

BUSINESS AND THE MULTILATERAL TRADING SYSTEM

**WTO NEGOTIATIONS ON THE AGREEMENT ON  
ANTI-DUMPING PRACTICES**

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Companion volume updating the chapter on Anti-Dumping Practices in the joint ITC/Commonwealth Secretariat publication: "Business Guide to the World Trading System" - provides overview of the provisions of the Agreement on Anti-dumping Practices; explains the rights it confers in favour of parties from the business community, and obligations it imposes on investigating authorities; describes developments in the application of anti-dumping measures; reviews proposals tabled in ongoing WTO negotiations for improvement and modification of the provisions of the Agreement; explains steps to be taken in order to derive full benefits from the framework of rights and obligations under the Agreement; includes listing of proposals made for modification of the rules of the Agreement on an issue-by-issue basis; bibliography (p. 91-93).

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## STRUCTURE OF THE VOLUME

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This companion volume updates the chapter on Anti-Dumping Practices in the joint publication of the Commonwealth Secretariat and the International Trade Centre UNCTAD/WTO (ITC), the *Business Guide to the World Trading System*.

The volume is structured as follows:

- **Part One** contains an Introduction and an Executive Summary.
- **Part Two** is divided into two chapters:
  - **Chapter 1** provides an overview of the provisions of the Agreement on Anti-dumping Practices (AD Agreement). This is complemented in **Chapter 2** by explaining the rights it creates in favour of parties from the business community, having an interest in anti-dumping investigations and the obligations it imposes on the investigating authorities, to ensure that the concerned parties are able to take full advantage of these rights.
- **Part Three – Chapter 3** – describes the recent developments in the application of anti-dumping measures. This is followed in **Chapter 4** by an overview of the proposals that have been tabled in the ongoing WTO negotiations for modifications of the provisions of the Agreement and of the differing views that are being expressed in the discussions on these proposals.
- **References** to the relevant provisions in the AD Agreement and cross-references to paragraphs where the same subjects are discussed in different chapters are provided in the margins.
- **The Annex** lists, on an issue-by-issue basis, the relevant proposals that have been made by countries for modifications in the AD Agreement.



## **PART ONE**

### **Introduction and Executive Summary**

# INTRODUCTION

## 1. Basic features of the GATT rules applicable to trade in goods

The General Agreement on Tariffs and Trade (GATT 1994) and its associate agreements contain the rules applicable to multilateral trade in goods under WTO's legal framework. The basic objective of these agreements is to encourage countries to promote economic development by pursuing open and liberal trade policies. The pursuit of such policies benefits producers in the importing countries by enabling them to obtain raw materials and input they need from the most competitive suppliers throughout the world. The resulting cost benefits improve their competitive positions to market their products in other countries. The consumers in all countries benefit as they have a wider choice of goods available at more competitive prices.

In order to ensure that foreign suppliers have liberal and assured access to the markets of importing countries, the rules stipulate that protection to the domestic producers should be provided through tariffs and prohibit the use of quantitative restrictions, except in a limited number of specified situations. Furthermore, they call on member countries to reduce tariffs on a mutually advantageous basis, by participating in periodic rounds of negotiations that are held under the auspices of WTO. The tariffs reduced in such negotiations are listed in each country's WTO schedule of concessions and are bound against further increases. Thus, the binding of tariff rates provides a security of access to foreign suppliers, by assuring them that tariff rates applicable in importing markets would not be raised. It is also not open to countries to impose quantitative restrictions or other measures that reduce the value of bindings to importers and exporters. Both the bound rates and tariff rates that are not bound have to be applied without discrimination to imports from all countries on a most favoured nation (MFN) basis to imports from all countries.

As a result of the rounds of negotiations that have taken place since GATT came into existence in 1948, almost all tariffs of developed countries have been bound against further increases. In the case of developing countries, all were required to bind tariffs in the agricultural sector during the Uruguay Round of trade negotiations. Most of these countries have increased the proportion of tariffs bound by them in the industrial sector significantly. A large number of these countries have, however, made binding commitments at levels that are higher than the reduced rates that have been recorded in their schedule of concessions. This provides them with the flexibility to raise the reduced rates to the level of bound rates anytime this is considered necessary, without infringing any of their GATT obligations.

## 2. Rules governing trade remedy measures

The GATT framework of rules described above recognises that its rules prohibit countries from increasing tariffs over and above the bound rates and prevents them from imposing quantitative restrictions on imports may pose problems to domestic producers in the importing countries in situations:

- Where they are not in a position to meet competition posed by the increased imports, and
- Where foreign suppliers are engaging in unfair trade practices

and permits them to introduce trade restrictive measures.



Trade restrictive measures that are permitted to be taken in the two above situations are known as trade remedy measures. These could take the form of safeguard actions, anti-dumping and countervailing measures.

## **2.1 Definitions**

### **2.1.1 Safeguard actions**

The restrictive measures that may be taken in the first case, viz. where the problems faced by the industry occur due to its inability to meet increased import competition following the reductions in tariffs or removal of other restrictions, are called safeguard actions. The rules provide that such restrictions should be applied for a temporary period of time (not exceeding eight years in the case of developed countries and ten in the case of developing countries), to provide the affected industries some breathing time for improving their competitive position through adoption of new technologies and rationalisation of their production processes and methods.

### **2.1.2 Anti-dumping and countervailing measures**

The second situation in which the rules, under certain conditions, permit countries to take trade remedy measures is where it is established that foreign producers are resorting to unfair trade practices by charging low prices in the importing markets. Such low prices may be the result of subsidies granted by the governments; alternatively, they may be the result of dumping by foreign firms. In the case where low prices are the result of subsidization, the rules permit the governments of the importing countries to levy countervailing duties to offset the element of subsidy in the price. Where such low prices are the result of dumping by the foreign firms, they permit countries to levy anti-dumping duties.

These rules, however, impose two conditions, which must be fulfilled before any of the above-mentioned trade remedy measures could be taken. First, they require that such measures should generally be taken only on the basis of a complaint made by the affected domestic industry. Second, they provide that such measures can be applied by governments only after – on the basis of the investigations undertaken by them, according to the procedures laid down in the relevant Agreement – it has been possible for them to establish that:

- The domestic industry is suffering a material injury, a threat of material injury or that the establishment of the domestic industry is materially retarded.
- The injury being suffered by the industry is causally linked to dumped/subsidised imports.

## **3. The significance of trade remedy measures in trade policy**

The detailed rules relating to the application of safeguard measures are contained in the Agreement on Safeguards. The Agreement on Anti-dumping and Agreement on Subsidies and Countervailing Measures lay down rules governing the use of anti-dumping and countervailing measures respectively. These rules, permitting governments of member countries to take remedy measures, constitute an important element in the policy options available to governments wishing to pursue open and liberal trade practices. Willingness of the business community to support the maintenance of existing liberal policies and to allow their governments to make further improvements in such policies, depends greatly on whether they are confident about the ability of their government to take trade remedy

measures to restrict imports when their interests are adversely affected and conditions relating to such actions prescribed by the relevant WTO agreements are met.

It is important to note, however, that trade remedy measures are double-edged weapons. Used properly and in accordance with the rules laid down by the relevant Agreements, they could play an important role in trade policy measures adopted by governments in the context of liberalization policy, by providing safety nets that enable governments to come to the rescue of their domestic industry:

- In an emergency situation created by their inability to meet the import competition, or
- In situations where they are facing problems as a result of unfair trade practices resorted to by foreign suppliers.

There is danger, however, that such measures could be used for protectionist purposes. This could happen if, in applying such measures, the rules governing their application are not strictly followed.

### **3.1 The increasing use of trade remedy measures by developing countries**

Recent years have witnessed a gradual increase in the use of trade remedy measures. Until approximately two decades ago developed countries were the main users of such measures. Furthermore, many of those measures were targeted against imports from developing countries and transition economies. Since then, the situation has changed dramatically and developing countries – particularly those that are at a higher stage of development – have become important users. Many of the trade remedy measures taken by them have been applied to imports from other developing countries.

Among the trade remedy measures used, the bulk has taken the form of anti-dumping measures. For example, 221 anti-dumping measures were applied in 2003<sup>1</sup>, whereas only 6 countervailing duties were imposed during the same year<sup>2</sup>.

## **4. The Doha mandate for review of the rules**

The increasing use of trade remedy measures, particularly anti-dumping and countervailing measures, has resulted in demands by industries, trade associations and by governments of a number of countries, for review of the rules to ensure that such measures are taken only in situations specified in the relevant WTO agreements, and not for protective purposes. These demands resulted in a decision, including a review of WTO rules relating to anti-dumping and countervailing measures in its work programme, for the negotiations launched at the Ministerial Conference held in Doha in 2001.

Paragraph 28 of the Doha Declaration comprises three elements:

- First, it provides that negotiations should be held during the round and aim at clarifying and improving the disciplines under the Agreement on Anti-dumping Practices and the Agreement on Subsidies and Countervailing Measures.

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<sup>1</sup> See WTO website ([http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm))

<sup>2</sup> Ibid. ([http://www.wto.org/english/tratop\\_e/scm\\_e/scm\\_e.htm](http://www.wto.org/english/tratop_e/scm_e/scm_e.htm))

- Second, it provides that such negotiations, while aiming at improving the disciplines, should “preserve the basic concepts, principles and effectiveness of the Agreements” taking into account the needs of developing and least developed participants.
- Third, to provide a basis for negotiations, it requests the participating countries to table proposals indicating the provisions in the two Agreements, which they consider need clarification and improvement.

The above mandate for negotiations clearly brings out that while a number of countries, including developing countries, considered that there was need for improvements of the rules, in order to ensure that anti-dumping and countervailing measures are taken in the situation specified by the relevant agreements and not for protective purposes, there was general consensus among them that the basic concepts and principles, on which the two Agreements are based, should not be changed.

## **5. Objective and structure of the volume**

The basic objective of this volume, which complements and updates the information contained in the Business Guide to the World Trading System, on rules relating to anti-dumping measures, is two-fold.

First, it brings to the attention of the business community that the rules of the AD Agreement confer certain rights - particularly on producers - for petitioning for anti-dumping actions when dumped imports are causing injury to the domestic industry; and for exporters, to defend their interests when anti-dumping investigations are initiated by countries to which they export.

Second, it provides an overview of the problems that are being encountered in the application of these rules and the differing views that are being expressed in the negotiations on the proposals made for changes of the rules.

The area of anti-dumping duties has been chosen for coverage in the first instance, as these measures represent the majority of the trade remedy measures taken at present by WTO member countries.

# EXECUTIVE SUMMARY

## 1. General

This Executive Summary is divided into three sections. The first section provides an overview of the provisions of the AD Agreement. This is followed by a summary of the recent developments in the utilization of these measures. The last section provides a synoptic picture of the proposals that have been tabled for modifications of the rules and makes brief observations on the negotiating approaches taken by different countries in the Doha Development Agenda and some of the developments relating to the operation of the Agreement.

## 2. Overview of the provisions of the AD Agreement (summary of Chapter One)

The rules authorising countries to levy anti-dumping duties on dumped imported products are contained in Article VI of the GATT 1994. These rules have been elaborated in a separate Agreement. Its official title is Agreement on Implementation of Article VI. It has, however, become a practice to call it Agreement on Anti-dumping (“AD Agreement”).

When are goods treated as being dumped? In common parlance dumping is presumed to occur when foreign suppliers sell their products at unfairly low prices. The AD Agreement, however, lays down strict criteria for determining when products should be treated as being dumped. In particular it states that a product is to be treated as being dumped by an exporter, if the price at which a “like product” is “sold for consumption in the exporting country” is higher than the export price. In other words, if on the basis of a comparison of the export price and the price charged by the exporter for sale of a like product in his home market, it is found that the former price is lower, the product could be considered as being dumped.

The question that arises is why WTO rules permit taking anti-dumping measures on dumped imports. Lower prices charged by foreign suppliers of such articles like textiles and clothing, shoes and televisions, benefit consumers in importing countries. In cases where industrial raw materials like steel, aluminium and chemicals are dumped, industries using them as inputs in further processing and manufacturing benefit from lower prices in competing in world markets. From the point of view of consumer and industries using raw materials in the importing countries, dumping by foreign suppliers could be “welfare creating”.

While dumping by foreign suppliers could bring welfare benefits to consumers and industrial users, it may adversely affect or injure the industries producing similar products that are being dumped in the importing countries or may pose problems for the developments of such industries. The GATT rules seek to draw a balance between these two conflicting considerations. Its Article VI, for instance, states that dumping “is to be condemned only if it causes or threatens to cause material injury to an established industry” in the importing country or “materially retards the establishment of a domestic industry”. The purpose of this provision is to emphasise that no anti-dumping duties should be levied by importing countries where low prices resulting from dumping are non-injurious for the domestic industry. Further, in order to ensure that anti-dumping measures are applied taking into account this principle, the AD Agreement provides that:

- Such measures can be taken only after an investigation has been initiated and conducted in accordance with its provisions, and
- As a result of these investigations it has been established that the imports concerned.

- Are dumped
- That the domestic industry is suffering material injury, a threat of material injury, or that the establishment of a domestic industry is materially retarded, and
- That the injury being suffered by the industry is causally linked to the dumped imports.

Anti-dumping measures that are permitted to be taken under the provisions of the Agreement take three forms: provisional measures, price undertakings by the exporter to maintain prices that eliminate dumping; and final duties.

The Agreement further provides that anti-dumping duties collected should not exceed the margin of dumping determined on the basis of comparison of the price charged by the exporter for the product for sale in his domestic market and its export price. The level of anti-dumping duties is, therefore, determined for each exporter separately on the basis of a comparison of prices charged by them in their domestic and export markets. Where, however, due to the existence of a large number of small exporters or for other reasons it is not possible to fix separate rates, a weighted average rate calculated on the basis of separate rates, which were calculated for individual exporters, is applied to the remaining exporters.

### **3. The rights of exporters and producers in the exporting countries in anti-dumping investigations – a business perspective (summary of Chapter Two)**

The WTO member countries are under an obligation to ensure that their national legislations are in full conformity with the rules of the AD Agreement. Countries which have not been able to adopt such laws are prevented from taking anti-dumping actions.

The procedures and practices that are applied by countries in pursuance of their national laws create certain rights in favour of the parties from trade and industry, which has trade and economic interests in the outcome of anti-dumping investigations. These interested parties from the business community include, on the one hand “foreign producers, exporters and importers” whose interests may be adversely affected if anti-dumping measures are taken, and on the other hand “domestic producers in the importing countries” who may have an interest in petitioning for anti-dumping investigations, when dumped imports are causing injury to the domestic industry.

Key examples of such rights are:

- The right of exporters, foreign producers or importers to expect that anti-dumping measures shall not be taken unless it has been established on the basis of investigations undertaken, in pursuance of the provisions of the Agreement, that dumped imports are causing injury to the domestic industry in the importing country;
- The right of the above-mentioned parties (e.g. exporters, foreign producers and importers) to “defend their interests” in the investigations undertaken by the authorities of the importing country; and
- The right that producers in the importing country - of the products that are like the imported dumped products - have to petition for the levying of anti-dumping duties when they consider that such imports are causing injury to the domestic industry.

To ensure that the parties on whom the above-mentioned and other rights are conferred are able to derive full benefits from their right, the AD Agreement imposes certain obligations on them and on investigating authorities. However, the obligations imposed on investigating authorities mainly aim at

providing transparency to the investigating procedures, while those imposed on parties aim at assisting them in securing full benefits from the rights conferred on them.

It is important to note that the rights which the Agreement confers on the parties having interests in anti-dumping investigations can be exercised on their behalf by “trade or business associations”, if the majority of the concerned parties are members of such associations.

#### **4. Recent developments in the application of anti-dumping measures (summary of Chapter Three)**

Recent years have witnessed increasing resort to anti-dumping measures by all countries – developed, developing and transitional economies. The increasing use of these measures by developing countries, particularly by those that are at a higher stage of development, can partly be attributed to the policies they are pursuing for gradually opening their markets to foreign competition by reducing tariffs and eliminating quantitative and other barriers to trade which they applied previously. As a result of reductions in tariffs made on an autonomous basis and in the Uruguay Round of trade negotiations, the average level of tariffs of all developing countries had fallen from an average of 15.5 per cent in the pre-Uruguay Round period to (approximately) 12.3 per cent by 2000.

The continued maintenance of these policies requires the governments of these countries to come to the rescue of their domestic producers if they are able to demonstrate that they are being injured by unfair trade practices, such as dumping, resorted to by foreign exporters. Even though developing countries are now becoming important users of anti-dumping measures, from the point of view of “trade impact”, the measures taken by developed countries have serious adverse effects on the trade of developing countries. It is important to note in this context that a significant proportion of such measures taken by developing countries are also targeted against other developing countries.

#### **5. Overview of the proposals tabled in the ongoing negotiations for modifications in the provisions of the Agreement, of the negotiating positions and of other developments relating to the operation of the Agreement (summary of Chapter Four)**

Increasing resort to anti-dumping measures has also resulted in complaints that such measures are often used by countries to protect their industries from competition from outside countries. A number of problems have also arisen in the application of the rules, as countries have interpreted them in different ways. In the ongoing negotiations, therefore, a number of proposals have been tabled by some of these countries for modifications in the provisions of the Agreement with a view to ensuring consistency and predictability in their application. These can be grouped under the following headings.

- Proposals made for improvements in rules relating to the initiation of investigations;
- Proposals made for review of the rules relating to the determination of dumping margins;
- Proposals made for review of the rules applicable to the determination of the volume of dumped imports for establishing a causal link between such imports and injury to the domestic industry;
- Proposals for review of the rules relating to the imposition and collection of anti-dumping duties;
- Proposals for review of the rules relating to the determination of injury to the domestic industry;
- Proposals for more detailed rules on sunset reviews, providing that anti-dumping measures should not be extended beyond the 5 years stipulated in the Agreement.

## 5.1 Proposals made for improvements of the rules relating to the initiation of investigations

The rules of the Agreement require that the investigations should be initiated only after it has been possible of the investigating authorities to evaluate, on the basis of the information provided by the petitioners in their applications, that dumped imports are causing injury to the domestic industry. In making such an assessment the authorities are further expected to satisfy the requirement that the applicants petitioning for imposition of anti-dumping measures are acting on behalf of the domestic industry. The experience of the operation of the Agreement has, however, shown that these rules permit the investigating authorities to commence investigations, even though there is not adequate evidence to suggest that the domestic industry is being injured by the dumped imports. Some countries have, therefore, proposed that:

- The provisions imposing obligations for examining the accuracy and adequacy of the evidence in the applications for imposition of anti-dumping duties and for the evaluation of such evidence should be strengthened, in order to ensure that investigations are not commenced on the basis of unsubstantiated evidence.
- The commencement of back-to-back investigations, where new investigations are started soon after an investigation is terminated on the grounds that there is no evidence of dumping or injury, on the basis of a fresh complaint, should be prohibited.
- The existing rules, requiring investigating authorities to terminate investigations where the margin of dumping is found to be *de minimis* and the volume of dumped imports negligible, should be revised to raise the threshold levels that have been provided in the Agreement. It has also been suggested that, in relation to the volume of imports, the threshold should be calculated not in relation to imports of the product under investigations, but in relation to the consumption in the importing country of such product. Adoption of such criteria may also ensure that ordinarily no anti-dumping duties are levied on imports from least developed countries.
- The provisions in the Agreement, stipulating that the applicants must demonstrate that in order to establish that the application is made “by or on behalf of the industry” producing like products, they have support of producers accounting for 25 per cent of the production for their request for imposition of anti-dumping measures should be amended to provide for a threshold of 50 per cent.
- To remove the uncertainty which has arisen because of the absence of a precise definition in the Agreement of like products, it is proposed that the relevant provisions should be clarified by establishing, *inter alia*, non-hierarchical and non-exhaustive criteria which countries must apply in determining whether the imported product, alleged to be dumped is identical to the domestically produced product and is, therefore, a like product.

## 5.2 Proposals for review of rules relating to the calculation of dumping margins

The AD Agreement lays down that anti-dumping duties payable by the exporters should not exceed the “margin of dumping”. To ensure compliance with this rule, it prescribes criteria and methodologies that should be followed in determining dumping margins. In particular, it provides that the margin of dumping should ordinarily be determined on the basis of comparison of the “normal value”, (calculated on the basis of price for sale of a product which is “like” the product under investigation) with the “export price” charged for such a product in the country where the complaint is made.

The Agreement, however, provides that it may not be possible to determine the margin of dumping on the basis of the above criteria, in the following cases:

First is the case where there are no sales in “the ordinary course of trade” in the domestic market. The Agreement does not define the concept of ordinary course of trade. In practice, however, most of the investigating authorities treat sales between affected parties as not in the ordinary course of trade, if the relationship between the parties has influenced the domestic price.

Second is the case where, because of the particular market situation or low volume of sales in the domestic market of the exporting country, a comparison between the domestic and export price is not feasible. However, in order to ensure that the dumping margin is determined on the basis of comparison between domestic and export prices to the maximum extent possible, the Agreement provides that such sales, which constitute 5 per cent or more of the sales under consideration in the domestic market, should be considered as sufficient to warrant the use of the criteria.

However, where it is not possible to determine the dumping margin by comparison between domestic and export prices because of the above-mentioned situations, the Agreement provides that the margin could be determined on the basis of:

- A comparable price for like products when exported to an appropriate third country market, provided the price is appropriate, or
- The cost of production plus a reasonable amount for administrative selling and general expenses and for profits.

The proposals made for modifications of the rules in this area aim at dealing with some of the problems that have arisen as a result of the way in which they are applied in practice. These include the following:

- In calculating dumping margins on the basis of a comparison of the normal value (adjusted domestic price) with the export price, the rules provide methodologies that should be used for averaging of the margins in different transactions. Such margins may be positive or negative. The margin is positive when the normal value (domestic price) is higher than the export price (e.g. normal value \$100 – export price \$80 = margin \$20). It is negative, where the export price is higher than the normal value (normal value \$90 – export price \$100 = dumping margin - \$10). The normal practice should be to take into account, in averaging, both negative and positive margins. If this were done, the average dumping margin in the case cited above would be \$10. However, some countries treat – in calculating average dumping margins – negative margins as zero. These practices inflate the average dumping margins. In the above case if the negative margin is treated as zero, the average dumping margin would be \$20.

It has, therefore, been proposed that this practice of disregarding or treating the negative margins as zero (“zeroing”) should be prohibited.

- In determining the margins of dumping on the basis of a comparison of the normal value and the export price, the practice of most countries is to disregard the transaction between the exporting company and the affiliated parties, where the investigating authorities consider that relation has influenced the price on the grounds that such sales are not in the ordinary course of trade. The AD Agreement provides no guidelines on how affiliated transactions between affiliated parties should be treated; nor does it contain any definition of affiliated and non-affiliated parties.

Some countries have therefore proposed that a definition should be adopted, providing that a party should be treated as an affiliated party if, *inter alia*, it has more than half of the voting power. A



specific criterion should further be adopted for determining when transactions with affiliated parties could be disregarded in calculating the normal value and export price on the grounds that prices charged were not in the ordinary course of trade.

The counterview is that a definition of the affiliated parties on the basis of the percentage share in voting rights may not always be useful, as even a small percentage of control of the equity (5 per cent) often enables a firm to influence the prices.

- A related issue that arises is how sales below cost (i.e. at prices that are lower than per unit costs of production – fixed and variable – plus administrative, selling and general costs) should be treated in calculating the average normal value, for comparison with the export price. If such sales are taken into account in averaging, it would give a lower normal value. On the other hand, if such sales are disregarded, as sales involving such transactions are considered, as being “not in the ordinary course of trade”, the average normal value and the resulting dumping margin would be higher.

The Agreement, therefore, puts restraint on the right of investigating authorities to disregard such sales in calculating normal value, by providing that sales could be disregarded only where:

- The volume of sales below unit costs represent not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value,
- They are made at prices that do not provide for recovery of all costs within a reasonable period of time, and
- For a period of more than six months.

It has been suggested that this threshold should be raised to 40 per cent. The acceptance of the proposal would limit the right of the investigating authorities to disregard sales below costs, only if they exceed 40 per cent of the sales under consideration. If they are lower than this threshold, they must be taken into account in determining the normal value.

The rules relating to the calculation of a constructed normal value, on the basis of the cost of production, should be reviewed to provide, *inter alia*, that where such a value is determined by using methods other than the accounts of the producing company, there should be a cap on the element of profit that could be included in the calculation of costs.

### **5.3 Proposals for review of the rules applicable to the determination of the volume of imports for establishing a causal link between such imports and injury to the domestic industry**

A question that has been raised, is how the volume of dumped imports that should be taken into account in determining whether such imports are causing injury, should be determined. The practice followed by a large number of countries is to calculate such a volume of trade on the basis of all imports of the products under investigation from the country alleged to be dumping. This often leads to a situation when imports from such a country, from producers/exporters who are not dumping, are being taken into account in determining the volume of imports.

The rules further envisage that investigating authorities should determine whether dumped imports are causing injury separately for each exporting country, on the basis of the volume of dumped imports originating in that country. The Agreement, however, permits the investigating authorities to make such a determination by cumulating imports from different countries, which are alleged to be dumping, if certain specified conditions are met.

Some countries have proposed that:

- The term “dumped imports” should be clarified to cover only imports from exporters who are dumping and not total imports of the product under investigation from the concerned exporting country.
- Rules in the Agreement, which permit cumulation of imports from different countries in assessing injury to the domestic industry, should be reviewed with a view to limiting situations in which such assessment could be made.

#### **5.4 Proposals for review of the rules relating to the determination of injury to the domestic industry**

The Agreement lays down 15 economic factors (such as the decline in sales, profits, output, market share, productivity, return on investment or utilisation of capacity), which must be examined by the investigating authorities in determining whether dumped imports are causing injury to the domestic industry. Further, in order to ensure that such measures are taken only where the volumes of dumped imports are causing injury, it lists factors other than dumped imports that could pose problems to the domestic industry. The investigating authorities are expected to examine these “non-attributable factors” in order to avoid the possibility of injury being determined on the basis of such factors.

Under the Agreement, the investigating authorities are under a mandatory obligation to examine the 15 listed economic factors. No such mandatory obligation, however, applies to the examination of “non-attributable factors”.

Some countries have suggested that:

- The mandatory 15 economic factors that the investigating authorities must examine and evaluate should be further elaborated, in order to ensure consistency and predictability among investigating authorities in examination.
- The provisions relating to non-attributable factors, which require investigating authorities to ensure that injury to the domestic industry is not determined by factors other than the dumped import, should be reviewed to broaden such a list of factors and to make their examination mandatory.

#### **5.5 Proposals relating to the levying of anti-dumping duties where dumped imports are materially retarding the establishment of the domestic industry**

The AD Agreement states that the term “injury” covers cases where dumped imports are causing or threatening to cause material injury to the domestic industry, as well as cases where such imports are retarding the establishment of the domestic industry. It does, however, not contain any precise rules prescribing the causal link between dumped imports and retardation of the establishment of the domestic industry. There is, therefore, a need for the adoption of new rules to facilitate the application of anti-dumping duties on such grounds.

## 5.6 Proposals for review of the rules relating to the imposition and collection of anti-dumping duties

The Agreement provides that as far as possible, anti-dumping duties should be determined separately for “each known exporter”, by calculating separately dumping margins on the basis of the prices charged by them in the domestic market and for exports. However, in cases where – because of a large number of exporters – it does not become possible to fix such individual rates for all exporters, separate rates may be fixed for a limited number of exporters selected on the basis of a statistically valid sample.

The Agreement further provides that anti-dumping duties should ordinarily be determined by using data on prices and other elements needed for the determination of the dumping margins on the basis of the information provided by the producers and exporters in the questionnaires sent to them. Where, however, such exporters or producers fail to submit such information or do not provide additional requested information, or otherwise impede the investigations, the investigating authorities are permitted to determine prices on the basis of the information provided by the domestic industry applying for the imposition of anti-dumping duties and “other facts” available to them.

For known exporters for whom such individual rates have not been fixed, a “common rate” is determined on the basis of the weighted average margin, calculated for exporters for whom separate rates have been determined on the basis of the above two methods. However, in calculating such an average, zero and *de minimis* margins and margins determined on the basis of facts available are to be disregarded. This rate is often called “limited examination rate”.

It is the practice of some of the investigating authorities to apply such a common rate to exporters whose identity was not known to the investigating authorities when the anti-dumping duties were being determined. The practice, however, is not uniform; while some apply the common rate, others apply the highest rate available. The rates applicable to exporters whose names were not known at the time of the determination of duties are called “all other rates”.

One of the other important rules laid down in the Agreement is, that where it is considered that a duty which is less than the dumping margin would be adequate to prevent injury, a “lesser duty” should be applied. This is called the “lesser duty rule”. The lesser duty rule is, however, at present recommendatory, and not mandatory.

It has been suggested that:

- Rules that permit investigating authorities to make a preliminary and final determination, affirmative or negative, on the basis of the information available to them (facts available), should be reviewed to ensure that they do not resort to this method, unless they have made sufficient efforts to obtain necessary information from the concerned exporters or producers.
- Rules in the Agreement relating to the common rate of duty, applicable to exporters for whom separate rates have not been determined (all other rate), should be reviewed.
- The obligation to apply a duty which is less than the “dumping margin”, if it is adequate to prevent injury, should be made mandatory.

## 5.7 Sunset reviews

The AD Agreement limits the application of the anti-dumping measures to a period of five years. Such duties could, however, be continued if, on the basis of a review conducted before the end of the five-year period, the need for the continuation of the measure is established. The experience has shown that because of the provisions for review, anti-dumping measures are being maintained in a number of countries for periods longer than the maximum period of five years provided by the Agreement. Against this background, some countries have suggested that:

- Anti-dumping duties should be terminated automatically after five years without having to undergo the process of sunset reviews.
- The same standards that apply to the initiation of investigations should be applied in undertaking such reviews. In particular, the provisions that investigations for anti-dumping duties should be terminated if dumping margins are *de minimis* or the volume of imports is negligible, should be made applicable in the examination in sunset reviews of the need for the continuation of the anti-dumping measures after the expiry of the 5 year period.

## 5.8 Broad outline of the negotiation approaches and positions

A few broad observations can be made on the negotiating positions taken by different countries on the discussions on the above proposals. On the basis of negotiating positions and approaches taken, it may be possible to divide countries that are presently taking an active interest in the negotiations, into three groups.

In the first group are countries that are pressing for clarification and improvement of the rules with a view to prescribing stricter criteria for the application of such measures. The countries falling in this group have come to be known as “Friends of Anti-dumping Negotiations”. The group includes Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Japan, Korea, Mexico, Norway, Singapore, Switzerland and Thailand and Turkey.

These countries have stated that they have six objectives in seeking clarification of the rules of the AD Agreement. These are:

- Terminating unwarranted and unnecessary investigations at an early stage. By improving the disciplines relating to the initiation of investigations, the filing of frivolous and unjustified petitions for the levying of anti-dumping duties can be prevented.
- Improving and clarifying substantive rules relating to the calculation of dumping margins and determination of injury.
- Mitigating the excessive effects of AD measures by, *inter alia*, making it mandatory for investigating authorities to take into account the “public interest” aspects, through examination of the impact of anti-dumping duties on other stake holders such as industrial users and consumers of the product on which such duties would be levied.
- Enhancing the transparency of the proceedings of anti-dumping investigations.
- Reducing the costs of anti-dumping investigations: Due to the increased complexity, the AD investigations have become very costly for importers, governments, and other parties. Moreover, as costs do not vary according to the volume of trade, small exporters have to bear the same burden as larger exporters.

- Preventing AD measures from becoming permanent, by reviewing the rules relating to the review of the measures after a period of five years, in order to discourage the practice of allowing a “rollover” of such measures for further periods.

The second group comprises countries, which consider that the Agreement is working well and are generally not in favour of most, if not all, of the proposals tabled. In this group would fall U.S.A and a few of the other countries, both developed and developing.

The third group comprises countries with positions between the positions of the two above-mentioned groups. This group could include the European Union and a number of developing countries.

In this context it is important to note that it has not been possible for a number of developing countries, particularly those at a lesser stage of development, to participate actively in the discussions that are taking place at WTO on the basis of the above proposals. Many of these countries have pointed out that since, at present, their administrations lack the institutional and technical capacities needed for taking such measures, separate simplified rules may have to be adopted for use by them when dumped imports are responsible for causing injury to their industries.

It should be noted that the above classification of countries into different groups does not reflect the differences or nuances and emphasis in the positions taken by different countries.

It is necessary to emphasise in this context, that this volume does not contain explanations of the negotiating positions taken by countries. Given its objective and purpose, which is to explain the various issues relating to the reform of the anti-dumping law for the benefit of the business and trading community, Chapter Four of this volume mainly describes the main features of the proposals tabled, counterviews that are being expressed, and highlights the points that would need further examination for more informed discussions on the proposals.

## **5.9 Other developments relating to the operation of the Agreement**

One of the other important issues relating to the operation of the Agreement - that was examined at the WTO on the basis of a complaint made by the EU and co-sponsored by Brazil, India and Japan - was whether it was permissible to the government of a country imposing anti-dumping and countervailing duties to distribute the amounts collected to the firms that had petitioned for relief. The United States Continued Dumping and Subsidy Control Act (known as the Byrd Amendment), adopted in 2000, requires the Customs Department to forward such collected duties to the petitioning firms and other domestic industry supporting the initiation of investigation, rather than adding it to the general revenue, as was the practice earlier. The Appellate Body ruled that such payments to domestic producers constituted actions that were inconsistent with WTO provisions relating to the impositions of anti-dumping and countervailing duties, and has asked the U.S.A to modify its law to bring it in conformity with the provisions of the AD Agreement.



## **PART TWO**

**Description of the provisions of the Agreement on Anti-Dumping and of the rights and obligations it creates for the business community**





## CHAPTER ONE

### Description of the Provisions of the Agreement on Anti-Dumping Practices (AD Agreement)

#### General

This chapter explains the provisions of the AD Agreement. It is divided into **seven** sections:

- **Section 1** describes the rules, which the investigating authorities have to follow in examining the applications received from producers alleging that dumped imports are causing injury to domestic production and the considerations that they have to take into account in deciding on whether or not to initiate investigations.
- This is followed in **Section 2** by an explanation of the rules which investigating authorities have to follow in actual conduct of the investigations.
- **Section 3** is devoted to the explanation of the rules the AD Agreement lays down for the determination of dumping margins.
- **Section 4** describes the rules embodied in the Agreement for the determination of injury to the domestic industry.
- **Section 5** explains the rules governing the application of provisional measures, the imposition of anti-dumping duties on a definitive basis and those relating to situations in which exporters can give “price undertakings” in order to avoid payment of anti-dumping duties.
- **Section 6** is devoted to the explanations of the procedures that are followed for collection of anti-dumping duties.
- **Section 7** explains the rules of the AD Agreement, for sunset and other reviews, in order to ensure that anti-dumping duties are not, without adequate justification, continued for a period of more than five years from the date of their imposition and are terminated earlier, if such termination is warranted by the circumstances.
- The last section (**Section 8**) describes the provisions relating to special and differential treatment to developing countries and those relating to the settlement of disputes among WTO member countries.

## 1. Rules applicable to the initiation of investigations

### 1.1 The need to establish a separate investigating authority

#### Art. 4

The AD Agreement requires that anti-dumping measures should be applied only after properly initiated and conducted investigations. However, it does not contain any guidelines as to how such investigating authorities should be constituted. This leaves considerable flexibility to countries in adopting institutional machinery that they consider suitable. In practice, in most of the countries a specialised department or body within a particular government Ministry is designated to conduct the investigations. **Box 1** describes the broad features of the institutional frameworks that have been adopted by different countries.

As the analysis done in an anti-dumping investigation requires a multiplicity of professional skills, the staff of anti-dumping investigating authorities typically includes technical experts, including lawyers, economists (trade economists) accountants, financial analysts and computer specialists. The number of staff in an anti-dumping authority varies from country to country and depends on available resources and the number of investigations handled.

#### Box 1<sup>3</sup>

##### **Institutional framework adopted for investigations of anti-dumping cases**

It is customary for Member countries to designate a specialized department or body within a particular government ministry or office for conducting anti-dumping investigations, e.g. the Ministry of Trade and Industry, the Ministry of Commerce, the Ministry of Finance, or officials of the Customs Department.

A bifurcated system has been established in some Member countries (e.g. U.S.A., Canada and Argentina), where the investigations of injury and dumping are undertaken by two different governmental bodies. In such systems the agency responsible for determining injury is usually an agency, which is independent from the central government.

In other Members – such as the EC, New Zealand, Mexico, Brazil and South Africa – a unitary system has been established, where a single government body processes both aspects of the investigations. Under such a system the administrative body in charge of administering the Anti-dumping laws may be independent from the government (e.g. Venezuela, Korea). Some jurisdictions (e.g. the Philippines) require that investigations are handled by separate government bodies, e.g. where one agency holds the responsibility for the initiation and determination at the preliminary stages of the investigation, while the other body makes the final determination.

It is customary that the decision-making part of the process is separated from the investigative process, irrespectively of the type of system – unitary or bifurcated. Traditionally, the actual decision-making procedure and the level of decision-makers – at officer or ministerial level – may also differ. Some jurisdictions stipulate that the final decisions are taken by a minister, a group of ministers; or by or senior officials acting on the recommendation of the relevant ministry or agency. Other jurisdictions grant the authority/authorities handling anti-dumping issues the full power to make decisions. Still other jurisdictions restrict the powers of the independent decision-making body only to the initiation and preliminary stages of the determination, thus leaving the final power to decide on definitive measures to a minister or group of ministers.

<sup>3</sup> This section draws on pp. 5-6 in Czako, J; Human, J & Miranda, J (2003), A Handbook on Anti-Dumping Investigations, World Trade Organization, (Cambridge, CUP: 2003).

## **1.2 Initiation of anti-dumping investigations**

### **Art. 5.1**

Who can initiate investigations? The AD Agreement provides that anti-dumping proceedings can be initiated ordinarily on the basis of a written application, made by or on behalf of the industry affected by the alleged dumped imports.

### **Art. 5.6**

Under “special circumstances”, however, such investigations may be initiated by the investigating authority itself, acting on its own responsibility. The Agreement, however, provides that the authority should initiate such investigations only if it has “sufficient evidence of dumping, injury to the domestic industry and of the causal link between injury and dumped imports”. An example of a case where an authority might decide to initiate an investigation on its own responsibility might be where the domestic industry consists of a number of small scale producers who are not organized in an association and are therefore not able to submit an application on behalf of the industry, even though they are suffering material injury from dumped imports.

## **1.3 The minimum information required in the application**

### **Art. 5.2**

Where an application is made by producers affected by dumped imports, the Agreements provide minimum information which must be provided in the application, in order to substantiate that the dumped imports are causing injury to the industry and to establish a causal link between dumped imports and the alleged injury.

Once the application is received, one of the first steps that the investigating authorities must take is to examine whether it meets the minimum information requirement. If it fails to meet this requirement, the authorities may request the applicants to submit additional information, or ask them to resubmit the application with additional information.

## **1.4 The obligation not to publicise the filing of the application**

### **Art 5.5**

The Agreement calls on investigating authorities to avoid publicising the filing of the application for anti-dumping investigations. The requirement is considered necessary, as public knowledge of such filing often makes importers to divert their orders from exporters or countries alleged to be dumping to other sources or countries.

## **1.5 The obligation to notify the government of the exporting country**

### **Art 5.5**

The investigating authorities are, however, required to notify the receipt of the application for anti-dumping investigations, to the government of exporting countries immediately after they decide that the filed application meets the documentation requirements prescribed by the Agreement. Further, as soon as investigations are initiated, the authorities must make available the full text of the written application to the governments of the exporting countries.

## **1.6 Assessing the standing or representativity of the applicants**

### **Art 5.4**

In deciding on whether or not to initiate investigations, the authorities have also to examine simultaneously whether the application is being brought by a section of the industry, which accounts for a major proportion of the total production. Such examination is commonly referred to as assessing the “standing” of the applicant. For this purpose the Agreement requires the investigating authorities to apply two separate but complementary tests.

- First, the authorities must assess whether the domestic producers expressing support to the application account for more than 50 per cent of production of the like products produced by firms expressing either support or opposition to the application.
- Second, they must satisfy that domestic producers expressing support to the application account for at least 25 per cent of the total production of the like product of the industry (**see also paras 2.1 and 2.2 in Chapter Two**).

## **1.7 Considerations that should be taken into account by the investigating authorities when initiating investigations**

### **Art 5.3**

The Agreement requires investigating authorities to examine the “accuracy and adequacy” of the evidence provided in the application relating to dumping, injury to the domestic industry and to other matters, in order to determine whether there is sufficient evidence to justify the initiation of investigations. It further calls upon them to consider simultaneously the evidence on dumping and injury both in deciding on whether or not to commence investigations and during the course of subsequent investigations.

### **Art 5.8**

However, the AD Agreement provides that the application should be rejected and there should be immediate termination of the investigations if:

- The dumping margin is *de minimis*
- The volume of imports actual or potential is negligible or
- The injury is negligible.

The Agreement defines *de minimis* dumping margin as a margin lower than 2 per cent (expressed as percent of the export price). 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 per cent of the total imports of the like product. However, this rule does not apply where countries which individually account for less than 3 per cent of imports each, collectively account for more than 7 per cent of the total imports (both dumped and not dumped).

To sum up the above discussions on the initiation of investigations, the investigating authorities can decide to initiate an investigation if:

### **Art 5.2**

They are satisfied that the application submitted contains the required information;

They have checked the “adequacy and accuracy” of the evidence relating to dumping, injury to the domestic industry and to other matters;

**Art. 5.4**

They conclude that the applicants submitting the application have the necessary standing;

**Art. 5.3**

They are satisfied that, after examining the accuracy and adequacy, of the evidence regarding dumping and injury, there is “sufficient evidence” to justify the initiation of investigations, and

**Art. 5.8**

The application provides evidence that the dumping margins are more than *de minimis* and that the volume of dumped imports and the resulting injury is more than negligible.

## **1.8 Public notice of the decision to initiate investigations**

**Art. 12.1.1**

Once the authorities have decided to initiate investigations, the Agreement requires investigating authorities to give public notice of the decision to initiate investigations. Such notice should contain adequate information with respect to the following:

- The products involved.
- The name of the exporting country or countries involved.
- The date of the initiation of proceedings.
- The basis on which dumping is alleged in the application.
- The summary of the factors on which the allegation of injury is based.
- The address to which representation by interested parties should be sent.
- Time limits allowed to interested parties in making their views known.

## **2. Rules governing the conduct of investigations**

### **2.1 Fixing of time periods for collection of data**

The main purpose of the investigations is to ascertain whether, as alleged by the applicants, dumped imports are causing injury to the domestic industry. For this purpose, the authorities need to gather data on which such findings can be based. An important question that arises refers to the period for which data to be used in the investigations should be collected by the investigating authorities.

The AD Agreement does not contain any specific guidelines on how the period of collection of data should be determined for making an assessment of dumping or injury. The Committee on Anti-dumping Practices has, however, adopted recommendations that reflect the common practice followed by the members. They provide that:

- As a general rule the period of data collection for dumping investigations, should normally be 12 months and in any case not less than 5 months, ending as close to the data of initiation as practicable.

- In the case of an injury investigation, the period of data collection “shall normally be at least 3 years, unless the party from whom data is being gathered, has existed for a lesser period, and should include the entirety of the period of data collection for dumping investigations”.

From the above recommendations it is clear that the period for which data is collected for injury investigations is longer than that fixed for collection of data needed for dumping investigations. The main reason for this is that in the case of dumping investigations the authorities have to ascertain primarily whether goods are being dumped or not, while in the case of an injury determination, the data is needed to examine how over a period of time, the industry has been adversely affected as a result of the dumped imports. It is also important to note that the recommendations preclude, in the case of dumping investigations, data from being collected for the period after the initiation of the investigations

## **2.2 Transmission of copies of the application to the governments of the exporting countries and to all known exporters**

### **Art. 6.1.3**

Immediately after the investigations are launched, the authorities are required to transmit the full text of the application that has been filed to “all known exporters”.

Although it is not required by the AD Agreement, it is the practice of some authorities to send the public version of the application also to the known importers. In addition the application must be made available, upon request, to all other interested persons.

As noted earlier, the Agreement calls on the investigating authorities to inform the Governments of the exporting countries that the application petitioning for anti-dumping action has been made, as soon as a properly documented application has been filed. After the decision to initiate negotiations is taken, the investigating authorities are under an obligation to send them the full text of the application.

## **2.3 The issuing of questionnaires**

### **Art. 6.1.1**

It is standard practice of the investigating authorities to send detailed questionnaires for collection of data required for assessing whether, as alleged in the application, dumped imports are causing injury to the domestic industry. The AD Agreement imposes an obligation to send such questionnaires to all exporters and foreign producers. In practice however, most of the investigating authorities send such questionnaires also to domestic producers, importers and in some cases to purchasers of the imported products in the domestic market. Generally, for this purpose separate standard or model questionnaires - tailored for soliciting information that is needed from each of the above-mentioned parties - are kept ready by the investigating authorities, in order to ensure that these are sent soon after the investigations are launched. **(See also para 1.2.2 in Chapter Two).**

## **2.4. On the spot investigations**

### **Art.6.7 and Annex II**

Investigating authorities often find it necessary to undertake on the spot investigations to verify the information provided by exporters or foreign producing companies in response to the questionnaire or

to collect additional information. The Agreement stipulates that such investigations should be carried out only

- With the agreement of the firms concerned, and
- If the government of the concerned exporting country has been notified and does not object to the investigation.  
(See also para 1.2.3 in Chapter Two).

## **2.5 Provisions relating to hearings and transparency of the investigation process**

### **Art. 6.2; see also**

The AD Agreement provides that the investigating authorities should - throughout the investigations - provide “full opportunity to all interested parties for the defence of their interests”. In pursuance of these provisions, the investigating authorities commonly hold for the following types of hearings:

- Adversarial hearings where parties with opposite interests are present, and
- Hearings where only one party is present and information is presented.  
(See also para 1.4.2 in Chapter Two).

## **2.6 Disclosure of “essential facts” before making the final determination**

### **Article 6.9**

After completion of the investigations and termination of the hearings, but before the final determinations are made, the investigating authorities are required to inform the parties of the “essential facts under consideration which form the basis for the decision whether to apply definitive measures”. It further states that the “disclosure should take place in sufficient time for the parties to defend their interests”. (See also Para 1.4.4 in Chapter Two).

## **3. Rules relating to the determination of dumping margins**

### **3.1 The main criterion for the determination of dumping margins**

#### **Art 2.1**

As noted earlier, the AD Agreement lays down that the main criterion that is to be used for determining whether goods are being dumped, is to compare the “export price” of the product under investigation with its “normal value”. Such a normal value is calculated on the basis of the price at which a product, which is identical or similar (like product), is sold in the domestic market. If the normal value or domestic price is higher than the export price, the product could be considered as being dumped.

### **3.2 Identification of like products**

#### **Art 2.6**

In order to ensure that the price comparison remains fair, the investigating authorities have to identify products that are being sold in the domestic market of the exporting country, which are “like” the

alleged dumped exported product. The Agreement provides that products could be treated as like products if they are “identical” to the alleged dumped products or in the absence of such products “closely resembles” those products. The reason for having more than one possibility is that the exporter might not be selling a product, which is exactly the same as the exported product, in the domestic market of the country of export. Thus, when there is no perfect match between the product sold in the domestic market and the allegedly dumped product, the Agreement allows a calculation of the normal value on the basis of the price of the product sold in the domestic market, which closely resembles the allegedly dumped product. It would, however, be necessary in such cases to make due allowance for differences in the physical characteristics and quality between the two products when determining prices for comparison purposes.

### **3.3 Adjustments in export prices and normal value**

#### **Art 2.4**

The AD Agreement further provides that in order to ensure that a comparison between the export price and the normal value (domestic price) remains fair, “such comparison should be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible, the same time”.

Adjustments have also to be made for any differences between the domestic and export prices that affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade quantities and physical characteristics.

Such adjustments are normally made to domestic prices. The AD Agreement requires the investigating authorities to consult the interested parties in making such adjustments. At the same time it requires them not to impose “an unreasonable burden of proof on the parties”.

### **3.4 Currency conversion**

#### **Art 2.4.1**

Comparing the normal value (domestic price) with the export price normally involves the conversion of the former into the currency of the export transaction. Because of fluctuations, the rate used for currency conversion could greatly influence the margin of dumping. In order to ensure consistency in the methods used by investigating authorities, the AD Agreement provides that the exchange rate prevalent on the date of sale should be used for conversion purposes. However, if the transaction is based on an exchange rate stated in a forward contract, that rate should be used.

### **3.5 Methods to be used in price comparison**

#### **Art 2.4.2**

Once the decision is taken on the type of adjustment that would have to be made in the export and domestic prices to make them comparable, the AD Agreement provides that one of the two following methods could be used for calculating dumping margins:

- A comparison of a weighted average normal value and weighted average export price;
- A comparison of normal value and export price on transaction-to-transaction basis.



The AD Agreement also permits a third method, a comparison of weighted average normal value to individual export prices. This method, however, can be used under very specific circumstances where investigating authorities find “a pattern of export prices which differ significantly among different purchasers, regions or time period”.

A description of the main features of the first two methods is provided below, followed by illustrations of how dumping margins are calculated under each of these methods.

**A. Calculation of dumping margin by comparing weighted average normal value against weighted average normal value**

Table 1 below illustrates the calculation of weighted average dumping margin for the product under investigation.

It is assumed that the product is exported in 10 different models (A to J). Margins for two of the models are negative (models B and D) and for one model (model F) equals zero.

The weighted average dumping margin is calculated by multiplying each dumping margin by the corresponding weight as share of total export volume of total exports; summing up the totals; and dividing by 100.

Some members either exclude negative dumping margins (viz. -2.36; -0.95 and 0.0 from the table above) from the calculation of the weighted average or include them with a value of zero. This practice inflates the weighted average dumping margin considerably. The Panel has ruled out that the practice of zeroing in calculation model-specific margins, is inconsistent with the provisions of Article 2.4.2 which provides that a weighted average dumping margin used for the levying of anti-dumping duties, must be determined by comparing the weighted average normal value with the export price for all comparable export transactions.

**Table 1<sup>4</sup>**  
**Calculation of the dumping margin for the subject merchandise**

Product code (A)	Weighted average export price \$/MT (B)	Weighted average normal value \$/MT (C)	Dumping margin in percentage terms % (D)=(C-B)/(B) x 100	Dumping margin in percentage terms % Including zeroing	Shares in total volume exported during POI (E)
A	380	467	22.74	→ same margin	40%
B	424	414	(-2.36)	0	20%
C	408	425	4.17	→ same margin	3%
D	420	416	(-0.95)	0	5%
E	402	454	12.94	→ same margin	15%
F	440	440	0.00	→ same margin	2%
G	410	415	1.22	→ same margin	4%
H	401	408	1.75	→ same margin	3%
I	402	437	8.71	→ same margin	3%
J	409	440	7.58	→ same margin	5%
<b>Weighted average dumping margin:</b>			<b>11.38</b>	<b>11.90</b>	

<sup>4</sup> The information and data draw on pp. 187-200 in Czako, J; Human, J & Miranda, J (2003) A Handbook on Anti-Dumping Investigations, World Trade Organization, (Cambridge, CUP: 2003).

## B. Calculation of dumping margins on transaction-to-transaction basis

Where the dumping margin is calculated on a transaction-to-transaction basis, specific margins are calculated for each of the export sale. The Agreement requires that under this methodology, comparison between the normal value and the export price should be made in respect of sales “as near as possible in time”. One of the important criteria that have to be applied in identifying comparable normal value is how close in time sales are to export sales. Table 2 below illustrates how the dumping margin is calculated under this method.

**Table 2<sup>5</sup>**  
**Calculation of the dumping margin by comparing individual normal values**  
**to individual export prices**

Date of export sale (A)	Exported qty MT (B)	Adjusted export price \$/MT (C)	Date of sale (D)	Adjusted normal value \$/MT (E)	Dumping margin in percentage terms % (F)=(E/C)/(C) x 100	Shares in export volume % (G)
07/01/2000	19.0	444	05/01/2000	512	15.3	2.9
08/01/2000	20.0	415	05/01/2000	512	23.6	3.0
21/01/2000	18.5	439	19/01/2000	508	15.6	2.8
22/01/2000	19.5	410	19/01/2000	508	23.9	3.0
07/02/2000	18.0	434	05/02/2000	503	15.8	2.7
08/02/2000	19.0	405	05/02/2000	503	24.3	2.9
21/02/2000	17.5	429	19/02/2000	498	16.1	2.7
22/02/2000	18.5	400	19/02/2000	498	24.7	2.8
07/03/2000	17.0	424	05/03/2000	494	16.4	2.6
08/03/2000	18.0	395	05/03/2000	494	25.1	2.7
<b>Weighted average dumping margin:</b>					<b>5.67</b>	

### 3.6 Treatment of sales below cost

#### Art 2.2.1 and footnotes 3, 4 and 5

A question arises as to whether in calculating normal value for comparison purposes, sales below cost of production in the domestic market should be taken into account. If such sales are taken into account, the resulting dumping margin could be low; on the other hand, exclusion of such sales will result in higher margins, leading to imposition of comparatively high anti-dumping duties. Under certain circumstances, sales below cost may also be “normal business practices”. For instance, firms routinely dispose of old models below cost of production, before introducing in the market new models. Selling below cost may, however, be justifiable, if the firm is able to recoup losses incurred over a reasonable period of time.

The Agreement therefore leaves an option to investigating authorities to decide on whether sales below cost should be included or not in determining normal value for price comparison purposes. It however provides that, if they wish to exclude such sales they could do so if such sales below cost:

- Are being made within an extended period of time, normally one year,
- The average selling price in the domestic market is less than weighted average cost,
- The volume of sales below cost is substantial, i.e. more than 20 per cent of the total, and

<sup>5</sup> The information and data draw on pp. 187-200 in Czako, J; Human, J & Miranda, J (2003, A Handbook on Anti-Dumping Investigations, World Trade Organization, (Cambridge, CUP: 2003).

- The costs are not recovered over a reasonable period.

### 3.7 Determination of dumping margins when there are no sales in the domestic market

#### Art 2.2

The Agreement envisages that a dumping margin should be calculated on the basis of comparison of the normal value (determined on the basis of domestic prices) and export prices in all cases except:

- Where there is no sale in the domestic market of the like product in the domestic market of the exporting country, or
- Where because of the “particular market situation or low volume of sale in the domestic market”, such a comparison is not feasible.

However, in order to ensure that prices for sale in the domestic market are used in anti-dumping investigations to the maximum extent possible, the Agreement provides that domestic sales representing more than 5 per cent of the exports of the alleged dumped product shall not be treated as “low volume of domestic sales”. It further states that domestic sales accounting for even a smaller proportion can be used as a basis for price comparison purposes as long as such sales “are of sufficient magnitude to provide a basis for such comparison”.

The Agreement does not specifically identify cases in which, because of the “particular market situation”, domestic prices should not be used for determining the normal value.

In cases where the dumping margin cannot be determined - in the above-mentioned situations - on the basis of a comparison between the normal value and the export price, the Agreement provides that the margin should be determined:

- By a comparison of export price by a comparable price of the like product when exported to an appropriate third country market, or
- On the basis of the cost of production in the country of origin plus a reasonable amount for administrative, selling and general expenses and profits.

The Agreement does not express any preference between the above two alternatives (viz. third country price or constructed value) and it is open to a country to choose either export prices to a third country market or constructed normal value calculated from cost of production for price comparison purposes.

#### 3.7.1 Calculation of the constructed value

The value determined by using the method based on the cost of production is known as “constructed value”. **Box 2** below summarises the guidelines embodied in the Agreement for calculation of the constructed value.

**Box 2**  
**Guidelines for calculating constructed values**  
**(Agreement on Anti-dumping, Art. 2.2.1 and 2.2.2)**

When investigating authorities decide, for price comparison purposes, to replace the consumption price in the exporting country with a constructed value, calculated on the basis of the production costs of the exporting industry, the AD Agreement lays down principles for arriving at such a value. In particular, it states that the costs should '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'.

The Agreement further provides that the amounts for administrative, sales and general costs and profits should 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'. However, when it is not possible to determine such amounts on the above basis, the Agreement provides that they can be determined on the basis of:

- Actual amounts incurred by the producers or exporters in question on sales of other merchandise in the same general category;
- The weighted average amounts incurred by other producers or exporters in respect of production and sales of the like product; and
- Any other reasonable method, provided that the amount for profit so established does not exceed the profit normally realised by other exporters or producers of the same general category of products.

### **3.8 Calculation of dumping margins separately for each known exporter and producer**

#### **Art 6.4**

The Agreement provides that dumping margins on the basis of the methods described above, should - as a rule - be calculated separately for all known exporters, producers or importers, in order to enable the investigating authorities to determine individual rates of duties for each of them. However, where - because of the existence of a large number, it becomes impracticable to determine separate margins - the individual margin could be determined only for a limited number of producers and exporters.

### **3.9 Determination of dumping margins for goods originating in non-market economies**

#### **Notes to**

#### **GATT Art VI:1**

In the case of non-market economies where the state has a complete or substantial monopoly on trade and where all domestic prices are fixed by the state, the rules of GATT 1994 provide that it may not always be appropriate to determine the dumping margin on the basis of a price comparison between the domestic prices and export prices. Neither GATT 1994, nor the AD Agreement lay down any precise guidelines on how a price comparison should be made. This leaves considerable discretion to the investigating authorities in calculating dumping margins for the levying of anti-dumping duties on products imported from non-market economies. The practice followed by most authorities is to use - instead of the domestic price of non-market economy countries:

- The export price from a surrogate country to a third country, or
- A constructed normal value on the basis of cost data of the applicant industry.

With the progress made by Eastern Europe and other regions where previously production and trade were controlled by the state, the number of countries that are treated as non-market economy countries has steadily declined. Most of these countries, which in the years after the collapse of communism

were referred to as “countries in transition”, have now completed their transition to market economies and have become members of the European Union.

Among countries that are still treated as “non-market economies” by the investigating authorities in a number of other countries, perhaps the most important in international trade is China. The box below provides an overview of how the dumping margins are calculated by the investigating authorities in the USA and the EU in investigations against China.

#### **Determination of dumping margins for imports from China**

The Protocol on the Accession of the People’s Republic of China (WT/L/432) permits countries to treat China as a “non-market economy” for 15 years from the date of its accession to WTO, i.e. until 2016. Since its accession, China has been seeking to secure “market economy status”. However, these efforts have been met with limited success. The United States, for instance, still treats China as a non-market economy country and uses – for price comparison purposes in anti-dumping investigations – “prices charged for exports to a third country”, or “costs of production” in one or more market economy countries that are at a “comparable level of economic development”. Such countries are referred to as “surrogate countries”. India is often used as a surrogate country. Examples of other countries that are used as surrogates are Pakistan, Indonesia, Sri Lanka, the Philippines and Bangladesh. The European Union utilises a different method than the USA. The EU treats China not as a “non-market economy”, but as a “transition economy”. This permits the investigating authorities to give individual producers and exporters that meet certain criteria “market economy status” in anti-dumping investigations. For Chinese producers and exporters that do meet these criteria, price or cost data from other comparable market economy countries are used. Under EC law such countries are referred to as “analogue countries”. The EU has used a variety of analogue countries for China, including Argentina, Brazil, Turkey, Thailand, USA and Norway. A number of other countries treat China and other transition economies in a similar way as the USA and thus, for price comparison purposes, use information from surrogate countries.

## **4. Determination of injury to the domestic industry**

### **4.1 Definition of domestic industry**

#### **Art. 3**

Anti-dumping measures are permitted to be taken in cases where investigating authorities have been able to establish that dumped imports are

- Causing material injury to the domestic industry,
- Threatening to cause material injury to the domestic industry, or
- Retarding the establishment of the domestic industry.

#### **Art. 4**

In all of the three situations above, an important issue which the investigating authorities have to address is how to determine what constitutes “domestic industry”, in order to determine whether the dumped imports are causing injury or threatening to cause material injury or retarding its establishment. The Agreement clarifies that domestic industry for this purpose must include “domestic producers as whole of the like product” or “of those of them whose collective output of the like product constitutes a major proportion of the total production”.

#### **4.1.1 Non-inclusion of “related” producers**

It is, however, open to the authorities to exclude, when determining what constitutes “domestic industry”:

- Producers who are related to the exporters or importers or
- Are themselves importers of the alleged products,

#### **Art 4.1 and footnote 11**

As prices charged by such producers to exporters and importers may not reflect prices charged in transactions in normal commercial sales.

Producers are to be treated as related to exporters or importers only where, legally or operationally:

- One of them, directly or indirectly, controls the other;
- Both of them are directly or indirectly controlled by a third person, or
- Together they directly or indirectly control a third person.

The mere existence of such a relationship would, however, not be a sufficient ground for producers related to exporters or importers from being excluded from what constitutes the domestic industry. There must be sufficient grounds to believe or suspect that the “effect of the relationship is such as to cause the producer concerned to behave differently than non-related producers”.

#### **4.1.2 Determination of the “domestic industry” on a regional basis**

#### **Art 4.3**

The term “domestic industry” covers the production of the products under investigation of producers situated within the country. Where, however, two or more countries are members of a customs union, the production in the area of the union may be treated as “domestic industry”, if “it has reached the level of integration that they have the characteristics of a single market”.

#### **Art 4.1 and 4.2**

In exceptional situations, the Agreement permits the investigating authorities to divide the production into two or more competitive markets, and treat production in each market as a separate industry for the purpose of determination of injury, provided that:

- The producers within each regional market, sell all or most of their production of the product in question in the market and that
- The demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory of the country.

However, where the domestic industry has been determined as referring to producers belonging to a certain area or region within a country, in accordance with the above provisions, the anti-dumping duties can be levied only on the products that are “consigned for final consumption in that area”. However, in cases where the constitutional law of the importing country does not permit the levying of anti-dumping duties on such a basis, it could levy such duties without limitations only if:

- The exporters have been given an opportunity to cease exporting at dumped prices, or have made price undertakings and the adequate assurance in this regard has not been given, and

- Such duties cannot be levied only on products of specific producers who supply the area in question.

## **4.2 Rules governing investigations of injury to the domestic industry**

### **Art 3.1**

The Agreement further requires that investigating authorities shall base their injury determination on the “objective examination” of the evidence of:

- The volume of dumped imports,
- The effect of such imports on prices in the domestic market for the like products, and
- The consequent impact of these imports on domestic producers of such products.

### **4.2.1 Impact of the volume of dumped imports on the domestic industry**

#### **Art 3.2**

In examining the evidence in the application of the volume of dumped imports, the investigating authorities are required to examine whether there has been an increase in the volume of dumped imports, either in absolute terms or relative to consumption.

In order to comply with these provisions, the authorities are required to review the import data of the exporting country in order to assess the percentage increases/decreases in the volume of dumped imports from one period to the next during the course of the investigations. Import data is also compared to production and apparent consumption, in order to assess whether there is relative increase in the level of dumped imports.

In this context, it is important to note that even though anti-dumping duties are collected only from those exporters who are found to be dumping, the practice of many countries is to take into account all imports of product(s) which are “like” the product(s) under investigation, from the country where exporters are situated.

This issue was examined by the panel in the *EC Bed Linen Case*. India had argued that EC should have limited its consideration of the effect for dumped imports, to those imports attributable to specific transactions in which dumping was actually found during the period of the investigations. The Panel held that the “ordinary meaning” of the term “dumped imports” has to be determined in the light of the object and purpose of Articles 3.1, 3.4 and 3.5 of the AD Agreement. These provisions make it clear that a dumping determination is made with respect to a product and not on the basis of individual transactions. In this context, the Panel referred to the earlier GATT decision in *Salmon Anti-Dumping Duties* where it was held that the term “dumped imports” included imports from all producers from the concerned exporting country, without distinction of transactions. The panel further observed that the interpretation of “dumped imports”, suggested by India, as being limited to only those transactions with positive margins would be impossible, at least impracticable, to administer in cases where dumping margins are based on samples or on weighted average prices.

#### **4.2.2 Cumulation of imports**

##### **Art 3.3**

Normally when imports from several countries are subject to investigations, the assessment of whether such imports are causing injury to the domestic industry has to be made separately for each country. The Agreement, however, allows the investigating authorities in certain situations to assess the combined effects of all imports under investigation in determining injury. Such a cumulation of imports is allowed only if:

- The dumping margin or the amount of subsidization of each individual country exceeds the *de minimis* level;
- The volume of imports from each country is not negligible; and
- Such cumulative assessment is appropriate in the light of conditions of competition between imported products and the conditions of competition between the imported products and the like domestic products.

#### **4.2.3 The effect of such imports on prices in the domestic market for the “like product”**

##### **Art 3.2**

Once the volume of imports that should be taken as a basis for investigations has been determined, the investigating authorities are required to examine the effects of such imports on prices. The Agreement envisages that effects on prices may be reflected in the following three ways.

- Price undercutting
- Price depression
- Price suppression

It further lays down guidelines that should be used in assessing the price effects in each of the above situations. In particular it states that:

- Whether price undercutting have occurred, can be analysed by comparing prices of imported products with the prices in sales of “like” domestically produced and imported products. Such a comparison, however, should be made with trade taking place at the same level and under the same conditions.
- Price depression can be determined by considering the trend in price of the like domestic product over the period of investigation. If these prices are declining, it then becomes necessary to assess whether such declines are significant and whether they can be attributed to the effect of dumped imports.
- A finding of price suppression requires, firstly, a conclusion that domestic prices should have increased. Secondly, there must be a conclusion that the expected price increase has not occurred or has been less than expected, as a result of dumped imports.

#### **4.2.4 Economic factors that must be taken into account for establishing a causal relationship**

In assessing the impact of dumped imports on the domestic industry, an evaluation has to be made of “all relevant economic factors and indices having a bearing on the industry”.



### **Art. 3.5**

The Agreement states that such factors could include:

- Actual and potential decline in sales, profit, output, market share, productivity return on investment or utilization of capacity;
- Factors affecting domestic prices;
- The magnitude of margin of dumping;
- Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and investment.

The Agreement imposes a mandatory obligation on the investigating authorities to examine - when evaluating the impact of dumped imports on the domestic industry - each of the factors mentioned above. However, it clarifies that the listing is not exhaustive. This implies that the investigating authorities must also examine whether any factors, other than those listed, may be adversely affecting the domestic industry.

That the obligation to examine the listed factors is mandatory, was reaffirmed by the Panel in the *Thailand H-Beams Case*. In the *EC Bed Linen Case*, the panel - while reaffirming that the list was mandatory - observed that the records of investigations must clearly demonstrate how the investigating authorities considered whether each of the factors mentioned in the paragraph were relevant or not in final determination.

**Box 3** highlights some of the elements that have to be taken into account in evaluating the state of the domestic industry.

### **Box 3**

## **Factors to be taken into account when determining injury to the domestic industry**

### **I. Decline in sales, profit, output, market share, productivity return on investment or utilisation of capacity**

#### **1. Declines in sales**

Movements in sales revenue reflect changes in volumes and prices of goods sold. Dumped imports can affect either of these factors through increased supply of goods to the market and/or through price competition. An increase in sales during the period of investigation will not necessarily preclude a finding of material injury.

#### **2. Declines in profits**

Changes in net profit reflect changes in prices, sales volumes and costs. The effect of dumped imports can be reflected in any or all of these variables. Profit levels and profitability are important factors in evaluating whether dumped imports are causing injury. In some circumstances it may be possible to determine that injury is being caused where profits are not declining, depending on the facts of the individual case.

#### **3. Declines in output**

Changes in output, or domestic production, reflect production decisions in response to factors such as changes in demand and competition, movements in prices, costs of production, etc. A decline in production will usually be reflected in declines in sales revenues, depending on price movements. However, declines in output will not necessarily support a finding of material injury, while increased output will not preclude such a finding.

#### **4. Declines in market share**

The analysis of market share must take account of the growth or decline of the market as a whole and questions of demand in general, as well as with respect to dumped imports versus domestic goods. This requires information on the volumes of imports. Imports may decrease in absolute terms, but still increase their market share under certain market conditions. A decline in the market share of the domestic industry, even a relatively small decline, can be an indicator of material injury

#### **5. Declines in productivity**

It is essential to measure productivity in terms of real output, but it is often impossible to separate capital productivity from labour productivity. To measure this factor, investigating authorities generally calculate the 'average product', which is the total output divided by the amount of any one of the inputs used.

#### **6. Declines in return on investments**

The traditional approach of businessmen and accountants is to define return on investments as the ratio of profit to assets employed. It is sometimes difficult to separate the assets used in producing the like product from the total assets of an enterprise.

#### **7. Declines in utilization of production capacity**

The utilization of capacity reflects changes in the volume of production, or changes in production capacity, or a combination of both factors. A decline in the utilization of production capacity will lead to an increase in the unit cost of production, and potentially a loss of profit. The reasons for such a decline may be unrelated to dumped imports, e.g. increases in capacity may be the result of poor management choices in investing in new facilities.

### **II. Factors affecting domestic prices**

Factors that are likely to affect domestic prices, other than the dumped imports are most commonly related to changes in the cost structure of the domestic industry, but may include the prices of competing or substitute goods or changes in sales practices. Trends in pricing data must be evaluated in the context of the prevailing conditions of competition in the market, including an analysis of the effects of factors other than dumped imports.

### **III. Magnitude of the margin of dumping**

This factor can be a useful indicator of the extent to which injury can be attributed to dumping, particularly when compared to the level of price undercutting. It can also be useful to compare the weighted dumping average margins of dumping for each producer subject to the investigation and examine the trends in the magnitude of the margins of dumping over the period of the investigation.

#### **IV. Actual and negative effects on cash flow, inventories, employment and wages, growth and on ability to raise capital or investment**

##### **1. Effect on cash flow**

Cash flow is a source of internally generated funds for a business. Cash is a crucial ingredient for the day-to-day running of a business, but is also important in maintaining long-term solvency and survival of a business. Cash flow can also be generated from investment activities and from financing activity undertaken by a business. Loss of sales generally leads to reduced operating cash flow, and can force a company to borrow money to finance activities rather than using its own resources.

##### **2. Effects on inventories**

Increasing inventory levels at the end of a financial period can be a sign of injury. However, the analysis of changes in inventories must be made in the context of normal industry conditions and practices, e.g. inventories in a seasonal industry are likely to be subject to natural fluctuations during particular times of the year.

##### **3. Effects on employment and wages**

A domestic industry suffering from loss of sales, loss of market share, and low profitability will often consider the numbers of staff it employs and the consequent wage bill. Employment figures can be evaluated in terms of actual numbers of employees or hours worked or, in relation to sales or production volumes per employee.

##### **4. Effects on growth**

Indicators in this area would include the cancellation or delay of plans for expansion of manufacturing capacity or the development of new facilities. Other indices such as capacity utilization or sales and employment can also give an indication of an actual or potential negative effect on growth.

##### **5. Ability to raise capital or investments**

Where indicators of an industry's performance are trending down, the overall profitability and viability of an industry could be threatened, and the ability to raise capital and attract new investment or invest in new initiatives could be compromised. Consideration of the debt/equity ratio of the producers in the domestic industry can be useful in evaluating the ability of the industry to raise capital or seek investment.

*Source: Czako, J; Human, J & Miranda, J (2003), A Handbook on Anti-Dumping Investigations, World Trade Organization, (Cambridge, CUP: 2003)*

#### **4.2.5 Ensuring that injury is not determined by factors other than those related to dumped imports**

There could, however, be a situation where injury to the industry is caused by factors other than dumped imports. Such factors could, for instance, include:

- Contraction in overall demand for the relevant products;
- Changes in patterns for consumption of such products;
- Failure to the domestic industry to keep pace with the new technological developments;
- Decline in productivity and in exports of the domestic industry because of the lack of efforts to engage in research and development (R&D) or to remain otherwise competitive;
- Effects of restrictive business practices followed by domestic and foreign procedures (within the country of importation).

### **Art. 3.5**

The investigating authorities have to ensure that injury caused by such factors “is not attributed to dumped imports” and anti-dumping measures are applied only after it is established that there was a direct causal relationship between dumped imports and injury to the domestic industry.

However, in the *Thailand HBeams Case* the Panel held that the listing in the paragraph was only illustrative and not mandatory. It was, therefore, not necessary to examine all of these factors in each case. Nevertheless, it was necessary for the panels to examine all “known factors” that were raised before the investigating authorities by the interested parties – which, in their opinion, had no causal relationship with injury to the domestic industry – in order to determine whether injury was being caused by these factors, or by dumped imports.

## **4.2.6 Determination of dumping and injury on the basis of facts available**

### **Art. 6.8**

The investigating authorities require information from the interested parties – producers, exporters and importers – for assessing whether a product is being dumped and as a result of such imports, the domestic industry is injured. As noted earlier, the authorities are therefore encouraged to solicit such information from all interested parties by sending them questionnaires. The question that arises is what investigating authorities should do if the exporters and other parties, to whom the questionnaire is sent, do not reply or provide all the information requested by the authorities. The Agreement provides that in cases in which interested parties fail “to provide necessary information within a reasonable period” or “significantly impede the investigations”, the authorities could make a preliminary determination for the application of provisional measures, as well as determination for the application of such measures on definitive basis on the basis of “facts available with them”. Guidelines that should be followed in using such information are provided in the Annex to the AD Agreement. In particular, it urges investigating authorities to - where information for the determination of findings, including that with respect of dumping margin and/or normal value is based on secondary sources - “do so with special circumspection”. In such cases the authorities should, “where practicable, check the information from independent sources available at their disposal, such as published price lists, official import statistics and customs returns and from information obtained from other interested parties during the investigations”.

The need for the authorities to rely on available facts in making determinations arise, in practice, is two situations:

- The first is where the exporter does not respond to the questionnaire.
- The second is where the exporter submits the response to the questionnaire but fails or is reluctant to provide data information on specific points, or where he significantly impedes the investigations. In these situations the authorities may be forced to determine the normal value and the dumping margin on the basis of the data provided in the application by the complaining industry, by checking it with the help of the data on trade and prices that may be available to them.

Experience has proven that where because of the failure of exporters to cooperate, the authorities have to rely on secondary sources and determine margins on facts available with them, the level at which margin of dumping is fixed tends to be very high.

### 4.3 Rules for determining whether dumped imports are threatening to cause material injury

#### Art. 3.7

Applications for levying of anti-dumping duties on the ground of a “threat of material injury” are made when the industry has a convincing reason to believe that an increase of dumped imports, that is expected to occur in the near future, would injure it. **Box 4** contains a non-exhaustive list of factors specified in the Agreement for consideration by the investigating authorities, when determining whether there is threat of material injury.

#### **Box 4** **Threat of material injury**

Article 3.7 of the AD Agreement contains a non-exhaustive list of specific factors to be considered in determining whether a threat of material injury exists to the domestic industry. The factors include:

- **The rate of increase in dumped imports**  
Indicating the likelihood of a substantially increased importation
- **Capacity**  
E.g. sufficient freely disposable, or an imminent substantial increase in the 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 and additional exports.
- **Price suppressing or depressing effects**  
If imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports.
- **Inventories**  
Investigation of inventories of the imported product, whether held in the country of export or in the importing investigating country.

Factors listed in art 3.4 must also be taken into account, as well as any other economic indicators relevant to whether the domestic industry would suffer imminent harm in the absence of anti-dumping relief. In addition, art 3.8 states that the application of anti-dumping measures shall be considered and decided with special care. Thus, this implies that a higher level of scrutiny is expected in investigations predicated on threat of injury as compared to material injury.

*Source: Czako, J; Human, J & Miranda, J (2003), A Handbook on Anti-Dumping Investigations, World Trade Organization, (Cambridge, CUP: 2003)*

The Agreement clarifies that merely one of the factors listed in the Box cannot provide decisive guidance on its own, and all these factors must be considered together in order to determine whether the threat of injury was “imminent”. It further warns against such a determination of a threat being made on more allegations, conjecture or more possibility.

### 4.4 Rules for determining whether dumped imports are retarding the establishment of the domestic industry

#### Footnote 9 to Art. 3, AD Agreement

GATT Article VI envisages that an application for the levying of anti-dumping duties may be made when dumped imports are “retarding” the establishment or further development of production.

The AD Agreement clarifies these rules by providing that the term “injury” shall, unless otherwise specified, be interpreted to mean material injury to a domestic industry, threat of material injury to a domestic industry or “material retardation” of such an industry.

In the light of these provisions applications for the levying of anti-dumping duties on the grounds of material retardation could be made:

- Where there is no industry producing a product and efforts to establish such an industry have been hindered as a result of dumped imports, or
- Where there has been some production of the like product, but such production has not reached a sufficient level to allow consideration of injury or threat of injury.

In the investigation of such complaints, the first step for the authorities is to examine whether there is established industry that is being retarded as a result of dumped imports. Where it is found that an industry has not been established, the authorities would have to examine whether the establishment of the industry has been impeded as a result of the dumped imports. It should be noted, that even though the Agreement contains these provisions, applications for imposition of anti-dumping measures on these grounds are rarely made.

## **5. Rules governing the application of provisional measures, imposition of anti-dumping duties on a definitive basis and price undertakings**

### **5.1 Provisional measures**

The AD Agreement provides that provisional measures could be applied only if, on the basis of a request made in the application:

#### **Art 7.1**

- A preliminary affirmative determination has been made of dumping and consequent injury to the domestic industry, and
- The authorities concerned consider such measures necessary to prevent injury from being caused during the period of investigation.

#### **5.1.1 Forms of provisional measures**

##### **Art. 7.2**

The provisional duty may take the form of provisional duty (*ad valorem* or specific). However, many countries require importers to provide a security - cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated.

#### **5.1.2 Rules governing the application of provisional measures**

##### **Art. 7.3**

The Agreement provides that such measures should not be applied “sooner than 60 days from the date of the initiation of the investigations”. This provision is intended to ensure that before applying such measures the authorities have sufficient time to make a determination on a preliminary basis of dumping and injury and to judge that provisional measures are necessary.

No guidelines on how investigations for application of provisional measures should be conducted have been provided in the Agreement. The “Working Group on Implementation” of the Anti-Dumping

Committee has, however, been examining the information base that should be taken into account in making a “preliminary determination for applying provisional measures.

### **5.1.3 Duration of provisional measures**

#### **Art. 7.4**

The provisional duties are to be applied for a period “as short as possible”, not exceeding 4 months. The period could, however, be extended to 6 months at the request of exporters representing a significant percentage of trade involved. The period for the application of the provisional measures could be extended to 9 months, where the authorities have decided to apply a provisional duty, which is less than the full dumping margin by applying the lesser duty rule.

## **5.2 Application of anti-dumping duties on a definitive basis**

### **5.2.1 Determination of the level of final anti-dumping duties payable by different exporters**

As noted earlier, the Agreement requires that dumping margins should be determined separately for each known exporter. For such known exporters “individual rates” of anti-dumping duties are fixed on the basis of these separate margins.

However, in cases where the number of known exporters is large and it is practically impossible to determine separate margins, the investigating authorities can limit the calculation of margins to the exporters selected:

- On the basis of a statistically valid sample or
- According to a significant proportion of total export volume.

For known exporters for whom it has not been possible to fix individual margins, the Agreement provides that a “common rate of duty” – calculated on the basis of weighted average margins determined by using the two above-mentioned methods – should be applied. In calculating such a common rate, however, zero margins, *de minimis* margins and margins based on facts available are to be excluded. This rate is often called “limited examination rate”.

The Agreement does not specifically provide rules on the rate that should be applied to exporters who were not known to the investigating authorities at the time of determination of the rates of anti-dumping duties. Such a situation could arise when official import statistics show only names of importers and not those of exporters. The practice followed in fixing such rates, which have come to be known as “all other rates”, varies. While some members apply the “limited examination rate” to such exporters, others apply the highest rate available.

### **5.2.2 Lesser duty rule**

#### **Art. 9.1**

The AD Agreement lays down three basic principles in regard to the imposition of duties of definitive basis. These are:

- Firstly such duties should be imposed only after investigations for the final imposition of duties has been carried out in accordance with its rules;
- Second the level of duty – whether it should be the full margin of dumping or less - should be left to be determined by the government;
- Thirdly, the imposition of such duties on the basis of recommendations made by the investigating authorities should be “permissive” and duties that are “less than the margin” should be imposed” if a lesser duty is adequate, to remove the injury to the domestic industry.

In accordance with these provisions, national laws of most countries have given the responsibility for deciding whether, on the basis of the recommendations contained in the report of the investigating authorities, anti-dumping duties should be imposed and if so, their level to the Ministers of either Finance or Commerce.

### **5.3 Price undertakings**

#### **Art. 8; See also para 2.9 in Chapter Two**

Exporters can avoid application of anti-dumping duties by undertaking to increase their export prices to a level that eliminates the dumping or injury. However, to prevent exporters from being required to give such price undertakings even when their exports are not causing injury to the domestic industry of the importing country, the Agreement permits such price undertakings only after the investigating authorities have made a preliminary affirmative determination of injury to the domestic industry and of dumping. It further stipulates that the decision to offer a price undertaking should be left to the exporter and that “no exporter shall be forced to enter into such undertakings”. It is also possible that the authorities of the importing countries may consider the acceptance of undertakings impractical; this would be the case when the “number of actual or potential exporters is too great” or for other reasons, including general policy. **(See also para 1.5 in Chapter Two).**

### **5.4 Public notice of final determination**

#### **Art. 12.2.2**

Immediately after the final determination is made, the investigating authorities are required to give public notice in sufficient detail the “findings and conclusions reached on all issues of facts and law considered material” by them. It also sets out specific elements that must be included in such notice. These include:

- A description of the investigated product that is sufficient for customs purposes;
- The names of the exporters involved, and where this is impracticable, the exporting countries involved;
- The margins of dumping calculated by the investigating authorities, including the full explanation of the reasons for the methodologies used in the establishment of the export price and normal price value for comparison purposes;
- Consideration that had been taken into account in injury determination;
- The main reasons on which the final determination was based.



## **6. Procedures followed for the collection of anti-dumping duties**

### **6.1 Prospective and retrospective systems**

#### **Art. 9.3**

The Agreement provides that irrespectively of the level of duty fixed, “the amount of duty collected” on each of the shipments “should not exceed the margin of dumping”. The rule imposes an obligation on the authorities responsible for collection of duties, to refund to the importers for whose exporters the applicable anti-dumping duty has been determined, if the margin of dumping on the shipments taking place after it was fixed, is less than the duty level. For example, in the case where the actual level of duty fixed is 20% - if the exporter establishes on the basis of the prices charged during a period of e.g. one year that the margin of dumping was around 10% - the importer would be entitled to claim an adjustment for the excess duty paid or payable during that period.

To make such adjustments, countries follow broadly two systems – “prospective” and “retrospective”.

Under the prospective system duty is collected from importers on the basis of the rate of duty fixed under the anti-dumping order. In an enquiry for refund arranged at the request of the importer, the margin of dumping is calculated for each shipment and the difference between the duty collected and the actual dumping margin is refunded. The duty rates that are collected on future shipments are not altered and the importer is required to continue to pay the duty at the rate fixed for the particular exporter.

Under the retrospective system, final duties are not paid on each shipment, but the importer is required to put in a cash deposit or give a guarantee for the amount of duties that he may be required to pay during a fixed period. Actual dumping margins are calculated periodically on the basis of the export prices charged for shipments during that period and adjusted against cash deposits, by refunding or collecting the difference between the cash deposit or bond and final amounts payable. Deposits for the subsequent shipments are calculated on the basis of the final duty applied for the preceding period.

The Agreement requires that the refunds due to the exporter under the prospective method, and the adjustments in the case deposits under the retrospective system, should normally be made within a period of 90 days following the completion of the assessment.

## **7. Duration of anti-dumping duties and reviews for continuation after the period of duration or for their early termination**

### **7.1 Duration of anti-dumping duties and sunset reviews**

#### **Art. 11.3**

The anti-dumping duties, once imposed, remain applicable for five years. They lapse unless a decision is taken to continue them in a review conducted for this purpose, before the expiry of the five year period. Such reviews are called “sunset reviews”.

Such reviews can be initiated:

- By the investigating authorities on their own initiative, or

- Upon a “duly substantiated” request made by or on behalf of the “domestic industry” and filed “within a reasonable time prior to the expiry of the five year period of the imposition of the definitive duties.

The main objective of the review is to examine whether termination would lead to the “continuation or reoccurrence of dumping and injury”. The reviews, therefore, are prospective in nature and the investigating authorities are expected to determine whether the domestic industry is “likely to be materially injured” if duties are lifted.

It should be noted that under the provisions of the Agreement, the duties continued on the basis of sunset reviews, might be continued for further five-year periods on the basis of reviews carried out before the expiry of each of the five-year periods.

## **7.2 Interim or changed circumstances review**

### **Art 11.2**

During the five-year period, the Agreement permits the authorities to “review the need for continued imposition of duty”. Such reviews, as in the case of sunset reviews described above, can be initiated:

- By the authorities themselves if reasonable time has elapsed since the imposition of the definitive-anti-dumping duty, or
- Upon request by an interested party which submits positive information substantiating the need for a review.

If the authorities conclude - on the basis of such a review – that because of the changed circumstance continuation of duties is not necessary, their application is terminated. If, on the other hand, they determine that dumping is likely to continue, the application of the duty is continued for a further period of five years from the date of the completion of the review.

## **8. Provisions relating to the extension of special and differential treatment to developing countries and settlement of disputes**

### **8.1 Special and differential treatment of developing countries**

#### **Art. 15**

The Agreement calls on developed countries to give “special regard” to the “special situation” of developing countries, when considering the application of anti-dumping measures. Towards this end, it requires them to explore the possibilities of using “constructive remedies provided by the Agreement before applying anti-dumping duties, where they would affect the essential interest of developing countries”.

These provisions are mandatory. The panel in the *EC Bed Linen Case* has held that investigating authorities from developed countries are under an obligation “to consider actively the possibility of constructive remedies with an open mind prior to the imposition of final anti-dumping measures”. It has also observed that such constructive remedies could take the form of:

- Acceptance of price undertakings from exporters from developing countries or
- Application of the lesser duty rule to such imports.

## 8.2 Rules governing the settlement of disputes

### Art 17.1

All differences and disputes among member countries of the WTO in relation to the application of anti-dumping duties are to be settled under the provisions of the WTO Understanding on Dispute Settlement. The Agreement, however, contains special provisions laying down the criteria on the basis of which WTO panels should assess the decision taken by the investigating authorities on the ‘matters of fact’ in cases investigated by them. In particular, it stipulates that the panels should, in such

### Art. 17.5

Examinations, confine themselves to assessing whether the establishment of facts by the investigating authorities was “proper” and whether the “evaluation was objective and unbiased”. It cannot, however, overturn the conclusion, even though it “might have itself reached a different conclusion”, where the objectivity of the investigating authorities was not in doubt and it had established the facts properly.

The Agreement also lays down special rules on how “issues of law” should be addressed by the WTO panels. In particular, it states “where a relevant provision of the Agreement admits more than one permissible interpretation, the panel shall find the measure of the (investigating) authorities to be in conformity with the Agreement, if it rests on one of those permissible interpretations.

## 8.3 The need on the part of investing authorities to keep proper records

Whenever a case is brought to WTO for settlement of disputes, the Panels or Appellate Body have to rely on records of investigations maintained by the investigating authorities. This makes it essential for the investigating authorities to maintain proper records (See **Box 5** below).

**Box 5<sup>o</sup>**  
**Keeping a proper record of the investigation**

An important element in any anti-dumping investigation is its proper administration, including the filing of all relevant documents, e.g. internal memoranda and working papers; or documents submitted by the interested parties.

To facilitate for any newcomers to follow the progress of each case, all case-related documents and working papers should be filed in a sequence with clear labelling, displaying file numbers and ID number, together with a detailed index to the document. It is customary for authorities to number the pages of documents in files sequentially and cumulatively.

Although no specific requirements regarding records are provided in the AD Agreement, investigating authorities usually create a separate case file for each investigation. Such a file may contain not only all the internal documents produced by the investigating authorities, but also all submissions by parties, all correspondence between the investigating authorities and the parties, and any other relevant documents.

In the event of a domestic judicial review of the determinations, or in WTO dispute settlement, records may play a significant role. Art 17. 5 (ii) of the Agreement stipulates that a review by a WTO panel is to be based upon “the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member”.

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<sup>6</sup> This section draws on pp. 44-46 in Czako, J; Human, J & Miranda, J (2003), A Handbook on Anti-Dumping Investigations, World Trade Organization, (Cambridge, CUP: 2003).



## CHAPTER TWO

### **The Rights of Exporters and Producers in the Exporting Countries and of Producers in Importing countries in Anti-dumping Investigations - A Business Perspective<sup>7</sup>**

#### **General**

The previous chapter described the substantive and procedural rules laid down in the AD Agreement. WTO member countries are under an obligation to ensure that their national anti-dumping laws are in full conformity with these rules. Countries that have not been able to adopt such laws are prevented from taking anti-dumping measures.

The primary purpose of this chapter, which is addressed to the business community, is to provide an overview of the main features of the procedures and practices that are adopted by the investigating authorities in different countries for investigations of the applications for anti-dumping measures. In doing so, it explains how these procedures and practices - when applied in accordance with the principles and rules of the AD Agreement - create certain rights in favour of parties from the business community with trade and economic interests in the outcome of anti-dumping investigations. These interested parties include, on the one hand, “foreign producers, exporters and importers” whose interests may be adversely affected if anti-dumping measures are taken, and on the other hand, “domestic producers in the importing country”, who may have an interest in petitioning for anti-dumping investigations when dumped imports are causing injury to the domestic industry.

Important examples of these rights are:

- The right of exporters, foreign producers or the importers to expect that anti-dumping measures shall not be taken unless it has been established, on the basis of investigations undertaken, in pursuance of the provisions of the Agreement, that dumped imports are causing injury to the domestic industry in the importing country.
- The right of the above-mentioned parties (e.g. exporters, foreign producers and importers) to “defend their interests” in the investigations undertaken by the authorities of the importing country, and
- The right of producers in the importing country (of the products that are like the imported dumped products), to petition for the levying of anti-dumping duties when they consider that such imports are causing injury to the domestic industry.

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<sup>7</sup> The chapter draws heavily on the publications published by the International Trade Centre, particularly the various Business Guides to Trade Remedies in the U.S.A., Canada, the European Union and South Africa and on the WTO Handbook on Anti-dumping Practices. See bibliography.

**Box 6** contains a detailed listing of the rights of parties from trade and industry with an interest in the outcome of the negotiations.

**Box 6**

**Rights of parties from trade and industry having an interest in investigations for impositions of anti-dumping duties**

**I. Rights of exporters and foreign producers**

- A. The right of exporters to expect that no anti-dumping duties would be levied by the importing country on products it exports, unless it is established that they are being dumped and that such dumped imports are causing or threatening to cause injury to the domestic industry in the importing country.
- B. The right of exporters and foreign producers and importers to “defend their interests” where on the basis of the application made by producers in the importing country or, as a result of the initiative taken by the Government, investigations are initiated by the investigating authorities. These rights include the following:
- The right of all known exporters and producers to receive, from the investigating authorities, the full text of the application as soon as investigations are initiated (**Art. 6.1.3**).
  - The right of all known exporters and foreign producers to receive a questionnaire calling, *inter alia*, for information required for the determination of dumping margins (**Arts. 6.1.1.1. and 6.1.1.2**).
  - The right of the exporters and producers to expect that the team, sent by the investigating authorities for verification of the information in the questionnaire through on-the-spot investigations, would visit them only after they have obtained consent of their government and the dates for verification visit are fixed by mutual agreement (**Annex I**).
  - The rights of exporters and producers to get, as far as possible, individual rates of anti-dumping duties determined for them (**Art. 6.10 and Art. 9.4**).
  - The right to – from time to time – get access to the responses to the questionnaires and other information presented by other parties to the investigating authorities and make written presentations on the basis of such information (**Art. 6.4**).
  - The right to participate in *ex-parte* and adversarial hearings arranged by the investigating authorities and to make oral presentations (**Art. 6.2**).
  - The right to expect that oral statements made in the hearings would be included in the official records after their transcripts have been approved by parties making the statements.
  - The right not to be penalised for failure to attend the hearings (**Art 6.2**).
  - The right to expect that offers made by exporters for giving price undertakings would receive serious consideration from the investigating authorities (**Art. 12**).

**II. Rights of producers in importing countries**

- The right to apply for anti-dumping investigations (**Art. 5.3**).

**III. Rights available to all parties having interests in anti-dumping investigations**

- The right to expect that confidential information furnished to the investigating authorities would not be disclosed to other parties without the consent of the party providing such information

To ensure that the parties on whom the above-mentioned rights are conferred are able to derive full benefits, the AD Agreement imposes obligations on investigating authorities and also on the concerned parties. The obligations imposed on investigating authorities mainly aim at providing transparency to the investigating procedures, while those imposed on parties aim at assisting them in securing full benefits from the rights conferred on them.

### **Art. 6.11**

It is important to note that the rights which the Agreement confers on the parties having interests in anti-dumping investigations can be exercised on their behalf by “trade or business associations”, if the majority of the concerned parties are members of such associations.

### **Art. 13**

The nature of the rights and the extent to which they are enforceable under the national laws depends on whether they impose binding obligations on the investigating authorities to comply with, or merely obligations to make best endeavours to enforce them. All of the national laws contain, according to the requirements in the AD Agreement, provisions for the establishment of “administrative tribunals and procedures” that are “independent of the investigating authorities” for the consideration of the complaints of non-compliance of the procedural rules by the investigating authorities and of the final determinations made by them in the investigations. It is also open to the parties to appeal to the courts or other judicial bodies if they are not satisfied with the decisions of the tribunals.

In the following, this chapter aims at describing the steps that the interested parties from trade and industry have to take and the background preparatory work they have to undertake, in order to take full advantage of the framework of rights and obligation created by the AD agreement. It is divided into four sections.

**Section One** deals with the rights and obligations of foreign producers, exporters and importers, who are facing anti-dumping investigations.

**Section Two** provides an overview of the rights and obligations of the producers in the importing countries, whose interests are adversely affected as a result of dumped imports.

**Section Three** explains that parties have a right to have certain information provided by them treated as confidential (that this information should not be disclosed to other parties).

**Section Four** explains the obligations the AD Agreement imposes on the investigating authorities to ensure transparency in the investigation process, with a view to enabling the parties having rights to benefit from them.

**Section Five** makes a few general observations concerning the practical problems and difficulties the producers and exporters from developing countries are encountering at present in taking full advantage of the rights the AD Agreement has conferred on them.

## **1. Rights and obligations of exporters, foreign producers and importers**

### **1.1 Adoption of pricing policies that could reduce the number of demands for anti-dumping actions**

From the point of the rules governing applications of anti-dumping measures, the most appropriate pricing strategy for an exporting firm would be to charge export prices that are not significantly different from those it charges for sale in its domestic market. For instance, if the ex-factory prices of a product for sale in the domestic market for a particular product is \$5, the price charged in the export market (excluding transport costs) should not be significantly less than this price.

In practice, however, exporting firms often find that for sale in outside markets, it has to match the price for its product with that charged by its competitors in those markets. In many cases, such a price is lower than that charged by it in its domestic market. In such a situation, the exporting firm has two choices. It may either reduce the domestic price to bring it down to the level of the export price it proposes to charge, or leave the domestic price unchanged and charge a lower price in the export market. It can, however, choose the second alternative if its share in the total imports of the foreign market is relatively small and as compared to its export sales, its domestic sales are substantially large.

Small and medium-sized enterprises often find it necessary to resort to such pricing policies, as in most cases they are “price takers” and have no capacities, because of the low volume of sales in their domestic markets, to influence the level of prices either in the domestic or foreign markets. Enterprises pursuing such policies have however to watch the developments in their main foreign markets closely and continuously endeavour to reduce the difference between their home market and export prices as their exports start rising, particularly in cases where the industries in the importing countries producing products that are like the product which they export, are finding it difficult to adjust to import competition.

## **1.2 The rights of foreign producers, exporters and importers to defend their interests in anti-dumping cases and the preparations needed to take advantage of these rights**

However, if -despite the adoption of appropriate pricing policies - a decision is taken by the investigating authorities to initiate investigations on the basis of a petition for the levying of anti-dumping duties made by the producers in countries to which exports are directed, it becomes necessary for the exporting firms to make immediate arrangements for taking advantage of their rights to defend their interests throughout the entire process of negotiations.

### **1.2.1 Establishment of an internal defence team in the company<sup>8</sup>**

The first step an exporting firm has to take in arranging the defence of its interests in the investigations is to appoint an internal anti-dumping team. The anti-dumping investigations raise complex legal and economic issues. The investigating authorities also require exporting firms to provide detailed information on prices charged in sales in domestic and export markets on a transaction-by-transaction basis. Taking this into account, the common practice among large firms facing anti-dumping investigations is to establish such a team, soon after it becomes known that the application for such investigations has been filed, without waiting for the formal decision by the investigating authorities to initiate investigations. The team generally consists of:

- At least one member of the senior management
- Sales people of the product under investigation
- Financial accountants
- Cost accountants
- Legal experts from the company and external law firms

Preparing a case for defence requires a coordinated approach amongst different departments of the firm. The person selected for heading the team should therefore, be a senior director or general

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<sup>8</sup> See ITC Business Guide to Trade Remedy measures in U.S.A., pp. 30-35.



manager who is able to get along with heads of other departments and thus, able to obtain the information required.

The sales people included in the team have an important role to play in the defence team, as they know the market where investigations are taking place and are often able to develop information on prices charged and sales practices adopted by competitors in the investigating country that can help the team in preparing a more effective defence in the investigations. Financial accounts complement the contribution made by the sales people, by verifying the information provided by the latter on prices and other matters.

The role of cost accountants becomes important, if in the course of investigations, the investigating authorities decide on determining the home market price (normal value) or export price on the basis of cost of production.

It is also necessary to include, in addition to the company's legal expert, an external law firm, specializing in anti-dumping law, in the defence team. In most cases however, it becomes necessary to choose such a firm from the country where investigations are taking place, as it alone has the expertise needed in the procedures adopted at the national level by the investigating authorities. Moreover, under the laws of most countries, if an appeal is to be made against the decision of the investigating authorities, only lawyers who have registered for practice can argue in the courts.

Employment of foreign law firms is however extremely expensive. Most of the well-established firms in the U.S.A. and Europe charge fees on an hourly basis. These fees vary between US\$ 200 or to US\$ 300 per hour. Defending a case in an investigation could, therefore, cost a firm using its services anywhere between US\$ 200,000 to 300,000.

Defending interests in anti-dumping cases also imposes a heavy administrative burden on exporting firms. Apart from the high fees of the lawyers, the internal staffs of the exporting firms have to devote a considerable proportion of their time in the preparation of the defence and in providing information requested by the investigating authorities. As a result, most of the small and medium-sized enterprises (SMEs) and even larger firms from developing countries may find it difficult to prepare effectively for the defence.

### **1.2.2 Preparation of questionnaire responses**

The next step in the preparation for the defence in the investigations is to prepare for the replies to the questionnaire.

#### **Art. 6.1.1 and 6.1.2**

The foreign producers and known exporters to whom copies of the application and the questionnaires are sent, are identified by the investigating authorities on the basis of the information provided in the application and other information that is available to them. If any exporting firm does not receive the application or the questionnaire it would be in its interest to obtain them by approaching the investigating authority directly (**see also para 2.3 in Chapter One**).

Most of the investigating authorities keep model forms of the questionnaire ready to be sent to the interested parties. The questionnaire sent to the exporting firms, producers and importers is typically divided into four parts:

1. General information on the background of the firm, products it produces and the nature of its relationship with its associated and affected companies.
2. Information and data on sales by the exporting firm in its home market.
3. Information and data on sales by the exporting firm in the market of the investigating country.
4. Information on the cost of production.

It is ordinarily not difficult for the exporting companies to provide general information required in the first part above - first on the structure of the firm, different products it produces and on its relationship with its affiliates and associates. The other sections, however, call for very few narrative replies but require the exporting firms to prepare a computerised sales database. The 2nd part, for instance, calls on exporting firms to provide a transaction-by-transaction listing of every single sale (the volume and the price charged) in the home market during the period chosen for investigations, which is generally one year. Likewise, part 3 in the questionnaire requires similar data to be provided on volume and price in respect of every single shipment to the market of the investigating country. In relation to all such transactions/shipments, the questionnaire also requires the firms to provide data on different types of selling expenses and information on circumstances of each of the sale, to enable the investigating authorities to make necessary adjustments in the home market and export prices, while making a price comparison for determining the margins of dumping.

As regards part 4, the investigating authorities require exporters and foreign producers to provide data on the cost of production only where a properly documented allegation has been made by the applicants, that domestic sales cannot be used as a basis for the calculation of the normal value, because sales were made at prices below cost. As in these situations, a constructed normal value has to be determined, the exporting firms are required by the questionnaire to provide, in respect of each of the sales made in the domestic market during the investigation period data on the cost of manufacture (direct labour and direct materials) plant overheads, (indirect labour, indirect materials, electricity, gas and water and plant depreciation), and sales, general and administrative expenses and profits.

The detailed statistical information that has to be provided on a transaction-by-transaction basis in response to the questionnaire is, thus, quite voluminous. The administrative burden and the high costs of collection of data in the required form often deters SMEs and even big firms from developing countries from submitting the information in response to the questionnaires.

Even though the obligation of the Agreement on exporting firms to submit information in response to the questionnaire is recommendatory and not a binding one, a decision not to respond to the questionnaire has to be taken carefully. Exporters who have submitted replies to the questionnaire have a right to expect that the dumping margins for products exported by them would be determined on the basis of the data supplied by them on home market and export prices. For exporting firms which have not submitted such data, the amount of duty payable is determined on the basis of the average of duties payable for exporters for whom separate duties have been fixed. Because of this, an exporting firm which has not submitted replies to the questionnaire may find that it has to pay anti-dumping duties at a rate that may be substantially higher than the difference between the price it charges in its home market and its price for exports.

On the whole, therefore, it would appear that it would be in the interest of the foreign producers and exporters to cooperate with the investigating authorities by providing information requested in the questionnaire. It is also necessary to ensure that the responses to the questionnaires are submitted within the stipulated period of time or where an extension is granted, during the extended period. The normal period provided for sending the response is the firm has received thirty days after the questionnaire. Most investigating authorities extend it to forty-five days, if requested by the exporting

firm. The investigating authorities generally refuse to grant an extension beyond this period. They also refuse to take into consideration replies received after the stipulated or extended period of time.

### **1.2.3 Rights of exporting firms in relation to the verification visits**

A crucial next step in the investigations is verification of the foreign producers' or exporters' responses to the questionnaire by the officials from the investigating authorities. For this purpose, the investigating authorities send a team of officials to the premises of the foreign producing company or exporting firm for checking the accuracy of the data provided in the questionnaire. It is the practice of some investigating authorities to send a verification outline to the company, indicating the types of documents and data that would be verified, at least a week prior to the visit.

#### **Art. 6.7 and Annex II**

Exporting firms have a right to expect that the investigating authorities would send such verification teams for on-the-spot investigations, only after they have been able to get consent from its governments for such a visit. Further, the timing the visit has to be fixed by the authorities in consultation with the concerned exporting firm.

In practice, the verifiers do not generally check all of the information provided in the questionnaire. They generally select a few transactions for verification. If these transactions are found accurate, it is assumed that the remainder of the information submitted is also accurate (**see also para 2.4 Chapter One**).

It is necessary for the foreign firm submitting responses to the questionnaire, to prepare for the visit of the verification team by keeping ready all the documents required for establishing accuracy. Some firms start the process of preparation for verification from the time when responses to the questionnaires are being prepared.

There is, however, an element of subjectivity in the level of detailed information that is requested to be submitted during the course of the verification, as standards of proof applied by different officials carrying out verifications vary according to their past experience and approach. Some of the requests made by the verifiers may look to the foreign firms as unreasonable. For instance the verifiers may ask for proof, such as a bank statement or an invoice and/or for payments made for expenses recorded in the firm's account books. Even though there is little possibility of such records being forged, it would be in the interest of firms to comply with the requests and furnish the information<sup>9</sup>.

It is desirable for the foreign companies to involve the outside law firm which has been included in the defence team, also in the work relating to verification, as it is familiar with the type of proof or supporting documents that the verifying team is likely to request. The lawyer can also advise on the best approach that could be adopted in providing supporting documents and point out if there are any weaknesses in the company's preparations.

Difficulties in communication may also arise where the language of the verifying team is different from the national language or the language used by the firm in its work. In such cases it is advisable

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<sup>9</sup> For more practical tips in preparation for verification visits of the officials from the investigating authorities see ITC Business Guide to Trade Remedy in U.S.A., pp. 140-156.

for the company to employ interpreters, who are familiar with the legal and accounting terms used in anti-dumping investigations.

#### **1.2.4. The right of interested parties to have access to the questionnaire responses**

##### **Art. 6.4**

The replies to the questionnaire that are received from the foreign producers, exporters and importers, as well as replies to the questionnaires sent to other interested parties (producers and purchasers of the product under investigation) are filed by the investigating authorities in a systematic way, as they form a part of the official records of investigations. Most investigating authorities require the parties to submit a non-confidential version of their replies where, in the view of the parties submitting the responses, they contain confidential information that they do not wish to be disclosed. All interested parties have a right of access to the non-confidential responses to the questionnaire and to the submissions made by other interested parties.

#### **1.2.5 The need for exporters to make best efforts to provide additional information requested by the investigating authorities**

##### **Art. 6.8**

The received responses to the questionnaires are scrutinised by the investigating authorities to ascertain whether they contain all of the required information. On the basis of such scrutiny, the investigating authorities often request for additional information. A period of two to three weeks is provided by most of the investigating authorities for the submission of such information. **(See also para 4.3.6 in Chapter One).**

It is necessary for foreign producers and exporters to make their best efforts to furnish the additional information requested by the authorities, within the stipulated time period. The investigating authorities have a right to make a “preliminary or final determination” by determining the margin of dumping on the basis of the information on home market and export prices furnished by the applicants petitioning for anti-dumping investigations or on the basis of other information (facts available) with them, particularly in cases, where the exporters or producers refuse access to the information or fails to provide additional information requested within a reasonable period of time or otherwise impedes the investigation. In almost all of these cases the dumping margins get determined at levels that are higher than those that would result if exporters or producers were to cooperate by providing the required information.

### **1.3 Preliminary determinations**

Once the responses to the questionnaire are received, the authorities may proceed to make a preliminary determination. The AD Agreement does not impose an obligation to make preliminary determinations but provides that such a determination is necessary, if the authorities consider that the application of anti-dumping measures on a provisional basis may be necessary in order to prevent injury from being caused during the period of investigations. Such provisional measures may take the form of a provisional duty or of a security cash deposit or a bond.

The foreign producers and exporters have a right to expect that the provisional measures would not be applied sooner than sixty days from the date of the commencement of the investigations. Taking into account this provision of the AD Agreement, most of the members have established statutory

deadlines for preliminary determination ranging from three to six months, in order to provide the investigating authorities sufficient time to study and analyse whether there is sufficient evidence of dumping and consequent injury to the industry.

Where a preliminary determination is made, the Agreement imposes an obligation on the investigating authorities to issue a public notice of the determination. Some investigating authorities implement this requirement by publishing the entire text of the report relating to preliminary determination in the official gazette of the government. Others publish a short notice in the gazette or newspapers indicating that a preliminary determination has been made and that the public report containing all the information relating to the determination can be obtained from the office.

### **1.3.1 Rights of interested parties during “disclosure meetings” arranged after the preliminary determination**

#### **Art. 6.8**

A number of investigating authorities have developed a practice of holding “disclosure meetings” shortly after the preliminary determination is made for discussions between their staff members and the individual interested parties, on the factual basis of the preliminary determination of dumping. Such meetings are generally arranged upon a request from the interested parties. The public notice of the preliminary determination indicates generally how such requests may be made.

At the disclosure meetings, the exporters for whom individual margins have been determined can obtain information from the staff members, on the methodology used in the calculation of the dumping margins. Some members have developed a practice of making available, to exporters for whom individual margins have been determined, a copy of the worksheets showing the relevant calculations; the staff responsible for those calculations remains available to answer specific questions concerning methodological issues. Discussions on the basis of the information contained in the cost sheets also enable the exporters or their representatives, to point out the errors in the calculations.

Following the preliminary determination, the investigating authorities generally provide an opportunity to interested parties to make written submissions commenting on the reasoning and findings of the preliminary determinations and to present their views in the disclosure meetings. While some investigating authorities arrange for such disclosure meetings immediately after the preliminary determination is made, others arrange them after the information in the responses to the questionnaire has been verified and all other information is collected.

The written submissions made by exporters at this stage generally relate to:

- Methodological issues relating to the calculation of dumping margins.
- Factual points relating to the calculation of dumping margins – e.g. disregarding certain pricing data submitted by the exporter in determining the normal value.
- The application of the injury test, particularly comments on the factors mentioned in AD Agreement and the national laws, which have to be taken into account in determining injury.

Some investigating authorities also allow exporters and other interested parties to present “rebuttal” submissions at this stage, giving comments on the submissions made by other interested parties. The time allowed for such rebuttal submissions is very short, generally one week or so.

## 1.4 Rules relating to the final determination and rights of exporters

### 1.4.1 The time period for making the final determination

#### Art. 5.10

The final determination in anti-dumping cases has to be made under the provisions of the AD Agreement, ordinarily within a period of one year from the date of initiation. In no case, however, can the period of investigation exceed 18 months. Taking into account these provisions of the Agreement, and those relating to the period for which provisional measures could be applied, the national laws provide periods within which a final determination must be made in cases where provisional measures are applied on the basis of the preliminary determination and in cases where no such preliminary determination is made.

### 1.4.2 Rights of exporters and other interested parties in the hearings arranged by the investigating authorities

#### Art. 6.2

To enable exporters and other interested parties continuous opportunities to defend their interests throughout the course of the investigation, the authorities arrange hearings from time to time. Such hearings generally take the following two forms:

- *Ex-parte* hearings, where only one party is present and information can be presented orally, and
- *Adversarial* hearings, where parties with opposing interest are present.

Where focus of the hearings is on the margins of dumping, the authorities generally arrange for *ex-parte* hearings. This is because dumping margins are determined for all known exporters on an individual basis; consequently discussions with individual exporters, rather than in an open forum, proves useful in such cases. (See also para 2.5 in Chapter One).

The *ex-parte* hearings provide an opportunity for exporters to comment on the methodology used, as well as on the detailed calculations made of the dumping margin. Such hearings are also used by the investigating authorities to pose questions to the exporters and to solicit further information on sales and accounting practices of the concerned exporting firm.

*Adversarial* hearings are generally arranged for discussions on injury issues, where opposing parties - the producers who have petitioned for investigations and other interested parties (exporters, foreign producers and importers) - get an opportunity to express their views. In order to facilitate orderly conduct, hearings generally follow a standard form. In particular, parties first present a brief summary of their arguments, and then answer questions from the investigating authorities and possibly, from other parties. Some investigating authorities also provide an opportunity to the exporters and other interested parties to make written submissions, including rebuttals of the arguments made by other parties.

In order to have proper records of the proceeding in the investigations, the AD Agreement stipulates that oral information provided by parties during hearings can be taken into account only in so far as it is subsequently reproduced in writing. To meet this requirement, a number of investigating authorities make available transcripts of their oral statements to the parties. These are included in the records after approval by the concerned parties. Alternatively, the parties are encouraged to submit an

overview of the points that would be made by them in their oral statement or to submit a brief report immediately after the hearing, recapitulating the points made by them.

### **1.4.3 The closing of records and preparation of the final report on the investigations**

At some point after the hearings are held, the investigating authorities “decide on closing the investigations for submission of new information and further arguments concerning interpretation of law and practice. This point is referred to by some investigating authorities as ”closing of records”.

After the records are closed, the staff of the investigating authorities prepare their final report for consideration by the commissioners or senior officials who are responsible for making final or negative determinations. The report examines, on the basis of data collected and the evidence submitted by parties through written submissions and oral statements made during the course of hearings, whether or not it is possible to determine that the products under investigation are being dumped and if so, whether there is a causal relationship between dumping and injury to the domestic industry in the importing country. In cases where dumping margins are calculated, not on the basis of the information provided by the exporters in response to the questionnaire, but on the basis of the “facts” available with the investigating authorities, it explains the reasons for calculating them on this basis. In cases where a preliminary determination has been made, the report is in essence a revision of the preliminary determination, in the light of the information that was received subsequently.

### **1.4.4 The right of exporters and other parties to comment on the “essential facts” on which the final determination is based**

#### **Art. 6.9**

Before the final determination is made, the AD Agreement requires the investigating authorities to provide an opportunity to all interested parties to comment on the essential facts, which form the basis for the decision on whether or not to apply definitive measures. Most investigating authorities comply with these obligations by arranging disclosure meetings to which all interested parties are invited. It is normal practice to prepare for consideration at such disclosure meeting a brief report summarising the factual information on which the determination is based, including *inter alia*:

- The methodology used for calculating the dumping margin for each exporter or foreign producer and the sources of information used, e.g. questionnaire responses or facts available and where margins are determined on the basis of facts available, the reasons for not relying on the information provided in the questionnaire;
- The information used for the injury determination, in the form of tables, charts, graphs and narrative expulsions relating to all economic factors that were considered for the determination of the injury.

Instead of arranging for disclosure meetings, some investigating authorities meet the obligation laid down in the AD Agreement, by making available the report on the final determination in draft form to the interested parties for comments. Whatever form is used for disclosure of the essential facts and findings in the final determination report, it is necessary for the investigating authorities to give sufficient time to exporters, foreign producers and other interested parties to comment on the findings. Generally, a period of two weeks is provided for this purpose after the disclosure meeting or after a copy of the draft report is sent to the interested parties. Comments received must be included in the

records and must be taken into account by the investigating authorities in making final positive or negative determinations. (See also para 2.6 in Chapter One).

## 1.5 The right of exporters and foreign producers to offer price undertakings

### Art. 8

Apart from laying down procedures that would enable exporters and foreign producers to derive full benefits from the right to defend their interests in anti-dumping investigations, individual exporters have a right, under the provision of the AD Agreement, to offer “price undertakings” which, by raising export prices eliminate the margin of dumping. The exporters offering such price undertakings are exempted from the payment of anti-dumping duties, if the offer is accepted by the investigating authorities.

From the perspective of the importers and the applicants demanding for the imposition of anti-dumping measures, the price undertakings and the anti-dumping duty have equivalent effect, as both result in an increase in landed price of the product under investigations. From the exporters’ perspective, however, in certain situations an undertaking may be preferable to a duty, as with an undertaking the exporter charges higher a export price and benefits from the excess, whereas with an anti-dumping duty - although the import price is higher - it is the country of import which collects more tax revenue. (See also para 5.3 in Chapter One).

The Agreement imposes an obligation on the investigating authorities to give serious consideration to the offers made by individual exporters to make price undertakings. As noted in Chapter One, the Appellate Body held, in the *EU Bed Linen Case*, that acceptance of price undertakings could be one of the ways by which special and more favourable treatment could be extended to developing countries in the application of anti-dumping measures.

While the Agreement imposes an obligation on the investigating authorities to give serious consideration to the offers made by individual exporters to give price undertakings, it recognises that it may not be possible for them, in some situations to accept such undertakings, particularly where the number of exporters is large. However, in all such cases where the authorities consider that the acceptance of the undertaking is impractical or inappropriate, they are expected to state the reason to the exporters for non-acceptance, and take into account their comments before taking a final decision.

The Agreement further requires the authorities not to accept the undertakings from exporters unless a preliminary determination has been made of dumping and injury. The rule is intended to prevent investigating authorities from using undertakings as an alternative to the investigations of anti-dumping complaints. It is, however, open to the exporters who have given such undertakings, to request that investigations should be continued after they have given undertakings. Such requests are made where exporters who have given price undertakings consider that the anti-dumping complaint was unjustified and as such, final determination may be negative. If the final determination in such investigations is negative, the undertakings obtained are terminated. Where, however, the authorities find that the negative determination is in part due to the existence of undertaking, they may require the exporters to maintain the undertaking.

Undertakings impose higher obligations on investigating authorities, as they have to monitor the compliance by exporters of their price undertakings periodically. To facilitate such monitoring, some investigating authorities have adopted the practice of requiring the exporters concerned, to submit reports providing information on a quarterly or other periodic basis, on prices charged on each of the



shipments. These reports are similar in format and content to the questionnaire used in the investigations. They are verified by the authorities from time to time to ensure that price undertakings are being adhered to by the exporters.

## **1.6 The right of exporters and producers to get (as far as possible) an individual rate**

The Agreement grants rights to exporters and producers to secure the determination of dumping duties on the basis of “margins calculated separately” for each of them. Towards this end, it provides the following rights to exporters and importers and imposes obligations on investigating authorities.

### **Art. 6.10**

First, the Agreement requires the investigating authorities to determine “individual duty rates” on the basis of the dumping margins calculated separately for each known exporter or producer.

#### **Art. 6.10.1**

Second, where the investigating authorities find that known exporters/producers are so large as to make determination on individual basis impossible, it permits them to determine such individual rates for a limited number, by selecting them on the basis of information available with them and by using a statistically valid sampling method. Where the selection is made on that basis, the investigating authorities are urged to make it in consultation with the concerned exporters and producers.

#### **Art. 6.10.2**

Third, where the authorities have limited their examination to selected exporters and producers, the Agreement provides a right to those who have not been selected, to demand that an individual margin of dumping should be determined for them by voluntarily offering to provide the required information. The Agreement provides that such “voluntary offers should not be discouraged” by the investigating authorities “except where the number is so large as to make “individual examination too burdensome to the authorities and prevent timely completion of the investigations”.

### **Art. 9.4**

Fourth, for exporters or producers for whom individual rates are not determined, the Agreement permits the investigating authorities to determine a “common rate” of duty. Such a common rate of duty is to be calculated on the basis of the weighted average of the dumping margins determined for known exporters or/and for exporters selected on the basis of a sample. In calculating such a common duty rate, however, zero and *de minimis* margins and margins established on the basis of available facts are to be excluded.

## **2. Rights of producers in importing countries to apply for anti-dumping investigations**

### **2.1 The right to petition for investigations**

The chapter has, so far, provided an overview of the rights of exporters and foreign producers to take steps to defend their interests in anti-dumping investigations. It now turns to the discussions concerning the right under the AD Agreement to producers who are adversely affected by dumped imports, to apply to the investigating authorities for the application of anti-dumping measures.

Any such application has to be made in writing by or on behalf of the industry, by either the producers themselves or on their behalf by their associations. However, the associations are qualified to make such an application, only if “the majority of producers” producing the product that is alleged to be dumped are their members.

The producers who have applied, or where the application was made by an association on behalf of the producers, the concerned producers or associations have further to establish that they have a standing to make applications on behalf of the domestic industry. For this purpose, they have to canvass for support of other producers from the industry and have to include evidence in the application to demonstrate that:

- Producers accounting for over 50 per cent of the collective production of the domestic industry, producing a product which is like the imported product, have been consulted, and that they have expressed interest in the investigation by indicating either support or opposition, and
- Those who support the application do not account for less than 25 per cent of total production of such product by the domestic industry.

An example would help in understanding the rule clearly. Let us assume that the application indicates that out of 40 firms in the industry, 20 have indicated support, 15 have expressed opposition, while the remaining 5 have not expressed views either in favour or against - or have remained silent. If the production of the 20 firms supporting the application is more than 50 per cent of the “combined production” of 35 firms (i.e. firms expressing support and those expressing opposition), the criteria laid down by the first test are met. In applying this test the production of firms, which have not expressed any views, is to be ignored.

While the first test is based on the “combined production” of firms expressing support or opposition, the criterion in the second test is based on the “entire production” of the industry. Even if the application meets the criteria of the first test, the application could be deemed to have standing, only if the 20 firms supporting the need for anti-dumping measures account for 25 per cent or more of the total domestic production of products which are “like” or similar to the products under investigation.

## **2.2 Minimum information to be provided in the application**

In order to ensure that the application is not based on “simple assertions” of exporters and importers, but on definite evidence of dumping and on the causal relationship between such dumping and injury to the industry, the AD Agreement stipulates that the minimum information must be provided in such an application. To comply with these rules, the investigating authorities in most of the countries have adopted standard forms for applicants who wish to apply for anti dumping investigations could use. These forms require information to be provided under the following four sections:

- 1) The identity of the applicants, value and volume of the product (which is like the alleged dumped product) produced by them, and the list of all producers.
- 2) A complete description of the allegedly dumped product, the names of countries of export, the names of exporters or foreign producers, and the names of importers.
- 3) Specific information supporting the allegation of injury to the industry and causality viz. information on:
  - Volume and evolution of alleged dumped imports
  - Effect of such imports on prices and
  - Their “consequent impact on industry” – such as decline in production, sales, profits, etc.

- 4) Information required to support the allegation of dumping viz. information on:
- Prices of the product in question for sale in the domestic market of the exporting country (home market prices).
  - Export prices to the investigating country.
  - Export prices to third country markets.

By their very nature, the information required for inclusion in the application under sections 1-3 above, is readily available from the sources within the country. The information required under point 4, which *inter alia* requires the applicants to provide information on home market prices in the exporting country and on the prices charged by the exporting firms to their third country markets has, however, to be collected from sources available in outside countries. Applicants often try to obtain information on home market prices and other information that has to be collected in the exporting country, by employing private market research agencies situated in that country. The difficulties applicants face in collecting such information have made some of the investigating authorities adopt guidelines permitting the applicants to substantiate dumping allegations by submitting price lists, price quotations or invoices as proof of sales that are made in domestic markets. (See also paras 1.3-1.6 in Chapter One).

### **2.3 Substantiating claims in the application by undertaking macro economic studies**

Anti-dumping cases raise complex economic issues relating to the impact that dumped imports have on the state of the industry. It is therefore increasingly becoming the practice of producers submitting applications for investigations to substantiate the information on the volume of imports and prices, by macro-economic studies prepared by private research institutions in the country, analysing the adverse economic impact that the dumped imports are having on the domestic industry.

### **2.4 The practice adopted by some investigating authorities to send questionnaires to domestic producers**

The AD Agreement imposes an obligation on the investigating authorities to send questionnaires to all known exporters and foreign producers, for collecting information needed, to determine whether dumped imports are causing injury to the domestic industry. Even though the Agreement does not impose an obligation to send such questionnaires to the producers belonging to the industry, on whose behalf a complaint is lodged, a number of investigating authorities have adopted the practise of collecting information from domestic producers by sending questionnaires to them. Such questionnaires typically request information on the:

- Production, including capacity utilisation and on inventories;
- Sales prices during the period of investigations;
- Profit and loss in sales of the product in question, return on investment;
- Impact on employment and averages of dumping;
- Lost sales or lost revenue attributable dumped imports;
- Expenditure incurred on research and development and on technological improvements to strengthen the competitive position.

By sending such questionnaires, the investigating authorities are able to get the information, as well as the views on the impact the dumped import is having on the domestic industry from the producers who have opposed the application, as well as those who did not express any opinion when the

producers who applied consulted them. However, in practice it may not be possible for the investigating authorities to obtain information from all domestic producers, e.g. if the industry is made of many small producers. The extent to which the investigating authorities can force domestic producers to submit the information requested in the questionnaire will depend on the powers available to them under the national legislations and the willingness on the part of the authorities to enforce such powers.

### **3. The right of parties to request that certain information submitted by them should be treated as confidential**

Given the nature of anti-dumping investigations, firms often find that they have to disclose information (to the investigating authorities) of a confidential nature on the cost of production, levels of profits, payments of royalties and on other matters they do not wish to disclose to their competitors. The AD Agreement, therefore, recognises that the parties submitting the information to the investigating authorities should have a right to request them to treat certain parts of the information as confidential, and to request them not to disclose it to the other parties without their consent. In most cases, the authorities require the parties submitting such information to submit a summarised non-confidential version (e.g. non-confidential version of the response to the questionnaire). Where, however, the parties concerned refuse to submit a non-confidential version and also insist on their non-disclosure, the authorities may decide on disregarding the information. Under no circumstances, however, can the authorities disclose the information, claimed by the party supplying it as confidential, without its specific permission to other parties.

### **4. Obligations of the investigating authorities to ensure transparency in the investigation procedures to enable interested parties from trade and industry to take full advantage of their rights**

#### **4.1 Transparency obligations**

To enable the interested parties from trade and industry on whom rights are conferred to take full advantage of their rights, the AD Agreement imposes an obligation on the investigating authorities to ensure transparency to the investigation process by:

- Notifying governments of the exporting countries of important developments and of the decisions taken during the course of the negotiations and forwarding copies of the relevant papers to them and
- Publishing notices on all-important decisions taken.

#### **4.2 Obligations relating to notifications to the governments of the exporting countries**

As even a possibility or threat of imposition of anti-dumping duties could lead to a serious disruption of the trade of the exporting country, particularly where the products on which additional duties are likely to be imposed are of significant importance in exports, the Agreement requires investigating authorities to keep the governments of the exporting countries informed of all important developments, already from the receipt of the application for anti-dumping investigations. The investigating authorities are, thus, required to:

**Art. 5.5**

- Notify the governments of the exporting countries as soon as the application for anti-dumping investigations has been received.

**Art. 12.1**

Notify the government as soon as decision is taken to initiate investigations and make available to them:

- A copy of the application,
- A public notice of initiation of investigations, and
- Copies of the questionnaire sent to all known exporters, and foreign producers.

**Annex I paras 1 and 2**

Inform them soon after the initiation of the investigations whether it is proposed to undertake on-the-spot investigations, and obtain their explicit approval before the visit to the exporting firm is finally scheduled.

**Annex I para 3**

Inform them of whether a non-governmental expert is included in the visiting investigating team for on-the-spot investigations.

**Art. 12.1.2**

Send them copies of all public notices that are required to be issued under the provisions of the Agreement.

The objective of these notification procedures is to keep the governments of the exporting countries fully informed about the developments in the anti-dumping investigations. In most cases, the investigating authorities comply with these obligations by sending the notifications and copies of the application, questionnaires and other relevant papers, to the commercial officers in the embassies of the exporting countries. It is the responsibility of the embassies to forward them immediately to its Ministry of Commerce or another Ministry that may be responsible for work in this area.

By using the notified information, the concerned Ministries in the exporting countries could play an important role in keeping the producers, exporting firms and their federations and associations of the developments in the investigations informed and in assisting them, where feasible, in preparing themselves for “defending their interests” in the negotiations. It is also important to note that even though it is not the normal practice for governmental representatives to take an active part in anti-dumping investigations, the Ministries often use diplomatic channels to express their concerns to their counterparts in the investigating country - either directly or through their embassies, about the impact the application of anti-dumping measures may have on the trade and industry in the country. The embassy officials could also often play a useful role when negotiations are taking place between exporters and the officials from the investigating authorities on price undertakings, by indicating the readiness of their government to take steps to ensure that undertakings are honoured by exporters.

**4.3 Obligations to issue public notices**

The investigating authorities are under an obligation to publish in the official gazette or in newspapers notices of the:

- Initiation of investigations;
- Preliminary and final determinations relating to the application of anti-dumping measures, setting forth in sufficient detail the findings and conclusions reached on all issues of fact and law;
- Termination of anti-dumping measures;
- Affirmative or negative preliminary or final determination to accept price undertakings; and
- Termination of such undertakings.

The public notices of the initiation of investigations and of the preliminary and final determinations aim at keeping, not only the interested parties from trade and industry - such as domestic and foreign producers, exporters and importers - informed about the developments in anti-dumping investigations, but also industrial users of the products under investigations, as well as consumers and the general public. For example, the imposition of anti-dumping duties on steel could lead to increases in cost of production for industries using steel, such as those producing automobiles, ships and machinery used in manufacturing. Imposition of such duties on textiles can lead to increases in prices of clothes sold in the domestic markets.

#### **Art. 6.12**

The AD Agreement recognises that both “industrial users of the product under investigation” and “consumer organizations where the product is commonly sold at retail level” would have an interest in the investigations. It, therefore, urges member countries to extend opportunities to them, to express their views in the investigations by providing them with access to the information submitted by the applicants, exporters and other interested parties.

Although this is not a binding obligation, a number of investigating authorities permit industrial users of the product under investigation and their associations, as well as consumer associations and other interest groups, to present their views by making written submissions and/or by making oral presentations in the hearings.

It is also the practice of some of the investigating authorities to send questionnaires, particularly to users or purchasers of the products under investigations. These questionnaires solicit information on the quantity and value of purchases of the product that is under investigation, and in the case of products used in further manufacturing, the effect the imposition of anti-dumping duties may have on cost of production and on demand for the final product and in the case of consume products on their retail prices.

### **5. Practical problems and difficulties encountered by parties from trade and industry in availing themselves of their rights**

A number of exporters and foreign producers find the administrative burden of the preparatory work for defending their interests in anti-dumping investigations both heavy and - from the financial point - costly, as considerable time and resources of the key members of the staff has to be devoted to the collection of data on trade and price needed for responding to the questionnaire, on a transaction-by-transaction basis.

Most of the investigating authorities, particularly from developed countries and increasingly from some of the developing countries at a higher stage of development, require further that such data should be provided both electronically and in hard copy, in the format provided by the questionnaire. The requirement to provide the data electronically poses serious difficulties to firms, particularly small

and medium sized enterprises, which have not as yet been able to computerise their accounting systems fully<sup>10</sup>.

The high costs of legal defence, particularly the need to hire the services of foreign legal firms, may provide another obstacle. As noted earlier, legal fees charged by foreign lawyers are often beyond the financial capacities not only of SMEs, but also of larger firms in developing countries. The result is that in a number of cases, the firms decide not to participate in defence and allow the decisions to be made without their participation in the investigation process.

#### **Art. 6.13**

In this context, it is important to note that the Agreement recognises that exporters, foreign producers and other interested parties, “particularly small companies” may have difficulties in providing information required by the investigating authorities in the importing countries. The investigating authorities are urged to take into account these difficulties by providing, where possible and feasible such assistance that would help them in participating more effectively in the investigation process. In practice, the investigating authorities have little interest in providing assistance to exporting firms and foreign producers. However, some of them have established systems for answering queries raised relating to the information requested by the questionnaires promptly.

A possible solution in such a situation would be to arrange for joint defence by all affected exporting enterprises and producers through their federations or associations. Further, where products on which anti-dumping duties are likely to be imposed are of considerable importance in foreign trade of a country and the imposition of duties is likely to result in reductions in exports and/or in reductions in domestic production, the governments, particularly those of developing countries, may have to help such federations and associations in arranging for such defence by agreeing to bear some part of the expenditure on legal defence, from a fund that may be established for this purpose.

Like the exporters and producers in the exporting developing countries, who are often seriously handicapped in arranging for their defence in anti-dumping investigations, the producers in the importing countries that are affected by dumped imports are often not able to take full advantage of their right to apply for anti-dumping investigations. This is largely due to the absence (nearly) of accountancy and research firms that could assist them in collecting information on prices, particularly information on home market prices in the exporting countries, which is generally not available in the importing country and has to be collected from sources available in the exporting countries. The non-availability at national level of legal experts who are trained in anti-dumping laws and practices further adds to the difficulties they are facing in providing the minimum information that has to be provided in the application to the investigating authorities requesting for anti-dumping measures.

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<sup>10</sup>In this context, it is relevant to note that the AD Agreement recognises that not all investigating authorities, particularly in developing countries, may be able to handle computerised data. Para 4 in Annex II of the Agreement states that “where authorities do not have ability to process the information, if provided in a particular form, the information should be supplied in the form of written material or any other form acceptable to the authorities”.

The situation has changed considerably since the Agreement was negotiated in the Uruguay Round and almost all of the investigating authorities in developed countries and in the developing countries, which have become users of anti-dumping measures, have fully computerised their operations and prefer to have data and other information submitted to them electronically. Since many exporting firms in developing countries have not been able to computerise their accounting systems, they are facing serious difficulties in meeting demands of investigating authorities for submission of the information required by them.





## **PART THREE**

**Recent developments in the application of anti-dumping measures and description of the proposals for modification of the rules of the AD Agreement**



## CHAPTER THREE

### Recent Developments in the Application of Anti-dumping Measures

#### General

In the past, mainly five developed countries made resort to anti-dumping measures - USA, EU, Canada, Australia and New Zealand. However, the situation has changed in recent years. Developing countries, particularly those at a higher stage of development, have started using such measures to protect their industries from dumped imports from other countries. There is also an increasing trend towards using such measures by transitional economies. Thus, as demonstrated by the table below, of the 1402 anti-dumping measures taken during the period of seven and a half years, from 1 January 1995, when WTO was established, to 30 June 2003, approximately 64 per cent of the measures were taken by developing countries and transitional economies.

**Table 3**  
**Anti-dumping measures taken by WTO Members**  
**during the period of seven and a half years from 1 Jan 1995 to 30 June 2003**

<i>Developed countries</i>		<i>Transitional economies</i>		<i>Developing countries</i>	
Australia	42	Czech Rep.	1	Argentina	138
Canada	68	Latvia	2	Brazil	55
European Community	184	Lithuania	7	Chile	6
Japan	3	Poland	9	P.R. China	16
New Zealand	12			Chinese Taipei	2
United States	196			Colombia	11
				Egypt	28
				Guatemala	1
				India	241
				Indonesia	14
				Israel	12
				Jamaica	3
				Malaysia	11
				Republic of Korea	29
				Mexico	57
				Nicaragua	1
				Paraguay	1
				Peru	23
				Philippines	10
				Singapore	2
				South Africa	108
				Thailand	24
				Trinidad and Tobago	6
				Turkey	54
				Uruguay	1
				Venezuela	24
<b>Total</b>	<b>505</b>	<b>Total</b>	<b>19</b>	<b>Total</b>	<b>878</b>

Source: WTO; <http://www.wto.org>

## 1. The impact of AD measures on the trade of developing countries

Even though a few of the developing countries have now become significant users of anti-dumping measures, from the point of view of trade impact, the actions taken by developed countries may – in some cases – have a serious adverse impact on the trade of developing countries. The imposition of anti-dumping duties, or even a threat of imposition of such duties may make importers shift their orders to other countries. Since the ability of exporting industries in these countries – which are in most cases small and medium-sized industries – to find alternate markets is greatly limited, the imposition of such duties may result in stoppage of exports, often leading to closure of production. Moreover, many of these duties are applied even though, as compared to the total share in apparent production, the market share of the country is extremely small. The rules in the Agreement, permitting cumulation of imports, often enables investigating authorities to determine that even low volumes of imports are causing injury to the domestic industry by lumping them with large dumped imports from other countries. Exporting enterprises from developing countries are further handicapped, as due to the financial constraints and lack of legal expertise they are not able to defend their interests in anti-dumping investigations initiated against their imports in outside countries.

**Table 4** below displays product sectors in which anti-dumping measures were applied by WTO members – developed, developing and transitional economies. Five sectors viz. base metals; chemicals; machinery and electrical equipment; plastics; and textiles account for 81 per cent of the actions taken.

**Table 4**  
**Product sectors**  
**in which anti-dumping measures were applied**  
**in seven and a half years (from 1 January 1995 to 30 June 2003)**

<i>Category</i>	<i>Total</i>
I: Live animals; animal products	16
II: Vegetable products	19
IV: Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes	20
V: Mineral products	31
VI: Products of the chemical or allied industries	244
VII: Plastics and articles thereof; rubber and articles thereof	161
VIII: Raw hides and skins, leather, fur skins and articles thereof; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silk-worm gut)	1
IX: Wood and articles of wood; wood charcoal; cork and articles of cork; manufactures of straw, of esparto or of other plaiting materials; basket ware and wickerwork	17
X: Pulp of wood or of other fibrous cellulose material; recovered (waste and scrap) paper or paperboard; paper	39

and paperboard and articles thereof	
XI: Textiles and textile articles	105
XII: Footwear, headgear, umbrellas, sun umbrellas, walking-sticks, seat-sticks, whips, riding-crops and parts thereof; prepared feathers and articles made therewith; artificial flowers; articles of human hair	17
XIII: Articles of stone, plaster, cement, asbestos, mica or similar materials; ceramic products; glass and glassware	32
XV: Base metals and articles of base metal	508
XVI: Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles	119
XVII: Vehicles, aircraft, vessels and associated transport equipment	11
XVIII: Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof	15
XX: Miscellaneous manufactured articles	37
... (unknown)	10
1/95 - 30/06/03	<b>1'402</b>

Source: WTO; <http://www.wto.org>

In the textile sector, for over two decades, the imports of a large number of textile products from a number of developing countries were subject to quantitative restrictions in most of the developed countries. The legal cover for such restrictions was provided by the Agreement on Textiles and Clothing (ATC). This Agreement was terminated on 1 January 2005. There are apprehensions with the termination of the Agreement that the industry in the developed countries would now increase pressure to restrict competitive imports from developing countries, by taking anti-dumping or safeguard measures.

There may also be an increased use of anti-dumping measures, particularly in developed countries, in sectors such as steel and chemicals, where the oversupply in world market is structural in nature, as the overall production is far in excess of the total world demand. Many of such measures would affect imports from developing countries that have been able to develop in recent years export trade in these and other related sectors.

**Tables 5 and 6** provide a synoptic picture of countries against which anti-dumping measures were applied during the seven and a half year period from 1 January 1995 to 30 June 2003. It would be noticed that a significant proportion of anti-dumping measures are applied to imports from other developing countries and transitional economies. Imports from least developed countries have also been subject to such measures in a few cases.

**Table 5**  
**Anti-dumping measures:**  
**Selected Developing Country Reporting Members v. Exporting Countries**  
**from 01/01/95 to 30/06/03**

Reporting country ?	(Exp. country) <i>Developed countries</i>	(Exp. country) <i>Transition economies</i>	(Exp. country) <i>Developing countries (Including LDCs)</i>	<i>Total: AD Measures by Reporting Country 1 Jan 1995-30 June 2003</i>
<i>Argentina</i>	34	14	90	<b>138</b>
<i>Brazil</i>	22	11	22	<b>55</b>
<i>India</i>	91	28	125*	<b>244</b>
<i>Mexico</i>	25	10	22	<b>57</b>
<i>South Africa</i>	59	4	46**	<b>109</b>
<b>Total:</b>	<b>231</b>	<b>67</b>	<b>305</b>	<b>603</b>

Source: Figures based on WTO statistics; <http://www.wto.org>

\*Of which 3 anti-dumping measures against LDCs.

\*\*Of which 1 anti-dumping measure against an LDC.

**Table 6**  
**Anti-dumping measures:**  
**Selected Developed Country Reporting Members v. Exporting Countries**  
**from 01/01/95 to 30/06/03**

Reporting country ?	(Exp. country) <i>Developed countries</i>	(Exp. country) <i>Transition economies</i>	(Exp. country) <i>Developing countries*</i>	<i>Total: AD Measures by Reporting Country 1 Jan 1995-30 June 2003</i>
<i>Australia</i>	17	2	23	<b>42</b>
<i>Canada</i>	26	15	27	<b>68</b>
<i>EC</i>	23	59	102	<b>184</b>
<i>New Zealand</i>	4	0	8	<b>12</b>
<i>U.S.A</i>	64	25	107	<b>196</b>
<b>Total:</b>	<b>134</b>	<b>101</b>	<b>267</b>	<b>502</b>

Source: Figures based on WTO statistics; <http://www.wto.org>

\*No measures were taken during the period against imports from the Least Developed Countries (LDCs).

## **2. Reasons for the increasing use of trade remedy measures - including AD measures - by developing countries and transitional economies**

A question that arises is why developing countries and transitional economies are finding it necessary to use trade remedy measures, particularly anti-dumping measures.

The main reason for this, in the case of developing countries, is the change that has occurred since approximately the end of the 1980s in the trade policies they are pursuing. Until that period, most of these countries were pursuing policies that encouraged domestic production, both in the agricultural and industrial sectors, of products that could be imported by providing protection against foreign

competition. The insulation of the domestic industry from foreign competition resulted in inefficient and high cost production. This made it difficult for these countries to market their products in other countries.

Almost all of these countries have now gradually changed these policies, to policies that encourage export-oriented growth by exposing domestic industries to foreign competition through the gradual removal of tariffs and elimination of quantitative and other restrictions they applied to imports in previous years. Compared to the applied tariffs of 15.5 per cent in the pre-Uruguay Round period, the average level for tariffs of the developing countries as a group had fallen to 12.3 per cent by 2000, as a result of the reductions made:

- Under the structural adjustment programmes sponsored by the international financial institutions, or
- Measures taken by them at their own initiative and on an autonomous basis, or
- In trade negotiations held on multilateral and regional basis.<sup>11</sup>

Since the breakdown of communism in the end of the 1980s, transitional economy countries have also been taking steps to change over from state controlled to market economies through:

- Privatisation of state enterprises and
- Removing price and other controls they applied previously in their internal markets, and by taking steps to open their markets to external competition, by reducing, *inter alia*, tariffs and removing other barriers they applied to imports previously.

The ability of these countries to maintain open trade policies and to further liberalise their external trade is, therefore, becoming increasingly dependent on how far they have been able to establish viable and effective institutional frameworks for applying trade remedy measures, like safeguard actions and anti-dumping and countervailing duties.

### **3. Problems encountered by developing countries in applying anti-dumping measures**

#### **3.1 Many developing countries do not have the framework needed for applying anti-dumping measures**

In relation to anti-dumping duties, the AD Agreement requires countries to apply anti-dumping measures only after it has been possible for them to establish, on the basis of investigations conducted according to its provisions, that dumped imports are causing injury to their domestic industry. Therefore, unless countries have adopted legislations at national level, providing for the establishment of investigating authorities, it is not possible for them to take anti-dumping measures, even though the industry affected by dumped imports may be clamouring for the application of such measures. It is relevant to note in this context, that, as **Table 7** below shows, about 28 WTO members have, so far, not adopted any national laws on anti-dumping.

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<sup>11</sup> These figures do not reflect that in some of the countries the level of tariffs is much lower than the average for developing countries as a whole, while in the case of others, the level of tariffs is much higher.

**Table 7**  
**Developing countries where legislation and institutional frameworks for taking anti-dumping measures have not been adopted<sup>12</sup>**

<i>Members indicating no anti-dumping law</i>			
Bahrain	Ghana	Maldives	Qatar
Benin	Guinea, Rep. Of	Mali	Sri Lanka
Botswana	Haiti	Malta	Suriname
Brunei Darussalam	Hong Kong	Mongolia	Swaziland
Burkina Faso	Jordan	Myanmar	United Arab Emirates
Burundi	Macao	Namibia	
Chad	Madagascar	Oman	
Cote d'Ivoire		Papua New Guinea	

*Source: WTO (29 October 2002) Annual Report (2002) of the Committee on Anti-Dumping Practices, G/L/581*

### **3.2 Absence of nationals trained in anti-dumping law and practice prevents affected industries from applying for the levying of anti-dumping duties**

Even in countries that have been able to establish an institutional framework required for taking anti-dumping and other trade remedy measures, the affected industries often find it difficult to apply for the imposition of such measures, as the lawyers, accountants and other professionals who could help them in preparing such applications and in pursuing their cases during the investigations are not as yet available. The absence of trained personnel often results in a serious handicap to industries in developing countries in applying for the application of trade remedy measures, even when dumped imports are adversely affecting production and they are entitled under the WTO law to request for the application of trade remedy measures.

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<sup>12</sup> From the developed countries, Switzerland could be mentioned as an example of a country that has chosen not to adopt any national legislation in this context.



## CHAPTER FOUR

# Problems and Issues that have Arisen in the Implementation of the AD Agreement and Description of the Proposals for Modifications in the Doha Development Round

### General

Against the background of the overview:

- In Part Two, of the main provisions of the AD Agreement and of the framework of rights and obligations it has created for the benefit of the parties from the business community, and
- Of the developments in the use of anti-dumping measures, in the previous chapter particularly of increasing resort to such measures by developing countries,

this chapter explains some of the main issues that have arisen in the implementation of the AD Agreement and the proposals that have been made for modifications in the rules in order to strengthen the disciplines they impose, and improve their operation both from the point of view of exporting and importing countries.

**Annex I** lists the specific proposals for modifications that have been made in relation to each of the issues discussed in the chapter and indicates the countries making the proposals.

## 1. Proposals for modifications of the rules relating to the initiation of investigations

### 1.1 Greater scrutiny and evaluation of the information provided in the application

The investigating authorities are expected to decide on whether or not to initiate investigations, after a preliminary assessment of whether the evidence provided in the application adequately substantiates the claim that imports of dumped products are causing injury to the domestic industry. In order to ensure that such investigations are commenced only in justified cases, the Agreement further requires the investigating authorities to examine the “accuracy and adequacy” of the evidence provided in the application.

It is alleged that decisions to initiate investigations are taken by the investigating authorities on the basis of a cursory examination and very often no efforts are made to ascertain whether there is enough evidence to suggest that there is a causal link between dumped imports and injury to the domestic industry. This is well brought out by the fact that in most of the countries a relatively high proportion of investigations do not result in the imposition of final anti-dumping measures. For instance, between 1955 and 1999, nearly 79 per cent of all Australian and 70 per cent to New Zealand’s investigations did not result in any imposition of anti-dumping duties. The ratio of cases that did not result in any affirmative final determination in the total number of cases initiated during the period, was 37 per cent in the case of EU, 32 per cent in the case of United States and 27 per cent in the case of Canada.<sup>13</sup>

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<sup>13</sup> Neufeld, Inge Nora (2001), “Anti-Dumping and Countervailing Procedures - Use or Abuse? Implications for Developing Countries”, UNCTAD, Policy Issues in International Trade and Commodities Study Series, no. 9, (New York and Geneva: United Nations, 2001), UNCTAD/ITCD/TAB/10, p. 6

There have also been cases where investigations were commenced back-to-back on the basis of a fresh application a few months after an investigation was terminated, on the grounds that there was no injury. The commencement of investigations in cases where there are no sufficient grounds adversely affects exporters in two ways. First, the apprehension that anti-dumping duties may be levied can make importers switch their orders to other countries. It is not always possible for exporters to gain the lost market after a negative determination is made and it is decided not to levy duties. Second, the commencement of such investigations puts exporters to unnecessary expenditure on furnishing information demanded by the investigating authorities in their questionnaire and hiring anti-dumping lawyers who can defend their interests.

Against the background of this experience in the operation of the Agreement, some countries have proposed that the provisions imposing obligations for examining the accuracy and adequacy of the evidence provided by the applicant before commencement of the investigations should be further strengthened, in order to ensure that such investigations are commenced only in justifiable cases. The countervail as reflected in the report of the WTO Panel in the *Mexico HFCS case*, is that examination made by the authorities at this stage is “only a first step in the investigations.” It would, therefore, be necessary to ensure that any strengthening of rules does not reduce the discretionary authority available to the investigating authorities to commence investigations, when they consider that there is sufficient evidence. There is a risk also that further strengthening of the rules may make the investigating authorities demand additional evidence from the applicants which they may find difficult to collect. The implications of further strengthening of these to small and medium sized industries in developing countries would also need careful examination.

## **1.2 Raising thresholds of the *de minimis* dumping margin and volume of imports**

### **Art. 5.8**

The AD Agreement further lays down the principle that investigations shall not be commenced if, in the preliminary investigations, it is found that the dumping margin is *de minimis* or the volume of dumped imports, actual or potential for the injury is negligible.

Presently, the relevant rules provide that a dumping margin of 2 per cent (expressed as percentage of the export price) should be treated as *de minimis*, as ordinarily such a low margin cannot cause injury to the industry in the importing countries.

As regards the volume of imports, the threshold provided for determining negligibility is 3 per cent of the total imports of the like product from a particular country. However, this rule is not to be applied where collective imports of countries with negligible imports of 3 per cent account for more than 7 per cent.

It has been suggested by some countries, that:

- The *de minimis* level for dumping margins should be suitably raised.
- The threshold level for exemption of imports from a developing country, from the application of anti-dumping duties should be raised from 3 to 5 per cent.
- The provisions requiring investigating authorities to commence investigations if collective imports of countries with negligible imports is more than 7 per cent, should be deleted.

Some countries have suggested that the basis adopted for determining the threshold relating to the volume of imports should be to provide that no anti-dumping duties would be levied on imports from

a developing country, if imports from that country constitute less than 5 per cent of the total consumption in the investigating country of the concerned product and not, as at present, of its total imports. Adoption of such criteria may also ensure that ordinarily no anti-dumping duties are levied on imports from least developed countries.

It should be noted that these numerical benchmarks specified in the Agreement at present are not based on an economic analysis, but are the result of agreements reached during the negotiations. As to how far their upward revision would result in a lesser number of investigations being initiated, would have to be examined on the basis of the data on dumping margins and the volume of imports in cases decided in the past in different countries. Further, a revision of the criteria of negligible imports, by linking it to consumption, may lead to a number of developing countries being exempted from anti-dumping actions when actions are taken by developed countries. At the same time, it may make it difficult for them to apply such measures to imports from other countries, when they have to resort to such measures.

The implications of the upward revision of such thresholds for the industries in developing countries that are affected by dumped imports would also have to be borne in mind. Some analysts consider that even the margin of 2 per cent could have serious negative effects on producers of agricultural and mineral products and even some of the industrial products in these countries.

### **1.3 Review of the provision relating to standing of the applicants**

A related question, which the investigating authorities have to address before initiating investigations, is whether the application has been made “by or on behalf of the industry”. The Agreement stipulates that investigations shall not be initiated, unless the authorities have been able to establish that the applicants have a “standing” to claim that the application has been made on behalf of a representative section of the industry. For the determination of such standing the Agreement lays down two tests. One of these two tests provides that the investigating authorities must, before commencing investigations, satisfy that the application is supported by producers who account for at least 25 per cent of the total production of the like product.

Some countries have proposed that this threshold should be raised from 25 per cent to 50 per cent. In their view the existing threshold is too low and does not in practice fully conform to the criteria prescribed by the Agreement, that the investigations should be commenced only where evidence shows that “a major proportion of the total domestic production is affected by dumped imports”.

The basic purpose of the proposal is to ensure that investigations are commenced only where it is possible for the applicants to establish that a major proportion of the industry producing like product is affected and not where only a few producers are affected by imports, which are alleged to be dumped.

The countervail is that raising the threshold for determination of standing may pose difficulties for the producers affected by dumped imports in applying for redress. This may particularly be the case for the producers in developing countries, where domestic industry consists of a large number of small and medium-sized industries. In such a situation the producers wishing to apply may, in practice, find it both time consuming and expensive to canvass for support and establish that producers accounting for 50 per cent of the production are supporting the application. The problems that may be faced in establishing standing may occur more in the agricultural sector, particularly in developing countries where the production of most of the crops is undertaken by thousands of small-scale farmers.

#### **1.4 Establishment of more precise criteria for identification of “like products”**

In determining whether the industry is being injured as a result of dumped imports, the Agreement requires that only the segment of the industry that produces products that are “like” the exported products which are alleged to be dumped, should be considered for purposes of standing. However, it does not contain any precise definition of what constitutes a like product, but states that the term should be generally interpreted to signify a product, which is identical i.e. alike in all respects to the products under consideration. It further provides that in the absence of such a product, another product that - although not alike in all respects - has characteristics closely resembling those of the product under investigation, could be treated as a like product.

It is argued that the present broad definitions provide wide discretion to the investigating authorities in determining which products should be treated as being “like” exported products that are alleged to be dumped. In some cases an attempt is made to define the category “broadly”. This results in a larger number of products being brought under the scope of the investigations, and eventually subject to anti-dumping duties. On the other hand, a narrower definition results in products that are substitutable escaping from imposition of such duties, even though they may be indirectly responsible of the injury caused to the domestic industry.

To remove the uncertainty created by the absence of a precise definition, some countries have proposed that the relevant provisions should be clarified, by establishing, *inter alia*, non-hierarchical and non-exhaustive criteria which countries must apply in determining whether the product alleged to be dumped is identical in all respects to the domestically produced product, and is therefore a like product. Such criteria should require the investigating authorities to apply - in addition to the criteria such as physical characteristics, comparable quality standards, functional similarity, and tariff classification, which are generally applied by them at present - also market-based criteria that help in ascertaining whether the products are “directly competitive and substitutable in the market place”.

In this context, some delegations have suggested that it may be desirable to elaborate separate criteria for determining the “like product” according to the two different purposes for which the concept is used in anti-dumping investigations. The investigating authorities would first have to identify the “domestic like product” that is being injured by the imported product under investigation. Secondly, they would have to identify the product sold in the domestic market of the exporting country (foreign product), and which is “like” the product under investigation, in order to determine dumping margins.

For identification of the “domestic like product” for the determination of whether increased imports are causing injury to the domestic industry, criteria should take into account – in addition to physical characteristics – market-based elements, such as “end uses, substitutability, pricing levels and distribution channels”. In the second case, where products that are like the domestic product have to be identified for determining dumping margins on the basis of a price comparison, a narrower criterion based on “physical characteristics of the product that would likely affect the price, including technical specification and quality”, should be adopted.

The other view is that in elaborating such criteria, care may have to be taken to ensure that discretion available to the investigating authorities to determine which products produced domestically should be treated as like products, should not be completely eliminated. The development of rigid criteria may in practice add complications and make determination of like products difficult, if the flexibility available to the investigating authorities at present is completely removed.

## **2. Proposals for review of the rules relating to the determination of dumping margins**

The discussion has, so far, centred on the proposals that have been tabled for tightening of the rules applicable to the issues the investigating authorities are expected to examine in taking a decision on the initiation of an investigation. In the following, the chapter describes the proposals that have been made for modifications of rules governing the determination of dumping margins.

### **2.1 The need to prohibit the practice of zeroing**

As noted in Chapter One, dumping margins are determined by comparing the normal value of the like product sold in the domestic market, with the export price. Normal value for this purpose is calculated from the prices charged in the domestic market, after making necessary adjustments.

Comparison between the normal value and the export price may give a margin that is positive or negative. The margin is considered to be positive where the export price is lower than the normal value; charging such an export price constitutes dumping. On the other hand, where the export price is higher than the normal value, there is no dumping; the margin is negative in such a case.

The question that arises is how negative dumping margins should be treated in calculating average dumping margins. The normal practice should be to add positive and negative dumping amounts separately in different transactions, and to reduce the negative amounts from the total of positive dumping amounts, to arrive at a dumping margin on the basis of which anti-dumping duties could be levied.

Some countries, however, appear to follow the practice of disregarding transactions where the margin is negative, or of taking them into account, but treating the margin as zero. The last-mentioned practice, which has come to be known as “zeroing”, results in the average dumping margin used for the levying of anti-dumping duties being determined at a level that is higher than would have been the case if negative margins were offset against positive margins.

The following somewhat simplistic illustration would help in understanding the practice of zeroing. Let us assume there are two transactions. In one transaction the normal value is \$100 and export price is \$ 80. The dumping margin of \$20 is positive. In the other transaction the normal value is \$ 120 and export price \$ 100. The margin of \$ 20 in this case is negative. If negative and positive margins were to be offset in calculating the average on the basis of these two transactions, the products would not have been treated as being dumped. If, however, the negative margin is disregarded or treated as zero, the dumping margin would be positive and the importer may have to pay an anti-dumping duty of \$ 20.

In the *EC Bed Linen Case* the WTO Appellate Body ruled that the practice of zeroing is not consistent with the objectives and rules of the AD Agreement. A number of countries have, therefore, proposed that the rules of the Agreement relating to the determination of dumping margins should be clarified, taking into account this ruling by the Appellate Body. Under WTO jurisprudence, the rulings made by the Panels or the Appellate Body are binding only on the parties to the dispute. The ruling that the practice of zeroing is inconsistent with the rules of the WTO Agreement and should, not be applied is, therefore, only binding on the EU. The EU has already taken steps to change its rules to comply with the decision.

The practice, however, is being followed by other countries - notably the USA. Recently (16 January 2004) the US Court of Appeals for the Federal Circuit ruled that the practice of zeroing was a reasonable interpretation of the US anti-dumping statute. The court also declared that the WTO ruling condemning zeroing was not “sufficiently pervasive” and it was “unreasonable” for WTO to hold the practice followed by the US investigating authorities was not correct.<sup>14</sup> The EU has since invoked a WTO dispute settlement procedure against USA to secure changes in the US practice for zeroing negative margins.

## **2.2 The need for review of the provision in the AD Agreement relating to affiliated party transactions in calculating the average normal value and export price**

The rule in the AD Agreement, stipulating that the dumping margin should be calculated on the basis of a comparison between the normal value (determined on the basis of home market prices) and the export price, applies when the transactions “are in the ordinary course of trade”. Are sales between the exporting company and its “affiliated” or “associated” parties in the “ordinary course of trade”? The present practice in most of countries is to treat such sales as “not in the ordinary course of trade”, and disregard them in the calculation of the normal value and average export price where the investigating authorities consider that the relationship has influenced the price.

Some countries have pointed out that since the AD Agreement provides no specific rules or guidelines on how the sales to affiliated enterprises should be treated, countries have adopted different practices at the national level for determining whether the relationship between the exporting company and its affiliated party has influenced the price. In a number of cases, the rules adopted are so complex that it is difficult for the exporting companies to know in advance which of the sales to the affiliated parties would be treated as being not in the ordinary course of trade and, therefore, would be excluded from the normal value or export price calculations. The present practice also puts an unnecessarily heavy burden on exporting companies, as some investigating authorities require in their questionnaires, information to be provided separately for sales to the “non-affiliated” and “affiliated parties”, both in regard to the home market and export sales. In relation to sales to affiliated parties, some investigating authorities require information to be furnished on the price charged by the affiliate for the product purchased by it from the exporting enterprise and sold by it in the home market, in order to determine whether the price charged by the exporting enterprise is influenced by relationship.

Therefore, it is proposed that rules in the AD Agreement, particularly those in Art 2.2 relating to the determination of dumping margins should be amended by the adoption of:

- A definition of “affiliated parties” which would apply in the determination of dumping margins, involving transactions between the exporting company and its related, associated or affiliated parties, and
- Rules laying down specific situations where such trade could be disregarded in the calculation of the normal value or export price, on the grounds prices in transactions between such parties could be unreliable.

As regards the definition, the proposal suggests that a party should be treated as an affiliated party if it directly or indirectly controls or is controlled by another party or is under the common control of a third party. Further, a party should be determined to have controlling power to govern and influence

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<sup>14</sup> WTO Reporter, 2 February 2004.

the pricing policies of an enterprise if, *inter alia*, it has more than half of the voting power, or has more than half of the voting rights by virtue of an agreement or a statute.

As regards the criteria that could be adopted in disregarding sales by the exporting company to its affiliated parties, it is proposed that such sales could be excluded from:

- The sales in the exporting country, or
- To a third country market,

for determining the *normal value*, only if the weighted average sales by the exporting country to its affiliated part varies by more than *X per cent* from the weighted average of sales to the unaffiliated parties and

- The weighted average price of sales by the exporting company to the affiliated party is more than the highest of the weighted average price of sales of each unaffiliated party, or
- Less than the lowest of the weighted average price of sales to each unaffiliated party based on company-to-company comparison.

Likewise, it is proposed that in calculating the weighted average export price for determining dumping margins on the basis of a comparison with the normal value, sales transactions between the exporting company and “affiliated importers” should be allowed to be disregarded by applying the same criteria.

The counterview is, that an adoption of the definition of affiliated parties on the lines suggested may not always be useful in determining whether the price has been influenced by the relationship. An enterprise having even less than 5 per cent of the voting rights in the affiliated company may be able to influence the prices. The investigating authorities would, therefore, need to have discretionary authority to determine whether the relationship between the exporting enterprise with the affiliated party in the country, or affiliated importer, has influenced the price that has been charged.

### **2.3 The need for revision of rules relating to the treatment of sales at a loss in determining the normal value**

A related issue has been raised in relation to the rules of the Agreement on how sales made by a firm in its domestic market at prices below unit cost of production should be treated in determining the normal value, for comparison with the export price. If such sales are not taken into account, dumping margins would be inflated. The degree of inflation is determined by the magnitude over or under the cost of production. The practice of many investigating authorities in the past before the Agreement was revised in the Uruguay Round, was to ignore all sales below cost of production completely. This resulted in normal values being determined at a high level and inflation of the dumping margins. The AD Agreement aims at putting some restraint on this practice by providing that such sales may be disregarded in determining the normal value, if they:

- Are made over an extended period of time (more than six months),
- Are made in substantial quantities i.e. they do not represent more than 20 per cent of the volume sold in transactions under consideration for the determination of normal value, and
- Do not provide recovery of all costs within a reasonable period of time

Some countries have proposed that the threshold of 20 per cent should be raised to 40 per cent. In other words, investigating authorities would be permitted to disregard transactions involving sales

below costs only where such sales exceed the threshold level of 40 per cent. If they are below that level, such sales would have to be taken into account in determining the normal value.

In this context, it is pointed out that sales below costs in domestic markets for a limited period of time are also regarded as normal practice in trade in certain sectors, where - because of the fast pace of innovations - old models have to be sold at a loss, or in sectors like steel, aluminium and others where there is structural oversupply resulting from an imbalance between world demand and supply. Upward revision of the threshold would reflect the present commercial reality.

The counterview is that such sales below costs, whatever may be the reason why they are undertaken by the exporting firms, could distort conditions of competition in the market of the importing country and result in injuring the domestic industry producing like products.

In further examination of the proposal to raise the threshold level, it has also to be borne in mind, that the present threshold of 20 per cent is a negotiated figure and is not based on any economic criteria.

#### **2.4 The need for review of the rules relating to the determination of dumping margins where there are no sales in the domestic market**

The Agreement envisages that dumping margins should normally be determined on the basis of a comparison on the “export price” of the product under investigations with the “normal value” calculated on the basis of the price of the like product for sale in the domestic market of the exporting country. It however recognises that such a comparison may not be possible:

- Where there are no sales in the domestic market, or
- Because of a particular market situation or low volume of sales in the domestic market, such a comparison is not feasible.

In such cases, the Agreement provides that the dumping margin should be determined by:

- A comparison of the export price of the product under investigation and the price of the like product exported to third country market, or
- On the basis of the cost of production in the country of origin, plus a reasonable amount for administrative, selling and general expenses and for profits.

Some countries have proposed that the use of a constructed value for the determination of the normal value should be resorted to, only where it is not possible to determine the normal value on the basis of the third country prices. The main reasons for the proposal is that in determining the “constructed value” on the basis of cost of production, the investigating authorities have considerable flexibility, with the result that the normal value based on a “constructed value” often gets determined at high levels. This also puts a considerable administrative burden on the industries in the exporting countries, to provide the cost and other data needed by the investigating authorities. Such problems could be avoided if the constructed value system is resorted to, only in situations where it is not feasible to determine the dumping margin on the basis of the prices charged by the exporter to third country markets.

The counterview is that the exporter charging dumped prices in one market may be charging similar prices in other export markets. Determining dumping margins on the basis of a comparison between the price charged by the exporter to the exporting market where it is alleged that goods are being



dumped at prices charged in other export markets may, therefore, not always provide an appropriate basis for the determination of margins in anti-dumping investigations.

## **2.5 Proposals for review of the methodologies specified in the Agreement for the calculation of the constructed value**

The Agreement stipulates that - where the investigating authorities find that the selling, general and administrative costs and profit elements of a constructed value cannot be determined on the basis of the accounts maintained by the firm, or on the basis of the cost of production of other exporters or producers in the country of export - the value should be determined on the basis of any other reasonable method.

The last method requires that the amount for profit in the total costs, “should not exceed the profit realised by other exporters or producers on sales of products of the same general category” in the domestic market of the exporting country. In applying this method, the investing authorities often rely on profit levels that are high, resulting in an increased normal value. This in turn results in the determination of higher dumping margins. In the *EC Bed Linen Case* where profit was 18.6 per cent of the total costs and in *Thailand H-Beams Case* where the profit was 36.3 percent, the panels have held that if reasonable levels of profit were calculated according to the methods prescribed in the Agreement, they cannot be challenged.

Some countries have suggested that there should be a cap on the amounts of profit that could be added in determining the normal value. In this context, it is relevant to note that this issue was discussed in the Uruguay Round. It was, however, not possible to agree on a numerical cap as the profit levels vary from industry to industry. Even in the same industry the profit levels could vary widely from year to year and from model to model in the same product category.

## **3. Proposals for review of the rules relating to the determination of the volume of imports and cumulation of imports**

### **3.1 The need for review of the rules relating to the determination of the volume of dumped imports**

The AD Agreement envisages that anti-dumping duties, not exceeding the margins of dumping, should be levied only after it has been possible for the investigating authorities to establish that the increased volume of dumped imports are causing material injury to the domestic industry.

To determine injury to the domestic industry, the investigating authorities are required to establish that there is - on the one hand - a causal link between the volume of dumped imports, and the consequent impact of those imports on domestic producers of such products on the other. The question that arises is how the volume of dumped imports should be determined for this purpose. The practice followed by many investigating authorities in assessing whether there has been an increase in dumped imports, is to determine volume on the basis of all imports of the product under investigation from the concerned exporting country, irrespectively of whether they are dumped or not.

It has been suggested by some countries that this practice is inconsistent with both the objective and the spirit of the Agreement. In determining the volume of imports for use in injury determination, only imports from exporters who are dumping the product under investigations from the country where

such exporters are situated, should be taken into account. In other words, imports of the product from the concerned exporting country that are not coming in at dumped prices must be excluded from the total.

This issue was raised by India before the Panel on *EC Bed Linen*. The Panel held that the term “dumped imports” has to be determined in the light of the objective and purpose of the AD Agreement and the relevant provisions relating to the determination of volume of imports. These provisions make it clear that dumping determination is to be made with respect of a product, and not on the basis of individual transactions. It was, therefore, both legitimate and appropriate to take all imports of the product from the country whose exporters were alleged to be dumping. The Panel also observed that an interpretation of the relevant provisions, that only transactions covering imports with positive margins should be considered in determining the volume of imports, would be impossible, or at least impracticable to administer in cases where dumping margins are based on samples or on the basis of weighted average prices.

Despite this ruling by the Panel, some countries have again suggested that the relevant rules should be clarified to require that only imports which are entering at dumped prices should be considered in arriving at the volume of imports and that the imports from the exporters, coming at non-dumped prices, must be excluded.

It would be necessary to examine whether this would put an additional burden on the investigating authorities and make the process more complex, time consuming and expensive.

### **3.2 The need for greater discipline in the flexibility available for cumulation of imports**

A related issue that has been raised regards the rules in the Agreement on the cumulation of imports. Ordinarily the investigating authorities are expected to examine whether dumped imports are causing injury to the domestic industry separately on the basis of imports from each country whose exporters are under investigations. However, the rules provide that where the investigating authorities determine that, taking into account “the conditions of competition” between:

- The imported products from different countries and
- The imported products and the like domestic product

The cumulation of dumped imports may be appropriate. In these situations, an assessment of the effects of the imports on the domestic industry may be made by cumulating them. It should be pointed out that the Agreement does not establish factors that should be considered in deciding whether the “conditions of competition” are comparable and therefore, warrant cumulation.

This often results in imports from countries whose exports are small from being cumulated with those from countries whose exports are large. If, in such cases, imports were not cumulated and each case was examined separately to determine whether it is causing injury to the domestic industry, countries whose share in total imports is small may not be subjected to anti-dumping duties. In most cases, countries that have such small shares are developing countries.

The counterview is that in the “commercial reality,” dumped imports from different countries compete with one another and the domestic product for sales in the importing market. Therefore, cumulation of dumped sales from all sources, taking into account the conditions prescribed by the Agreement, helps in correctly evaluating whether or not such imports are causing injury to the domestic industry.

#### **4. Proposals for review of the rules relating to the determination of injury to the domestic industry**

##### **4.1 The need for review of the provisions relating to economic and non-attributable factors that should be taken into account in determining injury**

The Agreement envisages that the price effects of the volume of dumped imports on the domestic price level could take the form of price undercuttings, price depression or prevention of price increases. It then goes to list specific economic factors, which the investigating authorities must take into account in determining the impact of dumped imports on the domestic industry.

The factors include:

- A decline in sales, profits, output, market share, productivity, return on investment or utilization of capacity,
- Factors affecting domestic prices,
- The magnitude of the dumping margin.

The above list of economic factors is not exhaustive. It is therefore open to the investigating authorities to examine “other economic relevant factors having bearing on the state of industry”. The WTO panels have, however, ruled that even though the listing of the factors is non-exhaustive, the Agreement makes it mandatory for investigating authorities to consider the effects of each of the listed factors on the state of industry. Further, the records of investigation must clearly demonstrate how the investigating authorities applied each of these and any other criteria provided by interested parties in making a positive or negative determination of injury.

The rules of the Agreement further aim at ensuring that anti-dumping duties are levied only where it has been possible for the investigating authorities to establish that there is a causal link between dumped imports and injury to the domestic industry. They emphasise that other factors than dumped imports may have caused the problems of the industry. The injuries caused by such factors, i.e. non-attributable factors, should not be attributed to dumped imports.

The rules list some of these “non-attributable” factors. These include:

- The volume and prices of imports not sold at dumping prices.
- The contraction of demand.
- Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and investment.
- Contraction in demand or changes in the pattern of consumption.
- Trade restrictive practices and competition between the foreign and domestic producers.
- Development of technology and the export performance and productivity of the domestic industry.

##### **4.2 Proposals to make the examination of the non-attributable factors mandatory**

The panel in the *Thailand H-Beams Case* has held that the listing of these non-attributable factors is only illustrative and not mandatory. Some countries have suggested that the list of these non-attributable factors should be reviewed and the examination of all listed factors should be made mandatory.

Proposals that have been made for improvements of rules in this area include:

- The clarification of the definition of material injury.
- An analysis of the causal relationship between dumped imports and injury to the domestic industry.

The economic factors listed in the Agreement, that have to be taken into account in determining whether or not increased imports are causing an injury to the domestic industry, are those that adversely affect the “operating performance” of the domestic industry. It is suggested that it may be desirable to provide a “benchmark” against which to measure the existence or absence of injury by adding the definition of the term of material injury in Article 3, which clarifies that the term means “injury as demonstrated by an important and measurable deterioration in the operating performance of the domestic industry”.

The other proposals envisage the review of the “economic factors” listed in the Agreement, in order to ensure consistency and predictability in their application by all countries and that injury is established only in situations where there is a causal relationship with dumped imports.

#### **4.3 Clarification of the concept of “material retardation”**

It is open to a country to levy anti-dumping duties, not only in cases where dumped imports are causing or threatening to cause material injury to the domestic industry, but also in cases where they “materially retard the establishment of the domestic industry”. The AD Agreement, however, does not contain precise rules on how the investigating authorities should determine that as a result of dumping by foreign producers, the establishment of a domestic industry is being retarded. A footnote to Art 9 only states that the term “injury” used in the Agreement should be interpreted as meaning “material injury” to a domestic industry, “threat of material injury” to a domestic industry or “material retardation” of a domestic industry.

It has been pointed out by some delegations that the absence of precise rules for the determination of retardation of domestic industry, similar to those laid down by the AD Agreement for the determination of material injury, has resulted in countries not being able to impose anti-dumping duties where dumped imports are materially retarding the establishment of the domestic industry.

The development of precise rules in this area is of particular importance to developing countries for, *inter alia* the following reasons:

- Production by domestic industry of a number of products often constitutes only a small proportion of the total domestic consumption and the bulk of it is met by imports. In order to retain their market share, foreign suppliers start charging dumped prices whenever they find that new domestic firms are trying to establish domestic production facilities.
- The new domestic firms entering the market often plan to introduce a product that is produced by upgraded technology, in order to have a competitive edge over products that are being supplied by the existing domestic and foreign producers. The products produced by upgraded technology are often different from the products marketed by foreign suppliers. Because of this, it becomes difficult to establish that the product that is produced by the new domestic firms – or is about to be put in the market – is “like” the product marketed by foreign producers, when they start dumping, in order to prevent or retard the development of a new domestic industry.

- In a number of developing countries important sectors of the economies are being privatised. The newly formed privatised industries are facing serious problems if, at the time when they are seeking to establish themselves and to adjust to a new competitive environment, foreign producers start “dumping” their products.

Therefore, it is proposed that the rules of the AD Agreement should be reviewed:

- To clearly identify situations in which the “material retardation” concept would be applicable, and
- To clarify how the tests laid down in the AD Agreement for the determination of injury can be applied in determining the causal link between dumped imports and material retardation.

## **5. Rules governing the imposition of anti-dumping duties**

Proposals have also been made for improvement of the rules laying down guidelines on how the level of anti-dumping duties payable by importers should be determined on the basis of dumping margins.

### **5.1 The need for review of rules relating to the determination of the rate applicable to exporters**

The Agreement requires that individual rates of anti-dumping duties should be established for all “known exporters” having exports during the period of investigations. However, where - because of the large number of exporters or producers - the establishment of a separate rate for each of them is considered impractical, the Agreement permits the fixing of individual rates only for a limited number of known exporters, on the basis of a statistically valid sample.

For all known exporters for whom such individual rates have not been fixed, a common rate is determined on the basis of weighted average margins established for known exporters or producers. However, in fixing such a rate, *de minimis* and zero margins and duties fixed on the basis of facts available are to be ignored. It is the practice of some investigating authorities to apply this rate (which has come to be known as the “limited examination rate”), also to exporters whose identity was not known to the investigating authorities when anti-dumping rates were being fixed. The practice, however, is not uniform. While some apply the common rate, others apply the highest rate. The rates applicable to exporters whose names were not known at the time of the final determination of anti-dumping duties are known as “all other rates”.

It has been suggested that the relevant rules should be modified to permit *de minimis* and zero margins being taken into account in determining the common rate. This would lead to a lower duty being applied to imports from exporters for whom separate rates have not been fixed. However, the proposal envisages that, as provided at present, rates of duties that are fixed by the investigating authorities on the basis of the information available to them (facts available rate) should continue to be excluded. The reason for this suggestion appears to be that in practice such rates tend to be fixed at higher levels than those based on information provided by the exporters and their inclusion in the calculation of average would inflate the final “all other rate”. The counterview is, that it would also be necessary to include a “facts available rate” in the calculation of the “all other rate”.

In this context, it is important to note that the existing rules providing for exclusion of *de minimis*, zero and rates fixed on the basis of facts available in determining rates applicable to the exporters for whom separate rates have not been fixed, are the result of negotiated compromises reached during the Uruguay Round and reflect practices followed by some countries at that time. The implication of the

current proposals would, however, need careful examination. Some commentators consider that the apprehension that the “all other rate” may be lower than the rates applicable to exporters for whom separate rates have been fixed, may make the applicants insist on fixing separate rates for all exporters. This may increase the burden unreasonably for the investigating authorities.

## **5.2 Review of the rules relating to the determination of rates determined on the basis of facts available**

Proposals have been made for a tightening of the rules relating to situations in which the investigating authorities are permitted to determine dumping margins on the basis of the information available to them. It is pointed out that the experience has shown that authorities reject the information provided by the exporter very often, or demand information that exporters are not able to provide readily and proceed to determine the dumping margin on the basis of information available to them. In most cases, this results in dumping margins being determined at levels that are higher than would have been the case, if margins were calculated on the basis of information obtained from the exporter.

The countervail to the proposal for tightening of the existing rules is that the Annex in the Agreement provides sufficient safeguards against investigating authorities turning to the facts available route for determining dumping margins. In any further effort to tighten this discipline, it has to be borne in mind that the investigating authorities have no legal power to compel exporters or producers, who are situated in outside countries, to provide information in response to the questionnaire. The possibility that the investigating authorities may fix anti-dumping duties on the basis of facts available to them, induces them to provide the required information within the indicated period of time.

## **5.3 The need to make the lesser duty rule mandatory**

The AD Agreement encourages countries to levy anti-dumping duties that are “less than the dumping margin” if such a lesser duty would be adequate to remove the injury to the domestic industry. In the *EC Bed Linen Case*, the panel observed that one of the ways in which developed countries could apply special and differential treatment to developing countries in the application of anti-dumping measures, is by applying a duty that is less than the dumping margin.

Some countries have proposed that the application of the lesser duty rule should be made mandatory. If such a rule is to be applied on a mandatory basis, it may be necessary to agree on methodologies for determining the lesser duty.

It has been proposed that one of the methodologies that could be used for this purpose would be to make it obligatory for investigating authorities to calculate the injury margin. Two broad options have been suggested for the calculation of such a margin.

Under the first option, the injury margin is the difference between the price of the like product produced by the domestic industry (in the country of investigation) and the prices of dumped imports for each exporter or producer under investigation.

Under the second option, the injury margin shall be determined on the basis of the difference between the “target price” of the domestic industry and the price of the dumped imports for each exporter or importer.

It is suggested that the target price for the above purpose could be determined by using one of the following four options:

- The price of the domestically produced like product (in the country of investigation) prior to it being affected by the dumping;
- The price of the product concerned when exported by those exporters or producers who are found not to have dumped the product during the investigating period;
- The price of the like product, when exported during the investigation period from appropriate third countries, and
- The “cost of production” method.

## **6. Sunset Reviews**

### **6.1 The need for automatic termination of anti-dumping duties after five years**

The AD Agreement limits the application of anti-dumping duties to a period of five years from the date of their application. Such duties could, however, be continued if on the basis of a review conducted before the end of the five year period, a need for continuation of the measure is established. Because of these provisions for review, the anti-dumping duties are being continued in a number of countries for a period of time that is longer than five years.

Because of this, some countries have suggested that the rules should be modified to provide for automatic termination of the anti-dumping measures after five years. It is further proposed that if the provisions for review are to be maintained, the same standards that are applied in the initiation of investigations should be applied in undertaking reviews. In other words, the review procedures would have to be terminated if it is found that dumping margins are *de minimis* and the volume of the dumped imports is negligible.

The countervail is that a change of the rules to provide for an automatic termination of anti-dumping duties after a period of five years could lead to the removal of such duties even in cases where exporters have not ceased dumping. This may leave no alternative to the affected domestic industry, but to apply for new investigations before the end of the period. As any such rule would also apply to developing countries, the implications for their industries of having to initiate new investigations in such situations must be carefully examined.

The proposals that some standards, like those applying to the initiation of investigations should apply to the standards used in sunset reviews would also need careful examination, taking into account that the considerations on which the investigating authorities have to base their decisions are vastly different in two cases. In the case of investigations for the levying of anti-dumping duties, the authorities have to examine whether the imposition of such duties is necessary. In sunset reviews, on the other hand, the authorities have to examine the likely effect on the domestic industry of a change in status quo, viz. the termination of the definitive anti-dumping measure. The inquiry in the latter case is inherently prospective and requires the investigating authorities to engage in an analysis of the possible implications of the removal of anti-dumping duties on future export prices and volume of imports. There could be a situation when margins of dumping may be *de minimis* or the volume of imports negligible, because of the existence of anti-dumping measures, but their removal may lead to the recurrence of dumped imports.





## ANNEX

### Listing of proposals made for modification of the rules of the AD Agreement on an issue-by-issue basis

#### 1. Proposals for modification of the rules relating to the initiation and conduct of investigations

##### **The need for greater scrutiny and evaluation of the information provided in the application**

*Require authorities to verify information in applications for investigation.*

TN/RL/W10: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand.

##### **Raising thresholds of *de minimis* dumping margin and volume of import**

*Increase de minimis dumping levels.*

TN/RL/W/4: India;

TN/RL/W/6: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; Turkey;

TN/RL/W/7: Brazil;

TN/RL/W/66: People's Republic of China.

*Increase the negligible volume threshold:*

TN/RL/W/4; TN/RL/W/6; TN/RL/W/66

##### **Review of the provision relating to standing of the applicants**

*Raise support threshold for a "major proportion" of domestic industry support for applications for an anti-dumping investigation*

TN/RL/W10: Brazil; Chile; Colombia; Costa Rica;

Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand;

TN/RL/W47: Canada;

TN/RL/W/66: People's Republic of China

*Agreement on sampling methods for determining minimum domestic industry support for investigations*

TN/RL/W/26: India

*Prompt access to non-confidential information (Art 6.4 Anti-dumping Agreement and 12.3 Agreement on Subsidies and Countervailing Measures)*

TN/RL/GEN/13, TN/RL/W162/Rev.1: United States of America

### **Establishment of more precise criteria for identification of like products**

*Define “product under investigation”*

TN/RL/W/7: Brazil;

TN/RL/W/10: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand.

*Narrow the scope of the “like” product*

TN/RL/W/47: Canada.

TN/RL/GEN/26: Canada.

*Apply domestic market viability test to each model instead of to the like product.*

TN/RL/W/29: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; Turkey.

## **2. Proposals for review of the rules relating to the determination of dumping margins**

### **The need to ensure fair comparison at the “same level of trade”**

*Fair comparison at the “same level of trade” - symmetrical adjustments between export price/constructed export price and normal value; exclusion of certain types of export sales from the calculation of export price and constructed price etc; comparison methods.*

TN/RL/W/158: Chile; Colombia; Costa

Rica; Hong Kong, China; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand.

### **The need to prohibit the practice of zeroing**

*Prohibit “zeroing”*

TN/RL/W/6: Brazil; Chile, Colombia, Costa Rica; Hong Kong,

China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; Turkey;

TN/RL/W/26: India

TN/RL/W/66: People’s Republic of China.

### **The need for review of the provision in the AD Agreement relating to affiliated party transactions in calculating average normal value and export price for determination of dumping margins**

*Define “Affiliated parties”; exclude all sales by the responding party to its affiliate Parties from the sales in the exporting country for determining normal value etc.*

TN/RL/W/146: Brazil; Colombia; Costa Rica;

Hong Kong, China; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand.

**The need for revision of rules relating to the treatment of sales at loss in determining normal value**

*Clarify rules under Article 2.2.1 regarding sales in the ordinary course of trade.*

TN/RL/W/6: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; Turkey.

*Allow more below cost sales for cyclical perishable products.*

TN/RL/W/6 (see above);

TN/RL/W/45: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Singapore; Switzerland; Thailand.

*Determination of normal value: Define “quantity of sales of the like product in the domestic market for the determination of normal value”; define sales of the like product in the ordinary course of trade etc.*

TN/RL/W/150: Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Singapore; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand.

**Proposals for review of the methodologies specified in the Agreement for the calculation of constructed value**

TN/RL/W/6: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; Turkey;

TN/RL/W/45: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Singapore; Switzerland; Thailand.

*Provide rules to calculate injury margins for application of the lesser duty rule.*

TN/RL/W/26: India;

TN/RL/W/47: Canada.

**3. Proposals for review of the rules relating to the determination of the volume of imports and cumulation of imports**

**The need for review of the rules relating to the determination of volume of dumped imports**

*Prohibit determination of injury on the basis of the effect of all imports of an investigated product from an exporting country*

TN/RL/W/29: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; Turkey.

*Limit discretion on injury determinations*

TN/RL/W/66: People's Republic of China.

**The need for greater discipline in the flexibility available for cumulation of imports**

*Clarify what factors are to be considered in determining whether to cumulatively assess injury, restricting situations where investigating authorities determine injury from several countries together*

TN/RL/W/6: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; Turkey.

**4. Proposals for review of the rules relating to the determination of injury to the domestic industry**

**The need for review of the economic factors that should be taken into account in an injury analysis; the need to make an examination of the non-attributable factors mandatory**

*Prohibit determination of injury on the basis of the effect of all imports of an investigated product from an exporting country*

TN/RL/W/29: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; Turkey.

*Limit discretion on injury determinations*

TN/RL/W/66: People's Republic of China

*Clarification of the definition of material injury; analysis of the causal relationship between dumped imports and injury to the domestic industry*

TN/RL/GEN/28: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of.; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand.

**5. Proposals for review of rules relating to material retardation**

**The need to clarify "material retardation"**

*Clarify the definition of "material retardation"; identify a material retardation test*

TN/RL/W/175, TN/RL/GEN/40: Egypt.

## 6. Rules governing the imposition of anti-dumping duties

### **The need for review of the rules relating to the determination of dumping margins where there are no sales in the domestic market**

#### *Mandatory lesser duty rule in all investigations*

TN/RL/W/6: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; Turkey;  
TN/RL/W/13: European Commission.

#### *Make the lesser duty rule mandatory for all investigations of developing country products by developed countries*

TN/RL/W/4: India;  
TN/RL/W/7: Brazil;  
TN/RL/W/66: People's Republic of China.  
TN/RL/GEN/32: India.

### **The need for review of rules relating to the determination of “all other rate”**

#### *Include zero & de minimis margins in “all others” rate*

TN/RL/W/10: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand;  
TN/RL/W/66: People's Republic of China.

#### *Allow partial facts available margins to be used to calculate the all others rate*

TN/RL/W/72: United States of America.

### **Review of the rules relating to the determination of rates determined on the basis of facts available**

#### *Restrict the use of “facts available”*

TN/RL/W/6: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; Turkey;  
TN/RL/W/26: India.

## 7. Sunset reviews

### **The need for automatic termination of anti-dumping duties after five years**

#### *Automatic termination (“sunset”) of definitive measures after five years, without exception, under Article 11.3*

TN/RL/W/6: Brazil; Chile, Colombia, Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; Turkey

TN/RL/W/76: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; Turkey.

*Automatic termination (“sunset”) of definitive measures imposed by developed countries against developing countries*

TN/RL/W/66: People’s Republic of China.

*Provide specific conditions for extending cases past 5 years*

TN/RL/W/47: Canada.

*Use investigation standards in “sunset” reviews*

TN/RL/W/10: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand.

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