve, but whether there was evidence of and arguments concerning the effect of the alleged restraint agreement, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future. If the latter is the case, the investigating authority is obliged to consider the effects of such an alleged agreement, assuming it exists.[24]
***Mexico-HFCS, Panel***

A WTO Panel has held that, contrary to the Article 3.4 factors, the Article 3.5 factors need not be examined as a matter of course in each administrative determination. Rather, such examination will depend on the arguments made by interested parties in the course of the administrative investigation.

The text of Article 3.5 refers to "known" factors other than the dumped imports which at the same time are injuring the domestic industry but does not make clear how factors are "known" or are to become "known" to the investigating authorities. We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation.[25]
***Thailand-H-beams, Panel***

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…Therefore, the Article 3.4 evaluation is also relevant in a threat case.[26]
***Mexico-HFCS, Panel***

[24]. Mexico-HFCS, panel, para. 7.174.
[25]. Thailand-H-beams, panel, para. 7.273.
[26]. Mexico-HFCS, Panel, paras 7.126-7.127.

## 3.7 Injury margins

The determination whether dumping has caused material injury to the domestic industry producing the like product is generally made with respect to the country or countries under investigation. By nature, this is either an affirmative or a negative determination. If the determination is affirmative, WTO Members which apply a lesser duty rule in accordance with Articles 8.1 and 9.1, will then calculate injury margins.

The ADA does not give any guidance on such calculation and arguably leaves its Members substantial discretion. Injury margins are normally producer-specific, as are dumping margins, and that they will compare the prices of imported and domestically-produced like products, focusing on whether the former are undercutting or underselling the latter.

**Example 1: Calculation injury margin, based on price undercutting**

| | Domestic producer X | Foreign exporter Y | Foreign exporter Z |
|---|---|---|---|
| Price | 100 | 80 | 110 |
| Injury margin | | (100-80=20)/80x100=25% | 100-110=-10=0 |

**Example 2: Calculation injury margin, based on price underselling**

| | Domestic producer X | Foreign exporter Y | Foreign exporter Z |
|---|---|---|---|
| Price | 100 | 80 | 110 |
| Target price | 121 | | |
| Injury margin | | (121-80=41)/80x100=51.25% | (121-110=11)/110x100=10% |

In the second example, it is assumed that the unit cost of domestic producer X actually is 110. Faced with the low-priced imports, however, he has been forced to sell below cost. A target price may be calculated for producer X, comprised of his costs plus a reasonable profit, for example 10%. In the example, the target price will therefore become: 110+(110x10%=11)=121.

**Questions**

1. An administering authority investigating injury allegedly caused by dumped tomato imports determines that inventories are not a relevant injury factor for such a highly perishable product and therefore does not evaluate it in the definitive measure. Is this legal?

2. A domestic industry wishes to bring an anti-dumping case against the producers of the like product in another country. However, one of the producers is related to an exporter and opposes the case. Can the investigating authority initiate the case?

3. The investigating authority finds that the volume of dumped imports has consistently decreased during the past three years. Can it nevertheless find that injury has been caused by dumped imports?

4. The investigating authority finds that imports were in fact higher-priced than the products sold by the domestic industry. Can such higher-priced imports cause injury to the domestic industry?

5. In an anti-dumping case involving five exporters, the investigating authority finds that four of them did not dump. The fifth exporter dumped some 50% of its exports while the other 50% was not dumped. In analysing the volume of the dumped imports, which data should the investigating authority use?

## 4. The national procedures

***WHAT YOU WILL LEARN***

*By far the largest portion of the ADA is dedicated to various procedural obligations that authorities wishing to investigate injurious dumping must comply with. This section will provide an overview of these procedural obligations that national authorities must comply with throughout the course of an anti-dumping investigation. It also provides a flowchart of the various steps in an anti-dumping investigation. This section discusses due process rights, such as notification, public notices, confidentiality, disclosure of findings and hearings as well as restrictions on use of facts available. It further analyses the remedies of anti-dumping duties and undertakings and summarises duty assessment systems.*

### 4.1 INTRODUCTION

The following Articles of the ADA contain important procedural provisions:

| | |
|---|---|
| Article 5 | Initiation and subsequent investigation, including the standing determination |
| Article 6 | Evidence, including due process rights of interested parties |
| Article 7 | Provisional measures |
| Article 8 | Price undertakings |
| Article 9 | Imposition and collection of anti-dumping duties |
| Article 10 | Retroactivity |
| Article 11 | Duration and review of anti-dumping duties and price undertakings, including |
| Article 12 | Public notice and explanation of determinations, pertaining to initiation, imposition of preliminary and final measures |
| Article 13 | Judicial review |

It falls outside the scope of this handbook to discuss these procedural provisions in detail. However, the general tendency of Panels and the AB has been to interpret these provisions strictly.

The relevant Panel findings in *Guatemala Cement II* may serve as an example of this because they cover many of the procedural requirements.[27]

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[27]. The AB report in *United States-Hot rolled steel* and the Panel report in *Argentina-Tiles* offer interesting material on use of facts available.

(a) Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation, is inconsistent with Article 5.3 of the ADA

(b) Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation and consequent failure to reject the application for anti-dumping duties by Cementos Progreso is inconsistent with Article 5.8 of the ADA.

(c) Guatemala's failure to timely notify Mexico under Article 5.5 of the ADA is inconsistent with that provision.

(d) Guatemala's failure to meet the requirements for a public notice of the initiation of an investigation is inconsistent with Article 12.1.1 of the ADA.

(e) Guatemala's failure to timely provide the full text of the application to Mexico and Cruz Azul is inconsistent with Article 6.1.3 of the ADA.

(f) Guatemala's failure to grant Mexico access to the file of the investigation is inconsistent with Articles 6.1.2 and 6.4 of the ADA.

(g) Guatemala's failure to timely make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997 is inconsistent with Article 6.1.2 of the ADA.

(h) Guatemala's failure to provide two copies of the file of the investigation as requested by Cruz Azul is inconsistent with Article 6.1.2 of the ADA.

(i) Guatemala's extension of the period of investigation requested by Cementos Progreso without providing Cruz Azul with a full opportunity for the defence of its interest is inconsistent with Article 6.2 of the ADA.

(j) Guatemala's failure to inform Mexico of the inclusion of non–governmental experts in the verification team is inconsistent with paragraph 2 of Annex I of the ADA.

(k) Guatemala's failure to require Cementos Progreso's to provide a statement of the reasons why summarization of the information submitted during verification was not possible is inconsistent with Article 6.5.1 of the ADA.

(l) Guatemala's decision to grant Cementos Progreso's 19 December submission confidential treatment on its own initiative is inconsistent with Article 6.5 of the ADA.

(m) Guatemala's failure to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" is inconsistent with Article 6.9 of the ADA.

(n) Guatemala's recourse to "best information available" for the purpose of making its final dumping determination is inconsistent with Article 6.8 of the ADA …[28]

***Guatemala-Cement II, Panel***

## 4.2 Application

An anti-dumping case normally starts with the official submission of a written complaint by the domestic industry to the importing Member authorities that injurious dumping is taking place. This complaint is called the application in the ADA. Article 5.2 contains the requirements for the contents of this application. It must include *evidence* on dumping, injury and the causal link between the two; simple assertion is

[28]. Guatemala-Cement, Panel, para. 9.1. Technical note: the term 'AD Agreement' has been replaced by 'ADA'.

not sufficient. More specifically, to the extent *reasonably available* to the applicant, the application must contain the following information:

> (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
>
> (ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
>
> (iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member.
>
> (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.
>
> ***Article 5.2(i)-(iv), ADA***

## *PRE-INITIATION EXAMINATION*

Article 5.3 imposes the obligation on the importing Member authorities to *examine*, *before* initiation, the accuracy and the adequacy of the evidence in the application. However, as Article 5.3 does not provide any details on the nature of this examination, it is difficult for Panels to judge whether importing Member authorities have complied with Article 5.3.

> The quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation. That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation.[29]
>
> In our view, Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of **all** underlying issues considered in making that determination.[30]
>
> ***Mexico-HFCS, Panel***

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[29]. Mexico-HFCS, panel, para. 7.94, quoting panel report in Cement I, which in turn relied on panel report in Softwood lumber.

[30]. Mexico-HFCS, panel, para. 7.102.

### *Standing determination*

Under Article 5.4 ADA, importing Member authorities must determine, again *before* initiation, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. GATT Panels have held several times that the failure to properly determine standing before initiation is a fatal error which cannot be repaired retroactively in the course of the proceeding.

> The Panel observed that under Article 5:1 (apart from 'special circumstances') an anti-dumping investigation shall normally be initiated upon a written request "by or on behalf of the industry affected". The plain language in which this provision is worded, and in particular the use of the word "shall", indicates that this is an essential procedural requirement for the initiation of an investigation to be consistent with the Agreement…
> The Panel considered, in light of the nature of Article 5:1 as an essential procedural requirement, that there was no basis to consider that an infringement of this provision could be cured retroactively.[31]
> ***United States-Steel, Panel***

An application is made by or on behalf of the domestic industry of the importing Member if it is supported by those domestic producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25% of total production of the like product produced by the domestic industry. These tests are often called the 50% and the 25% test and the following example may explain their operation.

> ***Example standing tests***
> Suppose that there are two domestic producers X and Y which produce 3,500 and 6,500 tons of the product concerned. Producer X files the application while producer Y neither supports nor opposes the application.
> -The 50% test is met because producer X represents 100% of those supporting or opposing the application;
> -The 25% test is also met because producer X represents (3,500:10,000x100=) 35% of the total production.
> If, however, producer Y would have expressed opposition to the application, producer X would not have met the 50% test because in that case he would have represented only 35% of those expressing support or opposing the application.

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31. United States-Seamless stainless steel hollow products, Panel, para. 5.20. Compare United States-Cement.

### *Notification*

Article 5.5 expresses a preference for confidential treatment of applications prior to initiation of an investigation. On the other hand, before initiation, the importing Member authorities must *notify* the government of the exporting Member. The ADA does not contain rules on the form of such notification.

> While a written notification might arguably best serve this goal and the promotion of transparency and certainty among Members, and might also provide a written record upon which an importing Member could rely in the event of a subsequent claim of inconsistency with Article 5.5 of the ADA, the text of Article 5.5 does not expressly require that the notification be in writing.
> We consider that a formal meeting between government officials could satisfy the notification requirement of Article 5.5, provided that the meeting is sufficiently documented to support meaningful review by a panel. For these reasons, the fact that Thailand notified Poland under Article 5.5 orally in the course of a meeting between government officials, rather than in written form, does not render the notification inconsistent with Article 5.5.[32]
> ***Thailand-H-beams, Panel***

### *De minimis/negligibility thresholds*

Article 5.8 provides as a general rule that an application shall be rejected and an investigation terminated *promptly* as soon as the investigating authority is satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the case.

Article 5.8 then provides two situations in which termination shall be *immediate.*

> ***De minimis and negligibility rules Article 5.8***
> -where the dumping margin is *de minimis, i.e.* less than 2%, expressed as a percentage of the export price;
> -where the volume of dumped imports, actual or potential, or the injury, is *negligible*. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3% of imports of the like product in the importing Member, unless countries which individually account for less than 3% collectively account for more than 7% of the imports. Note that the denominator for this test is the total volume of imports, not market share.

The difference between the words 'prompt' and 'immediate' highlighted above possibly reflects recognition by the drafters that findings of *de minimis* dumping and *negligible* injury can often only be made when the investigation is well advanced.

Contrary to other commercial defence agreements such as the ASCM and the Safeguards Agreement, these rules do not establish a higher threshold for developing countries.

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[32]. Thailand-H-beams, panel, para. 7.89-7.90.

### *Deadlines*

Article 5.10 provides that investigations shall normally be concluded within one year and in no case more than 18 months, after their initiation. The 18 months' deadline seems absolute.

### *Interested parties*

The parties most directly affected by an anti-dumping investigation are the domestic producers, foreign producers and exporters and their importers. However, the government of the exporting country and representative trade associations also qualify. Article 6.11 provides that other domestic or foreign parties may also be included as interested parties by the importing country Member.

## 4.3 Due process rights

Articles 6 and 12 ADA contain various due process rights of interested parties and the AB emphasised their importance in *Thailand-H-beams.*

> Article 6…establishes a framework of procedural and due process obligations which, amongst other matters, requires investigating authorities to disclose certain evidence, during the investigation, to the interested parties. Article 6.2 requires that parties to an investigation "shall have a full opportunity for the defence of their interests". Article 6.9 requires that, before a final determination is made, authorities shall "inform all interested parties of the essential facts under consideration which form the basis for the decision"…
> …In a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a final determination…Article 12, like Article 6, sets forth important procedural and due process obligations.[33]
> ***Thailand-H-beams, AB***

### *Public notices and explanation of determinations*

Article 12 obliges importing Member authorities to publish public notices of initiation, and of preliminary and final determinations, with increasing degrees of specificity, as the investigation progresses. In addition, they must publish detailed explanations of their determinations.

> ***Contents notice of initiation (Article 12.1.1)***
> (i) name of the exporting country/countries and product involved;
> (ii) the date of initiation of the investigation;
> (iii) the basis on which dumping is alleged in the application;
> (iv) a summary of the factors on which the allegation of injury is based;
> (v) the address to which representations by interested parties should be directed;
> (vi) the time-limits allowed to interested parties for making their views known.

[33]. Thailand-H-beams, AB, paras 109-110.

***Contents notice imposition provisional measures (Article 12.2.1)***
Sufficiently detailed explanations for the determinations of dumping and injury and reference to the matters of fact and law which have led to arguments being accepted or rejected, including:

(i) names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) margins of dumping established and full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

***Contents notice definitive measures (Article 12.2.2)***
All relevant information on the matters of fact and law and reasons which have led to the imposition of definitive measures, including the information under points (i)-(v) above as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any sampling decisions.

Conceptually, Article 12 violations are often linked to substantive violations. If, for example, an exporter argues that the injury suffered by the domestic industry was not caused by dumped imports, but by its lack of productivity and the investigating authority does not examine this argument, the authority logically violates both Article 3.5 (the substantive obligation) and Article 12.2.2 (the procedural obligation).

While some panels have followed this logic, others, however, have not, as the following two different approaches show.

Mexico's failure to set forth findings or conclusions on the issue of the retroactive application of the final anti-dumping measure is inconsistent with the provisions of Articles 12.2 and 12.2.2 of the ADA.[34]
***Mexico-HFCS, Panel***

We consider that where there is a violation of the substantive requirement, the question of whether the notice is sufficient under Article 12.2.2 is immaterial.[35]
***EC-Bed linen, Panel***

The difference between the two approaches is important because of the two-tiered WTO dispute settlement system and the lack of remand authority of the AB: If, under the second approach, the AB overturns the substantive violation, it may not be able to address the Article 12 violation because the Panel has not reached a finding on this issue.

### *Confidentiality*

Anti-dumping investigations involve immense amounts of confidential and sensitive business information because they require companies to submit to the importing Member authorities pricing and costing information in various markets in exquisite detail. In order to mount an optimal legal defence, interested parties ideally need access to the confidential information submitted by the opposing side (foreign

[34]. Mexico-HFCS, Panel, para. 8.2.
[35]. EC-Bed linen, Panel, para. 6.261.

producers and their importers versus domestic producers and vice versa). On the other hand, they will be extremely reluctant to provide their own confidential information to their competitors. Thus, to ensure fair play and equality of arms, a balance must be struck between these competing interests and a legal system must give opposing parties equal levels of access to information.

Article 6.5 ADA chooses for the principle[36] that information which is by its nature confidential or which is provided on a confidential basis shall, upon good cause shown, be treated as confidential by the authorities and shall not be disclosed without specific information of the party submitting it. However, the authorities shall require interested parties providing confidential information to provide meaningful non-confidential summaries thereof.

Thus, whenever interested parties make a submission to the importing Member authorities, they should generally prepare both a confidential and a non-confidential version of the submission. The confidential version will be accessible only to the importing Member authorities. The non-confidential version, on the other hand, will be placed in the non-confidential file and can be accessed by all interested parties in the investigation.

***Other rights***

Important other due process rights in Article 6 include the opportunity to present evidence in writing (Article 6.1), the right of access to the file (Article 6.1.2 *jo.* 6.4), the right to have a hearing and to meet opposing parties (confrontation meeting; Article 6.2), the right to be timely informed of the essential facts under consideration which form the basis for the decision whether to apply definitive measures (disclosure; Article 6.9), and the right to obtain, subject to exceptions,[37] an individual dumping margin (Article 6.10).

***Facts available/administrative deadlines***

Article 6.8 *jo.* Annex II to the ADA provide that in cases where an interested party refuses access to, or otherwise does not provide, necessary information within 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.

In *Hot rolled steel*, the Appellate Body and the Panel essentially adopted a rule of reason approach in rejecting automatic recourse to facts available where deadlines are missed.

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36. However, in an important footnote 17, Members recognise that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required. This is the case, *inter alia*, in the United States and Canada.

37. In certain cases, authorities may resort to sampling.

We recognise that in the interest of orderly administration investigating authorities do, and indeed must establish…deadlines. However, a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied.

…Particularly where information is actually submitted in time to be verified, and actually could be verified, we consider that it should generally be accepted, unless to do so would impede the ability of the investigating authority to complete the investigation within the time limits established by the ADA…One of the principle elements governing anti-dumping investigations that emerges from the whole of the ADA is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the "first-best" information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps "second-best" facts.[38]

***United States-Hot rolled steel, Panel***

…we conclude…that, under Article 6.8, USDOC was not entitled to reject this information for the sole reason that it was submitted beyond the deadlines for responses to the questionnaires. Accordingly, we find that USDOC's action does not rest upon a permissible interpretation of Article 6.8 of the ADA.[39]

***United States-Hot rolled steel, AB***

## 4.4 Provisional measures

Provisional measures should preferably take the form of a security (cash deposit or bond), may not be applied sooner than 60 days from the date of initiation and may not last longer than four months or, on decision of the importing Member authorities, upon request by exporters representing a significant percentage of the trade involved, maximally six months. Where authorities examine the lesser duty rule, these periods may be six and nine months.

It is important to note that Article 7 uses the term 'measures' and not 'duties.' Under the system of the ADA, at the time that the importing Member decides to impose definitive duties, it must also decide whether to retroactively levy provisional anti-dumping duties (see section 4.6 below).

## 4.5 Price undertakings

Anti-dumping investigations may be suspended or terminated without anti-dumping duties where exporters offer undertakings to revise prices or cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Use of the word 'may' indicates that authorities have complete discretion in this regard and, indeed, some authorities are reluctant as a matter of policy to accept price undertakings. Price undertakings are often the preferred solution by exporters. The *EC-Bed linen* Panel ruled that acceptance of price undertakings may qualify as a constructive remedy in cases involving developing countries.

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38. United States-Hot rolled steel, panel, paras 7.54-7.55.
39. United States-Hot rolled steel, AB, paras 85-89.

## 4.6 Anti-dumping duties

Imposition of anti-dumping duties where injurious dumping has been found is discretionary and use of a lesser duty rule is encouraged. Many WTO Members include a public interest clause in their national legislation to enable them to refrain from imposing duties, even where injurious dumping is found.

If an anti-dumping duty is imposed, it must be collected on a non-discriminatory basis on imports of the product from all sources found to be injuriously dumped.

Article 9.4 provides special rules in cases where the authorities have resorted to sampling. In such cases, the cooperating sampled producers will normally get their individual anti-dumping duties. This leaves two categories: cooperating/non-sampled producers and non-cooperating/non-sampled producers. Article 9.4 addresses the situation of the first category. It provides that the anti-dumping duty applied to them shall not exceed the weighted average margin of dumping established with respect to the sampled producers or exporters, provided that the authorities shall disregard any zero and *de minimis* margins and margins established on the basis of facts available.

In *United States-Hot rolled steel*, the AB confirmed the panel finding that a provision of the United States Tariff Act of 1930, as amended, requiring *inclusion* of margins established *partly* on facts available in calculating the rate for cooperating/non-sampled producers was inconsistent with Article 9.4 ADA.

> *As section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, requires the inclusion of margins established, in part, on the basis of facts available, in the calculation of the "all others" rate, and to the extent that this results in an "all others" rate in excess of the maximum allowable rate under Article 9.4, we uphold the Panel's finding that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is inconsistent with Article 9.4 of the ADA. We also uphold the Panel's consequent findings that the United States acted inconsistently with Article 18.4 of that Agreement and with Article XVI:4 of the WTO Agreement. We further uphold the Panel's finding that the United States' application of the method set forth in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the "all others" rate in this case was inconsistent with United States' obligations under the ADA because it was based on a method that included, in the calculation of the "all others" rate margins established, in part, using facts available.*[40]
> ***United States-Hot rolled steel, AB***

### *Retrospective/prospective systems*

Article 9.3 introduces the distinction between retrospective and prospective duty collection systems and requires prompt refunds of over-payments in both cases.

Under the retrospective system, used mainly by the United States, the original investigation ends with an estimate of future liability; however, the actual amount of anti-dumping duties to be paid will be established in the course of annual reviews, covering the preceding one-year period.

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[40]. United States-Hot rolled steel, AB, para. 129.

Under the prospective system, used by the EC and most other countries, on the other hand, the findings made during the original investigation form the basis for the future collection of anti-dumping duties, normally for the five years following the publication of the final determination.

The retrospective system is more precise than the prospective system. On the other hand, it is costly and time-consuming for all parties, including the importing Member authorities.

### 4.7 Retroactivity

Article 10 ADA provides for two types of retroactivity.

First, where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied. This type of retroactivity is often applied by importing Members.

> While Article 10.2 does not explicitly require a "determination" that "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury", there must be some specific statement in the final determination of the investigating authority from which a reviewing panel can discern that the issue addressed in Article 10.2 was properly considered and decided.[41]
> ***Mexico-HFCS, Panel***

Second, a definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

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

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

This second type of retroactivity is seldom applied because the conditions are very stringent.

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41. Mexico-HFCS, panel, para. 7.191.

## 4.8 Reviews

The ADA recognises three types of reviews of anti-dumping measures. First, Article 9.5 requires importing Member authorities to promptly – and in accelerated manner - carry out reviews requested by newcomers, *i.e.* producers which did not export during the original investigation period and which will normally be subject to the residual duty ("all others" rate) that was imposed in the original investigation. During the course of the review, no anti-dumping duties shall be levied on the newcomers. However, the importing Member authorities may withhold appraisement and/or request guarantees to ensure that, should the newcomer review investigation result in a determination of dumping, anti-dumping duties can be levied retroactively to the date of initiation of the review.

Second, Article 11 provides for what can be called interim and expiry reviews. To start with the latter, definitive anti-dumping duties shall normally expire after five years from their imposition, unless the domestic industry asks for a review within a reasonable period of time preceding the expiry, arguing that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

*During the five year period* (hence the term interim review), interested parties may request the authorities 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 or varied, or both. In both cases, the measures may stay in force pending the outcome of the review.

The interim and expiry review investigations require prospective and counter-factual analysis. In this context, the fact that during the review investigation period, dumping and/or injury did not take place is not necessarily decisive because it might indicate that the measures are having effect.

> In our view, the absence of present dumping does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2 ADA.[42]
> ***United States-DRAMs, Panel***

## 4.9 Judicial review

Article 13 provides that Members which do adopt anti-dumping legislation, must also maintain independent judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review of administrative final and review determinations.

## 4.10 Flowchart

The flowchart below shows the various procedural stages in an anti-dumping investigation emanating from the ADA. It is emphasised that national implementing legislation often will be much more detailed:

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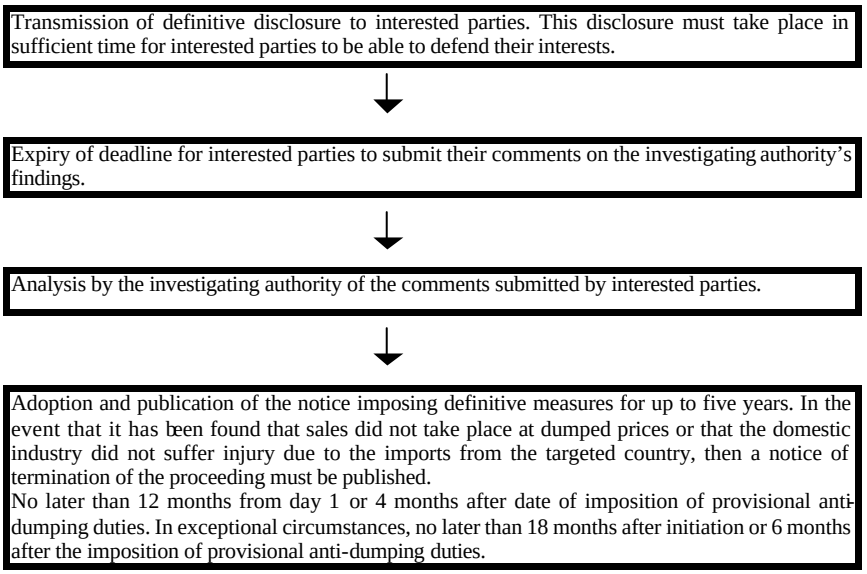
[42]. United States-DRAMs, panel, para. 6.32.

| Day | Stage of the proceeding |
|---|---|
| | Submission of a written application by the domestic industry. |
| | ↓ |
| | Examination of the application by the investigating authority. Before initiating the investigation, the investigating authority must notify the government of the exporting country concerned that an application for the initiation of an anti-dumping investigation has been received. |
| | ↓ |
| 1 | The investigating authority rejects the complaint if there is insufficient prima facie evidence that injurious dumping has taken place. In such a case, the proceeding is not initiated. Otherwise, the investigating authority initiates the investigation in which case public notice must be given. |
| | ↓ |
| | Transmission of the full text of the written application to the known exporters and to the authorities of the exporting Member *as soon as the investigation has been initiated*. Upon request, the text of the application must be made available to other interested parties. The investigating authority must also send the questionnaires to exporters, importers, domestic industry and other interested parties. Exporters or foreign producers must be given at least 30 days to reply. This time-limit must be counted from the date of receipt of the questionnaire, which shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member. Extensions may be granted. |
| | ↓ |
| | Expiry of deadline for questionnaire responses. Interested parties may submit comments. Non-confidential summaries of written submissions must generally be made available to other parties. Interested parties are also entitled to request to be heard and to hold confrontation meetings with opposing parties. Interested parties are entitled to have access to the non-confidential (public) file and to prepare presentations on the basis of the consulted information. |
| | ↓ |
| | Analysis of questionnaire responses and submissions, on-spot verifications of interested parties. [The investigating authority may also carry out the on-spot verifications after the imposition of provisional anti-dumping measures]. |
| | ↓ |
| | Analysis of all data collected. Provisional determination reached. |
| | ↓ |
| | Publication of a notice imposing provisional anti-dumping measures for six months if a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry. Interested parties must be given the possibility to submit comments to the findings on the basis of which the investigating authority decided to impose provisional anti-dumping measures.<br>No sooner than 60 days from day 1, no later than 9 months |
| | ↓ |
| | Interested parties have the right to be heard, submit comments, access to the non-confidential (public) file and hold meetings. |
| | ↓ |
| | Analysis by the investigating authority of the comments and evidence collected. Definitive determination reached. |
| | ↓ |




## 4.10 Initiation of anti-dumping investigations at the national level

Until the 1990s, Australia, Canada, the European Union and the United States initiated most anti-dumping investigations. However, since that time, many other countries have also adopted anti-dumping legislation and applied anti-dumping measures. According to WTO statistics, a substantial number of anti-dumping investigations have been initiated also by other countries such as Argentina, Brazil, Korea, India, Mexico and South Africa. According to recent UNCTAD estimates, from 1995 to 1999 1,229 anti-dumping proceedings were initiated, of which ___ by developing countries.

> "…developing countries now initiate about half of the total number of anti-dumping cases, and some of them employ anti-dumping more actively than most of the developed country users."[43]

[43]. Miranda, Torres, Ruiz, The International Use of Anti-Dumping--1987-1997, 32:5 Journal of World Trade, 1998, 5–72, at 64.

**Questions**

1. An administering authority prepares non-confidential summaries of confidential information that has been submitted by the domestic industry and puts these in the non-confidential file. Does this violate the ADA?

2. An administering authority gives exporters 45 days to respond to the questionnaires and domestic producers 60 days. Is this allowed under the WTO?

3. Can anti-dumping duties be imposed retro-actively? For how long and under what conditions?

4. A WTO Member provides in its anti-dumping legislation that trade unions may qualify as an interested party in an anti-dumping investigation. Is this allowed under the ADA?

5. In the context of an anti-dumping investigation, the investigating authority accepts an undertaking from an exporter not to export more than 5,000 metric tones a year. Is this permissible under the ADA?

## 5. The WTO procedures

***WHAT YOU WILL LEARN***

*This section gives an overview of WTO dispute settlement cases litigated under the ADA. It discusses the special dispute settlement provisions in the ADA and conceptual issues that have arisen in the case law of panels and the AB. It does not discuss substantive or national procedural issues because these have been discussed in the previous sections.*

### 5.1 INTRODUCTION

In light of the explosion of anti-dumping measures worldwide, it is noteworthy that relatively few anti-dumping measures have been challenged in the WTO. There may be several explanations for this phenomenon. More than in other areas of WTO law, anti-dumping measures directly and principally impact on the *private* sector and often result from skirmishes between domestic and foreign industries. Anti-dumping legislation is also complicated and cases are highly factual (as a result of which they are often multi-claim cases). Thus, before a WTO dispute settlement proceeding is initiated, the private industry must explain technicalities to and convince the government of the merits of its case and experience shows that this is no easy task. Furthermore, governments dislike losing WTO cases, especially as complainants where the initiative is theirs, and tend to proceed only if they can be convinced that the case is ironclad. WTO dispute settlement cases in this area are also labour-intensive and costly because so much depends on the details of the case. Last, as anti-dumping duties are producer-specific and there will often be producers with lower and higher duties, the industry as such may not necessarily have a common interest in challenging a measure.

However, the record shows that, once WTO dispute settlement cases *are* initiated, the applicant often is found to have a strong case. The table below provides details with respect to the cases which led to Panel/AB reports from 1995 to 2001.

**Table: WTO cases involving anti-dumping law or measures 1995-2001**

| Panel report | AB report | Date | Applicants [Appellant] | Respondents [Appellee] | Third Parties [Participants] |
|---|---|---|---|---|---|
| Floor tiles | | 28/9/2001 | EC | Argentina | Japan Turkey USA |
| | Hot rolled steel | 24/7/2001 WT/DS184/AB/R | Japan USA | Japan USA | Brazil Canada Chile EC Korea |
| HFCS 21.5 | | 22/6/2001 WT/DS132/RW | United States | Mexico | EC Jamaica Mauritius |
| | H-beams | 12/3/2001 WT/DS122/AB/R | Thailand | Poland | EC Japan USA |
| | Bed linen | 1/3/2001 WT/DS141/AB/R | EC India | EC India | Egypt Japan USA |
| Hot rolled steel | | 28/2/2001 WT/DS184/R | Japan | USA | Brazil Chile Canada Korea |
| Steel plate | | 22/12/2000 WT/DS179/R | Korea | USA | EC Japan |
| Bed linen | | 30/10/2000 WT/DS141/R | India | EC | Egypt Japan USA |
| Cement II | | 24/10/2000 WT/DS156/R | Mexico | Guatemala | EC Ecuador El Salvador Honduras USA |
| H-Beams | | 28/9/2000 WT/DS122/R | Poland | Thailand | EC Japan USA |
| | 1916 AD Act | 28/8/2000 WT/DS136/AB/R WT/DS162/AB/R | EC Japan USA | EC Japan USA | EC India Japan Mexico |
| 1916 AD Act | | 29/5/2000 WT/DS162/R | Japan | USA | EC India |
| 1916 AD Act | | 31/5/2000 WT/DS136/R | EC | USA | India Japan Mexico |
| HFCS | | 28/1/2000 WT/DS132/R | USA | Mexico | Jamaica Mauritius |
| DRAMS | | 29/1/1999 WT/DS99/R | Korea | USA | |
| | Cement I | 2/11/1998 WT/DS60/AB/R | Guatemala | Mexico | USA |
| Cement I | | 19/6/1998 WT/DS60/R | Mexico | Guatemala | USA Canada El Salvador Honduras |

The EC, Japan, Korea and Mexico each were the complainant in two cases, and India, Poland and the United States each in one case. The United States was a defendant in five cases, Guatemala in two cases, and Argentina, the EC, Mexico and Thailand each in one case. It is noteworthy that developing countries[44] were involved as principal parties in six and as third parties in 13 cases.

Third party representations were made mostly by the EC (five times) and Japan and the United States (four times each). This seems to reflect the perception of these countries that it is important to actively monitor and be heard in on-going dispute settlement proceedings because of systemic determinations that will often exceed the specifics of the case.

## 5.2 WTO ADA jurisdiction and standard of review

***Identification of measure in request for establishment***

***Article 17.4 contains a special rule providing that a Member may refer the matter to the DSB if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings. When a provisional measure has a significant impact and the***

[44]. For this purpose I include Argentina, Brazil, Chile, Ecuador, Egypt, El Salvador, Honduras, Guatemala, India, Jamaica, Mauritius, Poland, Thailand and Turkey.

***Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB. Thus Article 17.4, which does not have a counterpart in other commercial defence agreements such as the ASCM and the ASG, explicitly identifies three types of measures.***

***In the first anti-dumping case before it, Guatemala-Cement I, the Appellate Body ruled that the request for establishment of a panel in an anti-dumping case must always identify one of these three measures. In other words, it is not possible to challenge a 'proceeding.' Similarly, it is not possible to challenge the initiation of a proceeding or subsequent procedural or substantive decisions as such. Claims relating to such issues may be made, but one of the three measures mentioned in Article 17.4 ADA must always be identified.***

> *Article 17.4 specifies the types of "measure" which may be referred as part of a "matter" to the DSB. Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. According to Article 17.4, a "matter" may be referred to the DSB only if one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a panel request in a dispute brought under the ADA to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure.*[45]
> ***Guatemala-Cement I, AB***
>
> *In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted. Article 17.4 strikes a balance between these competing considerations.*[46]
> ***United States-1916 Act, AB***

### *Challenging legislation*

In a jurisdictional challenge in the *1916 Anti-Dumping Act* cases, the United States took the position that Article 17.4 ADA should be interpreted as allowing WTO dispute settlement actions only against one of the three measures and not against legislation. The AB rejected this interpretation and upheld traditional GATT jurisprudence that *mandatory* (as opposed to *discretionary*) legislation can be challenged.

> In the same way that Article XXIII of the GATT 1994 allows a WTO Member to challenge legislation as such, Article 17 of the ADA is properly to be regarded as allowing a challenge to legislation as such, unless this possibility is excluded. No such express exclusion is found in Article 17 or elsewhere in the ADA.
>
> …We note that, unlike Articles 17.1 to 17.3, Article 17.4 is a special or additional dispute settlement rule listed in Appendix 2 to the DSU.
>
> …Nothing in our Report in Guatemala – Cement suggests that

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[45]. Guatemala-Cement I, AB, para. 79.
[46]. United States-1916 Act, AB, para. 73.

> Article 17.4 precludes review of anti-dumping legislation as such. Rather, in that case, we simply found that, for Mexico to challenge Guatemala's initiation and conduct of the anti-dumping investigation, Mexico was required to identify one of the three anti-dumping measures listed in Article 17.4 in its request for establishment of a panel. Since it did not do so, the panel in that case did not have jurisdiction.[47]
> ***Guatemala-Cement, AB***

Thus, legislation may be challenged *in se*, if it is mandatory, as was the case in the *United States-1916 Anti-Dumping Act* cases. It may also be contested *as applied* in a certain investigation. The latter occurred, for example, in cases such as *United States-DRAMs* and *United States-Hot rolled steel.* This means that a Member challenges one of the three measures identified in Article 17.4 and argues that certain elements of the national law on which the measure was based violate WTO provisions.

***Special standard of review***

Article 17.6 of the ADA provides a special standard of review for Panels examining anti-dumping disputes.

> …in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned
> ***Article 17.6(i) ADA***
> …the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.
> ***Article 17.6(ii) ADA***

Article 17.6(i) is designed to prevent *de novo* review by panels by placing limits on their examination of the evaluation of the facts by the authorities. Article 17.6(ii) obliges panels to uphold permissible interpretations of ADA provisions by national authorities in cases where such provisions permit more than one permissible interpretation.

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47. Guatemala-Cement, AB, paras 62-72.

Thus far two permissible interpretations have been found only once by a Panel, but the relevant Panel finding was overturned on appeal.

> …we consider that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible.[48]
> ***EC-Bed linen, Panel***
> …we reverse the finding of the Panel…that, in calculating the amount for profits under Article 2.2.2(ii) of the ADA, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade. [49]
> ***EC-Bed linen, AB***

In contrast, in *United States-Hot rolled steel,* the AB overturned the Panel in finding that use of downstream sales prices by affiliates to unrelated customers on the domestic market was a permissible interpretation of Article 2.1.

> *In the present case, as we said, Japan and the United States agree that the downstream sales by affiliates were made "in the ordinary course of trade". The participants also agree that these sales were of the "like product" and these products were "destined for consumption in the exporting country." In these circumstances, we find that the reliance by USDOC on downstream sales to calculate normal value rested upon an interpretation of Article 2.1 of the ADA that is, in principle, "permissible" following application of the rules of treaty interpretation in the Vienna Convention.*
> *We, therefore, reverse the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the reliance by USDOC on downstream sales between parties affiliated with an investigated exporter and independent purchasers to calculate normal value was inconsistent with Article 2.1 of the ADA.*[50]
> ***United States-Hot rolled steel, AB***

## 1.3 Procedural issues

### *Specificity of claims in request for establishment*

The Appellate Body has held that claims must be specified with sufficient precision in the request for establishment of a Panel. While in some instances, it may be sufficient to mention the articles of the Agreements alleged to have been violated (*EC-Bananas*), in cases where articles contain multiple obligations, more detail will generally be necessary (*Korea-Dairy safeguards*), unless the rights of defence of the respondent are not impeded by the failure to do so. The latter determination must be made on a case-by-case basis (*Thailand-H-Beams*).

This ruling is very important for the ADA because many ADA articles, including key articles such as Articles 2, 3, 4, 5, 6 and 12, contain multiple obligations and may form the basis for numerous claims. It is therefore recommendable that an applicant not only refers to articles and paragraphs in an ADA dispute, but also shortly summarises

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48. EC-Bed linen, Panel, para. 6.87.
49. EC-Bed linen, AB, paras 84.
51. United States-Hot rolled steel, AB, paras 172-173.

its claims in descriptive form. This is all the more so because disputes in this area tend to be multi-claim in nature.

***'New' claims***

The Appellate Body has confirmed that a *government* bringing an anti-dumping case is not necessarily confined to the claims made by its *producers* in the course of the national procedures. There is, in other words, no principle of exhaustion of administrative remedies.

> The Panel's reasoning seems to assume that there is always continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO. This is not necessarily the case. The parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute.[51]
> ***Thailand-H-Beams, AB***

***Standing***

WTO dispute settlement proceedings are between governments and, consequently, only WTO Members can initiate such proceedings. Thus, even though anti-dumping disputes are driven by the private sector and target foreign competitors, as opposed to foreign governments, neither the domestic industry nor foreign exporters and producers can initiate or respond in WTO dispute settlement proceedings or appear before Panels or the Appellate Body in their own right.

Indirectly, however, industry representatives may play a role in such proceedings in at least two manners. First of all, the AB has held that Members have the right to compose their own delegation. Thus, if a WTO Member decides to attach an industry representative to its delegation, this is allowed, it being understood that the representative will be subject to the same confidentiality requirements as governmental members of the delegation. Second, interested parties may file *amicus curiae* briefs. This happened, for example, in *EC-Bed linen* in the panel phase[52] and in *Thailand-H-beams* in the AB phase.[53]

## *PANEL RECOMMENDATIONS AND SUGGESTIONS*

THE DISTINCTION BETWEEN PANEL RECOMMENDATIONS AND SUGGESTIONS (WHICH ARE NOT LEGALLY BINDING) IS MADE IN ARTICLE 19.1 DSU[54] AND IS THEREFORE NOT SPECIFIC TO THE ADA.

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51. Thailand-H-beams, AB, para. 94.
52. The Foreign Trade Association filed an *amicus curiae* submission in support of India's complaint, see EC-Bed linen, Panel, footnote 10.
53. The brief was filed by Consuming Industries Trade Action Coalition ("CITAC"), a coalition of United States companies and trade associations.
54. Article 19.1 provides that where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the

HOWEVER, IT IS RECALLED THAT THE MAIN REASON FOR THIS DISTINCTION IS THAT A NUMBER OF GATT PANELS IN THE AD/CVD AREA HAD RECOMMENDED THAT, WHERE INVESTIGATIONS HAVE BEEN INITIATED ILLEGALLY BY THE INVESTIGATING AUTHORITIES, AD/CVD MEASURES IMPOSED MUST BE REVOKED AND DUTIES COLLECTED REIMBURSED. SUCH RECOMMENDATIONS ARE NO LONGER POSSIBLE AND ONLY SUGGESTIONS TO THAT EFFECT CAN NOW BE MADE. THUS FAR, ONLY THE *GUATEMALA-CEMENT* PANEL HAS SUGGESTED THAT A MEASURE BE REVOKED. THE SAME PANEL REFUSED TO SUGGEST THAT THE ANTI-DUMPING DUTIES COLLECTED BE REIMBURSED ON SYSTEMIC GROUNDS.

> In light of the nature and extent of the violations in this case, we do not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Guatemala revoke its anti-dumping measure on imports of grey Portland cement from Mexico.
> In respect of Mexico's request that we suggest that Guatemala refund the anti-dumping duties collected, it is noted that Guatemala has now maintained a WTO-inconsistent anti-dumping measure in place for a period of three and a half years. Thus, the panel fully understands Mexico's desire to see the anti-dumping duties repaid and considers that repayment might be justifiable in circumstances such as these…
> Mexico's request raises important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which have not been fully explored in this dispute. Thus, the panel declines Mexico's request to suggest that Guatemala refund the anti-dumping duties collected.[55]
> ***Guatemala-Cement II, Panel***

measure into conformity with that agreement and that, in addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

55. Guatemala-Cement II, panel, paras 9.6-9.7.

**Questions**

1. A WTO Member adopts legislation mandating prison terms for exporters found to have injuriously dumped. Can this legislation be challenged in the WTO? What do you think a Panel would decide?

2. A WTO Member claims in its request for establishment of a Panel that another Member has violated Article 2 ADA. Is this claim sufficiently precise? What if he claims a violation of article 2.2? Article 3.4? Article 5.9?

3. A WTO Member starts a dispute settlement proceeding against an anti-dumping measure taken by another Member and raises an issue that was not argued by its exporters in the course of the administrative proceeding. Does the Panel have jurisdiction to entertain this claim?

4. A WTO Member starts a dispute settlement proceeding against an anti-dumping measure taken by another Member which is also being challenged in the domestic courts of the latter by the exporters. Can the Panel proceed?

5. Can a Panel recommend the reimbursement of anti-dumping duties, which, in its view, have been illegally collected?

## 6. Developing country members

***What you will learn***

*This section discusses Article 15 of the ADA which provides special and differential treatment for developing countries.*

### 6.1 Article 15 ADA

We have noted above that developing countries have been active participants in WTO dispute settlement proceedings involving anti-dumping issues. At the level of the ADA itself, however, the position of developing countries in most respects is not different from that of developed countries. They must abide by the same rules and developing country exporters have the same rights and obligations as their counterparts in developed countries. The one exception is Article 15 ADA. This Article was unchanged from the Tokyo Round Code.

> 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 anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.
> ***Article 15 ADA***

### 6.2 Panel interpretation

Under the Tokyo Round Anti-Dumping Code, in *EC-Cotton yarns*, Brazil had challenged the failure of the EC to apply this Article; however, the Panel rejected Brazil's claims. As a result, many considered Article 15 a dead letter. However, in the recent *EC-Bed linen* report, the Panel gave the provision new life:

> …the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.[56]
> The rejection expressed in the European Communities' letter of 22 October 1997 does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand…the European Communities simply did nothing different in this case, than it would have done in any other anti-dumping proceeding…Pure passivity is not sufficient to satisfy the obligation to "explore" possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned.[57]
> ***EC-Bed linen, Panel***

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[56]. EC-Bed linen, Panel, para. 6.233.
[57]. EC-Bed linen, Panel, para. 6.238.

### 6.3 Constructive remedies

The Panel further ruled that 'constructive remedies' could take the form of acceptance of undertakings or application of a lesser duty rule. On the other hand, according to the Panel, a decision not to impose an anti-dumping duty on a developing country was not required as constructive remedy.

### 6.4 Timing

As Article 15 provides that constructive remedies must be explored before *applying anti-dumping duties*, the question also arose whether the remedies must be explored before provisional or definitive measures are imposed. In this regard, the Panel held that the obligation arises only before definitive measures are imposed.

**QUESTIONS**

1. What special obligation under the ADA do developed countries have if they wish to impose anti-dumping measures on developing countries?

2. When does this obligation arise?

3. Do you agree with the findings of the Panel?

# CHAPTER II

# DUMPING AND INJURY MARGIN CALCULATION METHODS

## A. Practical aspects of Dumping margin

### 1. Suggestions for developing countries considering the adoption of anti-dumping legislation

It is relatively easy to adopt an anti-dumping law. However, it is very difficult to use it in a WTO-consistent manner. This is because anti-dumping, as developed over time, has become a sophisticated, legalised trade instrument. The basis for anti-dumping law and practice, at least for WTO members, is the WTO Anti-Dumping Agreement [hereinafter: ADA]. The ADA imposes many obligations on countries wishing to apply anti-dumping measures. Careless imposition of anti-dumping duties may quickly lead to WTO challenges.

Generally, developing countries face three major problems with the application of anti-dumping laws:

- Lack of expertise;
- Lack of financial resources; and
- Lack of manpower.

While these are short- to medium-term problems which will be solved in the long run, it is nevertheless worth exploring to what extent they can be minimised. This can be done by keeping the anti-dumping system simple, at least in the initial short- to medium-term "learning" stage. Nevertheless, the system must be compatible with the ADA.

Although we do not suggest that everyone should adopt anti-dumping laws, we will examine some procedural and substantive issues and present some recommendations for developing countries which want to adopt anti-dumping laws in their legal system consistent with the WTO legal framework.

#### 1.1 Procedural issues

***Institutional separation of the dumping and the injury determinations?***

The ADA does not contain any provision on this issue. In practice, most traditional users separate the determinations of dumping and injury. In some cases, these determinations are even carried out by separate agencies. In spite of this, it seems preferable for developing countries to have one single government agency to determine both dumping and injury as there are unlikely to be many cases in the beginning and because staff will be trained most efficiently by conducting an administrative proceeding from beginning to end.

A question often asked by developing countries is which ministry should take charge of this matter. Considering its main function and efficiency concerns, it makes the most sense for a separate department within the Ministry of International Trade and Industry or its equivalent to be in charge of anti-dumping investigations. In addition, this Ministry will maintain regular contact with domestic industries and will therefore be more aware of problems that domestic producers are facing with competition from imports.

On the other hand, the collection of anti-dumping duties should probably be in the hands of the Ministry of Finance because there are similarities between the collection of customs duties and the collection of anti-dumping duties.

As for day-to-day administration of anti-dumping legislation, it seems advisable to establish a separate department within the Ministry of International Trade and Industry. Key disciplines that could be represented in the department dealing with anti-dumping include law, economics and accounting. It also seems recommendable that the department is structured to be an independent technical entity as far as the conduct of the investigations is concerned. However, the final decision on whether to impose duties might probably be made at political level.

In the process of conducting anti-dumping investigations, the competent authorities in developing countries might in the beginning choose to be assisted by independent outside experts. As a matter of fact, even sophisticated users of the antidumping instrument such as the US have sometimes used the service of outside accountants. This assistance might be helpful in preparing the questionnaire, during the verification of the responses, etc.

Article 13 of the ADA provides that each WTO Member with national legislation containing anti-dumping measures must maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review of administrative actions relating to final determinations and review determinations. Such tribunals or procedures must be independent of the administrative authorities.

As anti-dumping determinations are highly technical, it may be recommendable for developing countries to set up a special tribunal to review administrative determinations on this area, as the US has done. On the other hand, as there are certain links between anti-dumping and customs laws, notably customs valuation and rules of origin, developing countries already having in place a court handling appeals of customs decisions might consider expanding the jurisdiction of such a court to also cover administrative anti-dumping proceedings.

***Standing of the Domestic Industry***

Article 5.4 of the ADA provides that, before launching an investigation, the importing country must first determine whether 'there is a sufficient degree of support for the complaint among domestic producers of the like product.' The standing determination must be made before the proceeding is initiated. An infringement of this requirement cannot be cured retro-actively in the course of the proceeding.

In application of Article 5.4, the investigating authority must establish the following two factors cumulatively before initiating an investigation:

- The producers supporting the complaint represent more than 50% of total production by domestic producers, and
- The producers expressly supporting the complaint account for at least 25% of total domestic production.

An example may clarify the operation of these two tests. Suppose that the total domestic production of a product is 1,000 MT, under the second test the producers expressly supporting the complaint then must produce 250 MT. Suppose further that the domestic producers either supporting or opposing the complaint represent 800 MT. In this case, domestic producers supporting the complaint must then produce more than 400 MT in order to meet the first test.

In certain circumstances Article 4.1 of the ADA allows the exclusion of domestic producers of the product concerned from the definition of "domestic industry". This can occur in cases where the domestic producer is related to an exporter or importer of the allegedly dumped product or imports that product itself. Arguably, mere "assemblers" of the product do not qualify as "producers."

***Time-limits***

Traditional users of the anti-dumping instrument have adopted a system of strict time-limits, which because of the complexity of the investigations are often not met. In addition, these time-limits put enormous pressure on the administrative authorities in charge of conducting the investigations.

It is recommendable that developing countries adopt such time-limits only where those time-limits are provided in the ADA. This is for example the case with regard to the eighteen-month deadline for the conduct of investigations provided for in Article 5.10.

***Investigation Period***

The investigation period is the period used to determine dumping margins (and injury margins, where such injury margins are required by implementing legislation).

The ADA does not contain any provision on the determination of the investigation period. In the EC, the investigation period is the one-year period preceding the official initiation of the proceeding. In the US, the investigation period normally covers a six-month period. The longer the investigation period, the more work it is for interested parties to reply to the questionnaire and for the investigating authority to verify it. On balance, it seems recommendable for developing countries to use a short investigation period, for example, six months.

***Questionnaire Format***

Questionnaires are lists of questions addressed to the main interested parties, i.e. foreign producers/exporters, related and unrelated importers and domestic producers.

Sample questionnaires are attached to the module. The responses to the questionnaires, as verified, form the basis for the calculations of dumping and injury.

The ADA does not contain rules on the format of questionnaires used for carrying out the investigation. In traditional user countries, questionnaires have become more and more complicated over time, often containing requests for information that are at most tangential to the real calculations. In spite of this trend, clear and simple questionnaires are preferable for both importing and exporting countries.

With regard to the information to be requested in these questionnaires, it depends on the party to which it is addressed. In case of foreign producers/exporters, questionnaires typically request general information on the exporting company, data on production, capacity utilization, employment, investments, stocks, sales in volume and value in the domestic and export market of the product concerned. In the EC, questionnaires also request information on the cost of production of the product concerned. By contrast, data on cost of production are generally not requested in the US unless the applicant industry alleges that sales below cost occurred. The US approach appears more efficient and therefore might serve as an example for developing countries.

***Sampling, Verifications and Disclosure***

If there are many exporters, importers or users willing to cooperate in an anti-dumping investigation, developing countries might wish to resort to sampling and to send questionnaires to and conduct verifications at a limited number of companies only. The strict provisions of Articles 6.10 and 9.4 of the ADA must however be complied with.

Verifications are visits by importing country administrators to interested parties to determine the correctness of the completed responses of questionnaires submitted by them. Verifications by the EC Commission, which tend to rely more on random checking and cross-checking, take much less time (two-to-three days per company generally) than verifications by case-handlers of the US Department of Commerce.

In cases where high dumping results appear to exist based on the reply filed by the foreign producer/exporter, it is advisable that investigating authorities do not carry out verifications in order to avoid incurring useless costs. Otherwise, the investigating authority might wish to conduct short verifications, as the EC does.

As far as disclosure is concerned, some jurisdictions have a system under which confidential information, submitted by one interested party, can be accessed by the attorneys of other interested parties under an administrative protective order (US, Canada). In other jurisdictions, it is merely required that interested parties submit non-confidential summaries of every confidential document. Although from a systemic point of view the US disclosure system is more comprehensive, the EC's non-disclosure of confidential documents seems preferable for developing countries because it is easier to administer.

***Forms of Duty/Undertakings***

Once dumping and resulting injury are found, anti-dumping duties may be imposed. There are several forms of duties: *ad valorem*, specific (fixed amount), or variable.

*Ad valorem* duties are normally expressed as a percentage of the CIF export price. In order to effectively levy such duties, one must often first calculate the CIF export price on the basis of the customs valuation rules. Exporters can easily circumvent these duties by lowering their CIF export price. Therefore, such type of duty needs anti-absorption rules to ensure its effectiveness. For this reason, *ad valorem* duties may not be in the interest of developing countries.

Specific duties and variable duties are more suitable type of duties when the desired effect is to stabilise domestic price levels. Specific duties involve the levying of a fixed amount per unit, for example $5 per metric ton. This type of duty is very easy to administer but may not be appropriate for certain products.

Variable duties are typically expressed as the difference between the CIF export price and the minimum price. They are payable to the extent that the former is lower than the latter.

In sum, specific and variable duties are easier to administer than *ad valorem* duties. In addition, specific and variable duties are better suited to stabilising domestic price levels than *ad valorem* duties. However, if the importing country wishes to raise revenue, *ad valorem* or specific duties might be more attractive options.

As an alternative to the imposition of anti-dumping duties, developing countries might consider granting minimum price undertakings instead. However, it should be borne in mind that sometimes it takes more resources to enforce minimum price undertakings as they require a certain amount of monitoring.

***Levy and Suspension of Duties***

Another question that developing countries pose quite often is whether duties should be levied prospectively or retroactively.

In the EC, anti-dumping duties are imposed prospectively and, in principle, last for five years. Interested parties can request an interim review if at least one year has passed from the date of imposition of the definitive anti-dumping duties. By contrast, in the US the anti-dumping duty order only provides an estimate of the anti-dumping duty liability. The actual amount of duties due is then determined in the course of subsequent annual reviews. The EC system of prospective levy of duties seems more attractive as it is simpler and requests for reviews and refunds, which are cumbersome to administer, do not happen too often.

Developing countries may consider adopting a temporary suspension provision in their anti-dumping laws. This would allow developing countries not to levy anti-dumping duties on products on a temporary basis in cases where short-supply situations arise.

Finally, developing countries are reminded to establish a residual anti-dumping duty applicable to those exporters which have not cooperated in the investigation. This anti-dumping duty could be set at the highest dumping margin found for any of the cooperating exporters. This reflects the view, held by the EC for example, that exporters should be encouraged to cooperate and should not be rewarded for non-cooperation.

***Motivation Requirements***

Article 12.2 of the ADA requires that the published notice sets forth in sufficient detail the findings and conclusions reached on all issues of law and fact considered material by the investigating authorities. This provision seems designed to preclude importing country authorities from arguing that certain issues of fact or law were considered not material by them and hence not discussed in the published findings.

Article 12.2 of the ADA makes it easier for exporting countries to challenge anti-dumping measures imposed by an importing country in cases where the imposition of the duties is not or is insufficiently motivated. This requirement weighs heavier on developing countries which are handicapped not only by their new user status, but also by the fact that business is sometimes conducted in a less legalistic manner.

## 1.2 Dumping

Traditional users have developed a number of biases in their dumping margin calculation methodologies resulting in higher dumping margins. The rationales for such biases are dubious. Some of them, such as the practice of inter-model zeroing, have been found to violate WTO rules. The application of these biases complicates the dumping margin calculations. For these reasons, developing countries are advised to avoid the lure of following the laws and/or the practice of traditional users on these issues.

## 1.3 Injury

***Distinguishing Injury and Causation***

Under the ADA, the investigating authority will have to show that the domestic industry was not only injured but that it was injured by the dumped imports. In order to comply with this requirement, it seems best that importing country authorities follow a two-step approach to establish injury and causation. In other words, it should be first established whether the domestic injury has been materially injured. If this is the case, it should then be determined whether the material injury is caused by the dumped imports.

***Injury margins***

Article 9.1 ADA provides that anti-dumping duties should be less than the dumping margin if a lesser duty is sufficient to alleviate the injury. This provision is however not mandatory and, for instance, the US and Canada do not calculate injury margins. These countries impose the duty on the basis of the dumping margin. By contrast, the EC implemented the desire expressed in Article 9.1 ADA and routinely calculates

injury margins as well as dumping margins to impose antidumping duties on the basis of the lower of the two. However, as the calculation of injury margins is complicated and technical, developing countries desiring a simple system might be better off not applying a lesser-duty rule. If they nevertheless wish to apply the lesser-duty rule, they could use simpler methods than the complicated EC calculation methods.

***Public Interest Criterion***

In addition to findings of dumping and injury, some jurisdictions such as the EC require that anti-dumping duties be imposed only if they are shown to be in the interest of the domestic industry. Such requirement does not exist in the US antidumping legislation.

An importing country interest criterion seems useful for developing countries because it offers a safety valve if antidumping action, for whatever reason, seems undesirable.

## 1.4 Circumvention

Despite the absence of multilateral rules on anti-circumvention, a number of jurisdictions including the US, EC and some Latin American Countries have adopted anti-circumvention provisions unilaterally. However, it is recommendable to define circumvention tightly and impose strict conditions for the imposition of anti-circumvention measures when developing countries want to do so. In this regard, the Dunkel Draft prepared in the course of the Uruguay Round negotiations might serve as a good example. It provided as follows:

> *Measures to Prevent Circumvention of Definitive Anti-Dumping Duties*
>
> *X.1 The authorities may include within the scope of application of an existing definitive anti-dumping duty on an imported product those parts or components destined for assembly or completion in the importing country, if it has been established that:*
> *(i) the product assembled or completed from such parts or components in the importing country is a like product to a product which is subject to the definitive anti-dumping duty;*
> *(ii) the assembly or completion in the importing country of the product referred to in sub-paragraph (i) is carried out by a party which is related to or acting on behalf of[58] an exporter or producer whose exports of the like product to the importing country are subject to the definitive anti-dumping duty, referred to in sub-paragraph (i);*
> *(iii) the parts or components have been sourced in the country subject to the anti-dumping duty from the exporter or producer subject to the definitive anti-dumping duty, suppliers in the exporting country who have historically supplied the parts or components to that exporter or producer, or a party in the exporting country supplying parts or components on behalf of such an exporter or producer;*

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58. [Footnote No. 2 in original] Such as when there is a contractual arrangement with the exporter or producer in question (or with a party related to that exporter or producer) covering the sale of the assembled product in the importing country.

*(iv) the assembly or completion operations in the importing country have started or expanded substantially and the imports of parts or components for use in such operations have increased substantially since the initiation of the investigation which resulted in the imposition of the definitive anti-dumping duty;*

*(v) the total cost*[59] *of the parts or components referred to in sub-paragraph (iii) is not less than 70 per cent of the total cost of all parts or components used in the assembly or completion operation of the like product,*[60] *provided that in no case shall the parts and components be included within the scope of definitive measures if the value added by the assembly or completion operation is greater than 25 per cent of the ex-factory cost*[61] *of the like product assembled or completed in the territory of the importing country.*

*(vi) there is evidence of dumping, as determined by a comparison between the price of the product when assembled or completed in the importing country, and the prior normal value of the like product when subject to the original definitive anti-dumping duty; and*

*(vii) There is evidence that the inclusion of these parts or components within the scope of application of the definitive anti-dumping duty is necessary to prevent or offset the continuation or recurrence of injury to the domestic industry producing a product like the product which is subject to the definitive anti-dumping duty.*

*X.2 The authorities may impose provisional measures on parts or components imported for use in an assembly or completion operation only when they are satisfied that there is sufficient evidence that the criteria set out in sub-paragraphs (i)-(vi) are met. Any provisional duty imposed shall not exceed the definitive anti-dumping duty in force. The authorities may levy a definitive anti-dumping duty once all of the criteria in paragraph 1 are fully satisfied. The amount of the definitive anti-dumping duty shall not exceed the amount by which the normal value of the product subject to the existing definitive anti-dumping duty exceeds the comparable price of the like product when assembled or completed in the importing country.*

*X.3 The provisions of this Code concerning rights of interested parties and public notice shall apply <u>mutatis mutandis</u> to investigations carried out under this Article. The provisions regarding refund and review shall apply to anti-dumping duties imposed, pursuant to this Article, on parts or components assembled or completed in the importing country.*

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59. [Footnote No. 1 in original] The cost of a part or component is the arm's length acquisition price of that part or component, or in the absence of such a price (including when parts or components are fabricated internally by the party assembling or completing the product in the importing country), the total material, labour and factory overhead costs incurred in the fabrication of the part or component.

60. [Footnote No. 2 in original] i.e., parts or components purchased in the importing country, parts or components referred to in subparagraph (iii), other imported parts or components (including parts or components imported from a third country) and parts or components fabricated internally.

61. [Footnote No. 3 in original] i.e., cost of materials, labour and factory overheads.

We recall, however, the Dunkel draft was never adopted and the Uruguay Round Anti-Dumping Agreement as finally adopted does not contain provisions with respect to anti-circumvention:

> *"When it became apparent that no agreement could be reached on the proposals made by the United States to amend the anti-circumvention provisions in the Dunkel text, the anti-circumvention provisions and country hopping provisions were deleted in their entirety, at the request of the United States."*[62]

### 1.5 Rules of Origin

Anti-dumping duties are normally imposed on merchandise originating in or exported from a certain country. Imposition of anti-dumping duties on the basis of country of exportation may lead to easy circumvention by means of, for example, transhipment. Therefore, imposition of anti-dumping duties on the basis of the country of origin, while more complicated, may sometimes be more effective. The rules used to determine such origin are the non-preferential rules of origin of the importing country. Developing countries wishing to apply anti-dumping duties on the basis of country of origin are well-advised to adopt a set of non-preferential rules of origin to enforce duties imposed.

## 2. Dumping margin calculations

The international basis for dumping margins is Article 2 of the WTO Anti-Dumping Agreement.

A dumping margin calculation essentially involves five steps:

(1) the determination of the export price;
(2) the determination of the normal value;
(3) the *netting back* of both (1) and (2) to bring them back to the same level;
(4) the comparison of the netted back export price and normal value which will give the dumping amount; and
(5) the calculation of the actual dumping margin as a percentage of the export price.

The explanation of these five separate steps will be made with the help of a sample calculation, which is annexed to this paper. Two observations must be made. First, the sample calculation is based on sales of one single model (or type) in both domestic and export market. In case that two or more models (or types) of the like product were sold in the export market, separate calculations would have to be performed for each type. The dumping margin for the like product will be obtained dividing the total dumping amount for the various types exported by the total CIF value. Second, the sample calculation is based on sales to unrelated parties. If sales were made to related parties in the domestic or in the export market, investigating authorities would normally consider the prices charged to the related party to be unreliable. When faced with this situation, investigating authorities normally construct domestic and/or export

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62. Koulen, The New Anti-Dumping Code through its Negotiating History, at 191.

prices starting from the selling price to the first unrelated party (for instance the distributor or the retailer). In view of the complexity of the adjustments made and the diversity of methodologies that might be applied by different investigating authorities, the calculation of constructed normal values or export prices was excluded from the sample calculation and from the explanation below.

## 2.1 Export price

The calculation of the export prices is quite straight-forward (see Annex 6.4, Part I to this paper). The following steps are to be noted:

- Subtract the sales discounts on the invoice from the gross invoice value expressed in the currency of export. This will give the net sales value;
- The net sales value has to be converted into the currency of the exporting country. Normally, the exchange rate to be used is that applicable on the day when the export sale took place. Some investigating authorities, however, request exporters to use the average exchange rate for the month when the sale took place.
- Subtract any quantities or values given by the exporters through credit notes. The net quantity and net sales turnover will be obtained. The net sales turnover in the currency of export has to be converted into the currency of the exporting country, normally using the exchange rate of the date of sale (see above).
- In order to bring the net sales turnover to ex-works level, the adjustments mentioned in section 3.3 below will have to be applied.

## 2.2 Normal value

The determination of the normal value involves three major steps. In the first, the investigating authority examines whether there are representative sales of the product exported in the domestic market. In the second stage, the investigating authority examines whether sales are made in the ordinary course of trade. In the last stage, normal value is calculated. Depending on the conclusions reached by applying steps 1) and 2), normal value will be higher or lower. This will therefore have a direct impact on the dumping margin by the exporter. In the following, these three steps will be explained.

In the first stage, the investigating authority examines whether sales in the domestic market can be considered representative. Article 2.2 of the ADA provides that they are not representative if there are no sales of the like product in the domestic market. In addition, if the volume of sales in the domestic market is low, the investigating authority can also consider those sales not to be representative. If sales for consumption in the domestic market constitute 5% or more of the sales of the product concerned to the importing Member, then they must normally be considered sufficient quantity for the determination of the normal value (footnote two to Article 2.2 of the ADA).

In our sample calculation, sales in the domestic market represented 38.71% of the volume exported (see Annex 6.3). Therefore, this first test was met.

The second step is to determine whether sales are made in the ordinary course of trade. In case that there are no sales in the ordinary course of trade, Article 2.2 of the ADA allows investigating authorities to disregard domestic prices and to establish the normal value on the basis of prices to appropriate third countries or constructed normal values. Article 2.2.1 of the ADA provides for the requirements to be met in order to treat domestic sales as not being in the ordinary course of trade. Footnote 5 to Article 2.2.1 of the ADA provides that sales below per unit costs are made in substantial quantities when *inter alia* the volume of sales below per unit costs represents not less than 20% of the volume sold in the transactions under consideration for the determination of the normal value.

In our sample calculation, the examination of the volume of sales below cost is made in Annex 6.2, Part II. It will be seen that three transactions show a loss (the net value per kg is lower than the weighted average cost of production). In volume, these three domestic sales represent 38.29% of the total sales in the domestic country. That is, the percentage of profitable domestic sales is 61.71%. The percentage of sales below cost is therefore higher than 20% and therefore sales below cost can be considered to be substantial.

As a third step, the investigating authority must calculate the normal value. For this purpose, sales below cost are excluded.

In our sample calculation, the three transactions showing a loss have been excluded (see Annex 6.2, Part V). The normal value is therefore obtained dividing the ex-works price of the profitable quantity by the quantity sold at profit in the domestic market.

## 2.3 Adjustments

Article 2.4 of the ADA provides that a fair comparison must be made between the export price and the normal value. This comparison must be made at the same level of trade, normally at the ex-factory level. Due allowance must be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

In application of the ADA's requirement, investigating authorities traditionally request exporters to submit information on the various adjustments to be made to sales in the domestic and export markets in order to be able to compare normal value and exports price at ex-works level.

In some cases, it is assumed that the adjustments reported in the attached sample calculation (see Annex 6.2, Part IV on domestic sales and Annex 6.4, Part II on export sales) correspond to actual amounts incurred by the exporters. This is the case of the reported amounts for the discounts, freight, charges, packing and commission report in Part II of Annex 6.4 (adjustments on export sales). For credit costs, where the actual cost incurred on a per-transaction basis might be difficult to determine, a notional amount has been calculated.

The amounts for the various adjustments in both the domestic and export market have been added up and subtracted from the net turnover in the currency of the exporting country. This gives the ex-works normal value and export price.

## 2.4 Fair comparison

As a final step, the ADA requires that the investigating authority carries out a fair comparison between the normal value and the export price. Through the comparison of the normal value and the export price, the investigating authority will obtain the dumping margin.
Article 2.4.2 of the ADA provides that the existence of margins of dumping must 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. The comparison can also be made between weighted average normal value and export prices on a transaction-by-transaction basis when certain strict requirements are met.

The sample calculation is based on a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions (see Annex 6.4, Part III and Annex 6.5). The calculation of the dumping margin includes the following steps:

- Determination of the ex-works export price per kg on a per-transaction basis;
- Comparison of the ex-works export price per kg for each transaction with the ex-works normal value per kg;
- The difference between the export price and the normal value constitutes the dumping margin per kg. for each transaction;
- The difference between the export price and the normal value for each transaction is then multiplied by the exported volume corresponding to that transaction expressed in kg, which gives the total dumping amount per transaction;
- The total dumping amount for each export transaction is added in order to obtain total dumping amount;
- The total dumping amount is divided by the total CIF price, which gives the dumping margin. In the sample calculation, the dumping margin is 3.9%

For the reader's reference, in Annex 6.4, Part III the impact on the dumping margin calculation of the zeroing practice is shown. The difference with the above explained comparison methodology is that, when zeroing is applied, negative dumping becomes zero. Therefore, negative dumping cannot offset "positive" dumping; thereby inflating the dumping margin. In the sample calculation, the first three export transactions are sold in the importing country at non-dumped prices. If an investigating authority applies zeroing, the total dumping amount is 299,610.15 monetary units, while if zeroing is not applied, the total dumping amount is 199,512 monetary units. The difference, 100,098.15 monetary units, corresponds to negative dumping from the first three export transactions which has been zeroed. In the sample case, it can be seen that the application of zeroing leads to a higher dumping margin (5.9% versus 3.9%).

## 2.5 Sales below cost and constructed normal value

The relevance of the determination of whether sales in the domestic market are made in the ordinary course of trade has already been explained in section 3.2 above. Thus, the determination that there are no sales in the ordinary course of trade means that the domestic prices cannot be used to establish the normal value. In such cases, Article 2.2 of the ADA gives investigating authorities various possibilities to determine the normal value. A first possibility open to investigating authorities is to use the comparable price of the like product when exported to an appropriate third country, provided that this price is representative. A second possibility is to construct the normal value by adding a reasonable amount for selling, general and administrative costs and profits to the cost of production (meaning cost of manufacturing) in the country of origin. This second option is generally preferred, for instance, by the EC.

In the sample dumping calculation, there is no example of constructed normal values. However, the methodology followed by the EC is explained below:

- The cost of manufacturing for each of the exported types is calculated. This cost of manufacturing includes the costs of raw materials used to produce the exported goods, plus the manufacturing overheads and direct labour;
- The cost of manufacturing for each type is grossed-up with a fixed percentage corresponding to profit and selling, general and administrative costs. The percentage for selling, general and administrative costs corresponds to the amount of selling, general and administrative costs incurred by the exporter in its export sales of the product concerned to the EC during the investigation period divided by the turnover relating to those sales. On the other hand, profit is obtained after excluding the sales below cost in the domestic market. In the sample calculation, the calculation of the profit margin is explained in Annex 6.2, Part II. If an investigating authority calculates the profit on profitable sales only, the investigating authority will exclude the three domestic transactions sold at a loss. The profit on profitable sales will be 117,372.94 monetary units. This will be divided by the volume in kg. of the profitable transactions. When expressed as a percentage, this will give the profit margin on profitable sales (6.96%). By contrast, if one allows the sales at a loss to offset the profit of the profitable sales in the domestic market, the profit margin will naturally be lower (in the sample calculation 113,877.25 monetary units). The profit margin will be obtained dividing this profit margin by the total volume sold in the domestic market in kg. When expressed as a percentage, this shows a profit margin of 4.16%. That is, using the second methodology, the profit margin is 2.80% lower. When using this second methodology, the overall percentage for profit and selling, general and administrative costs will be lower. Therefore, the constructed normal will be lower and so the dumping margin will be.

## 3. Injury margins

Article 9.1 provides that, even if dumping and resulting injury are found, the imposition of anti-dumping measures is discretionary. Furthermore, the article expresses a preference for imposition of measures at a level less than the margin of dumping if a lesser duty would be adequate to remove the injury. Many countries have taken over these provisions in their national anti-dumping legislation. In order

to determine whether a lesser duty suffices to remove the injury, such countries will calculate injury margins. Although modalities vary from country to country, *grosso modo* two methods can be distinguished: price undercutting and price underselling calculations.

### 3.1 Price undercutting: Price comparison

For the purpose of calculating injury margins based on the price undercutting method, the authority normally compares the adjusted[63] weighted average resale prices of foreign producers with the price of similar models/products of EC producers. The difference between the two is the amount of the injury, the comparison of the adjusted prices of foreign and EC producers being one for identical models/products. As a percentage of the CIF export price, it embodies the injury margin. This method implies that if a foreign producer sells above the price of an identical model/product of the EC producers, his injury margin is zero.

The price comparison typically involves the following steps:

1. selection of the national markets to be investigated;
2. selection of representative models produced and sold by EC producers;[64]
3. selection of comparable models sold by foreign producers;[65]
4. adjustment for differences in physical characteristics between the chosen models;
5. adjustment for differences in the level of trade;
6. calculation of weighted average resale price of representative EC models;
7. comparison of weighted average resale price of representative EC models with adjusted prices of comparable foreign models (this gives the per unit, per model amount of undercutting);
8. undercutting per unit multiplied by the quantity of the comparable foreign models sold (this gives the total amount of undercutting);
9. weighted average resale price of representative EC models (7) multiplied by the quantity sold of comparable foreign models (this gives the total EC resale value);
10. total undercutting amount (8) divided by the total EC resale value (9) multiplied by 100 (this gives the weighted average undercutting margin in percentage terms);
11. calculation of adjusted average price level of foreign producer on the basis of weighted average undercutting margin in comparison with average EC industry price;
12. calculation of weighted average CIF price of foreign producer on the basis of the actual price level (as opposed to the adjusted price level);

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63. Adjusted for differences in level of trade and differences in physical characteristics.

64. The authority will normally choose a number of representative models which cover more than 50% of the sales of the domestic producers in the markets chosen.

65. This model comparison is an extremely difficult task and often gives rise to heated arguments. While the authority normally asks the foreign producers/exporters in the questionnaires for foreign producers/exporters to state which models they consider comparable, the question tends to remain unanswered because the foreign producers/exporters do not have the necessary knowledge. The authority then normally makes its own selection and provides all producers involved with an opportunity to comment.

13. calculation of weighted average undercutting margin as a percentage of the weighted average CIF resale price.

As far as the adjustment for physical differences are concerned (step 4), this will normally be calculated on the basis of the differences in cost of production, including selling, general and administrative (SGA) expenses. The profit in percentage terms realised on sales of the finished product will then be added to the cost. If, for example, EC producer P sells a 14 inch colour television model A for US$ 280, and foreign producer S sells a similar colour television model B with a timer for US$ 200, the cost of production, including the SGA, of the timer is US$ 5, and the profit realised by S on the colour television is ten per cent, a downward US of US$ 5.50 would be made to the price of the foreign television. The price for the identical model then would be US$ 194.50.

With respect to the adjustment for differences in level of trade (step 5), it should be noted first of all that the authority will normally compare prices at the level of sales to independent dealers. It will then make an adjustment for differences in level of trade with respect to those sales that were made at other levels. If, for example, a Hong Kong producer sells FOB Hong Kong to a European importer/national distributor and a German producer sells a similar model to German dealers on a delivered basis, it is obvious that – in order to compare apples with apples – an upward adjustment must be made to the FOB prices of the Hong Kong producer to arrive at the price at which he would have sold to a dealer in Germany. Such an adjustment in the example given would have to cover the ocean freight and insurance (*e.g.* 4%), customs duties payable at the EC border (14%), and costs incurred (purchase costs, servicing, physical distribution, marketing, financing and overheads) and profit realised by the national distributor on sales to dealers (*e.g.* 20% in total). In the example above, this would then lead to the following adjustment: US$ 194.50 x 1.04 (4% ocean freight and insurance) = 202.28 x 1.14 (14% customs duty on the CIF price) x 1.2 (20% margin distributor) = 276.72.

The example in Table 1 may clarify the calculation. Assume the following:

**Table 1: Assumptions for the calculation of the injury margin, based on price undercutting:**

| EC producer *X* | | | Foreign producer *Y* | | |
|---|---|---|---|---|---|
| Model | Price | Quantity | Model | Price | Quantity |
| A | 280 | 100 | B | 200 | 150 |
| X | 260 | 200 | Y | 175 | 250 |
| Z | 270 | 100 | Y | | |

1-3. See steps 1 to 3, *supra*.
4. physical difference adjustment model *B:* 200 – 5.50 = 194.50;
5. level of trade adjustment:
   Model B: 194.50 x 1.04 x 1.14 x 1.2 = 276.72;
   Model Y: 175 x 1.04 x 1.14 x 1.2 = 248.97;
6. calculation of the weighted average resale price of EC models:
   A*:* 280 x 100 = 28,000:100 = 280;
   X: 260 x 200 = 52,000;
   Z: 270 x 100 = 27,000;
   X and Z: 79,000:300 = 263.33;
7. per unit, per model amount of undercutting:
   A: 280 – 276.72 = 3.28 undercutting per unit
   X and Z: 263.33 – 248.97 = 14.36 undercutting per unit;
8. total amount of undercutting
   (3.28 x 150 =) 492 + (14.36 x 250 =) 3,590 = 4,082;
9. total EC resale value:
   (280 x 150 =) 42,000 + (263.33 x 250 =) 65,833 = 107,833;
10. weighted average undercutting margin;
    4,082:107,833 x 100 = 3.79%;
11. adjusted average price level of the foreign producer:
    100 – 3.79 = 96.21;
12. weighted average CIF price of the foreign producer:
    96.21 x 100:138[66] x 104%[67] = 72.51;
13. weighted average undercutting margin as a percentage of the weighted average CIF resale price:
    3.79:72.51 x 100 = 5.23%.

### 3.2 Underselling: Target Prices

In some cases, the authority may find that it cannot simply compare prices of domestic producers with the prices charged by foreign producers because the former have been depressed or suppressed by reason of the dumped imports. This will typically be the case where the domestic producers have decided to lower their prices as a result of foreign pricing pressure in order not to lose too much market share.

In such cases, the authority may decide to ignore the sales prices of the domestic producers and construct target prices, consisting of the full costs of production of the domestic producers, including SGA, and a reasonable or target profit. Again, this

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[66]. Adjusted price level = 138% of the actual price.
[67]. CIF ratio = 104% of the selling price.

method has the result that a producer selling above the target price will have a zero injury margin.

The calculation steps will then become as follows:

1. selection of the national markets to be investigated;
2. selection of representative models produced and sold by EC producers;
3. selection of comparable models sold by foreign producers;
4. adjustment for differences in physical characteristics between the chosen models;
5. adjustment for differences in level of trade;
6. calculation of cost of production of representative EC models;
7. calculation of reasonable or target profit;
8. calculation of target price (on the basis of steps 6 and 7);
9. calculation of weighted average target price of representative EC models;
10. comparison of the weighted average target price of representative EC models with adjusted prices of comparable foreign models (this gives the per unit, per model amount of underselling);
11. underselling per unit multiplied by the quantity of the comparable foreign models sold (this gives the total amount of underselling);
12. weighted average target price of representative EC models (9) multiplied by the quantity sold of comparable foreign models (this gives the total EC resale value);
13. total underselling amount (11) divided by the total EC resale value (12) multiplied by 100 (this gives the weighted average underselling margin in percentage terms);
14. calculation of the adjusted average price level of the foreign producer on the basis of the weighted average underselling margin in comparison with the average EC industry price;
15. calculation of the weighted average CIF price of the foreign producer on the basis of the actual price level (as opposed to the adjusted price level);
16. calculation of the weighted average underselling margin as a percentage of the weighted average CIF resale price.

Again, an example may clarify the calculation. Assume the following:

**Table 2: Assumptions for the calculation of an injury margin, based on price underselling**

| EC producer X | | | | | Foreign producer Y | | |
|---|---|---|---|---|---|---|---|
| Model | Cost | T. profit | T. price | Quantity | Model | Price | Quantity |
| A | 290 | 12% | 324.8 | 100 | B | 200 | 150 |
| X | 270 | 12% | 302.4 | 200 | Y | 175 | 250 |
| Z | 280 | 12% | 313.6 | 100 | Y | | |

1-3. see steps 1 to 3, *supra*.
4. physical difference adjustment model B: 200 – 5.50 = 194.50;
5. level of trade adjustment:
Model B*:* 194.50 x 1.04 x 1.14 x 1.2 = 276.72;
Model Y: 175 x 1.04 x 1.14 x 1.2 = 248.97;
6-8. see Table 2.
9. weighted average target price EC models:
A: 324.8 x 100 = 32,480:100 = 324.80;
X: 302.4 x 200 = 60,480;
Z: 313.6 x 100 = 31,360;
X and Z: 91,840:300 = 306.13;
10. per unit, per model amount of underselling:
A: 324.80 – 276.72 = 48.08 underselling per unit;
X and Z: 306.13 – 248.97 = 57.16 underselling per unit;
11. total amount of underselling:
(48.08 x 150 =) 7,212 + (57.16 x 250 =) 14,290 = 21,502;
12. total EC resale value:
(324.8 x 150 =) 48,720 + (306.13 x 250 =) 76,532.5 = 125,252.5;
13. weighted average underselling margin:
21,502:125,252.5 x 100 = 17.7%;
14. adjusted average price level of the foreign producer:
100 – 17.17 = 82.83;
15. weighted average CIF price of the foreign producer:
82.83 x 100:138[68] x 104% = 62.42;
16. weighted average underselling margin as a percentage of the weighted average CIF resale price:
17.17:62.42 x 100 = 27.5%.

It may be clear from the above examples that the underselling method will lead to higher injury margins than the price undercutting method.

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[68]. Adjusted price level = 138% of the actual price.