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TRAINING MODULE ON THE WTO AGREEMENT ON ANTI-DUMPING

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TABLE OF CONTENTS

ABBREVIATIONS

AB: Appellate Body

ADA: Anti-Dumping Agreement

ADP: Anti-dumping practices

ASCM: Agreement on Subsidies and Countervailing Measures

ASG: Agreement on Safeguards

CIF: Cost insurance freight

CTV: Color televisions

CVD: Countervailing duties

DITC: Division on International Trade in Goods, and Services and Commodities

DOC: U.S. Department of Commerce

DRAM: Dynamic random access memories

DSU: Dispute Settlement Understanding

FANs: Friends of the Anti-dumping Negotiations

GATT: General Agreement on Tariffs and Trade

GSP: General System of Preferences

HFCS: High fructose corn syrup

HS: Harmonized system

IIP: Injury investigation period

JWT: Journal of World Trade

LDCs: Least developed countries

MEG: Mono ethylene glycol

PSF: Polyester staple fibres

S&D: Special and differential treatment

SG&A: Administrative, selling and general costs

TNCDB: Trade Negotiations and Commercial Diplomacy Branch

TNC: Trade Negotiations Committee

TPKM: the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

UNCTAD: United Nations Conference on Trade and Development

USDOC: United States Department of Commerce

WTO: World Trade Organization

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This training module is for information and training purposes only and does not intend to state the official position of Member States of the WTO or UNCTAD. It aims to provide training materials and inputs for developing countries' trainers, lecturers and government officials involved in training and research tasks on anti-dumping.

INTRODUCTION

This module is divided into several parts. The first chapter contains substantive material related to the Anti-Dumping Agreement (ADA) and current WTO negotiations. The second chapter gives detailed explanations of the dumping margin calculation, including sample calculations. Two annexes are attached to the module: one contains a table with the proposals Members have put forth in current negotiations, the other contains relevant legal texts (e.g. the WTO Anti-Dumping Agreement).

Chapter I of the module gives an overview of the Anti-Dumping Agreement, including as it has been interpreted by panels and the Appellate Body over recent years. It reviews both substantive and procedural rules. Since the entry into force of the ADA in 1995, several WTO panel reports have been issued interpreting ADA provisions, of which some have been appealed. While not serving as legal precedents, the panel and the Appellate Body reports can offer crucial interpretations of key provisions of the Agreement.[1] The last section of Chapter I gives an overview of the anti-dumping negotiations in the context of the Doha Work Programme.

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

[1] For a detailed review of the ADA's provisions, as they have been interpreted by WTO panels and the Appellate Body, see *Van den Bossche, P*, The Law and Policy of the World Trade Organization; Text, Cases and Materials; Chapter 6; Cambridge University Press 2005.

CHAPTER I

THE ANTI-DUMPING AGREEMENT IN THE WTO: AN OVERVIEW

I.1. Introduction

I.1.1 History

Dumping occurs if a company sells at a lower price in an export market than in its domestic market. If such dumping injures the domestic producers in the importing country, under certain circumstances the importing country authorities may impose anti-dumping duties to offset the effects of the dumping[2].

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

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

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

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

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

An Anti-Dumping Code was negotiated during the 1967 Kennedy Round and signed by 17 parties. The Code was revised during the Tokyo Round. The Tokyo Round Code had 25

[2] This module focuses on the legal aspects of anti-dumping frameworks. Economic analyses, discussing the welfare implications of dumping o of imposing anti-dumping duties are beyond the scope of this module. It is important to recall, however, that the economic basis of current anti-dumping practices can be disputed. For a critique of current WTO negotiations as failing to address the fundamental economic questions of today's anti-dumping system, see William Kerr and Laura Loppacher, Anti-dumping in the Doha Negotiations Fairy Tales at the World Trade Organization, JWT 38 (2), pp. 211-244.

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

I.1.2 Current situation

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

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

I.1.3 Outline of the ADA

The ADA is divided into three parts and two important annexes. Part I, covering Articles 1 to 15, is the heart of the Agreement and contains the definitions of dumping (Article 2) and injury (Article 3), as well as all procedural provisions that must be complied with by importing Member authorities wishing to take anti-dumping measures. Articles 16 and 17 in Part II establish respectively the WTO Committee on Anti-Dumping Practices (ADP) and special rules for WTO dispute settlement relating to anti-dumping matters. Article 18 in Part III contains the final provisions. Annex I provides procedures for conducting on-the-spot investigations, while Annex II imposes constraints on the use of best information available in cases where interested parties cooperate insufficiently in the investigation. The text of the ADA is reprinted at the end of this training module.

I.1.4 Actionable forms of dumping

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

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

On the other hand, the reasons why companies dump are considered irrelevant as long as the technical definitions are met: dumping may therefore equally cover predatory dumping,[3] cyclical dumping,[4] market expansion dumping,[5] state-trading dumping[6] and strategic dumping.[7]

Conceptually, the calculation of dumping is a comparison between the export price and a benchmark price, the normal value, of the like product. Depending on the circumstances in

[3] Dumping in order to drive competitors out of business and establish a monopoly.
[4] Selling at low prices because of over-capacity due to a downturn in demand.
[5] Selling at a lower price for export than domestically in order to gain market share.
[6] Selling at low prices in order to earn hard currency.
[7] Dumping by benefiting from an overall strategy which includes both low export pricing and maintaining a closed home market in order to reap monopoly or oligopoly profits.

the domestic market, this normal value can be calculated in various ways. These will be discussed in section 2 below.

I.1.5 Like product

The term like product ('produit similaire') is defined in Article 2.6 of the ADA as a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. This definition is strict and may be contrasted, for example, with the broader term 'like or directly competitive products' in the Safeguards Agreement. In the context of the ADA, the term is relevant for both dumping and injury determination.

Typical like products might be, for example, polyester staple fibres, stainless steel plates, or colour televisions (CTVs). Such products can often[8] be classified within a Harmonized System[9] heading. Thus, polyester staple fibres fall under HS heading 55.03, stainless steel plates fall under HS heading 72.19 and CTVs under HS heading 85.28.

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

I.1.6 Forms of injury

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

I.1.7 Investigation periods

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

[8] Depending on the product definition, however, the product under investigation may sometimes cover several HS headings, while at other times it may need to be defined further because the HS heading is too broad.
[9] Harmonized Commodity Description and Coding System, developed by the World Customs Organization in Brussels.

Questions

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

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

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

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

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

I.2 The determination of dumping

I.2.1 Overview of Article 2

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

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

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

Article 2.3 covers the construction of the export price.

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

Article 2.5 deals with transhipments.

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

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

> Article 2 contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin.[10]
> ***Thailand-H-Beams, Panel***

I.2.2 The export price

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

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

Constructed export price

In some cases, the export price may not be reliable. Thus, where the exporter and the importer are related, the price between them may be unreliable for transfer pricing reasons.[11]

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

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

> The term "should" in its ordinary meaning generally is non-mandatory, i.e. its use in Article 2.4 indicates that a Member is not *required* to make allowance for costs and profits when constructing an export price. We believe that, because the failure to make allowance for costs and profits could only result in a higher export price – and thus a lower dumping margin – the ADA merely permits, but does not require, that such allowances be made.
> …Article 2.4 provides an *authorisation* to make certain specific allowances. Allowances not within the scope of that authorisation cannot be made. [12]
> ***United States-Steel plate, Panel***

[10] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R.l, para. 7.35.

[11] Transfer pricing is taking place, for example, when goods, intangibles and services are traded within multinational enterprises. Frequently, this results in a situation where the transfer price does not reflect the true cost of the product or service.

[12] Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, paras 6.93-6.94.

I.2.3 Normal value

I.2.3.a) Standard situation: domestic price

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

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

If this is found to be the case and if, for example, the domestic price of a model is 100 and its export price is 80, the *dumping amount* is 20 and the *dumping margin* is 20/80x100=25%.[13]

I.2.3.b) Alternatives: third country exports or constructed normal value

Article 2.2 provides that when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the dumping margin is determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that the price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. In other words, Article 2.2 envisages three special situations and provides two alternative methods for calculating normal value in such cases (often called third country exports and constructed normal value). Some of these require a further explanation.

Situation 1: No domestic sales in the ordinary course of trade

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

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

Situation 2: Unrepresentative volume of domestic sales; 5% rule

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

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

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

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

Second alternative method: constructed normal value

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

> Nothing in these provisions prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost.[14]
> ***Guatemala-Cement II, Panel***

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

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

> …costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilised by the exporter or producer, in particular in relation to establishing appropriate amortisation and depreciation periods and allowances for capital expenditures and other development costs.
> ***Article 2.2.1.1 ADA***

[14] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, Panel, para. 8.183.

Article 2.2 distinguishes three elements of constructed normal value:

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

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

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
> (i) the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
> (ii) the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.
> ***Article 2.2.2.of the ADA***

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

> Reading into the text of Article 2.2.2(ii) a requirement provided for in the chapeau of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii)...
> Therefore, we reverse the finding of the Panel in paragraph 6.87 of the Panel Report that, in calculating the amount for profits under Article 2.2.2(ii) of the ADA, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade. [15]
> ***Bed Linen, AB***
> To us, the use of the phrase "weighted average" in Article 2.2.2(ii) makes it impossible to read "other exporters or producers" as "one exporter or producer". First of all, and obviously, an "average" of amounts for SG&A and profits cannot be calculated on the basis of data on SG&A and profits relating to only one exporter or producer. Moreover, the textual directive to "weight" the average further supports this view because the "average" which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the "weighted average" relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase "weighted average" envisages a situation where there is more than one exporter or producer. [16]
> ***Bed Linen, AB***

[15] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, para. 84.
[16] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, para. 73.

I.2.3.c) Special situations

Exclusion of sales below cost

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

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

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

Related party sales on the domestic market

It may happen that domestic producers and distributors are related. Some WTO Members will then ignore the prices charged by the producer to the distributor on the grounds that they are not arms length transactions. Instead, they base normal value on the sales made by the distributor to the first independent customer. This price will be higher and is therefore more likely to lead to a finding of dumping.

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

> The use of downstream sales prices to calculate normal value may affect the comparability of normal value and export price because, for instance, the downstream sales may have been made at a different level of trade from the export sales. Other factors may also affect the comparability of prices, such as the payment of additional sales taxes on downstream sales, and the costs and profits of the reseller. Thus, we believe that when investigating authorities decide to use downstream sales to independent buyers to calculate normal value, they come under a particular duty to ensure the fairness of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison. [17]
> ***United States-Hot rolled steel, AB***

Transshipments

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

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

I.2.4 Non-market economy dumping/surrogate country

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

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

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

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

[17] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras 166-173.

1.2.5 Fair comparison and allowances

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

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

Article 2.4 goes on to require that due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

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

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

I.2.6 Comparison methods

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

Main rules

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

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

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

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

Exception

Exceptionally, weighted average normal value may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of one of the two principal methods.

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

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

Zeroing

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

Use of this method implies that if just one transaction is dumped, dumping will be found.[18] The method therefore facilitates dumping findings. Prior to the conclusion of the Uruguay Round, it was standard practice of some WTO Members to apply this method.[19] Because of pressure exerted by other WTO Members, Article 2.4.2 was adopted and WTO Members generally resorted to use of the weighted average method (the first of the two main rules).

However, within the weighted average method, some WTO Members applied a new type of zeroing: inter-model zeroing. If, for example, model A was dumped while model B was not dumped, the Members would not allow the negative dumping of model B to offset the positive dumping of model A. In EC-Bed linen, the AB upheld the Panel finding that this practice was inconsistent with Article 2.4.2:

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

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

transactions – that is, for all transactions involving all models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[20]
EC-Bed Linen, AB

In *United States-Steel plate,* the Panel ruled that the United States' use of multiple averaging periods in the *Plate* and *Sheet* investigations was inconsistent with the requirement of Article 2.4.2 to compare a weighted average normal value with a weighted average of all comparable export transactions. The United States had divided the investigation period for the purpose of calculating the overall margin of dumping into two averaging periods to take into account the Korean won devaluation in the period November-December 1997, corresponding to the pre- and post-devaluation periods. The United States had calculated a margin of dumping for each sub-period. When combining the margins of dumping calculated for the sub-periods to determine an overall margin of dumping for the entire investigation period, the U.S. Department of Commerce DOC had treated the period November-December, where the average export price was higher than the average normal value, as a sub-period of zero dumping—where in fact there was *negative dumping* in that sub-period. The panel concluded that this was not allowed under Article 2.4.2—although the Article did not prohibit multiple averaging as such; multiple averaging could be appropriate in cases where it would be necessary to ensure that comparability is not affected by differences in the timing of sales within the averaging periods in the home and export markets.

I.2.7 Simplified calculation examples

To facilitate the reader's understanding of the operation of these complicated rules, a few simple calculation examples are provided below.

Example 1: Direct sale to unrelated customers

Normal value	Export price
Producer X --> unrelated customer	Producer X --> unrelated importer
Sales price: 100	CIF sales price: 100
- duty drawback: 5	- physical difference: 5
- discounts: 2	- discounts: 2
- packing: 1	- packing: 1
- inland freight: 1	- inland freight: 1
	- ocean freight/insurance: 6
- credit: 5	- credit: 2

[20] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, paras 51-66.

- guarantees: 2	- guarantees: 2
- commissions: 2	- commissions: 2
= ex-factory normal value: 82	= ex-factory export price: 79

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

Example 2: Direct sale to unrelated customers

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

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

Example 3: Construction of export price

Normal value	Export price
X ----------> unrelated customer 140	X ---> related importer ---> unrelated retailer 100 140

- duty drawback: 5	- discounts subs.: 5
- discounts subs.: 5	- inland freight subs.: 0.5
- inland freight subs.: 0.5	- credit by subs.: 2
- packing: 1	- guarantees by subs.: 2
- credit.: 4	- net SGA subs.: 17 (12.14%)
- guarantees: 2	- reasonable profit subs. (5%): 7
-level of trade: 24 (17.14%)	- customs duties paid by subs.: 8.2
	- constructed EP: 98.3
	- ocean freight/insurance: 6
	- inland freight: 1
	- packing: 1
	- physical difference: 5
= ex-factory normal value: 98.5	= ex-factory export price: 85.3

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

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

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

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

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

Questions

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

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

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

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

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

I.3 The determination of injury

I.3.1 Overview of Article 3

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

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

Article 3.3 establishes the conditions for cumulation.

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

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

Article 3.6 contains the product line exception.

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

I 3.2 The notion of "dumped imports"

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

The Panel, while finding this issue poses an interesting question, did not decide on the matter.

> It is possible that a calculation conducted consistently with the ADA would lead to the conclusion that one or another Indian producer should be attributed a zero or *de minimis* margin of dumping. In such a case, the imports attributable to such a producer/exporter may not be considered as "dumped" for purposes of injury analysis. However, the panel lacks legal competence to make a proper calculation and consequent determination of dumping for any of the Indian producers – its task is to review the determination of the EC authorities, not to replace that determination, where found to be inconsistent with the ADA, with its own determination. In any event, the panel lacks the necessary data to undertake such a calculation. Thus, while the treatment of imports attributable to producers or exporters found **not** to be dumping is an interesting question, it is not an issue before the panel and the panel reaches no conclusions in this regard.[21]
> ***EC-Bed linen, Panel***

I.3.3 The like product/product line exception

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

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

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

[21] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.138.

permit the investigating authority to assess the effects of the dumped imports with respect to all fresh cut roses.

I.3.4 The domestic industry

Article 4 of the ADA defines the domestic industry as the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. The ADA does not define the term 'a major proportion.' There are two exceptions to this principle.

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

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

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

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

I.3.5 Material injury

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

> An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the ADA, involves the collection and assessment of both confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the ADA must be based on the totality of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information...
> We consider, therefore, that the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve an "objective" examination of the required elements of injury does not imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation. Article 3.1, on the contrary, permits an investigating authority making an injury determination to base its determination on all relevant reasoning and facts before it.[22]
> ***Thailand-H-Beams, AB***

(However, the AB emphasised due process rights of interested parties, emanating from Articles 6 and 12 ADA, against which the injury determination must be scrutinised. These will be discussed in section 4 below.)

Injury investigation period

A recommendation of the WTO Committee on Anti-Dumping Practices provides that injury should preferably be analysed over a period of at least three years.[23] This period is often called the injury investigation period (IIP). Such a relatively long period is needed particularly because of the causation requirement.

While the industry must be suffering material injury during the regular investigation period (the length of which is not specified in the ADA, but which ranges from one year in the EC to six months in the US) and detailed injury margin calculations in the case of application of a lesser duty rule will be based on the data existing during the regular investigation period, the analysis of injury and causation needs a longer period in order to examine trend factors, such as those mentioned in Articles 3.4 and 3.5 ADA.

Volume and prices

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

The wording is understandably broad because injury can occur in many forms. Thus, for example, in the typical situation, there will be an absolute increase in the volume of imports over the IIP coupled with a declining trend in the prices of the imports. Indeed, the simultaneous occurrence of these two trends will be a strong indicator not only of injury but also of causation, because it indicates that producers are gaining market share through aggressive pricing.

In many other cases, however, the situation will not be so clear-cut. It is possible, for example, that domestic producers cut back production while foreign producers continue to export at steady levels. This would mean that the imports increase relative to production (but

[22] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, paras 106-111.
[23] WTO Committee on Anti-Dumping Practices - Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations - Adopted by the Committee on 5 May 2000, G/ADP/6 (16 May 2000).

not in absolute terms). Similarly, with regard to prices, it is possible that, faced with increased costs for raw materials, domestic producers are precluded from increasing prices to pass on the price increase to their customers through the presence in the market of low-priced imports that are sold at the same price as before.

Cumulation of dumped imports from various countries

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

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

Article 3.4 requires that the examination of the impact of the dumped imports on the domestic industry include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry producing the like product in the importing country and then mentions 15 specific factors. Article 3.4 concludes that this list is not exhaustive and that no single factor or group of factors can necessarily give decisive guidance.

The 15 Article 3.4 injury factors
Actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

The scope of this obligation has been examined in four panel proceedings.[24] All four Panels, strongly supported by the AB in *Thailand-H-beams*, held that the evaluation of the 15 factors is mandatory in each case and must be clear from the published documents.

The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities…" We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the ADA.[25]
Thailand-H-Beams, AB
It appears that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely a factor cannot be evaluated without the collection of relevant data.[26]
EC-Bed linen, Panel

[24] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000. Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R. Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton- Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R. Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000.

Threat of injury

It may occur that a domestic industry alleges that it is not yet suffering material injury, but is threatened with material injury and material injury will develop unless anti-dumping measures are taken.

However, because such statements are easy to make and any investigation based on threat of material injury will necessarily be speculative because it involves analysis of events that have not yet happened, Article 3.7 offers special provisions for a threat case. Thus, a determination of threat must be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances that would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

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

Special threat factors
(i) A significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
(ii) Sufficiently freely disposable, or an imminent substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
(iii) Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for additional imports; and
(iv) Inventories of the product being investigated.
Article 3.7, ADA

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

I.3.6 Causation/other known factors

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

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

[25] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 125.
[26] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.167.

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

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

> …the question for purposes of an anti-dumping investigation is not whether an alleged restraint agreement in violation of Mexican law existed, an issue which might well be beyond the jurisdiction of an anti-dumping authority to resolve, but whether there was evidence of and arguments concerning the effect of the alleged restraint agreement, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future. If the latter is the case, the investigating authority is obliged to consider the effects of such an alleged agreement, assuming it exists.[27]
> ***Mexico-HFCS, Panel***

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

> The text of Article 3.5 refers to "known" factors other than the dumped imports which at the same time are injuring the domestic industry but does not make clear how factors are "known" or are to become "known" to the investigating authorities. We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation.[28]
> ***Thailand-H-beams, Panel***
>
> While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry…Therefore, the Article 3.4 evaluation is also relevant in a threat case.[29]
> ***Mexico-HFCS, Panel***

I.3.7 Injury margins

The determination as to whether dumping has caused material injury to the domestic industry producing the like product is generally made with respect to the country or countries under investigation. By nature, this is either an affirmative or a negative determination. If the

[27] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, para. 7.174.
[28] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.273.
[29] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, paras 7.126-7.127.

determination is affirmative, WTO Members which apply a lesser duty rule in accordance with Articles 8.1 and 9.1 will then calculate injury margins.

The ADA does not give any guidance on such calculation and arguably leaves its Members substantial discretion. Similar to dumping margins, injury margins are normally producer-specific. For calculating injury margins, national authorities normally compare the prices of imported and domestically produced like products, focusing on whether the former are undercutting or underselling the latter.

Example 1: Calculation injury margin, based on price undercutting

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

Example 2: Calculation injury margin, based on price underselling

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

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

Questions

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

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

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

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

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

I.4. The national procedures

I.4.1 Introduction

The following Articles of the ADA contain important procedural provisions:

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

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

The relevant Panel findings in *Guatemala Cement II* may serve as an example of this, because they cover many of the procedural requirements.[30]

(a) Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation is inconsistent with Article 5.3 of the ADA.
(b) Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation and consequent failure to reject the application for anti-dumping duties by Cementos Progreso is inconsistent with Article 5.8 of the ADA.
(c) Guatemala's failure to timely notify Mexico under Article 5.5 of the ADA is inconsistent with that provision.
(d) Guatemala's failure to meet the requirements for a public notice of the initiation of an investigation is inconsistent with Article 12.1.1 of the ADA.
(e) Guatemala's failure to timely provide the full text of the application to Mexico and Cruz Azul is inconsistent with Article 6.1.3 of the ADA.
(f) Guatemala's failure to grant Mexico access to the file of the investigation is inconsistent with Articles 6.1.2 and 6.4 of the ADA.
(g) Guatemala's failure to timely make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997 is inconsistent with Article 6.1.2 of the ADA.
(h) Guatemala's failure to provide two copies of the file of the investigation as requested by Cruz Azul is inconsistent with Article 6.1.2 of the ADA.
(i) Guatemala's extension of the period of investigation requested by Cementos Progreso without providing Cruz Azul with a full opportunity for the defence of its interest is inconsistent with Article 6.2 of the ADA.
(j) Guatemala's failure to inform Mexico of the inclusion of non–governmental experts in the verification team is inconsistent with paragraph 2 of Annex I of the ADA.
(k) Guatemala's failure to require Cementos Progreso to provide a statement of the reasons why summarization of the information submitted during verification was not possible is inconsistent with Article 6.5.1 of the ADA.
(l) Guatemala's decision to grant Cementos Progreso's 19 December submission confidential treatment on its own initiative is inconsistent with Article 6.5 of the ADA.
(m) Guatemala's failure to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" is inconsistent with Article 6.9 of the ADA.
(n) Guatemala's recourse to "best information available" for the purpose of making its final dumping determination is inconsistent with Article 6.8 of the ADA…[31]

Guatemala-Cement II, Panel

1.4.2 Application

An anti-dumping case normally starts with the official submission of a written complaint by the domestic industry to the importing Member authorities that injurious dumping is taking place. In the ADA, this complaint is called the application. Article 5.2 contains the requirements for the contents of this application. It must include *evidence* on dumping, injury and the causal link between the two; simple assertion is not sufficient.

[30] The AB report in *United States-Hot Rolled Steel* and the Panel report in *Argentina-Tiles* offer interesting material on use of facts available.
[31] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, para. 9.1. Technical note: the term 'AD Agreement' has been replaced by 'ADA'.

More specifically, to the extent *reasonably available* to the applicant, the application must contain the following information:

(i) The identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) A complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) Information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member.

(iv) Information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

Article 5.2(i)-(iv), ADA

Pre-initiation examination

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

The quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation. That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation.[32]

In our view, Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of **all** underlying issues considered in making that determination.[33]

Mexico-HFCS, Panel

Determination of standing

Under Article 5.4 of the ADA, importing Member authorities must determine, again *before* initiation, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. GATT Panels have held several times that the

[32] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, para. 7.94, quoting panel report in Cement I, which in turn relied on panel report in *Softwood Lumber*.

[33] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, paras 7.126-7.127, para. 7.102.

failure to properly determine standing before initiation is a fatal error which cannot be repaired retroactively in the course of the proceeding.

> The Panel observed that under Article 5.1 (apart from 'special circumstances') an anti-dumping investigation shall normally be initiated upon a written request "by or on behalf of the industry affected". The plain language in which this provision is worded, and in particular the use of the word "shall", indicates that this is an essential procedural requirement for the initiation of an investigation to be consistent with the Agreement…
> The Panel considered, in light of the nature of Article 5.1 as an essential procedural requirement, that there was no basis to consider that an infringement of this provision could be cured retroactively.[34]
> ***United States-Steel, Panel***

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

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

Notification

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

[34] Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, para. 5.20. Compare *United States-Cement*.

While a written notification might arguably best serve this goal and the promotion of transparency and certainty among Members, and might also provide a written record upon which an importing Member could rely in the event of a subsequent claim of inconsistency with Article 5.5 of the ADA, the text of Article 5.5 does not expressly require that the notification be in writing.
We consider that a formal meeting between government officials could satisfy the notification requirement of Article 5.5, provided that the meeting is sufficiently documented to support meaningful review by a panel. For these reasons, the fact that Thailand notified Poland under Article 5.5 orally in the course of a meeting between government officials, rather than in written form, does not render the notification inconsistent with Article 5.5.[35]
Thailand-H-beams, Panel

De minimis/negligibility thresholds

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

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

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

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

Contrary to other commercial defence agreements such as the Agreement on Subsidies and Countervailing Measures (ASCM) and the Safeguards Agreement (ASG), these rules do not establish a higher threshold for developing countries.

Deadlines

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

I.4.3 Due process rights

Interested parties

The parties most directly affected by an anti-dumping investigation are domestic producers, foreign producers and exporters, and their importers. However, the government of the exporting country and representative trade associations also qualify. Article 6.11 provides

[35] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.89-7.90.

that other domestic or foreign parties may also be included as interested parties by the importing country Member.

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

> Article 6 establishes a framework of procedural and due process obligations which, amongst other matters, requires investigating authorities to disclose certain evidence, during the investigation, to the interested parties. Article 6.2 requires that parties to an investigation "shall have a full opportunity for the defence of their interests". Article 6.9 requires that, before a final determination is made, authorities shall "inform all interested parties of the essential facts under consideration which form the basis for the decision"…
> In a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a final determination…Article 12, like Article 6, sets forth important procedural and due process obligations. [36]
> ***Thailand-H-beams, AB***

Public notices and explanation of determinations

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

Required contents of a notice of initiation (Article 12.1.1)

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

Required contents of a notice of the imposition of provisional measures (Article 12.2.1)

Sufficiently detailed explanations for the determinations of dumping and injury and reference to the matters of fact and law which have led to arguments being accepted or rejected, including:

(i) Names of the suppliers, or when this is impracticable, the supplying countries involved;
(ii) A description of the product which is sufficient for customs purposes;
(iii) Margins of dumping established and full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;
(iv) Considerations relevant to the injury determination as set out in Article 3;
(v) The main reasons leading to the determination.

Required contents of a notice of definitive measures (Article 12.2.2)

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

[36] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, paras 109-110.

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

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

> Mexico's failure to set forth findings or conclusions on the issue of the retroactive application of the final anti-dumping measure is inconsistent with the provisions of Articles 12.2 and 12.2.2 of the ADA.[37]
> ***Mexico-HFCS, Panel***
> We consider that where there is a violation of the substantive requirement, the question of whether the notice is sufficient under Article 12.2.2 is immaterial.[38]
> ***EC-Bed linen, Panel***

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

Confidentiality

Anti-dumping investigations involve considerable amounts of confidential and sensitive business information because they require companies to submit to the importing Member authorities pricing and costing information in various markets in exquisite detail. In order to mount an optimal legal defence, interested parties ideally need access to the confidential information submitted by the opposing side (foreign producers and their importers versus domestic producers and vice versa). On the other hand, they will be extremely reluctant to provide their own confidential information to their competitors. Thus, to ensure fair play and equality of arms, a balance must be struck between these competing interests, and a legal system must give opposing parties equal levels of access to information.

Article 6.5 of the ADA chooses the principle[39] that information which is by its nature confidential or which is provided on a confidential basis shall, upon good cause shown, be treated as confidential by the authorities and shall not be disclosed without specific information of the party submitting it. However, the authorities shall require interested parties providing confidential information to provide meaningful non-confidential summaries thereof.

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

[37] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, para. 8.2.
[38] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.261.
[39] However, in an important footnote 17, Members recognise that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required. This is the case, *inter alia*, in the United States and Canada.

Other rights

Important other due process rights in Article 6 include the opportunity to present evidence in writing (Article 6.1), the right of access to the file (Articles 6.1.2 and 6.4), the right to have a hearing and to meet opposing parties (confrontation meeting, Article 6.2), the right to be timely informed of the essential facts under consideration which form the basis for the decision whether to apply definitive measures (disclosure; Article 6.9), and the right to obtain, subject to exceptions,[40] an individual dumping margin (Article 6.10).

Facts available/administrative deadlines

Article 6.8 and Annex II to the ADA provide that in cases where an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

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

> We recognise that in the interest of orderly administration investigating authorities do, and indeed must establish…deadlines. However, a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied.
> …Particularly where information is actually submitted in time to be verified, and actually could be verified, we consider that it should generally be accepted, unless to do so would impede the ability of the investigating authority to complete the investigation within the time limits established by the ADA…One of the principle elements governing anti-dumping investigations that emerges from the whole of the ADA is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the "first-best" information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps "second-best" facts.[41]
> ***United States-Hot rolled steel, Panel***
> …we conclude…that, under Article 6.8, USDOC was not entitled to reject this information for the sole reason that it was submitted beyond the deadlines for responses to the questionnaires. Accordingly, we find that USDOC's action does not rest upon a permissible interpretation of Article 6.8 of the ADA.[42]
> ***United States-Hot rolled steel, AB***

I.4.4 Provisional measures

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

[40] In certain cases, authorities may resort to sampling.
[41] Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R, paras 7.54-7.55.
[42] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras 85-89.

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

I.4.5 Price undertakings

Anti-dumping investigations may be suspended or terminated without anti-dumping duties where exporters offer undertakings to revise prices or cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Use of the word 'may' indicates that authorities have complete discretion in this regard and, indeed, some authorities are reluctant as a matter of policy to accept price undertakings. Price undertakings are often the solution preferred by exporters. It is important to recall, however, that price undertakings may have considerable distributive consequences. Amongst others, these can originate from collusion between domestic producers and exporters and can result in inefficiencies similar to those of tariffs and to transfers of consumer surplus. The EC-Bed linen Panel ruled that acceptance of price undertakings may qualify as a constructive remedy in cases involving developing countries.

I.4.6 Anti-dumping duties

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

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

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

In *United States-Hot rolled steel*, the AB confirmed the panel finding that a provision of the United States Tariff Act of 1930, as amended, requiring *inclusion* of margins established *partly* on facts available in calculating the rate for cooperating/non-sampled producers was - to the extent that this results in an "all others" rate in excess of the maximum allowable rate under Article 9.4 - inconsistent with Article 9.4 ADA.

> As section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, requires the inclusion of margins established, in part, on the basis of facts available, in the calculation of the "all others" rate, and to the extent that this results in an "all others" rate in excess of the maximum allowable rate under Article 9.4, we uphold the Panel's finding that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is inconsistent with Article 9.4 of the ADA. We also uphold the Panel's consequent findings that the United States acted inconsistently with Article 18.4 of that Agreement and with Article XVI:4 of the WTO Agreement. We further uphold the Panel's finding that the United States' application of the method set forth in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the "all others" rate in this case was inconsistent with United States' obligations under the ADA because it was based on a method that included, in the calculation of the "all others" rate margins established, in part, using facts available.[43]
> ***United States-Hot rolled steel, AB***

Retrospective/prospective systems

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

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

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

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

I.4.7 Retroactivity

Article 10 of the ADA provides for two types of retroactivity.

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

> While Article 10.2 does not explicitly require a "determination" that "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury", there must be some specific statement in the final determination of the investigating authority from which a reviewing panel can discern that the issue addressed in Article 10.2 was properly considered and decided.[44]
> ***Mexico-HFCS, Panel***

[43] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 129.
[44] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, para. 7.191.

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

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

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

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

I.4.8 Reviews

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

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

During the five year period (hence the term interim review), interested parties may request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. In both cases, the measures may stay in force pending the outcome of the review.

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

> In our view, the absence of present dumping does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2 ADA.[45]
> ***United States-DRAMs, Panel***

[45] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, para. 6.32.

I.4.9 Judicial review

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

I.4.10 Flowchart

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

Stage of the proceeding

Submission of a written application by the domestic industry.

↓

Examination of the application by the investigating authority. Before initiating the investigation, the investigating authority must notify the government of the exporting country concerned that an application for the initiation of an anti-dumping investigation has been received.

↓

The investigating authority rejects the complaint if there is insufficient prima facie evidence that injurious dumping has taken place. In such a case, the proceeding is not initiated. Otherwise, the investigating authority initiates the investigation, in which case public notice must be given.

↓

Transmission of the full text of the written application to the known exporters and to the authorities of the exporting Member *as soon as the investigation has been initiated*. Upon request, the text of the application must be made available to other interested parties. The investigating authority must also send the questionnaires to exporters, importers, domestic industry and other interested parties. Exporters or foreign producers must be given at least 30 days to reply. This time-limit must be counted from the date of receipt of the questionnaire, which shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member. Extensions may be granted.

↓

Expiry of deadline for questionnaire responses. Interested parties may submit comments. Non-confidential summaries of written submissions must generally be made available to other parties. Interested parties are also entitled to request to be heard and to hold confrontation meetings with opposing parties. Interested parties are entitled to have access to the non-confidential (public) file and to prepare presentations on the basis of the consulted information.

↓

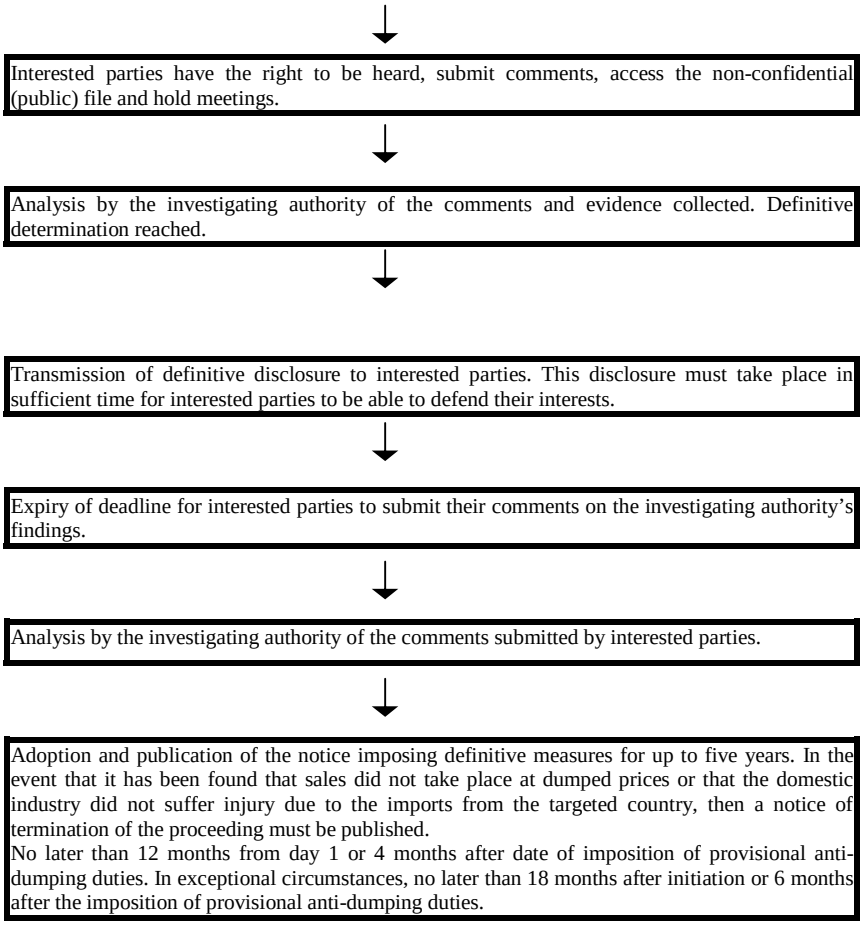
Analysis of questionnaire responses and submissions, on-spot verifications of interested parties. [The investigating authority may also carry out the on-spot verifications after the imposition of provisional anti-dumping measures].

↓

Analysis of all data collected. Provisional determination reached.

↓

Publication of a notice imposing provisional anti-dumping measures for six months if a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry. Interested parties must be given the possibility to submit comments to the findings on the basis of which the investigating authority decided to impose provisional anti-dumping measures.
No sooner than 60 days from day 1, no later than 9 months



I.4.11 Initiation of anti-dumping investigations at the national level

Until the 1990s, Australia, Canada, the European Union and the United States initiated most anti-dumping investigations. However, since then, many other countries have also adopted anti-dumping legislation and applied anti-dumping measures. According to WTO statistics, a substantial number of anti-dumping investigations have also been initiated by other countries such as Argentina, Brazil, Republic of Korea, India, Mexico, South Africa, Indonesia and more recently China. According to recent WTO statistics,[46] from 1995 to 2004 (June) 2,537 anti-dumping proceedings were initiated, of which 1,489 by developing countries.

> "…developing countries now initiate about half of the total number of anti-dumping cases, and some of them employ anti-dumping more actively than most of the developed country users."[47]

[46] http://www.wto.org/english/tratop_e/adp_e/adp_e.htm#statistics
[47] Miranda, Torres, Ruiz, The International Use of Anti-Dumping--1987-1997, 32:5 Journal of World Trade, 1998, 5–72, at 64.

Questions

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

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

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

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

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

I.5. WTO procedures

I.5.1 Introduction

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

However, the record shows that, once WTO dispute settlement cases *are* initiated, the applicant is often found to have a strong case. Third party representations were made mostly by the EC, the United States and Japan. This seems to reflect the perception of these countries that it is important to actively monitor and be heard in ongoing dispute settlement proceedings because of systemic determinations that will often exceed the specifics of the case. The table below provides some details for selected WTO proceedings which have led to Panel or Appellate Body reports so far.

Table: Selected WTO cases involving anti-dumping-related issues

Panel Report	AB Report	Date of Circulation-C Adoption of Report-A	Complainants [Appellant]	Respondents [Appellee]	Third Parties [Participants]
USA – Lumber ITC Investigation, Article 21.5 WT/DS277/R		15/11/2005 C	Canada	USA	China, EC
USA – "Zeroing" of Dumping Margins WT/DS294/R		31/10/2005 C	EC	USA	Argentina; Brazil; China; Hong Kong,China; India; Japan; Korea, Rep. of; Mexico; Norway;' Taiwan, Province of China; Turkey
Korea – Paper AD Duties WT/DS312/R		28/10/2005 C 28/11/2005 A	Indonesia	Korea	Canada, China, EC, Japan, USA
	USA – OCTG AD Measures WT/DS282/AB/R	2/11/2005 C 28/11/2005 A	Mexico/USA	Mexico/USA	Argentina; Canada; China; EC; Japan; Taiwan, Province of China; Venezuela
USA – OCTG AD Measures WT/DS282/R		20/6/2005 C 28/11/2005 A	Mexico	USA	Argentina; Canada; China; EC; Japan; Taiwan, Province of China; Venezuela
	Mexico – Rice AD Measures WT/DS295/AB/R	29/12/2005 C 20/12/2005 A	Mexico	USA	China, EC, Turkey
Mexico – Rice AD Measures WT/DS295/R		6/6/2005 C 20/12/2005 A	USA	Mexico	China, EC, Turkey
	USA – OCTG Sunset Reviews WT/DS268/AB/R	29/11/2004 C 17/12/2004 A	Argentina/USA	Argentina/USA	EC; Japan; Korea, Rep. of; Mexico, Chinese Taipei
USA – OCTG Sunset Reviews WT/DS268/R		16/7/2004 C 17/12/2004 A	Argentina	USA	Taiwan, Province of China; EC; Japan; Korea, Rep. of; Mexico
	USA – Final Lumber AD Determination WT/DS264/AB/R	11/8/2004 C 31/8/2004 A	Canada/USA	Canada/USA	EC, India, Japan
USA – Final Lumber AD Determination WT/DS264/R		13/4/2004 C 31/8/2004 A	Canada	USA	EC, India, Japan
USA – Lumber ITC Investigation WT/DS277/R		22/3/2004 C 26/4/2004 A	Canada	USA	EC; Japan; Korea, Rep. of

Panel Report	**AB Report**	**Date of Circulation-C** **Adoption of Report-A**	**Complainants [Appellant]**	**Respondents [Appellee]**	**Third Parties [Participants]**
	USA – Corrosion – Resistant Steel Sunset Review WT/DS244/AB/R	15/12/2003 C 9/1/2004 A	Japan	USA	Brazil; Chile; EC; India; Korea, Rep. of; Norway
USA – Corrosion – Resistant Steel Sunset Review WT/DS244/R		14/8/2003 C 9/1/2004 A	Japan	USA	Brazil; Canada; Chile; EC; India; Korea, Rep. of.; Norway
Argentina – Poultry AD Duties WT/DS241/R		22/4/2003 C 19/5/2003 A	Brazil	Argentina	Canada, Chile, EC, Guatemala, Paraguay, USA
EC – Pipe Fittings WT/DS219/R		7/3/2003 C 18/8/2003 A	Brazil	EC	Chile, Japan, Mexico, USA
	EC – Pipe Fittings WT/DS219/AB/R	22/7/2003 C 18/8/2003 A	Brazil	EC	Chile, Japan, Mexico, USA
USA-Dumping Offset Act WT/DS217/R WT/DS234/R		16/9/2002 C 27/1/2003 A	Australia, Brazil, Canada, Chile, EC, India, Indonesia, Japan, Rep. of Korea, Mexico, Thailand	USA	Argentina; Australia; Brazil; Canada; Costa Rica; EC; Hong Kong, China; India; Indonesia; Israel; Japan; Korea, Rep. of ; Mexico; Norway; Thailand
	USA-Dumping Offset Act WT/DS217/AB/R WT/DS234/AB/R	16/1/2003 C 27/1/2003 A	USA	Australia; Brazil; Canada; Chile; EC; India; Indonesia; Japan; Korea, Rep. of; Mexico; Thailand	Argentina; Costa Rica; Hong Kong, China; Israel; Norway
Egypt-Rebar WT/DS211/R			Turkey	Egypt	Chile, EC, Japan, United States
USA-Section 129		30/8/2002 WT/DS221/R	Canada	United States	Chile, EC, India, J
USA-Steel Plate from India		29/7/2002 WT/DS206/R/Corr	India	United States	Chile, EC, Japan
Argentina- Ceramic Floor tiles		05/11/2001 WT/DS189/R	EC	Argentina	Japan, Turkey USA
	USA- Hot rolled steel	23/8/2001 WT/DS184/AB/R	Japan,/USA	Japan/USA	Brazil; Canada; Chile; EC; Korea, Rep. of
	EC-Bed linen	12/3/2001 WT/DS141/AB/R	EC/India	EC/India	Egypt, Japan, USA
USA-Hot rolled steel (appealed)		28/2/2001 WT/DS184/R	Japan	USA	Brazil; Chile; Canada; Korea, Rep. of
USA- Stainless Steel plate		01/02/2001 WT/DS179/R	Korea, Rep. of	USA	EC, Japan
	EC – Bed Linen, Article 21.5 WT/DS141/AB/RW	8/4/2003 C 24/4/2003 A	India	EC	Japan; Korea, Rep. of ; USA

Panel Report	AB Report	Date of Circulation-C Adoption of Report-A	Complainants [Appellant]	Respondents [Appellee]	Third Parties [Participants]
EC – Bed Linen, Article 21.5 WT/DS141/RW		29/11/2002 C 24/4/2003 A	India	EC	Japan; Korea, Rep. of ; USA
	EC- Bed Linen WT/DS141/AB/R	1/03/ 2001 C	India/EC	India/EC	Egypt, Japan, USA
EC-Bed Linen		30/10/2000 WT/DS141/R	India	EC	Egypt, Japan, USA
Guatemala-Cement II		17/11/2000 WT/DS156/R	Mexico	Guatemala	EC, Ecuador, El Salvador, Honduras, USA
	Thailand- H-beams	15/4/2001 WT/DS122/AB/R	Thailand	Poland	EC, Japan, USA
Thailand H-Beams		28/9/2000 WT/DS122/R	Poland	Thailand	EC, Japan, USA
	USA-1916 AD Act	26/9/2000 WT/DS136/AB/R WT/DS162/AB/R	EC/Japan/USA	EC/Japan/USA	EC, India, Japan, Mexico
USA-1916 AD Act (Japan)		29/5/2000 WT/DS162/R	Japan	USA	EC, India
USA-1916 AD Act (EC)		31/5/2000 WT/DS136/R	EC	USA	India, Japan, Mexico
	Mexico-Corn Syrup HFCS 21.5	WT/DS132/AB/ RW	Mexico	USA	EC
Mexico-Corn Syrup HFCS 21.5		WT/DS132/RW	USA	Mexico	EC, Jamaica, Mauritius
Mexico - Corn Syrup (HFCS)		24/2/2000 WT/DS132/R	USA	Mexico	Jamaica, Mauritius
USA-DRAMS		19/3/1999 WT/DS99/R	Korea, Rep. of	USA	
	Guatemala-Cement I	2/11/1998 WT/DS60/AB/R	Guatemala	Mexico	USA
Guatemala-Cement I		19/6/1998 WT/DS60/R	Mexico	Guatemala	USA, Canada, El Salvador, Honduras

I.5.2 WTO ADA jurisdiction and standard of review

Identification of measure in request for establishment

Article 17.4 contains a special rule providing that a Member may refer the matter to the DSB if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings. When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB. Thus Article 17.4, which does not have a counterpart in other commercial defence agreements such as the ASCM and the ASG, explicitly identifies three types of measures.

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

> In the same way that Article XXIII of the GATT 1994 allows a WTO Member to challenge legislation as such, Article 17 of the ADA is properly to be regarded as allowing a challenge to legislation as such, unless this possibility is excluded. No such express exclusion is found in Article 17 or elsewhere in the ADA.
> …We note that, unlike Articles 17.1 to 17.3, Article 17.4 is a special or additional dispute settlement rule listed in Appendix 2 to the DSU.
> …Nothing in our Report in Guatemala – Cement suggests that Article 17.4 precludes review of anti-dumping legislation as such. Rather, in that case, we simply found that, for Mexico to challenge Guatemala's initiation and conduct of the anti-dumping investigation, Mexico was required to identify one of the three anti-dumping measures listed in Article 17.4 in its request for establishment of a panel. Since it did not do so, the panel in that case did not have jurisdiction.[48]
> ***Guatemala-Cement, AB***

Challenging legislation

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

> Article 17.4 specifies the types of "measure" which may be referred as part of a "matter" to the DSB. Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. According to Article 17.4, a "matter" may be referred to the DSB only if one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a panel request in a dispute brought under the ADA to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure.[49]
> ***Guatemala-Cement I, AB***
> In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted. Article 17.4 strikes a balance between these competing considerations.[50]
> ***United States-1916 Act, AB***

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

Special standard of review

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

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[48] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, paras 62-72.
[49] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 79.
[50] Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 73.

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

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

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

…we consider that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible.[51]
EC-Bed linen, Panel
…we reverse the finding of the Panel…that, in calculating the amount for profits under Article 2.2.2(ii) of the ADA, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade. [52]
EC-Bed linen, AB

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

In the present case, as we said, Japan and the United States agree that the downstream sales by affiliates were made "in the ordinary course of trade". The participants also agree that these sales were of the "like product" and these products were "destined for consumption in the exporting country." In these circumstances, we find that the reliance by USDOC on downstream sales to calculate normal value rested upon an interpretation of Article 2.1 of the ADA that is, in principle, "permissible" following application of the rules of treaty interpretation in the Vienna Convention.
We, therefore, reverse the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the reliance by USDOC on downstream sales between parties affiliated with an investigated exporter and independent purchasers to calculate normal value was inconsistent with Article 2.1 of the ADA.[53]
United States-Hot rolled steel, AB

I.5.3 Procedural issues

Specificity of claims in request for establishment

The Appellate Body has held that claims must be specified with sufficient precision in the request for establishment of a Panel. While in some instances, it may be sufficient to mention the articles of the Agreements alleged to have been violated (*EC-Bananas*), in cases where

[51] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.87.
[52] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, paras 84.
[52] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras 172-173.

articles contain multiple obligations, more detail will generally be necessary (*Korea-Dairy Safeguards*), unless the rights of defence of the respondent are not impeded by the failure to do so. The latter determination must be made on a case-by-case basis (*Thailand-H-Beams*).

This ruling is very important for the ADA because many ADA articles, including key articles such as Articles 2, 3, 4, 5, 6 and 12, contain multiple obligations and may form the basis for numerous claims. It is therefore recommendable that an applicant not only refers to articles and paragraphs in an ADA dispute, but also shortly summarises its claims in descriptive form. This is all the more advisable because disputes in this area tend to be multi-claim in nature.

'New' claims

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

> The Panel's reasoning seems to assume that there is always continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO. This is not necessarily the case. The parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute.[54]
> ***Thailand-H-Beams, AB***

Standing

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

Indirectly, however, industry representatives may play a role in such proceedings in at least two manners. First of all, the AB has held that Members have the right to compose their own delegation. Thus, if a WTO Member decides to attach an industry representative to its delegation, this is allowed, it being understood that the representative will be subject to the same confidentiality requirements as governmental members of the delegation. Second, interested parties may file *amicus curiae* briefs. This happened, for example, in *EC-Bed linen* in the panel phase[55] and in *Thailand-H-beams* in the AB phase.[56]

Panel recommendations and suggestions

The distinction between Panel recommendations and suggestions (which are not legally binding) is made in Article 19.1 of the DSU[57] and is therefore not specific to the ADA.

[54] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 94.
[55] The Foreign Trade Association filed an *amicus curiae* submission in support of India's complaint, see *EC-Bed Linen*, Panel, footnote 10.
[56] The brief was filed by Consuming Industries Trade Action Coalition ("CITAC"), a coalition of United States companies and trade associations.
[57] Article 19.1 provides that where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement and that, in addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

However, it is recalled that the main reason for this distinction is that a number of GATT panels in the AD/CVD area had recommended that, where investigations have been initiated illegally by the investigating authorities, AD/CVD measures imposed must be revoked and duties collected reimbursed. Such recommendations are no longer possible, and only suggestions to that effect can now be made. Thus far, only the *Guatemala-Cement* Panel has suggested that a measure be revoked. The same Panel refused to suggest that the anti-dumping duties collected be reimbursed on systemic grounds.

> In light of the nature and extent of the violations in this case, we do not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Guatemala revoke its anti-dumping measure on imports of grey Portland cement from Mexico.
> In respect of Mexico's request that we suggest that Guatemala refund the anti-dumping duties collected, it is noted that Guatemala has now maintained a WTO-inconsistent anti-dumping measure in place for a period of three and a half years. Thus, the panel fully understands Mexico's desire to see the anti-dumping duties repaid and considers that repayment might be justifiable in circumstances such as these…
> Mexico's request raises important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which have not been fully explored in this dispute. Thus, the panel declines Mexico's request to suggest that Guatemala refund the anti-dumping duties collected.[58]
> ***Guatemala-Cement II, Panel***

Questions

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

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

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

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

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

[58] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, paras 9.6-9.7.

I.6. Developing country members

I.6.1 Article 15 ADA

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

> It is recognised that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.
> ***Article 15 of the ADA***

I.6.2 Panel interpretation

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

> …the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.[59]
> The rejection expressed in the European Communities' letter of 22 October 1997 does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand…the European Communities simply did nothing different in this case, than it would have done in any other anti-dumping proceeding…Pure passivity is not sufficient to satisfy the obligation to "explore" possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned.[60]
> ***EC-Bed linen, Panel***

I.6.3 Constructive remedies

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

[59] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.233.
[60] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/, para. 6.238.

I.6.4 Timing

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

Questions

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

2. When does this obligation arise?

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

I.7. Current negotiations under the Doha Work Programme

I.7.1 The mandate in the Doha Declaration

As part of the Doha Work Programme, WTO Members are negotiating on anti-dumping related issues. In the 2001 Doha Declaration,[61] Ministers agreed to such negotiations with the aim of clarifying and improving disciplines, while preserving the basic concepts, principles and effectiveness of the agreements, and taking into account the needs of developing and least-developed participants.

More specifically, the mandate, as set out in paragraph 28 of the Doha Declaration, reads as follows:

"In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31."[62]
Doha Work Programme, Hong Kong Ministerial Declaration

For a number of WTO Members, the decision to include negotiations on anti-dumping in the Doha Round was an important and positive step. The so-called “Friends of the Anti-dumping

[61] WT/MIN(01)/DEC/W/1.
[62] Note, that this paragraph is followed by a second paragraph, which reads: "We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements."

Negotiations, the Friends/FANs",[63] a group of developing and developed country Members (including Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Republic of; Norway; Singapore; Switzerland; Thailand; Turkey and Taiwan, Province of China)[64] were – and still are – the main proponents of these negotiations. Their goal is to curtail the growing resort to anti-dumping investigations and, most importantly, to limit the discretion which national investigating authorities can exercise in the context of such investigations, as well as the abuse arising in that context.

Several developed countries (including the United States, and – to a lesser degree – the European Communities) were not in favour of re-opening any of the existing rules on anti-dumping for negotiation. Thus, when negotiating the Doha mandate the "Friends/FANs" faced stiff resistance, as a result of which the mandate places limits on what is open for negotiation. References to "clarifying and improving" as well as "preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives" are expressions of these limitations. In fact, they are also a reflection of the political sensitivity of anti-dumping procedures (and trade remedies more generally) among major trading partners.

Thus, in the current negotiations, the issue is one between those Members who desire to maintain their current ability to protect their domestic industries through the use of anti-dumping duties, and those Members who wish to curtail the growing use of anti-dumping investigations and measures.[65] In other words, the issue is one of preserving leeway for flexibility in administrative actions on the one hand, and reigning in administrative discretion in domestic anti-dumping procedures on the other. Interestingly, neither the positions in the current negotiations nor the use of the anti-dumping instrument, allows for clear North-South dividing lines.

Overall, after a period of increase, the use of the anti-dumping instrument has started decreasing, and so has the number of anti-dumping investigations being conducted. In 1987 the number of investigations was 120, in 2001 it increased to 366, but in 2003 it declined slightly - to 210.[66] In a May 2005 press release, the WTO Secretariat reported that, in the period 1 July - 31 December 2004, both the number of initiations of new anti-dumping investigations and the number of new final anti-dumping measures applied showed substantial declines compared with the corresponding period of 2003.[67] Developed countries, notably the United States (668), the European Community (530) and Australia (482)[68], are still leaders. At the same time, developing countries are also increasingly playing a prominent role, with countries such as India, Brazil, Mexico and South Africa taking the lead. In fact, by 2002 India had become the fourth most active user of anti-dumping measures (394 investigations).[69] According to the WTO Secretariat's analysis from May 2005[70], the list of Members initiating new investigations (during the 6 month period from 1 July to 31 December 2004) is headed by the EC (17), followed by China (16), India (14), Turkey (12)

[63] India, while actively participating in the negotiations, including in the role of a demandeur, is not member of the Friends Group.
[64] Not all FANs always sign on to joint Friends' proposals, Turkey being a case in point. Mexico in turn has co-sponsored earlier proposals but refrained from doing so more recently.
[65] Linda M. Young and John Wainio, The Anti-dumping Negotiations: Proposals, Positions and Anti-dumping Profiles, Selected Papers prepared for presentation at the American Agricultural Economics Association Annual Meeting, Denver, Colorado, 1-4 August 2004, p.5.
[66] Miranda J. "On the Use and Abuse of Trade Remedies by Developing Countries." Paper presented at the Dartmouth/Tuck Forum on International Trade and Business, Managing Global Trade: The WTO-Trade Remedies and Dispute Settlement, Washington, DC, 16/17 December, 2003.
[67] Overall, the WTO Secretariat's analysis reports declines in both new anti-dumping investigations and new final anti-dumping measures. See WTO Secretariat press release 406, 19 May 2005. http://www.wto.org.
[68] Young/ Wainio, 2004, p. 4.
[69] T. N. Srinivasan, Developing Countries and The Multilateral Trading System After Doha, Economic Growth Center, Yale University, February 2002, p.32.
[70] The data correspond to the time period between 1 July and 31 December 2004. See WTO Secretariat press release 406, 19 May 2005, http://www.wto.org.

and the US (4).[71] The list of countries subject to new investigations is headed by China (25), the Republic of Korea (12), Brazil and Taiwan, Province of China (6 each).[72]

Thus, developing countries are increasingly active, with countries such as China and India taking the lead in initiating new investigations. In fact, by 2002 India had become the fourth most active user of anti-dumping measures (394 investigations).[73] China is also one of the most prominent targets. Other developing countries that are playing a prominent role are Brazil, Mexico and South Africa. Thus, while developing countries are still the main targets of both anti-dumping investigations initiated and anti-dumping duties applied in developed countries, they are increasingly using the instrument – particularly against imports from other developing countries.[74] China is one of the most prominent targets.

I.7.2 The format and progress of negotiations

As part of the Doha Round, the negotiations started in January 2002 and are expected to finish within the single undertaking of the overall Doha package. Unlike other current negotiations, the talks on anti-dumping do not have any intermediary timelines. After a slowdown following the stocktaking at the 5th Ministerial Conference in Cancún (September 2003), the negotiations picked up momentum last year. Already by February 2005, WTO Members had tabled nearly 100 proposals (around 30 of which from the FANs), as well as numerous additional comments and questions.

The talks on anti-dumping form part of the so-called "rules negotiations" and are conducted in the Negotiating Group on Rules (created on 1 February 2002 by a decision of the Trade Negotiations Committee). In addition to anti-dumping, the Rules Negotiating Group also deals with issues related to subsidies (including fishery subsidies) and regional trade agreements. Other non-negotiating bodies where anti-dumping issues are being discussed include the Committee on Anti-Dumping Practices and its Working Group on Implementation.

The negotiations have essentially been proceeding in three phases. In the initial phase, Members indicated which provisions they wanted to clarify and improve. In the second phase, Members engaged in an in-depth examination of these provisions and the respective proposals for clarification. In numerous documents they set forth the precise changes they seek to the existing rules (for a list of the so-called GEN documents submitted until autumn 2005 see Annex I to this module).[75] Since spring 2005, Members pursued a mostly informal process. Upon suggestion by the Chairman, bilateral and plurialteral consultations with so-called "variable geometry" (convoked by the Chairman) and an open-ended Technical Group (examining possibilities to standardize A-D questionnaires) were put in place.[76]

[71] The list of Members imposing new final anti-dumping measures is headed by India (23), Turkey (12), China (10) and the Republic of Korea (9).
[72] The corresponding list for countries being the subject of the imposition of new final anti-dumping measures is headed by China (25), the US (9), followed by India and Republic of Korea, with 8 measures each.
[73] T. N. Srinivasan, Developing Countries and The Multilateral Trading System After Doha, Economic Growth Center, Yale University, February 2002, p.32.
[74] Overall, the WTO Secretariat's analysis reports declines in both new anti-dumping investigations and new final anti-dumping measures.
[75] Note that usually, informal JOB documents are restricted and not available to the general public. However, since July 2004, most of the informal JOB-style negotiating proposals are also circulated as official documents, available through the WTO document dissemination facility in the series TN/RL/GEN/…
[76] For a through description of the progress of the rules negotiations, see Report by the Chairman of the Rules Negotiating Group to the Trade Negotiations Committee, 19, July 2005, TN/RL/13, included in Annex III of this module.

Unlike some of the other WTO negotiating areas, the 2004 July Framework[77] does not contain comprehensive language for anti-dumping. Rather, in subparagraph f of the July Package, the General Council merely takes note of the reports the Negotiating Group on Rules had submitted to the Trade Negotiations Committee (TNC). However, some expected, that subsequently, at the WTO's 6th Ministerial Conference in December 2005, in Hong Kong, China, the anti-dumping negotiations would play a more prominent role.[78]

In fact, considering the high number of proposals, and the possibility that the Hong Kong Ministerial should provide an opportunity to bring the Round closer to its conclusion, the Friends proposed starting a text-based negotiation.[79] While there was not yet any agreement on which of the many issues suggested are truly acceptable for negotiation, it became increasingly clear that certain issues are on top of the proponents' priority list and subject to repeated in-depth discussions. By July 2006, the Chairman of the Rules Negotiating Group noted a common understanding that Members must have text-based negotiations in 2006 in order to conclude the negotiations on time.[80]

Finally, in Hong Kong, Members addressed Anti-dumping issues in both, the main Ministerial text, as well as in a separate Annex D to the text. In paragraph 28 of the main text, Ministers "recall the mandates … of the Doha Ministerial Declaration and reaffirm [their] commitment to the negotiations on rules, as we set forth in Annex D" of the Ministerial Declaration.[81] Subsequently, Annex D devotes several of its paragraphs to anti-dumping related issues. In one of them (para 4), Ministers "*consider* that negotiations on anti-dumping should, as appropriate, clarify and improve the rules regarding, *inter alia*, (a) determinations of dumping, injury and causation, and the application of measures; (b) procedures governing the initiation, conduct and completion of antidumping investigations, including with a view to strengthening due process and enhancing transparency; and (c) the level, scope and duration of measures, including duty assessment, interim and new shipper reviews, sunset, and anti-circumvention proceedings" (emphasis in original). In other paragraphs, Ministers note which issues Members have addressed through detailed proposals, and which aspects Members should take into account when considering possible clarifications and improvements in the area of anti-dumping.

Most importantly, however, in para 10, Ministers "direct the Group to intensify and accelerate the negotiating process in all areas of its mandate, on the basis of detailed textual proposals before the Group or yet to be submitted, and complete the process of analyzing proposals by Participants on the AD and SCM Agreements as soon as possible". Subsequently, in para 11 Ministers "mandate the Chairman to prepare, early enough to assure a timely outcome within the context of the 2006 end date for the Doha Development Agenda and taking account of progress in other areas of the negotiations, consolidated texts of the AD and SCM Agreements that shall be the basis for the final stage of the negotiations" (emphasis in original). It remains to be seen, how negotiators, back in Geneva, will implement this mandate in the months to come.

[77] Doha Work Programme, Decision Adopted by General Council on 1 August 2004, WT/L/579.
[78] The FANs, in their Senior Officials' Statement, "reaffirm[ed] that parallel and substantial progress in the anti-dumping negotiations is essential for the achievements to be made in Hong Kong", TN/RL/W/171.
[79] TN/RL/W/171, Senior Officials' Statement.
[80] See, para 4 of see the Report by the Chairman of the Rules Negotiating Group to the Trade Negotiations Committee, 19, July 2005, TN/RL/13.
[81] Doha Work Programme, WTO Ministerial Conference, Sixth Session, Hong Kong, 13 - 18 December 2005, WT/MIN(05)W/3/Rev.2. For a copy of the relevant parts of the Ministerial Declaration, see Annex III of this module.

I.7.3 Main issues and negotiating interests – an overview

The issues put forward for clarification and improvement are many and diverse. Essentially, they relate to every area of the Anti-dumping Agreement (ADA). They range from questions about the standards for initiating investigations, how to treat non–market economies, how to conduct dumping margin calculations, how to determine injury and causality, and how to deal with price undertakings, to discussions about public interest considerations, public notice and provisions on transparency.

Proposals by the Friends/FANs seek to elaborate and improve current WTO rules with the overall objective of disciplining the use of the anti-dumping instrument and reducing the discretion of national investigation authorities. Standardizing practices and preventing abuse by national authorities are key goals in that context. Along these lines, the Friends suggest *tightening the requirements for initiating action* (e.g. by increasing the threshold of industry support, or by setting time-related limits on the initiation of anti-dumping investigations); *clarifying definitions* (e.g. for the availability of the normal value) and *calculation practices* (e.g. for constructed normal value and constructed export price); *developing detailed rules* (e.g. for injury determination and causality); or *limiting the imposition of anti-dumping duties* (both time-wise and with respect to their amount, e.g. by strengthening the sunset clause and by making the lesser duty rule mandatory). Thus, the Friends mostly put forward proposals which address aspects that will help tighten the rules and thereby make themselves less vulnerable to anti-dumping investigations being initiated by other Members.

The United States,[82] in turn, would not like the WTO's anti-dumping rules to be strengthened to the extent that they would effectively narrow its administration's ability to impose discretion in carrying out anti-dumping duties investigations. Along these lines, the United States aims to preserve the basic concepts, principles and effectiveness of the agreement. The United States' written contributions relate more frequently to transparency-related and procedural issues, for example augmenting the technical capacity of authorities and providing increased disclosure (so that U.S. firms do not suffer from suits that are not administered well). In addition, the United States has put forward proposals to prevent circumvention of anti-dumping duties (for example by routing exports through third countries), as well as proposals relating to new exporters/shipments and to the "all others rate". Overall, the United States' approach is to address also the underlying causes of unfair trade practices, i.e. the trade-distorting practices that give rise to anti-dumping investigations in the first place. Amongst others, this refers to parallel negotiations on subsidies, also being conducted in the Negotiating Group on Rules. Rather than focusing on the use of the anti-dumping instrument as a means to address unfair trade practices, the United States appears to favour stricter disciplines on subsidies as the appropriate tool to address unfair trade.

The European Communities, without being a *demandeur*, have shown some sensitivity to the Friends' concerns. While they also argue for enhancing disclosure and access to non-confidential documents, they also suggest making the lesser duty rule mandatory and introducing a public interest test. In fact, it appears as if the Communities supported the FANs' ideas to the extent that they are consistent with the current European anti-dumping practice (and consequently would not require any significant amendments to the European system). Together with Japan, the Communities have also voiced concern over the increasing cost of responding to anti-dumping suits. They argue that excessive information requirements, together with inadequate procedural and unclear substantive rules, further increase the cost of investigations. One of their suggestions is to develop a standard format for anti-dumping rules to reduce costs.[83]

[82] For an overview of the United States' position, see also Young/ Wainio, 2004, p.8-9.
[83] Young/ Wainio, 2004, p. 11.

There are several ways in which to group proposals and their sponsors. One is to separate those focusing on the substance of the rules from those focusing more on procedural and transparency-related issues. Another is to group proposals according to their broader, underlying objectives: those originating in Members' desire to maintain their current ability to use the anti-dumping instrument to protect domestic industries; and those put forward by those Members, particularly developing country Members, who wish to curtail the growing resort to anti-dumping investigations (particularly to curtail the protectionist purpose and further proliferation of abusive anti-dumping measures). Interestingly, those Members wanting to preserve the status quo mainly limit themselves to providing oral comments on the others' substantive proposals. While they refrain from putting forward substantive proposals on these (substantive) issues, they contribute with more procedural and transparency-related proposals (see above).

As mentioned above, the dividing line between these groups does not necessarily parallel North-South lines. The Friends, for example, include both developed and developing country Members (note that neither China nor India are members of the Friends). In 2005, a third – still very informal group – emerged in the negotiations. The so-called "Middle Group" consists of Members that are both users of the anti-dumping instrument and exporters. The European Communities and Brazil are two prominent members of this group. It remains to be seen how this group evolves and what role it will ultimately play in the negotiations.

Currently, there is no cohesive developing county group in the negotiations. Neither the African Group nor the least developed countries (LDCs), the G 77 or the G 22 have acted jointly or otherwise established their profile in the anti-dumping negotiations. In part, this might be due to the limited participation of developing countries, arising from the high complexity and level of detail of the anti-dumping negotiations, together with pressing priorities in other areas of the Doha Work Programme. In addition, the particular dynamics and constellation of interests in the anti-dumping negotiations might be a reason for the limited participation of these countries acting as a group. Given that the Friends' overall objective is to curtail discretion and abuse of anti-dumping investigations and duties, the interests of those developing countries that are frequent targets of such anti-dumping measures may possibly be well served by the Friends/FANs.

There are, however, specific developmental interests that are not necessarily within the key objectives of the Friends. The so-called implementation issues or issues arising in the context of special and differential (S&D) treatment serve as examples. With respect to S&D, the issue does not figure prominently in the current negotiations. With respect to implementation issues, developing countries have pursued them according to para. 12 of the Doha Ministerial Declaration[84] and the Decision on Implementation Related Issues and Concerns[85] (see below).

I.7.4 Specific issues – implementation issues

Implementation issues in general are key for developing countries. In the anti-dumping context, the main issues are:

- how to deal with repeated investigations;
- how to ensure that special regard is given to the special situation of developing countries;
- timing aspects for determining the value of the dumped volume (particularly for determining whether the volume of dumped imports is negligible), and
- issues related to the annual reviews.

[84] WT/MIN(01)/DEC/W/1.
[85] WT/MIN(01)/DEC/W/17.

While some of the issues have been solved (either through Decisions by the Ministerial Conference or through Decisions by the General Council), others have not yet been successfully concluded.

The four issues that have been prominent during the last years are the following:

How to deal with repeated investigations. At the 2001 Doha Ministerial Conference, Ministers in their Implementation Decision agreed, that if a government receives a request for a second anti-dumping investigation into a product (within a year of a first negative finding on that product) the investigating authority must examine this request "with special care" and only go ahead with the investigation if circumstances have changed since the receipt of the previous request.[86]

How to ensure that "special regard" is given to developing countries and their export situation. Article 15 of the ADA stipulates that developed countries must give "special regard" to the special situation of developing countries when they consider anti-dumping measures on developing countries' exports. They should explore alternative "constructive remedies" before applying such duties. At the Doha Conference, Ministers underscored that this provision is mandatory and, in para. 7.2 of their Decision on Implementation Issues, they instruct the Anti-Dumping Practices Committee's Implementation Working Group to try to clarify how the provision could be implemented.

However, while para. 7.2 of the Implementation Decision places a 12 month deadline on the Working Group, to date Members have still not achieved any consensus on this issue. In fact, in December 2002, the report of the Working Group's Chairman notes that the Committee had succeeded in accomplishing maybe less than was originally expected.[87] The report also states that the issues raised in the proposals concerning Article 15 may yet form the basis for future discussion, should any Member submit relevant proposals for discussion in another forum. Since then Members have, indeed, submitted proposals on issues related to the effective implementation of Article 15 to the negotiations. Proposals on price-undertakings or on the (mandatory application of the) lesser duty rule serve as examples. However, even if there are proposals on these issues, they have not been discussed in the context of Article 15 (focussing on special regard to developing countries). In fact, the "implementation issue" as such has not attracted much attention in the Anti-Dumping Negotiating Group.

How to address timing issues in the determination of the dumped volume Article 5.8 of the ADA states that if the volume of dumped imported products is negligible, the investigation must be terminated (and no anti-dumping duty must be imposed). However, this article does not specify the time period to be used in determining the volume of dumped imports. In para. 7.3 of the Doha Implementation Decision, Ministers agree that this creates uncertainties in the implementation of the provision and they instruct the Implementation Working Group to prepare recommendations within 12 months, with the aim of making the application of time periods as predictable and objective as possible.

In December 2002, Members of the Implementation Committee (based on the Working Group's input) adopted a recommendation to this effect,[88] which subsequently was adopted by the General Council. According to the recommendation, the volume of dumped imports is to be determined with reference to one of the three defined time periods, namely (a) the period of data collection for the dumping investigation; (b) the most recent 12 consecutive months prior to initiation for which data are available; or (c) the most recent 12 consecutive months

[86] Interestingly, this provision does not specifically refer to developing countries.
[87] G/ADP/11.
[88] G/ADP/10.

prior to the date on which the application was filed for which data are available.[89] Subsequently, the Member should notify the Committee as to the methodology it chooses to use in all investigations, and if in any investigation the chosen methodology is not used, provide an explanation in the public notice or separate public record of that investigation.
How to best organize the annual review. Every year, the Anti-Dumping Practices Committee reviews how the agreement has been implemented and how it has operated. In para 7.4 of the Doha Implementation Decision, Ministers instruct the Working Group to prepare guidelines to improve the reviews, and to report its views and recommendations to the General Council within 12 months.

In December 2002, the Committee (again based on the Working Group's input) adopted a recommendation regarding annual reviews of the Anti-Dumping Agreement[90] (which was subsequently adopted by the General Council). According to that recommendation, Members will, in their annual reports, provide (a) information about the number of anti-dumping revocations; and (b) a comparison of the number of preliminary and final measures reported by Members on an ad hoc basis. In their semi-annual reports, Members will address the manner in which the obligations of Article 15 of the Agreement have been fulfilled, which in turn will be included (in the form of an additional column in a table) in the annual report.[91]

I.7.5 Specific issues – negotiating issues[92]

As mentioned, the issues being pursued in the negotiations are diverse. While the Rules Negotiating Group has not made any definitive decision as to which issues will ultimately be negotiated, several issues are receiving considerable attention. Key amongst these are issues related to injury determination, the application of the lesser duty rule, zeroing and sunset clauses.[93] Recently, the FANs outlined their broad objectives, serving as policy guidelines for their initiatives, under which their proposals can be grouped: these include (1) mitigating the excessive effects of AD measures; (2) preventing AD measures from becoming "permanent"; (3) strengthening due process and enhancing the transparency of proceedings; (4) reducing costs for authorities and respondents; (5) terminating unwarranted and unnecessary investigations at an early stage; (6) providing disciplines to improve and clarify substantive rules of dumping and injury.

The following pages will provide a short overview of some of the issues being discussed in the negotiations. The selection of issues is by no means exhaustive, nor does it attempt to indicate priorities or preferences. The specific issues covered are: case initiation standards, standing requirements and industry support; repeated investigations; zeroing; determination of injury; lesser duty rule; public interest clause; normal value and export price – and their construction; *de minimis* dumping margins and negligibility; sunset clause; and special and differential treatment (S&D).

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[89] This last option is subject to the requirement that the lapse of time between the filing of the application and the initiation of the investigation is no longer than 90 days.
[90] G/ADP/9.
[91] See, for example, Annex E of document G/L/707, the Report (2004) if the Committee on Anti-Dumping Practices.
[92] This is merely a selection of issues, not necessarily implying any priorities. In the GEN series of proposals, Members have also addressed a series of other issues, including the following: reviews (Friends); explanations of determinations and decisions (Canada); dispute settlement (Canada); duty assessment methodologies (Canada); price undertakings (Friends); accrual of interest (US); access to non-confidential information (US); material retardation (Egypt); circumvention (US); preliminary determinations (US); facts available (Friends); new shipper review (US); exchange rates (US); conduct of verifications (US); the "all-others rate" (US); or model matching (Friends).
[93] For an overview of issues arising in the current negotiations, see William Kerr and Laura Loppacher, Anti-dumping in the Doha Negotiations Fairy Tales at the World Trade Organization, JWT 38 (2), pp. 211-244, and Aluisio de Lima-Campos, Nineteen Proposals to Curb Abuse in Anti-Dumping and Countervailing Duty Proceedings, JWT 39 (2), pp. 239 – 280.

Case initiation standards, standing requirements and industry support

Even if ultimately not leading to the imposition of duties, anti-dumping investigations can negatively affect the targeted exporters – the so-called harassment or chilling effect. Thus, certain disciplines to rule out frivolous investigations or to limit more carefully the initiation of anti-dumping investigations may appear warranted. The issue of "repeated investigations" (see below) is a related one.

Currently, Art. 5.1 of the Anti-Dumping Agreement addresses the issue of domestic industry support and requires that an application must be made by or on behalf of the domestic industry of the importing Member, which (according to Art. 4) can also be a major proportion of the total domestic production of the product in question. However, these rules remain – in essence – unclear. Consequently, several WTO Members suggest clarifying or placing stricter limits on the requirements for initiating an anti-dumping investigation and on the industry support needed in that context.

The Friends Group, for example, suggests tightening standards for case initiation (Chile, Republic of Korea or Norway) and clarifying them (Brazil). The European Communities suggests that issues related to case initiation should be made subject to fast track dispute settlement at international level, and so does Canada.[94] Australia merely proposes "considering" case initiation standards.

As mentioned above, clarifying the term "major proportion of domestic industry" (domestic industry more generally being those producers whose collective output of the products constitute a major proportion of the total domestic production of these products) is a key issue. In their most recent communication, the Friends suggest making it clear that "a major proportion" refers to "the major proportion" of domestic industry, that is to say, more than 50 per cent of total domestic production."[95] Also China[96] and Canada[97] have suggested clarification. In addition, India suggests including specific rules for sectors that consist of many small producers.

Repeated investigations

Linked to the above issue of case initiation, and to the implementation issue under para 7.1 of the Doha Implementation Decision, a series of countries have made proposals to limit repeated investigations. Brazil and the Friends Group, for example, suggest that a Member should not be allowed to initiate a new antidumping investigation until a date no sooner than one year following the termination of a previous antidumping measure on the same product – unless there are exceptional circumstances that justify initiation in a shorter period (which in any case shall not be less than six months).

Along similar lines, India proposes that an investigation authority should not be allowed to initiate an anti-dumping investigation where an investigation on the same product (or a broader category of another product which included the product now under consideration) from the same Member has resulted in negative findings within 365 days prior to the filing of the petition seeking initiation of an new investigation.[98]

Similarly, China proposes prohibiting the initiation of new investigations against products from developing country Members under two circumstances: the first, in case of an investigation within 365 days after the expiry of a five-year period running from the

[94] TN/RL/W/47.
[95] TN/RL/GEN/27.
[96] TN/RL/W/66.
[97] TN/RL/W/47.
[98] TN/RL/W/86

imposition of duties on the product in question (see below the issue of a sunset clause); the second, in case of an investigation in the same product from the same Member, which had resulted in a negative finding - again within the 365 days prior to the filing of the application.[99]

Zeroing

Zeroing is a calculating method that is used when determining the existence of dumping. When "zeroing" in a dumping determination, the calculation includes positive dumping margins, while excluding (i.e. accounting for zero) negative dumping margins. Zeroing makes it easier to find dumping or higher dumping margins. In fact, this method has been characterised as creating dumping margins out of thin air.[100] Thus, zeroing puts those countries that are the most likely targets of anti-dumping investigations at a clear disadvantage. According to some authors the elimination of zeroing would reduce dumping margins by nearly 87%, and thus have important developmental effects.[101] In response, the Friends seek an explicit prohibition of zeroing.

Thus far, the practice of zeroing has – for specific situations – been ruled out by WTO jurisprudence: in the *EC – Bed Linen*[102] case for inter-model zeroing and in the *US – Stainless Steel*[103] case for zeroing negative dumping for certain sub-periods, both in the context of average to average transactions.[104] However, strictly speaking, the rulings by panels and the Appellate Body only matter for the case at issue, requiring the losing party to address the specific duties at issue, without obliging it to amend its overall anti-dumping regulation and practice. In addition, jurisprudence has – thus far – only addressed specific aspects of zeroing. Transaction to transaction calculations, for example, have not yet been addressed. Similarly, to date, cases have related to initial investigations, leaving open the question about zeroing in the context of reviews. Thus, important loopholes still remain.

Accordingly, the Friends Group looks for a negotiated response. They suggest that the Anti-Dumping Agreement explicitly rule out zeroing.[105] India and China both support that view. Academic debate goes even further and suggests not only ruling out zeroing, but also all of its possible derivatives. According to one author[106], one could go so far as to prohibit any creative alternative practice for calculating dumping margins, if it accords negative margins less than their full numerical value.[107] Amongst others, a negotiated solution along these lines would enhance legal clarity and predictability. Amongst others, it would avoid that the legality of practices other than strictly speaking zeroing would need to be determined through WTO dispute settlement on a case by case basis. Other Members however (e.g. Australia), contend that the Agreement currently does not permit zeroing of negative margins, and consequently reject clarification to expressly rule out this method.

It is important to note that, at the time of the writing, the zeroing issue is also currently also subject to WTO dispute settlement proceedings. The United States is the defending party in both cases, with the European Communities[108] and Japan[109] being the complainants.

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[99] TN/RL/W/66.
[100] Dan Ikenson, Zeroing In: Antidumping's Flawed Methodology under Fire, Free Trade Bulletin No. 1, 1 April 27, 2004.
[101] Ikenson, 2004.
[102] WT/DS141/…
[103] WT/DS179/…
[104] The issue of zeroing has also come up in *US – Softwood Lumber V*.
[105] TN/RL/GEN/8.
[106] Aluisio de Lima-Campos, Nineteen Proposals to Curb Abuse in Anti-Dumping and Countervailing Duty Proceedings, JWT 39 (2), pp. 239 – 280, at p. 267.
[107] An example would be an interpretation of Article 2 to allow consideration of only 50 % of the negative margin in the AD calculation. Technically, this would not be "zeroing".
[108] WT/DS294…

Determination of injury

Before imposing AD duties, domestic investigating authorities must make several affirmative findings. First they must find the existence of *dumping* and *injury* (including injury, threat of injury or material retardation of the establishment of a domestic industry), and second, they must find the *existence of a causal link* between the dumped import and the injury to the domestic industry. Thus, injury standards are key to balancing relevant interests in anti-dumping cases. If too lax, injury standards could lead to excessive restrictions on trade (this is a common complaint about current rules); if too stringent, relief could become unduly difficult to obtain.[110] The same applies to the standards in the determination of causation.

Most recently, the Friends have contributed detailed proposals on what should be the overarching framework (and its specific elements) to determine material injury caused by dumped imports.[111]

One key concept in the context of injury standards is the concept of 'non-attribution'. That is the requirement that injury, when it is caused by factors other than dumped imports, not be attributed to (dumped) imports. Clearly, disentangling various causes of injury to domestic industry and identifying that part of injury which could be ascribed to dumping[112] is a complicated task and frequently entails a considerable amount of discretion.[113] In that context, India suggests elaborating and clarifying the provisions regarding the examination of factors other than dumping that may be causing injury to domestic industry. In addition, in a recent, second proposal, the Friends address material injury, and in particular how to analyse causation. They affirm that "…the impact of dumped imports on the state of the domestic industry must be analyzed separately from the impact of other factors."[114]

Causality is another key concept. Currently, the ADA requires the existence of a causal relationship between dumped imports and injury. It does not, however, require that dumping be the *principal* cause of the injury. The Friends suggest that the dumped imports "in and of themselves" are, through the effect of dumping, causing injury.[115] They also suggest "…that the authorities must analyze the causal relationship focusing on the injurious effects that the dumped imports *alone* have on the domestic industry" (emphasis in original), and that authorities "…must give a reasoned and adequate explanation of how they determine whether the dumped imports in and of themselves are causing material injury and what evidence was analyzed in reaching the conclusion."

Lesser duty rule

When applying the lesser duty rule, national authorities impose duties at a level lower than the margin of dumping if the injury of the complaining domestic industry can be removed by the lower duty. Currently, the WTO Agreement authorizes but does not require such a practice (Article 9.1 ADA).

If the lesser duty rule were to become mandatory, the targets of anti-dumping duties would benefit from lower duties. Similarly, it is argued that the lesser duty rule would be positive,

[109] WT/DS322…
[110] Lewis E. Leibowitz, WTO negotiations on rules: prospects for reform 'from the centre', Advocacy Brief , International Trade Group, Hogan & Hartson LLP http://www.hhlaw.com, P.2
[111] TN/RL/GEN/38.
[112] WTO jurisprudence requires national authorities to clearly list all causes of injury to domestic industries in the importing country. The list of injury factors currently contained in Article 3.4. is a mandatory minimum and these as well as any other relevant factor must be assessed.
[113] Aradhna Aggarwal, Anti Dumping Law and Practice: An Indian Perspective, Indian Council for Research on International Economic Relations, April, 2002, p. 46.
[114] TN/RL/GEN/38. This proposal builds on an earlier submission on injury in TN/RL.GEN/28.
[115] TN/RL/GEN/38.

because it would make it possible to balance the quantity of assistance for domestic producers with the benefit to consumers in the importing country.

In the negotiations, the Friends propose that the lesser duty rule should be mandatory.[116] India supports this view,[117] and so does the European Communities. Australia, even if it applies the lesser duty in its domestic anti-dumping practice, opposes the mandatory application of the lesser duty rule (at the international level).

Canada and others (including the Friends) suggest that appropriate methodologies for the calculation of "lesser duties" should be considered. The Friends, for example, suggest various options, including the price undercutting method, the representative cost plus profit method, or the non-dumped import price method.[118] India argues that the mandatory lesser duty shall not exceed the *margin of dumping* or the *margin of injury*, whichever is lower, and subsequently suggests a framework for the determination of the *injury margin.*[119]

Previously, there were suggestions that the use of the "lesser duty" rule should be mandatory when investigating dumping of imports from a developing country (Brazil).[120] Similarly, China had proposed that the lesser duty rule should be mandatory in the application of anti-dumping measures by developed country Members on the imports from developing country Members.[121] Thus, the additional question here is whether the mandatory application of the lesser duty rule (when applied for the benefit of developing countries only) could constitute a tool for special and differential treatment, or whether its application should be general. However, several Members, while generally supporting the mandatory application of the lesser duty rule, do not agree with its exclusive application to developing country exports. In part, this could be due to the fact that today, developing countries are increasingly both exporters *and* users of the anti-dumping instrument.

Public interest clause

While sheltering the relevant domestic industry, anti-dumping duties can have significant effects on other parts of the country's economy, particularly on downstream users of the product in question. Thus, many countries, when deciding on the imposition of duties, consider the broader effects the potential duties may have on their economy. The European Communities and Canada are examples in point.

The European Communities argue that such a "public interest test" should be included in the ADA, thereby providing for an additional balancing of interests.[122] The Friends recently submitted a comprehensive proposal on public interest, identifying four main elements for a possible framework, including: public interest; minimum factors for consideration; the right for interested members of the public to present information; and transparency.[123] However, Members differ on the extent to which they would like public interest elements reflected. Canada, for example, suggests strengthening the existing provisions to allow more consideration of broader economic, trade and competition policy concerns, and to require a public interest test[124] – but only in exceptional circumstances. Australia in turn considers that the WTO Agreement should not force Members to consider the public interest, and that the decision to do so should rest solely with the domestic authority.

[116] TN/RL/GEN/1, see also TN/RL/W/119.
[117] TN/RL/GEN/32, see also TN/RL/W/170.
[118] TN/RL/W/119.
[119] TN/RL/W/170.
[120] TN/RL/W/7.
[121] TN/RL/W/66.
[122] See Also TN/RL/W/13.
[123] TN/RL/W/174/Rev.1.
[124] For an early contribution of Canada on this issue see TN/RL/W/1, see also TN/RL/W/47.

Normal value and export price – and their construction

When determining the existence of dumping, the "normal value" as well as the "export price" or their comparable (possibly constructed) alternatives are key. Dumping is more likely to be found the higher the normal value and the lower the export price. Currently, the WTO Agreement grants national authorities certain flexibilities, for example when determining whether information for the normal value is available and how to use comparable, constructed alternatives.[125] Similarly, certain flexibilities exist with respect to export prices.

Some argue that the increasing recourse to constructed normal values as the basis for normal value tends to be too artificial and discretionary,[126] and may also result in an increasing finding of dumping. In the current negotiations, some WTO Members aim to reduce these flexibilities and the potential abuse and misuse resulting therefrom. Amongst others, the idea is to promote symmetry between WTO Members' practices and to avoid discretion for choosing the calculation method that results in the highest dumping margins.

With respect to *the normal value* the overall concern is that Article 2.2.2 currently does not provide clear guidance on (a) when there is a situation where recourse would have to be taken to the constructed normal value (e.g. when there are no or not sufficient sales in the ordinary course of trade) and (b) what is the required method for calculating the constructed value (e.g. what is a reasonable amount for profit or for administrative, selling and general costs to be included in the calculation).

Several WTO Members suggest clarifying rules in that context. China, for example, suggests clarifying and strengthening the method for determining the normal price. India also suggests eliminating ambiguities in cost construction, for example about what profit margin should be included.[127] Along similar lines, India suggests clarifying which criteria must be used when choosing among several options to calculate the cost of production (this would prevent Members from simply using the method that results in the highest dumping margin).

Also the Friends suggest clarifying how the normal value should be constructed. More specifically, the Friends have proposals[128] about: what constitutes a sufficient quantity of sales of the like product in the domestic market (e.g. by clarifying the sufficient quantity test and by deleting the clause regarding the particular market situation); how to address sales of the like products in the ordinary course of trade (e.g. by defining what these sales are and by clarifying what are sales below cost); how to address the investigating authorities' discretion to request and use the respondent's data (e.g. by clarifying what is the period for data collection and the period of investigation, and by requiring authorities to accept a respondent's data in accordance with GAAP[129]); and how to calculate the constructed value (e.g. by using actual data for determining constructed vale and alternative methodologies, by including below-cost sales and the profit for constructed value, and by clarifying that general and administrative costs should not be included in determining the constructed value).

In addition to the broader communication on normal value, the Friends have recently also submitted a proposal addressing various problems related to "affiliated parties".[130] (The issue

[125] It is interesting to note that in the United States, 30% of the dumping cases were evaluated during 1979–86 on the basis of constructed value, and of those, dumping was found in 89% of the cases (Clarida p. 135). Also, the use of constructed value appears to have become standard in dumping investigations even though it is supposed to be used as a last resort (Young/ Wainio p. 10).
[126] Horlick, Gary and Edwin Vermulst, The 10 Major Problems With the Anti-Dumping Instrument: An Attempt at Synthesis, JWT 39 (1).
[127] In that context, India also suggests that the inclusion of "normal profits" should not exceed profits normally realized by other exporters of the same product of same general product category.
[128] All the following proposals are contained in document TN/RL/GEN/9.
[129] Generally Accepted Accounting Principles.
[130] TN/RL/GEN/19.

of affiliation plays a crucial role in the calculation of normal values and in the use of an constructed export price.) Amongst others, the Friends suggest clarifying what is an "affiliated party" and how to treat sales to such affiliated parties when determining the normal value. The Friends also have a related proposal addressing the allowances that are being made for differences that affect price comparability, to ensure that authorities make a fair comparison between export price/constructed export price and the normal value.[131]

Other countries are less keen on limiting national authorities' discretion when determining the normal value and the export price. Australia, for example, explicitly states that consideration needs to be give to authorities' discretion on the use of cost data in constructing total costs. Egypt and the United States also consider the current provisions adequate.

De minimis dumping margins and negligibility

De minimis margins are a concept for deciding whether or not to continue/terminate a proceeding (e.g. when determining whether a proceeding is justified or not). Related concepts used in similar situations are the *negligibility* of the volume of dumped imports (actual or potential imports). If dumped imports are negligible or if the dumping margin is below *de minimis*, the investigation shall be terminated and non anti-dumping duties shall be applied.

With respect to dumping margins, the higher the *de minimis* margin, the less likely it would be for dumping investigations to proceed. Thus, a higher *de minimis* margin would appear to be beneficial for those countries that are the most frequent targets of anti-dumping investigations. Some authors, however, argue that even if *de minimis* margins are raised to 10 %, this would not have a significant impacton the number of anti-dumping measures. In fact, in the European Communities, in only 10 out of 113 country specific cases is the margin less than 10 %. In most cases, also in the US, dumping margins are above 10 %.[132] Accordingly, the *de minimis* margin would have to be raised considerably.

Currently, the ADA in Article 5.8 defines *de minimis* dumping margins as margins lower than 2 per cent (expressed as a percentage of the export price). In the negotiations, some developing country proponents suggest raising the *de minimis* dumping margin. For example, India proposes that the existing *de minimis* dumping margin of 2 per cent of export price should to be raised to 5 per cent for imports from developing countries, and that the proposed *de minimis* dumping margin of 5 per cent should be applied not only in new but also in review cases. Along similar lines, China proposes that the existing *de minimis* dumping margin under the ADA (Article 5.8) should be increased from 2 per cent to 5 per cent of export price for imports from developing country Members.[133] The Friends propose to amend Article 5.8 to establish a new – yet to be determined – threshold,[134] and that the new *de minimis* standards should also be applied in review cases.[135]

With respect to *negligibility*, Article 5.8 of the ADA establishes that an investigation shall be terminated (and no anti-dumping duties shall be applied) if dumped imports from a particular country are less than 3 per cent of total imports.[136] The objective of this clause is to exclude import sources that are too small to have a significant adverse impact on the industry in the importing country. However, the current provision (by focussing on the share of total imports rather than the share of the domestic market) fails to measure the imports' impact on the

[131] TN/RL/GEN/24.
[132] Aradhna Aggarwal, Anti Dumping Law and Practice: An Indian Perspective, Indian Council for Research on International Economic Relations, April, 2002
[133] TN/RL/W/66.
[134] WT/RL/GEN/30/Rev.1.
[135] TN/RL/GEN/10.
[136] A so-called cumulation clause establishes that the investigation shall also be terminated if dumped imports from all negligible sources combined do not exceed 7 per cent of total imports.

domestic industry. In addition, the current provision allows for cumulating negligible imports and it fails to provide guidance about the time period over which to measure the negligibility. In this light, the Friends suggest modifying the basis for determining *negligibility* (to focus on the share of total domestic consumption of the like product in the importing country) and to determine the period of time for measuring the *negligibility*.[137] Turkey also made a proposal along these lines:[138] it suggested first, adding a threshold based on the market share of the dumped imports (while maintaining the current criterion based on the share of dumped imports in total imports into the importing country); second, increasing the current 3 per cent threshold (to a yet to be determined larger percentage) and thirdly, deleting the cumulation clause. India also proposes to raise the negligibility threshold to 5 per cent for imports from developing countries and to delete the cumulation clause.[139] According to China, the *negligible* volume of dumped imports under ADA Article 5.8 should be increased from 3 per cent to 5 per cent for imports from developing Members.[140]

In addition, one could consider differentiated thresholds for *de minimis dumping margins* and for *negligibility* for developing countries, possibly as a tool for special and differential treatment. In fact, the Friends, in their most recent proposal, suggest that, when deciding on the appropriate level of the *de minimis* threshold, one should give particular consideration to the developmental needs of developing countries, particularly the LDCs.[141]

Sunset clause

Clearly, the imposition of anti-dumping duties can cause considerable harm to the targeted producers. In fact, once imposed, anti-dumping duties tend to stay: in a large number of cases, measures are "rolled over" after "sunset" reviews, despite the fact that the ADA requires a revocation of the measures after five years. This may appear particularly problematic, bearing in mind that over time, the situation which had warranted the imposition of duties in the first place may have ceased to exist (or otherwise changed). Thus, it has been argued that there is a need to place certain limits on the time-period for which anti-dumping measures can be collected.[142]

Along these lines, the Friends Group proposes that dumping measures should remain in force only for as long as and to the extent necessary to counteract dumping which is causing injury; and that they shall be terminated at the latest 5 years from the imposition of the order. Similarly, China, proposes that anti-dumping measures taken by developed country Members against exports from developing country Members should automatically cease after five years and that in reviews, including in the Article 11.3 review, the same procedures and methodologies used in the initial investigation should be applied. [143]

Canada suggests that the exception to allow duties to go beyond the 5 year sunset needs to be explicitly and narrowly defined.[144] Australia suggests a one year (or six months) grace period

[137] TN/RL/GEN/31/Rev.1.
[138] TN/RL/GEN/33.
[139] Insert reference, same as above.
[140] TN/RL/W/66.
[141] TN/RL/GEN/30/Rev.1
[142] Note that currently, Article 11.3 of the ADA provides for the so-called sun-set review. Accordingly, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition unless, amongst others, the authorities determine, in a review initiated before that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.
[143] TN/RL/W/66.
[144] In fact, Canada suggests establishing an indicative list of factors that authorities should consider in determining whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. TN/RL/W/47.

for Members who continue to impose duties past the five year period and to use this time for the collection of information on the case.

It is interesting to note that the Friends have recently contributed a communication setting out in detail rules for the various reviews of anti-dumping duties (though not referring specifically to the Article 11.3 review),[145] and that, according to China's contribution, one could envisage an S&D component in the context of sunset reviews.[146] Finally, one has to bear in mind that the provision for a sunset review in Article 11.3 has also been subject to WTO dispute settlement, with the panels and the Appellate Body ruling against certain, albeit limited, aspects of United States defendant proceedings regarding sunset review.[147]

Special and Differential Treatment (S&D)

Like many other WTO Agreements, the ADA also contains provisions for S&D treatment. Article 15 on special regard to the special situation of developing country Members (e.g. through the exploration of constructive remedies) is one of them.

However, there is overall concern that S&D provisions lack specificity and are not operational enough. Several Members have argued that developing countries have not received the treatment specified in the ADA. In fact, the panel in *US-Steel Plates* held, in the context of Article 15, that "…Members cannot be expected to comply with an obligation whose parameters are entirely undefined".[148] According to the Doha Mandate, Members have agreed to review all S&D provisions with a view to strengthening them and making them more precise, effective and operational (para.44). This also applies to the relevant provisions of the ADA.

Subsequently, some developing countries have referred to the Doha Ministerial Declaration, suggesting that the anti-dumping negotiations should recognize S&D treatment as an important aspect of the negotiations on anti-dumping. In that context, China, for example made a series of suggestions for rules when applying to developing countries' exports. These include: the mandatory application of the lesser duty rule (when applying to imports from developing country Members), an increase of *negligibility* threshold and *de minimis* margins, (when affecting imports from developing country Members), a duty to accept a proposed price undertaking from the exporter concerned (i.e. developed country Members, when applying anti-dumping measures on imports from developing country Members, should accept the proposal of a price undertaking from the exporters concerned as long as the proposal of the undertaking offsets the dumping margin determined), and the automatic sunset of anti- dumping measures (again, when applying to developing country exports). [149]

Similarly, Brazil has made suggestions on the context of S&D. For example, Brazil suggested the mandatory application of the lesser duty rule (when applying to developing country exports) and revising certain provisions of the ADA. These include: (i) the criteria, methodology, and procedures of the reviews specified in the Agreement; (ii) the definition of the product motivating the investigation; (iii) the determination of the margin of dumping; (iv) and the imposition and collection of duties and the deletion of the cumulation clauses, again all of them specifically addressing developing country exports.

[145] TN/RL/GEN/10. For example, they suggest that the same rules applied to the original investigation shall also be applied to reviews and they specifically refer to reviews s under Article 9.3 (anti-dumping duty assessment), Article 9./5 (new shipper reviews) and Article 11.2 (revocation reviews).
[146] TN/RL/W/66 in para 2.4.
[147] See *US – OCTG Sunset Reviews*, WT/DS268/AB/R and *US – Corrosion-Resistant Steel Sunset Review*, WT/DS 244/AB/R.
[148] WT/DS206/R in para. 7.110.
[149] TN/RL.W.66.

Finally, India has also made specific proposals on special and differential treatment, referring to: higher *de minimis* dumping margins (also in review and refund cases), increasing the threshold volume for *negligible* dumped imports, deleting the cumulation clause and making the lesser duty rule mandatory.[150]

However, S&D has not received a lot of specific attention in the negotiations recently. One area where an S&D issue did arise is a recent Friends proposal suggesting that, when deciding on the appropriate level of the *de minimis* threshold, one could give particular consideration to the developmental needs of developing countries, particularly the LDCs.[151]

While S&D has not necessarily fallen off the agenda, it is clearly of more limited importance right now. This raises the question as to why the level of ambition is somewhat reduced (including when compared to earlier days). Nevertheless, S&D provisions in the ADA have received relatively less attention recently, compared to the beginning of the rules negotiations. Some might argue that the increasing blurring of North/South positions (e.g. the increasing use of AD measures by developing countries) could be a reason for this development. In fact, today, developing countries are not only the target of anti-dumping measures imposed by the North, but they are also imposing anti-dumping duties against their fellow developing countries' exports. Consequently, to be meaningful in that context, S&D treatment would possibly not have to be limited to situations involving developing country exports, but would apply also to situations involving developed country investigating authorities. Others might argue that this somewhat reduced attention to S&D is due to the overall stalemate on S&D issues in the Doha Work Programme. In any case, reviving S&D in the anti-dumping negotiations may require a careful assessment of developing countries' use of anti-dumping duties, their exposure to them and their specific negotiating priorities.

[150] TN/RL/W/4.
[151] TN/RL/GEN/30/Rev.1

CHAPTER II

DUMPING AND INJURY MARGIN CALCULATION METHODS

Chapter II of this module aims to give developing country governments and private enterprises a better understanding of the practical aspects of anti-dumping legislation and the related calculations. It first discusses suggestions for developing countries considering the adoption of anti-dumping legislation and then provides a step-by-step overview of dumping and injury margin calculations. This overview is supported with a series of sample calculations.

A. PRACTICAL ASPECTS

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

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

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

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

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

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

II.1.1 Procedural issues

Institutional separation of the dumping and the injury determinations?

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

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

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

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

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

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

Standing of the domestic industry

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

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

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

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

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

Time-limits

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

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

Investigation period

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

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

Questionnaire format

Questionnaires are lists of questions addressed to the main interested parties, i.e. foreign producers/exporters, related and unrelated importers, and domestic producers. The responses to the questionnaires, as verified, form the basis for the calculations of dumping and injury.

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

With regard to the information to be requested in these questionnaires, it depends on the party to which it is addressed. In the case of foreign producers/exporters, questionnaires typically request general information on the exporting company, data on production, capacity utilization, employment, investments, stocks, sales in volume and value in the domestic and export market of the product concerned. In the EC, questionnaires also request information on the cost of production of the product concerned. By contrast, data on cost of production are

generally not requested in the United States unless the applicant industry alleges that sales below cost occurred. The US approach appears more efficient and therefore might serve as an example for developing countries.

Sampling, verifications and disclosure

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

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

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

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

Forms of duty/undertakings

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

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

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

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

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

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

Levy and suspension of duties

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

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

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

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

Motivation requirements

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

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

II.1.2 Dumping

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

II.1.3 Injury

Distinguishing injury and causation

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

Injury margins

Article 9.1 of the ADA provides that anti-dumping duties should be less than the dumping margin if a lesser duty is sufficient to alleviate the injury. This provision is however not mandatory and, for instance, the United States and Canada do not calculate injury margins. These countries impose the duty on the basis of the dumping margin. By contrast, the EC acted in accordance with the desire expressed in Article 9.1 of the ADA and routinely calculates injury margins as well as dumping margins to impose anti-dumping duties on the basis of the lower of the two. However, as the calculation of injury margins is complicated and technical, developing countries desiring a simple system might be better off not applying a lesser-duty rule. If they nevertheless wish to apply the lesser-duty rule, they could use simpler methods than the complicated EC calculation methods.

Public interest criterion

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

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

II.1.4 Circumvention

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

> *Measures to Prevent Circumvention of Definitive Anti-Dumping Duties*
>
> *X.1 The authorities may include within the scope of application of an existing definitive anti-dumping duty on an imported product those parts or components destined for assembly or completion in the importing country, if it has been established that:*
> *(i) the product assembled or completed from such parts or components in the importing country is a like product to a product which is subject to the definitive anti-dumping duty;*
> *(ii) the assembly or completion in the importing country of the product referred to in sub-paragraph (i) is carried out by a party which is related to*

or acting on behalf of[152] *an exporter or producer whose exports of the like product to the importing country are subject to the definitive anti-dumping duty, referred to in sub-paragraph (i);*

(iii) the parts or components have been sourced in the country subject to the anti-dumping duty from the exporter or producer subject to the definitive anti-dumping duty, suppliers in the exporting country who have historically supplied the parts or components to that exporter or producer, or a party in the exporting country supplying parts or components on behalf of such an exporter or producer;

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

(v) the total cost[153] *of the parts or components referred to in sub-paragraph (iii) is not less than 70 per cent of the total cost of all parts or components used in the assembly or completion operation of the like product,*[154] *provided that in no case shall the parts and components be included within the scope of definitive measures if the value added by the assembly or completion operation is greater than 25 per cent of the ex-factory cost*[155] *of the like product assembled or completed in the territory of the importing country.*

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

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

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

X.3 The provisions of this Code concerning rights of interested parties and public notice shall apply <u>mutatis mutandis</u> to investigations carried out under this Article. The provisions regarding refund and review shall apply to

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

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

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

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

> *anti-dumping duties imposed, pursuant to this Article, on parts or components assembled or completed in the importing country.*

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

> *"When it became apparent that no agreement could be reached on the proposals made by the United States to amend the anti-circumvention provisions in the Dunkel text, the anti-circumvention provisions and country hopping provisions were deleted in their entirety, at the request of the United States."*[156]

II.1.5 Rules of Origin

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

II.2. Dumping margin calculations

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

A dumping margin calculation essentially involves five steps:

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

The explanation of these five separate steps will be given with the help of a sample calculation, which is attached to this section of the paper. The same calculation contains five tables (for the five steps), each of them containing several parts. Table 1 is entitled "exports sales" and contains three parts; table 2 addresses "domestic sales" and again contains three parts; table 3 is named "cost of production", again three parts; table 4 on "ordinary course of trade" contains two parts; and finally, table 5 entitled "dumping calculation" is one single part. The different tables build upon each other (e.g. table 3 follows up on what was calculated in table 2) and the different parts (I, II, III) of one table are usually to be read together (side by side). The tables are complemented by a written explanation of the abbreviations and concepts used in the calculations.

Two observations must be made. First, the sample calculation is based on sales of one single model (or type) in both domestic and export market. If two or more models (or types) of the like product were sold in the export market, separate calculations would have to be performed for each type. The dumping margin for the like product will be obtained by dividing the total

[156] Koulen, The New Anti-Dumping Code through its Negotiating History, at 191.

dumping amount for the various types exported by the total CIF value. Second, the sample calculation is based on sales to unrelated parties. If sales were made to related parties in the domestic or in the export market, investigating authorities would normally consider the prices charged to the related party to be unreliable. When faced with this situation, investigating authorities normally construct domestic and/or export prices starting from the selling price to the first unrelated party (for instance the distributor or the retailer). In view of the complexity of the adjustments made and the diversity of methodologies that might be applied by different investigating authorities, the calculation of constructed normal values or export prices was excluded from the sample calculation and from the explanation below.

II.2.1 Export price

The calculation of the export prices is quite straight-forward (see table 1 on "export sales" part I). The following steps are to be noted:

- Subtract the sales discounts on the invoice from the gross invoice value expressed in the currency of export. This will give the net sales value.
- The net sales value has to be converted into the currency of the exporting country. Normally, the exchange rate to be used is that applicable on the day when the export sale took place. Some investigating authorities, however, request exporters to use the average exchange rate for the month when the sale took place.
- Subtract any quantities or values given by the exporters through credit notes. The net quantity and net sales turnover will be obtained. The net sales turnover in the currency of export has to be converted into the currency of the exporting country, normally using the exchange rate of the date of sale (see above).
- In order to bring the net sales turnover to ex-works level, the adjustments mentioned in section 2.2.3 below will have to be applied.

II.2.2 Normal value

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

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

In our sample calculation, sales in the domestic market represented 38.71% of the volume exported (see table 4 "ordinary course of trade", part I, column H). Therefore, this first test was met.

The second step is to determine whether sales are made in the ordinary course of trade. If there are no sales in the ordinary course of trade, Article 2.2 of the ADA allows investigating authorities to disregard domestic prices and to establish the normal value on the basis of

prices to appropriate third countries or constructed normal values. Article 2.2.1 of the ADA provides for the requirements to be met in order to treat domestic sales as not being in the ordinary course of trade. Footnote 5 to Article 2.2.1 of the ADA provides that sales below per unit costs are made in substantial quantities when *inter alia* the volume of sales below per unit costs represents not less than 20% of the volume sold in the transactions under consideration for the determination of the normal value.

In our sample calculation, the examination of the volume of sales below cost is made in table 3 "cost of production", more specifically part II "calculation of normal value and profitable sales". It will be seen that three transactions show a loss (for transactions 7, 8, and 10). In volume, these three domestic sales represent 38% of the total sales in the domestic country. That is, the percentage of profitable domestic sales is 62% (see table 4, "ordinary course of trade tests", part I, column L). The percentage of sales below cost is thus higher than 20%, and sales below cost can therefore be considered to be substantial.

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

In our sample calculation, the three transactions showing a loss have been excluded (see table 3 "costs of production", part II, column H, where transactions 7, 8 and 10 are equated to zero; and subsequently, part III, column C). The normal value is therefore obtained by dividing the ex-works price of the profitable quantity by the quantity sold at profit in the domestic market.

II.2.3 Adjustments

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

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

In some cases, it is assumed that the adjustments reported in the attached sample calculation (table 2 "domestic sales", part III on domestic sales, and table 1 "export sales", part III on export sales) correspond to actual amounts incurred by the exporters. This is the case of the reported amounts for the discounts, freight, charges, packing and commission reported in table 1 "exports sales", part III (adjustments on export sales). For credit costs, where the actual cost incurred on a per-transaction basis might be difficult to determine, a notional amount has been calculated.

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

II.2.4 Fair comparison

As a final step, the ADA requires that the investigating authority carries out a fair comparison between the normal value and the export price. Through the comparison of the normal value and the export price, the investigating authority will obtain the dumping margin.

Article 2.4.2 of the ADA provides that the existence of margins of dumping must normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. The comparison can also be made between the weighted average normal value and export prices on a transaction-by-transaction basis when certain strict requirements are met.

The sample calculation is based on a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions (see table 5, dumping calculation). The calculation of the dumping margin includes the following steps:

- Determination of the ex-works export price per kg on a per-transaction basis;
- Comparison of the ex-works export price per kg for each transaction with the ex-works normal value per kg;
- The difference between the export price and the normal value constitutes the dumping margin per kg for each transaction;
- The difference between the export price and the normal value for each transaction is then multiplied by the exported volume corresponding to that transaction expressed in kg, which gives the total dumping amount per transaction;
- The total dumping amount for each export transaction is added in order to obtain the total dumping amount;
- The total dumping amount is divided by the total CIF price, which gives the dumping margin. In the sample calculation, the dumping margin is 4.1%

For the reader's reference, table 5 "dumping calculation" shows the impact on the dumping margin calculation of the zeroing practice. The difference with the comparison methodology explained above is that, when zeroing is applied, negative dumping becomes zero. Therefore, negative dumping cannot offset "positive" dumping; and the dumping margin is thus inflated. In the sample calculation, the second, third, fifth, sixth, seventh and last (tenth) export transactions are sold in the importing country at non-dumped prices. If an investigating authority applies zeroing, the total dumping amount is 312,745.53 monetary units, while if zeroing is not applied, the total dumping amount is 247,319 monetary units. The difference, 65,426.53 monetary units, corresponds to negative dumping from the first three export transactions which has been zeroed. In the sample case, it can be seen that the application of zeroing leads to a higher dumping margin (5.2% versus 4.1%).

II.2.5 Sales below cost and constructed normal value

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

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

- The cost of manufacturing for each of the exported types is calculated. This cost of manufacturing includes the costs of raw materials used to produce the exported goods, plus the manufacturing overheads and direct labour;

- The cost of manufacturing for each type is grossed up with a fixed percentage corresponding to profit and selling, general and administrative costs. The percentage for selling, general and administrative costs corresponds to the amount of selling, general and administrative costs incurred by the exporter in its export sales of the product concerned to the EC during the investigation period divided by the turnover relating to those sales. On the other hand, profit is obtained after excluding the sales below cost in the domestic market. In the sample calculation, the calculation of the profit margin is explained in table 3 "cost of production", part II. If an investigating authority calculates the profit on profitable sales only, the investigating authority will exclude the three domestic transactions sold at a loss (see column E for overall net sales quantity 27,326.00 and column I for net sales quantity sold at profit 16,855.00). The profit on profitable sales will be 119,401.22 monetary units (column J). This will be divided by the net sales value of the profitable sales (column L). When expressed as a percentage, this will give the profit margin on profitable sales (9.92%). By contrast, if one allows the sales at a loss to offset the profit of the profitable sales in the domestic market, the profit margin will naturally be lower (in the sample calculation, column F profit on all sales 117,266.30 monetary units). The profit margin will be obtained by dividing this profit by the net sales value of all sales (profitable and non profitable) sold in the domestic market (column K, 1875,421.14). When expressed as a percentage, this shows a profit margin of 6.25%. That is, using the second methodology, the profit margin is 3.67% lower. When using this second methodology, the overall percentage for profit and selling, general and administrative costs will be lower.

II.3. Injury margin calculations

Article 9.1 provides that, even if dumping and resulting injury are found, the imposition of anti-dumping measures is discretionary. Furthermore, the article expresses a preference for imposition of measures at a level less than the margin of dumping if a lesser duty would be adequate to remove the injury. Many countries have taken over these provisions in their national anti-dumping legislation. In order to determine whether a lesser duty suffices to remove the injury, such countries will calculate injury margins. Although modalities vary from country to country, *grosso modo* two methods can be distinguished: price undercutting and price underselling calculations.

II.3.1 Price undercutting: price comparison

For the purpose of calculating injury margins based on the price undercutting method, the authority normally compares the adjusted[157] weighted average resale prices of foreign producers with the price of similar models/products of EC producers. The difference between the two is the amount of the injury, the comparison of the adjusted prices of foreign and EC producers being one for identical models/products. As a percentage of the CIF export price, it embodies the injury margin. This method implies that, if a foreign producer sells above the price of an identical model/product of the EC producers, his injury margin is zero.

The price comparison typically involves the following steps:

1. Selection of the national markets to be investigated;
2. Selection of representative models produced and sold by EC producers;[158]
3. Selection of comparable models sold by foreign producers;[159]

[156] Adjusted for differences in level of trade and differences in physical characteristics.

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

4. Adjustment for differences in physical characteristics between the chosen models;
5. Adjustment for differences in the level of trade;
6. Calculation of weighted average resale price of representative EC models;
7. Comparison of weighted average resale price of representative EC models with adjusted prices of comparable foreign models (this gives the per unit, per model amount of undercutting);
8. Undercutting per unit multiplied by the quantity of the comparable foreign models sold (this gives the total amount of undercutting);
9. Weighted average resale price of representative EC models (7) multiplied by the quantity sold of comparable foreign models (this gives the total EC resale value);
10. Total undercutting amount (8) divided by the total EC resale value (9) multiplied by 100 (this gives the weighted average undercutting margin in percentage terms);
11. Calculation of adjusted average price level of foreign producer on the basis of weighted average undercutting margin in comparison with average EC industry price;
12. Calculation of weighted average CIF price of foreign producer on the basis of the actual price level (as opposed to the adjusted price level);
13. Calculation of weighted average undercutting margin as a percentage of the weighted average CIF resale price.

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

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

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

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

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

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

1-3. See steps 1 to 3, *supra*.
4. Physical difference adjustment model *B:* 200 – 5.50 = 194.50;
5. Level of trade adjustment:
   Model B: 194.50 x 1.04 x 1.14 x 1.2 = 276.72;
   Model Y: 175 x 1.04 x 1.14 x 1.2 = 248.97;
6. Calculation of the weighted average resale price of EC models:
   A: 280 x 100 = 28,000:100 = 280;
   X: 260 x 200 = 52,000;
   Z: 270 x 100 = 27,000;
   X and Z: 79,000:300 = 263.33;
7. Per unit, per model amount of undercutting:
   A: 280 – 276.72 = 3.28 undercutting per unit
   X and Z: 263.33 – 248.97 = 14.36 undercutting per unit;
8. Total amount of undercutting
   (3.28 x 150 =) 492 + (14.36 x 250 =) 3,590 = 4,082;
9. Total EC resale value:
   (280 x 150 =) 42,000 + (263.33 x 250 =) 65,833 = 107,833;
10. Weighted average undercutting margin;
    4,082:107,833 x 100 = 3.79%;
11. Adjusted average price level of the foreign producer:
    100 – 3.79 = 96.21;
12. Weighted average CIF price of the foreign producer:
    96.21 x 100:138[160] x 104%[161] = 72.51;
13. Weighted average undercutting margin as a percentage of the weighted average CIF resale price:
    3.79:72.51 x 100 = 5.23%.

II.3.2 Underselling: target prices

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

In such cases, the authority may decide to ignore the sales prices of the domestic producers and construct target prices, consisting of the full costs of production of the domestic producers, including SGA, and a reasonable or target profit. Again, this method has the result that a producer selling above the target price will have a zero injury margin.

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

The calculation steps will then become as follows:

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

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

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

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

1-3. See steps 1 to 3, *supra*.
4. Physical difference adjustment model B: 200 – 5.50 = 194.50;
5. Level of trade adjustment:
   Model B: 194.50 x 1.04 x 1.14 x 1.2 = 276.72;
   Model Y: 175 x 1.04 x 1.14 x 1.2 = 248.97;
6-8. See table 2.
9. Weighted average target price EC models:
   A: 324.8 x 100 = 32,480:100 = 324.80;
   X: 302.4 x 200 = 60,480;
   Z: 313.6 x 100 = 31,360;
   X and Z: 91,840:300 = 306.13;
10. Per unit, per model amount of underselling:
   A: 324.80 – 276.72 = 48.08 underselling per unit;

X and Z: 306.13 – 248.97 = 57.16 underselling per unit;

11. Total amount of underselling:
(48.08 x 150 =) 7,212 + (57.16 x 250 =) 14,290 = 21,502;
12. Total EC resale value:
(324.8 x 150 =) 48,720 + (306.13 x 250 =) 76,532.5 = 125,252.5;
13. Weighted average underselling margin:
21,502:125,252.5 x 100 = 17.7%;
14. Adjusted average price level of the foreign producer:
100 – 17.17 = 82.83;
15. Weighted average CIF price of the foreign producer:
82.83 x 100:138[162] x 104% = 62.42;
16. Weighted average underselling margin as a percentage of the weighted average CIF resale price:
17.17:62.42 x 100 = 27.5%.

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

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

B. SAMPLE DUMPING CALCULATIONS

EXPORT SALES

(TABLE 1)

Part I

Part II

Part III

TABLE 1: EXPORT SALES

Export sales for the period 01/01/01 till 31/12/01 (unrelated)

Part I

A	B	C	D	E	F	G	H	I	J	K	L	M
SN	**Product code number**	**Company product number**	**Invoice date**	**Invoice number**	**Bill number**	**Customer number**	**Destination**	**Order number**	**Quantity**	**Gross Invoice value**	**Sales discount**	**Net invoice value**
1	A-01-100-34-A-W-2-3-1	1	07.janv.01	1	A1	1	Italy	2001/1	5'000.00	10'200.00	0.00	10'200.00
2	A-01-100-34-A-W-2-3-1	1	19.janv.01	2	A2	2	UK	2001/2	2'900.00	6'003.00	0.00	6'003.00
3	A-01-100-34-A-W-2-3-1	1	01.mars.01	3	A3	3	Germany	2001/3	10'200.00	21'523.00	0.00	21'523.00
4	A-01-100-34-A-W-2-3-1	1	03.mars.01	4	A4	1	Italy	2001/4	8'400.00	15'288.00	0.00	15'288.00
5	A-01-100-34-A-W-2-3-1	1	22.mai.01	5	A5	3	Germany	2001/5	12'000.00	24'180.00	0.00	24'180.00
6	A-01-100-34-A-W-2-3-1	1	02.juil.01	6	A6	2	UK	2001/6	5'500.00	10'725.00	0.00	10'725.00
7	A-01-100-34-A-W-2-3-1	1	15.juil.01	7	A7	3	Germany	2001/7	6'250.00	12'437.50	0.00	12'437.50
8	A-01-100-34-A-W-2-3-1	1	05.sept.01	8	A8	1	Italy	2001/8	8'800.00	15'400.00	0.00	15'400.00
9	A-01-100-34-A-W-2-3-1	1	19.sept.01	9	A9	1	Italy	2001/9	15'600.00	26'520.00	0.00	26'520.00
10	A-01-100-34-A-W-2-3-1	1	01.déc.01	10	A10	2	UK	2001/10	8'000.00	15'536.00	0.00	15'536.00
	Totals:								**82'650.00**			

Formulas: *M=K-L*

M=10,200 (Table 1, Part I, column K)-0 (Table 1, Part I, column L); etc

PART I

SN: stands for sequential number
Product Code Number: this is a code to be constructed as per the instructions in the anti-dumping questionnaire. It should be different for different models or types of the product subject to investigation
Company Product Number: this is the code given by the exporter to each type or model of the product subject to investigation
Invoice date: date of transaction as per the invoice
Invoice number: number of the export invoice
Bill number: reference number in the Bill of Lading
Customer number: internal company code applicable to each customer (if any)
Destination: country to which the goods were sent
Order number: number of the purchase order
Quantity: volume of goods exported in units or other measurement unit
Gross invoice value: invoice value before sales discounts
Sales discounts: these are discounts included in the invoice
Net invoice value: invoice value after deduction of sales discounts

TABLE 1: EXPORT SALES

Export sales for the period 01/01/01 till 31/12/01 (unrelated)

Part II

	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	AA	AB
SN	**Net sales price per unit**	**Currency**	**Exchange rate**	**Net turnover (local currency)**	**Date credit note**	**Credit note number**	**Credit quantity**	**Credit value**	**Credit value / unit**	**Net sales quantity**	**Net sales value**	**Net turnover (local currency)**	**Payment terms**	**Delivery terms**	**CIF value**
1	2.04	USD	36.91	376518.72	10.juil.01	O2	100.00	204.00	2.04	4'900.00	9'996.00	368'988.35	90	CIF	368'988.35
2	2.07	USD	36.91	221592.34	0	0	0	0	0	2'900.00	6'003.00	221'592.34	CASH	FOB	225'137.82
3	2.11	USD	37.58	808892.45	0	0	0	0	0	10'200.00	21'523.00	808'892.45	60	CIF	808'892.45
4	1.82	USD	37.58	574564.32	0	0	0	0	0	8'400.00	15'288.00	574'564.32	90	CIF	574'564.32
5	2.02	USD	37.75	912857.87	0	0	0	0	0	12'000.00	24'180.00	912'857.87	60	CIF	912'857.87
6	1.95	USD	37.86	406044.21	0	0	0	0	0	5'500.00	10'725.00	406'044.21	CASH	FOB	412'540.92
7	1.99	USD	37.86	470878.78	0	0	0	0	0	6'250.00	12'437.50	470'878.78	60	CIF	470'878.78
8	1.75	USD	37.95	584373.02	0	0	0	0	0	8'800.00	15'400.00	584'373.02	90	CIF	584'373.02
9	1.70	USD	37.95	1006335.88	0	0	0	0	0	15'600.00	26'520.00	1'006'335.88	90	CIF	1'006'335.88
10	1.94	USD	38.04	590935.06	0	0	0	0	0	8'000.00	15'536.00	590'935.06	CASH	FOB	600'390.03
				5'952'992.64						**82'550.00**					**5'964'959.41**

N=M/J

N=Net invoice value (Table 1, Part I, column M)/Quantity (Table 1, Part I, column J). For instance, N=10,200 (Table 1, Part I, column M)/5,000 (Table 1, Part I, column J); etc

*Q=M*P*

Q=Net invoice value (Table 1, Part I, column M)*exchange rate (Table 1, Part I, column P). For instance, Q=10,200 (Table 1, Part I, column M)*36.91 (Table 1, Part II, column P); etc

V=204 (Table 1, Part II, column U)/100 (Table 1, Part II, column T); etc

V=U/T

W=J-T

W=5,000 (Table 1, Part I, column J)-100 (Table 1, Part II, column T); etc

X=M-U

X=Net invoice value (Table 1, Part I, column M) - credit value (Table 1, Part II, column U). For instance, X=10,200 (Table 1, Part I, column M) -204 (Table 1, Part II, column U); etc

*Y=X*P*

Y=9,996 (Table 1, Part II, column X)*36.91 (Table 1, Part II, column P); etc

In case of transactions on FOB basis, the CIF value has to be constructed by adding transport (ocean freight) and insurance costs to the net turnover in local currency. For instance, for SN2 the CIF value was determined as follows: 221,592.34 (net turnover in local currency [Table 1, Part II, column Y] * 1.016 (1 + 0.015 [ocean freight: Table 1, Part III, column AE] + 0.001 [insurance for ocean freight: Table 1, Part III, column AF]).

PART II

SN: stands for sequential number. It refers to the transactions reported in table 1 "export sales", part I
Net sales value on a per unit basis: the net sales value on the unit basis selected (units, kilograms, metric tons, etc.) (see table 1 "export sales", part I (dividing column M, listing net invoice value, by column J, listing quantity))
Currency: Currency in which the transaction took place
Exchange rate: rate of exchange between the currency in which the export sale took place and the domestic currency
Net turnover (local currency): Net turnover in the local currency
Date credit note: if a credit note has been issued, date of the credit note
Credit note number: number of the credit note
Credit quantity: quantity credited
Credit value: value credited
Credit value/unit: the credit value on a per unit basis
Net sales quantity: quantity exported after deduction of any credited quantity (see table 1, part I, column J, minus table 1, part II, column T)
Net sales value: (reported in table 1, part II, column X) net turnover in the transaction currency after deduction of any credited value (see table 1, part I, column M, minus table 1, part II, column U)
Net turnover (local currency): net turnover in domestic currency after deduction of any credited value
Payment terms: the agreed rules and conditions regarding payment for goods
Delivery terms: the agreed rules and conditions regarding delivery of goods
CIF value: turnover on CIF basis

TABLE 1: EXPORT SALES

Export sales for the period 01/01/01 till 31/12/01 (unrelated)

Part III

AO=Net turnover in local currency (Table 1, Part II, column Y) minus adjustments (Table 1, Part III, columns AC to AN). For instance, AO=368,988.35 (Table 1, Part II, column Y) -(3,689.88 (Table 1, Part III, column AC)+ 1,844.94 (Table 1, Part III, column AD)+5,534.83 (Table 1, Part III, column AE)+368.99 (Table 1, Part III, column AF)+199.64 (Table 1, Part III, column AG)+ 332.09 (Table 1, Part III, column AH)+ 6,600 (Table 1, Part III, column AI)+4,549.17 (Table 1, Part III, column AJ)+11,069.65 (Table 1, Part III, column AM)); etc

	AC	AD	AE	AF	AG	AH	AI	AJ	AK	AL	AM	AN	AO	AP
SN	**Quantity discount**	**Other discounts**	**Ocean freight**	**Insurance**	**Inland freight**	**Other charges**	**Packing**	**Credit costs**	**Warranty**	**After sales**	**Commission**	**Currency conversion**	**Total ex-factory export price**	**Ex-factory export price per unit**
1	3689.88	1844.94	5534.83	368.99	199.64	332.09	6600.00	4549.17	0.00	0.00	11069.65	0.00	334'799.16	68.33
2	0.00	0.00	0.00	0.00	115.79	199.43	3828.00	0.00	0.00	0.00	6647.77	0.00	210'801.35	72.69
3	16177.85	0.00	12133.39	808.89	407.26	728.00	13464.00	6648.43	0.00	0.00	24266.77	0.00	734'257.86	71.99
4	5745.64	5745.64	8618.46	574.56	335.39	517.11	11088.00	7083.67	0.00	0.00	17236.93	0.00	517'618.90	61.62
5	18257.16	0.00	13692.87	912.86	479.13	821.57	15840.00	7502.94	0.00	0.00	27385.74	0.00	827'965.61	69.00
6	4060.44	0.00	0.00	0.00	219.60	365.44	7260.00	0.00	0.00	0.00	12181.33	0.00	381'957.40	69.45
7	4708.79	0.00	7063.18	470.88	249.55	423.79	8250.00	3870.24	0.00	0.00	14126.36	0.00	431'715.99	69.07
8	5843.73	5843.73	8765.60	584.37	351.36	525.94	11616.00	7204.60	0.00	0.00	17531.19	0.00	526'106.50	59.78
9	20126.72	10063.36	15095.04	1006.34	622.87	905.70	20592.00	12406.88	0.00	0.00	30190.08	0.00	895'326.90	57.39
10	5909.35	0.00	0.00	0.00	319.42	531.84	10560.00	0.00	0.00	0.00	17728.05	0.00	555'886.40	69.49
													5'416'436.07	**65.61**
								*AJ=(Y*5%)*(Z/365)*					*AO=Y-SUM(AC:AN)*	*AP=AO/W*

AJ=(Net sales value (Table 1, Part II, column Y)*interest rate)*(payment terms (Table 1, Part II, column Z)/365). For instance, AJ=(368,988.35 (Table 1, Part II, column Y)*0.05 (interest rate))*(90 (Table 1, Part II, column Z)/365); etc.

AP=Total ex-factory export price (Table 1, Part III, column AO) divided by net sales quantity (Table 1, Part II, column W). For instance, AP=334,799.16 (Table 1, Part III, column AO)/4,900 (Table 1, Part II, column W); etc

PART III

SN: stands for sequential number. It refers to the transactions reported in table 1 on "export sales", part I, first column)
Discounts: adjustment for discounts and rebates not included in the invoice
Ocean freight: adjustment for the transport cost in case of C&F and CIF transactions
Insurance: adjustment for the insurance cost in case of CIF transactions
Inland freight: adjustment for the cost of freight in the exporting country
Other charges: adjustment that covers various miscellaneous charges related to export transactions: cost of loading, handling charges (container terminal fees, fees for customs agents, etc) and other ancillary costs (bank fees for letters of credit, etc)
Packing: adjustment for packing costs regarding the product concerned
Credit costs: adjustment for cost of the time the buyer is given to pay the goods
Warranty: adjustment for cost of warranties, guarantees technical assistance and services borne by the exporter. Technical assistance and services include any service, repair or consultation that the exporter provides to its customer regarding the product subject to investigation. This adjustment normally plays a role in investigations against electric and electronic products
After sales: adjustment for costs borne by the exporter other than warranties, guarantees technical assistance and services
Commission: adjustment for the commission paid by the exporter to traders or agents arranging the transaction
Currency conversion: adjustment to compensate for sustained currency fluctuations occurred during the investigation period
Total ex-factory export price: net turnover in domestic currency minus all the adjustments (see table 1 on "export sales", part III; column AO results from subtracting columns AC to AN (part III) from column Y (Part II))
Ex-factory export price per unit: the total ex-factory export price divided by the net quantity (see table 1 on "export sales", part III; column AP results from dividing column AO (part III) by column W (part II))

DOMESTIC SALES

(TABLE 2)

Part I

Part II

Part III

TABLE 2: DOMESTIC SALES

Domestic sales for the period 01/01/01 till 31/12/01 (unrelated)

Part I

A	B	C	D	E	F	G	H	I	J	K
SN	**Product Control Number**	**Company product number**	**Invoice number**	**Invoice date**	**Customer number**	**Quantity**	**Gross invoice value**	**Sales discount**	**Net invoice value**	**Net value per unit**
1	A-01-100-34-A-W-2-3-1	1	1	08.janv.01	D1	1'335.00	104'130.00	804.89	103'325.11	77.40
2	A-01-100-34-A-W-2-3-1	1	2	15.mars.01	D2	1'353.00	105'534.00	1'632.20	103'901.80	76.79
3	A-01-100-34-A-W-2-3-1	1	3	02.avr.01	D3	3'982.00	294'668.00	4'465.57	290'202.43	72.88
4	A-01-100-34-A-W-2-3-1	1	4	10.mai.01	D4	2'356.00	169'632.00	2'841.38	166'790.62	70.79
5	A-01-100-34-A-W-2-3-1	1	5	10.juin.01	D5	2'646.00	190'512.00	1'669.98	188'842.02	71.37
6	A-01-100-34-A-W-2-3-1	1	6	15.juil.01	D6	4'135.00	281'180.00	4'638.09	276'541.91	66.88
7	A-01-100-34-A-W-2-3-1	1	7	01.août.01	D7	3'344.00	217'360.00	2'297.28	215'062.72	64.31
8	A-01-100-34-A-W-2-3-1	1	8	10.sept.01	D8	3'350.00	217'750.00	2'301.08	215'448.92	64.31
9	A-01-100-34-A-W-2-3-1	1	9	05.oct.01	D9	1'063.00	76'536.00	1'192.97	75'343.03	70.88
10	A-01-100-34-A-W-2-3-1	1	10	12.déc.01	D10	3'777.00	245'505.00	4'447.42	241'057.58	63.82
	Totals					**27'341.00**	**1'902'807.00**		**1'876'516.14**	

Formulas:

J=H-I

J=104,130 (Table 2, Part I, column H)-804.89 (Table 2, Part I, column I); etc.

K=J/G

K=103,325.11 (Table 2, Part I, column J)/ 1,335 (Table 2, Part I, column G); etc.

PART I

SN: stands for sequential number
Product Code Number: this is a code to be constructed as per the instructions in the anti-dumping questionnaire. It should be different for different models or types of the product subject to investigation
Company Product Number: this is the code given by the exporter to each type or model of the product subject to investigation
Invoice number: number of the domestic invoice
Invoice date: date of transaction as per the invoice
Customer number: internal company code applicable to each customer (if any)
Quantity: volume of goods sold in the domestic market in units or other measurement unit
Gross invoice value: invoice value before sales discounts
Sales discounts: these are discounts included in the invoice
Net invoice value: invoice value after deduction of sales discounts
Net invoice value per unit: the net sales value on the unit basis selected (units, kilograms, metric tons, etc.)

TABLE 2: DOMESTIC SALES

Domestic sales for the period 01/01/01 till 31/12/01 (unrelated)

Part II

	L	M	N	O	P	Q	R	S
SN	**Date credit note**	**Credit note number**	**Credit quantity**	**Credit value**	**Credit value / unit**	**Net sales quantity**	**Net sales value**	**Net sales price per unit**
1	17.juin.01	A1	15	1'095.00	73	1320.00	102230.11	77.45
2	0	0	0	0	0	1353.00	103901.80	76.79
3	0	0	0	0	0	3982.00	290202.43	72.88
4	0	0	0	0	0	2356.00	166790.62	70.79
5	0	0	0	0	0	2646.00	188842.02	71.37
6	0	0	0	0	0	4135.00	276541.91	66.88
7	0	0	0	0	0	3344.00	215062.72	64.31
8	0	0	0	0	0	3350.00	215448.92	64.31
9	0	0	0	0	0	1063.00	75343.03	70.88
10	0	0	0	0	0	3777.00	241057.58	63.82
						27'326.00	**1'875'421.14**	

P=1,095 (Table 2, Part II, column O)/ 15 (Table 2, Part II, column N); etc

P=O/N

Q=G-N

R=J-O

S=R/Q

S=102,230.11 (Table 2, Part II, column R) /1,320 (Table 2, Part II, column Q); etc

Q=Quantity (Table 2, Part I, column G) minus credited quantity (Table 2, Part II, column N). For instance, Q=1,335 (Table 2, Part I, column G)-15 (Table 2, Part II, column N); etc

R=Net invoice value (Table 2, Part I, column J) minus credit value (Table 2, Part II, column O). For instance, R=103,325.11 (Table 2, Part I, column J)-1,095 (Table 2, Part II, column O); etc

PART II

SN: stands for sequential number and refers to the transactions reported in table 2 "domestic sales", part I
Date credit note: if a credit note has been issued, date of the credit note
Credit note number: number of the credit note
Credit quantity: quantity credited
Credit value: value credited
Credit value/unit: the credit value on a per unit basis
Net sales quantity: quantity sold domestically after deduction of any credited quantity (see table 2 "domestic sales", parts I and II; subtracting column N (part II) from column G (part I) results in column Q (part II))
Net sales value: net turnover after deduction of any credited value (see table 2 "domestic sales" parts I and II; subtracting "credit value" column O (part II) from "net invoice value" column J (part I) results in "net sales value" column R (part II))
Net sales price per unit: the net sales price on the unit basis selected, column S, table 2, part II

TABLE 2: DOMESTIC SALES

Domestic sales for the period 01/01/01 till 31/12/01 (unrelated)

Part III

	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE	AF	AG	AH	AI	AJ
SN	**Payment terms**	**Delivery terms**	**Physical differences**	**Duty drawback**	**Quantity discount**	**Other discounts**	**Rebate**	**Level of trade**	**Inland freight**	**Charges**	**Packing**	**Warranty**	**After sales**	**Commission**	**Currency conversion**	**Credit**	**Ex-factory normal value**
1	60	DEL	660.00	1226.73	0.00	0.00	0.00	0.00	475.20	0.00	1742.40	0.00	0.00	0.00	0.00	1786.37	97'659.42
2	15	DEL	676.50	1257.40	0.00	0.00	0.00	0.00	487.08	0.00	1785.96	0.00	0.00	0.00	0.00	453.89	100'593.97
3	30	DEL	1991.00	3700.63	0.00	0.00	0.00	0.00	1433.52	0.00	5256.24	0.00	0.00	0.00	0.00	2535.49	279'267.54
4	15	DEL	1178.00	2189.53	0.00	0.00	0.00	0.00	848.16	0.00	3109.92	0.00	0.00	0.00	0.00	728.62	161'092.39
5	60	DEL	1323.00	2459.03	0.00	0.00	0.00	0.00	952.56	0.00	3492.72	0.00	0.00	0.00	0.00	3299.82	179'960.89
6	30	DEL	2067.50	3842.82	0.00	0.00	0.00	0.00	1488.60	0.00	5458.20	0.00	0.00	0.00	0.00	2416.14	265'403.65
7	60	DEL	1672.00	3107.71	0.00	0.00	0.00	0.00	1203.84	0.00	4414.08	0.00	0.00	0.00	0.00	3758.00	204'251.09
8	60	DEL	1675.00	3113.29	0.00	0.00	0.00	0.00	1206.00	0.00	4422.00	0.00	0.00	0.00	0.00	3764.75	204'617.88
9	30	DEL	531.50	987.89	0.00	0.00	0.00	0.00	382.68	0.00	1403.16	0.00	0.00	0.00	0.00	658.27	72'442.53
10	30	DEL	1888.50	3510.12	0.00	0.00	0.00	0.00	1359.72	0.00	4985.64	0.00	0.00	0.00	0.00	2106.12	230'984.49

Suppose that the product sold in the export market contains an anti-theft device that the like product sold in the domestic market does not contain. The value of this anti-theft device will have to be added to the normal value in order to be able to make a proper comparison. In our example, the value is added to the net sales turnover (see AJ). By contrast, if only the domestically sold product had contained the above device, the value of that device should be deducted from the net sales turnover for the purpose of determining the normal value.

Suppose that the exporter concerned applied for a refund of the duties paid on imports of raw materials used for the production of the product exported. Suppose further that the amount refunded as duty drawback is 88,934 monetary units. This amount will be divided by the number of units exported (82,650) in order to obtain the duty drawback per unit (0.92934). On a per-transaction basis, the amount for duty drawback will be obtained multiplying the unit duty drawback by the number of units of each transaction. For instance, for SN1 the amount of duty drawback will be 1,226.73 (0.92934*1,320).

AI=(Net sales value (Table 2, Part II, column R)*interest rate)*(payment terms (Table 2, Part III, column T)/365). For instance, for SN1 AI=(102,230.11 (Table 2, Part II, column R)*10.63)*(60 (Table 2, Part III, column T)/365); etc.

*AI=(R*10.63%)*(T/365)*

AJ=R+V-SUM(W:AI)

AJ=Net sales value (Table 2, Part II, column R) plus physical difference allowance (Table 2, Part III, column V) minus other allowances (Table 2, Part III, columns W to AI). For instance, for SN1 AJ=102,230.11 (Table 2, Part II, column R)+660 (Table 2, Part III, column V)-(1,226.73 (Table 2, Part III, column W)+475.2 (Table 2, Part III, column AB)+1,742.4 (Table 2, Part III, column AD)+ 1,786.37 (Table 2, Part III, column AI)); etc

PART III

SN: stands for sequential number. It refers to the transactions reported in table 2 "domestic sales", part I, first column
Payment terms: the agreed rules and conditions regarding payment for goods
Delivery terms: the agreed rules and conditions regarding delivery of goods
Physical differences: adjustment requested on account of differences between the investigated product sold in the domestic market and the product exported
Duty drawback: downward adjustment to the normal value in order to take into account import charges applied to the product concerned and by materials physically incorporated therein when intended for consumption in the exporting country and not collected or refunded in respect of the product exported
Discounts and rebates: adjustment for discounts and rebates not included in the invoice
Level of trade: this adjustment may be granted where the exporter shows that the domestic sales of the product concerned are made at a level of trade which is different to the level of trade of the export sales and that such difference has affected price comparability
Inland freight: adjustment for cost of freight in the exporting country
Charges: adjustment covering various miscellaneous charges related to domestic transactions
Packing: adjustment for packing costs regarding the product concerned
Warranty: adjustment for cost of warranties, guarantees technical assistance and services borne by the exporter. Technical assistance and services include any service, repair or consultation that the exporter provides to its customer regarding the product subject to investigation. This adjustment normally plays a role in investigations against electric and electronic products
After sales: adjustment for costs borne by the exporter other than warranties, guarantees technical assistance and services
Commission: adjustment for the commission paid by the exporter to traders or agents arranging the transaction
Currency conversion: adjustment to compensate for sustained currency fluctuations occurred during the investigation period
Credit costs: cost of the time the buyer is given to pay the goods
Ex-factory normal value: the total ex-factory domestic price

COST OF PRODUCTION

(TABLE 3)

Part I

Part II

Part III

TABLE 3: COST OF PRODUCTION

Calculation of the Domestic Cost of Production

Part I

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S
Product Control Number	**Company product number**	**Quantity sold domestically**	**Quantity produced**	**Material A**	**Material B**	**Material C**	**Material Total**	**Direct labour costs**	**Manufacturing overheads**	**Total cost of manufacturing**	**Manufacturing cost per unit**	**Selling costs**	**General & administrative costs**	**Financial expenses**	**R&D costs**	**Total sales expenses**	**Sales expenses per unit**	**COP per unit**
A-01-100-34-A-W-2-3-1	1	27'341.00	27'400.00	649'549.89	532'089.11	182'507.63	1'364'146.63	45'400.76	162'010.13	1'571'557.52	57.36	124'321.00	58'356.00	8'658.98	0.00	191'335.98	6.98	64.34
Formulas:							*H=SUM(E:G)*			*K=H+I+J*	*L=K/D*					*Q=SUM(M:P)*	*R=Q/D*	*S=L+R*

H=649,549.89 (Table 3, Part I, column E)+532,089.11 (Table 3, Part I, column F)+182,507.63 (Table 3, Part I, column G)

K= 1,364,146.63 (Table 3, Part I, column H) + 45,400.76 (Table 3, Part I, column I) + 162,010.13 (Table 3, Part I, column J)

L= 1,571,557.52 (Table 3, Part I, column K)/27,400 (Table 3, Part I, column D)

Q=124,321 (Table 3, Part I, column M) +58,356 (Table 3, Part I, column N)+ 8,658.98 (Table 3, Part I, column O)+0 (Table 3, Part I, column P)

R=191,335.98 (Table 3, Part I, column Q)/ 27,400 (Table 3, Part I, column D)

S=57.36 (Table 3, Part I, column L)+6.98 (Table 3, Part I, column R)

PART I

CALCULATION OF THE DOMESTIC COST OF PRODUCTION

Product Code Number: this is a code to be constructed as per the instructions in the anti-dumping questionnaire. It should be different for different models or types of the product subject to investigation
Company Product Number: this is the code given by the exporter to each type or model of the product subject to investigation
Quantity sold domestically: (column C, table 3, part I) net sales quantity as reported in table 2 "domestic sales", part I, the total of column G
Quantity produced: quantity produced of the product concerned for sale in the domestic market
Material A: raw material, component or part used for the production of the product concerned
Material B: raw material, component or part used for the production of the product concerned
Material C: raw material, component or part used for the production of the product concerned
Total materials: Total amount of all materials used
Direct labour costs: these costs are those which vary in direct proportion to changes in the volume of production and are therefore linked with the production process of the product concerned
Manufacturing overheads: includes costs which are incidental or necessary for the product concerned such as indirect labour, depreciation, power, maintenance, etc.
Manufacturing cost per unit: includes the total of the materials used, the direct labour costs and the manufacturing overheads on a per unit basis
Selling, General and administrative costs: includes among others items such as insurance, freight and packaging costs, administration costs, selling costs, advertising/publicity, patents and royalties, technical assistance, warranties, security, pollution control, etc
Financial expenses: only financial expenses related to the production and sale of the product concerned are to be taken into account
R&D costs: research and development costs
Total sales expenses: total of selling, general and administrative costs plus, financial expenses and R&D
Sales expenses on a per unit basis: total sales expenses divided by the quantity produced
COP per unit: it includes that manufacturing cost and the sales expenses on a per unit basis

TABLE 3: COST OF PRODUCTION

Calculation of normal value and profitable sales

Part II

H=Difference between net value and COP unless COP is bigger than net value. In this case, H=0

I=Quantity sold if the net value is higher than COP. Otherwise, I=0. For instance, for SN1 I=1,320 because the net value (77.45) is higher than the COP (64.34). By contrast, for SN8 I=0 because the net value (64.31) is lower than the COP (64.34).

A	B	C	D	E	F	G	H	I	J	K	L
SN	**Net sales price per unit**	**COP**	**Profit per unit**	**Net sales quantity**	**Profit on all sales**	**Profitable transaction?**	**Profit on profitable transaction**	**Net sales quantity sold at a profit**	**Profit on profitable sales**	**Net sales value of all sales**	**Net sales value of profitable sales**
1	77.45	64.34	13.11	1'320.00	17'301.31	Yes	13.11	1'320.00	17'301.31	102'230.11	102'230.11
2	76.79	64.34	12.45	1'353.00	16'849.78	Yes	12.45	1'353.00	16'849.78	103'901.80	103'901.80
3	72.88	64.34	8.54	3'982.00	34'000.55	Yes	8.54	3'982.00	34'000.55	290'202.43	290'202.43
4	70.79	64.34	6.45	2'356.00	15'205.58	Yes	6.45	2'356.00	15'205.58	166'790.62	166'790.62
5	71.37	64.34	7.03	2'646.00	18'598.38	Yes	7.03	2'646.00	18'598.38	188'842.02	188'842.02
6	66.88	64.34	2.54	4'135.00	10'496.01	Yes	2.54	4'135.00	10'496.01	276'541.91	276'541.91
7	64.31	64.34	-0.03	3'344.00	-90.24	No	0.00	0.00	0.00	215'062.72	0.00
8	64.31	64.34	-0.03	3'350.00	-90.08	No	0.00	0.00	0.00	215'448.92	0.00
9	70.88	64.34	6.54	1'063.00	6'949.61	Yes	6.54	1'063.00	6'949.61	75'343.03	75'343.03
10	63.82	64.34	-0.52	3'777.00	-1'954.60	No	0.00	0.00	0.00	241'057.58	0.00
Totals:				**27'326.00**	**117'266.30**			**16'855.00**	**119'401.22**	**1'875'421.14**	**1'203'851.92**
Formulas:			*D=B-C*		*F=D*E*		*H=IF(B>C,B-C,0)*	*I=IF(H>0,E,0)*	*J=H*I*		*L=IF(B>C,K,0)*

Profit on profitable sales (%): **9.92**

Formula: *Q=(119,401.22/1,203,851.92)*100*

Profit on all sales (%): **6.25**

Formula: *Q=(117,266.30/1,875,421.14)*100*

Sales below cost (%): (these sales will be excluded) **38.32**

Formula: *Q=((27,326-16,855)/27,326)*100*

COP per unit (Table 3, Part I, column S)

D=77.45 (Table 3, Part II, column B)-64.34 (Table 3, Part II, column C); etc

F=13.11 (Table 3, Part II, column D) *1,320 (Table 3, Part II, column E); etc

J=13.11 (Table 3, Part II, column H)*1,320 (Table 3, Part II, column I); etc.

L=if the net value is higher than COP then L = net turnover. Otherwise, L=0. For instance, for SN1 the net value (77.45) is higher than the COP (64.34). Therefore, L=102,230.11.

PART II

CALCULATION OF NORMAL VALUE AND PROFITABLE SALES

SN: stands for sequential number. It refers to the transactions reported in table 2 "domestic sales", part I
Net sales price per unit: the net sales price as reported in table 2, part II, column S
Cost of production: the cost of production as reported in table 3, "cost of production", part I
Profit per unit: the difference between the cost of production and the net sales price per unit
Net sales quantity: the net sales quantity as reported in table 2, part II, column Q
Profit on all sales: the profit *or loss* concerning sales of the product concerned in the domestic market
Profitable transaction?: where the cost of production is lower than the net sales price, the transaction is profitable
Profit on profitable transaction: the *profit* obtained concerning sales of the product concerned in the domestic market
Quantity sold at a profit: the net quantity sold in the domestic market at a profit
Profit on profitable sales: the profit obtained from profitable sales of the product concerned in the domestic market
Turnover of all sales: the net sales value reported
Turnover of profitable sales: the net sales value from profitable sales in the domestic market

TABLE 3: COST OF PRODUCTION

Calculation of normal value after exclusion of sales below cost

Part III

A	B	C	D
SN	**Net sales quantity sold at a profit**	**Ex-factory normal value of profitable quantity**	**Ex-factory normal value per unit**
1	1'320.00	97'659.42	73.98
2	1'353.00	100'593.97	74.35
3	3'982.00	279'267.54	70.13
4	2'356.00	161'092.39	68.38
5	2'646.00	179'960.89	68.01
6	4'135.00	265'403.65	64.18
7	0.00	0.00	0.00
8	0.00	0.00	0.00
9	1'063.00	72'442.53	68.15
10	0.00	0.00	0.00
Totals:	**16'855.00**	**1'156'420.38**	**68.61**
Formulas			*D=C/B*

D=97,659.42 (Table 3, Part III, column C)/1,320 (Table 3, Part III, column B); etc.

PART III

CALCULATION OF NORMAL VALUE AFTER EXCLUSION OF SALES BELOW COST

SN: stands for sequential number. It refers to the transactions reported in table 2 "domestic sales", part I

Quantity sold at a profit: the net quantity sold in the domestic market at a profit as reported in table 3 "cost of production", part II, column I

Ex-factory normal value of profitable quantity: ex-factory normal value of profitable transactions in the domestic market (see table 2 "domestic sales", part III, column AJ)

Ex-factory normal value per unit: ex-factory normal value of profitable transactions on a per unit basis

ORDINARY COURSE OF TRADE TESTS

(TABLE 4)

TABLE 4: ORDINARY COST OF TRADE TESTS

Ordinary course of trade tests

Part I

A	B	C	D	E	F	G	H	I	J	K	L	M	N
Product code number	**Exported quantity**	**Sold domestically**	**Domestic sales quantity**	**Domestic net sales turnover**	**Profitable domestic sales quantity**	**Net turnover of profitable quantity**	**TEST 1: Domestic sales qty in % of export qty**	**Test 1 > 5%**	**TEST 2: Domestic Profitable sales in % of export qty**	**Test 2>5%**	**TEST 3: Profitable dom sales qty in % of total domestic sales**	**Test 3>10%**	**Normal value to be based on**
A-01-100-34-A-W-2-3-1	82'550.00	Yes	27'326.00	1'875'421.14	16'855.00	1'203'851.92	33.10	Yes	20.42	Yes	61.68	Yes	Profitable domestic sales
Formulas:							*H=(D/B)*100*		*J=(F/B)*100*		*L=(F/D)*100*		

H=(27,326 (Table 4 column D)/ 82,550 (Table 4, column B))*100

J=(16,855 (Table 4 column F)/ 82,550 (Table 4 column B))*100

L=(16,855 (Table 4 column F)/ 27,326 (Table 4 column D))*100

PART I AND II

ORDINARY COURSE OF TRADE TESTS

Product Code Number: this is a code to be constructed as per the instructions in the anti-dumping questionnaire. It should be different for different models or types of the product subject to investigation
Export quantity: quantity exported as reported in table 1 "export sales", part II, column W
Sold domestically?: asks whether the product concerned been sold in the domestic market
Domestic sales quantity: net sales quantity as reported in table 2 "domestic sales", part II, column Q
Domestic net sales turnover: the net sales value reported in table 2 "domestic sales", part II, column R
Profitable domestic sales quantity: the net quantity sold in the domestic market at a profit as reported in table 3 "cost of production", part II, column I
Net turnover of profitable quantity: the profit obtained from profitable sales of the product concerned in the domestic market as reported in table 3 "cost of production", part II, column L (net sales value of profitable sales)
Test 1 – Domestic sales quantity in percentage of export quantity: sales in the domestic market of the product concerned expressed as a percentage of the exporter's export sales of the product concerned
Test 1 - >5%: if domestic sales do not represent 5 per cent or more of the export sales, then this test is not met and the domestic prices of the exporter will not be used to determine the normal value
Test 2 – Profitable domestic sales in percentage of total export quantity: profitable sales in the domestic market of the product concerned expressed as a percentage of the exporter's export sales of the product concerned
Test 2 - >5%: if profitable domestic sales do not represent 5 per cent or more of the export sales, then this test is not met and the domestic prices of the exporter will not be used to determine the normal value
Test 3 – Profitable domestic sales quantity in percentage of total domestic sales: profitable domestic sales quantity of the product concerned expressed as a percentage of the exporter's total domestic sales quantity of the product concerned
Test 3 - >10 or <80%: if profitable domestic sales quantity does not represent 10 per cent or more of the total domestic sales quantity, then the domestic prices of the exporter will not be used to determine the normal value. In the event that profitable domestic sales quantity represents 10 per cent or more of the total domestic sales quantity, then normal value is calculated on the basis of the exporter's domestic price for the product concerned. If the profitable domestic sales quantity represents 80 per cent or more of the total domestic sales quantity, then the normal value will be determined on the basis of all sales of the product concerned in the domestic market, including sales at a loss. Otherwise, normal value will be determined on the basis of the profitable sales only (as is the case in our calculation)
Normal value to be based on: depending on the findings reached using the above tests, normal value can be constructed, based on profitable domestic sales, based on all domestic sales, etc.
Normal value based on domestic sales prices: this is the normal value obtained by excluding the exporter's sales below cost in the domestic market
COM: cost of manufacture. It comes into play only in case that normal value has to be constructed
Domestic SG&A: domestic selling, general and administrative costs. This is the percentage of SG&A expenses attributable to domestic sales. As COM, it comes into play where normal value must be constructed

Profit: this is the profit margin to be used in case the normal value has to be constructed. In table 3, part II, column J it is explained how this percentage is obtained
Constructed normal value: normal value will be constructed only where domestic prices cannot be used in accordance with the above tests
Normal value to be used: normal value to be compared with the export price in order to determine whether exports were made at dumped prices. This is the normal value reported in table 3, part III

DUMPING CALCULATION

(TABLE 5)

TABLE 5: DUMPING CALCULATION

Dumping calculation

J=(247,319 (Table 5, column I)/ 5,964,959.41 (Table 5, column D)) *100

L=(312,745.53 (Table 5, column K)/ 5,964,959.41 (Table 5, column D)) *100

A	B	C	D	E	F	G	H	I	J	K	L
SN	**Product code number**	**Export net sales quantity**	**CIF value**	**Total ex-factory export price**	**Ex-factory export price per unit**	**Ex-factory normal value per unit**	**Dumping amount per unit**	**Total dumping amount**	**% dumping**	**Total dumping amount (if zeroing applied)**	**% dumping (if zeroing applied)**
1	A-01-100-34-A-W-2-3-1	4'900.00	368'988.35	334'799.16	68.33	68.61	0.28	1'389.84	0.38%	1389.84	0.38%
2	A-01-100-34-A-W-2-3-1	2'900.00	225'137.82	210'801.35	72.69	68.61	-4.08	-11'832.35	-5.26%	0.00	0.00%
3	A-01-100-34-A-W-2-3-1	10'200.00	808'892.45	734'257.86	71.99	68.61	-3.38	-34'435.86	-4.26%	0.00	0.00%
4	A-01-100-34-A-W-2-3-1	8'400.00	574'564.32	517'618.90	61.62	68.61	6.99	58'705.10	10.22%	58'705.10	10.22%
5	A-01-100-34-A-W-2-3-1	12'000.00	912'857.87	827'965.61	69.00	68.61	-0.39	-4'645.61	-0.51%	0.00	0.00%
6	A-01-100-34-A-W-2-3-1	5'500.00	412'540.92	381'957.40	69.45	68.61	-0.84	-4'602.40	-1.12%	0.00	0.00%
7	A-01-100-34-A-W-2-3-1	6'250.00	470'878.78	431'715.99	69.07	68.61	-0.46	-2'903.49	-0.62%	0.00	0.00%
8	A-01-100-34-A-W-2-3-1	8'800.00	584'373.02	526'106.50	59.78	68.61	8.83	77'661.50	13.29%	77'661.50	13.29%
9	A-01-100-34-A-W-2-3-1	15'600.00	1'006'335.88	895'326.90	57.39	68.61	11.22	174'989.10	17.39%	174'989.10	17.39%
10	A-01-100-34-A-W-2-3-1	8'000.00	600'390.03	555'886.40	69.49	68.61	-0.88	-7'006.40	-1.17%	0.00	0.00%
	Totals:	**82'550.00**	**5'964'959.41**	**5'416'436.07**	**65.61**	**68.61**	**3.00**	**247'319**	**4.1%**	**312'745.53**	**5.2%**
	Formulas:				*F=E/C*		*H=G-F*	*I=H*C*	*J=(I/D)*100*	*K=IF(H<0,0,H*C)*	*L=(K/D)*100*

F=334,799.16 (Table 5, column E)/ 4,900 (Table 5, column C); etc

H=68.61 (Table 5, column G)- 68.33 (Table 5, column F); etc.

I= 0.28 (Table 5, column H)* 4,900 (Table 5, column C); etc

J=(1,389.84 (Table 5, column I)/ 368,988.35 (Table 5, column D))*100; etc

K=0 if the total dumping amount is 0 or lower than 0. Otherwise, K=total dumping amount. For instance, SN9 K=174,989.1 because this transaction was found to be dumped.

L=(1,389.84 (Table 5, column K)/ 368,988.35 (Table 5, column D))*100; etc

DUMPING CALCULATION

SN: stands for sequential number. It refers to the transactions reported in Annex 5.1, Part I.
Product Code Number: this is a code to be constructed as per the instructions in the anti-dumping questionnaire. It should be different for different models or types of the product subject to investigation
Export net sales quantity: quantity reported in table 1 "export sales", part II, column W
CIF value: amount reported in table 1, part II, column AB
Total ex-factory export price: amount reported in table 1, part III, column AO
Ex-factory export price per unit: amount reported in table 1, part III, column AP
Ex-factory normal value per unit: amount reported in Annex 5.3, Part III
Dumping amount per unit: the difference between ex-factory export price and normal value per unit
Total dumping amount: the dumping amount per unit times the net exported quantity
% dumping: the dumping amount expressed as a percentage of the CIF value
Total dumping amount (if zeroing is applied): the dumping amount in case zeroing was applied
% dumping (if zeroing is applied): the dumping margin expressed as a percentage of the total CIF value in the event that zeroing was applied. It should be noted that zeroing has the effect of artificially increasing the dumping margin of the exporter

ANNEX I

WTO MEMBERS' PROPOSALS ON ANTI - DUMPING IN THE GEN - DOCUMENT SERIES[163]

SYMBOLS	DATE	MEMBERS	TITLE	MAIN FEATURES
TN/RL/GEN/1 JOB(04)/40/Rev. 1	12/07/04	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Mexico; Norway; Singapore; Switzerland; TPKM; Thailand and Turkey	Lesser Duty Rule	Proposals for: • amending the ADA to provide for the mandatory application of the lesser duty rule; • specifying the methods for determining the duty level which will be adequate to remove the injury caused by dumping).
TN/RL/GEN/2 JOB(04)/41/Rev. 1	12/07/04	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Republic of Korea; Norway; Switzerland; TPKM and Thailand	Price Undertakings	Proposals for: • clarifying the conditions which authorities can set for accepting an undertaking; • requiring authorities to provide reasons for non-acceptance of undertakings; • clarifying the conditions when undertakings have to be accepted; • requiring authorities to inform exporters of their right to offer undertakings; • clarifying that exporters have the right to request an adjustment of the undertaking • requiring undertakings to be implemented in good faith.
TN/RL/GEN/3 JOB (04)/42	12/07/04	Canada	Duty Assessment Methodologies	Proposals for: • tighter timeframes in ADA Article 9.3 reviews or refunds; • clarifying the right of parties to seek reviews immediately after importation.
TN/RL/GEN/5 JOB (04)/46 TN/RL/W/149/ Rev.1	12/07/04	United States	Exchange Rates (ADA Article 2.4.1.)	Proposal for: • clarifying ADA Article 2.4.2 stating that: • Members should use exchange rates from sources of recognized authority; • Members should notify the Committee on the specific methodology they will normally follow; • Members should use a notified source and follow a notified methodology; • Members should notify a new

[163] Since July 2004, most of the informal JOB-style negotiating proposals are also circulated as official documents, available through the WTO document dissemination facility in the series TN/RL/GEN/…This table contains only these recent GEN- proposals, and is therefore not of an exhaustive nature.

				practice; • and specify ADA Article 2.4.2 stating the period when such notifications can be made.
TN/RL/GEN/8 JOB (04)/57	12/07/04	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Mexico; Norway; TPKM; Singapore; Switzerland and Thailand	Prohibition of Zeroing	Proposal for: • prohibiting the practice of zeroing in the calculation of dumping margins in AD proceedings; • clarifying that a single margin of dumping must be calculated for the entire period of investigation or review.
TN/RL/GEN/9 JOB (04)/58	12/07/04	Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Republic of Korea; Norway; TPKM; Singapore; Switzerland and Thailand	Determination of Normal Value	Proposals for: • the "sufficient quantity" test; • "particular market situation"; • definition of sales of the like product in the ordinary course of trade; • sales below cost; • period of data collection and period of investigation • acceptance of respondents' data in accordance with GAAP; • use of actual data for determining constructed value and alternative methodologies; • inclusion of below-cost sales; • the profit for constructed value; • and general and administrative costs.
TN/RL/GEN/10 JOB (04)/59	12/07/04	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Norway; TPKM; Singapore; Switzerland and Thailand	Reviews	Proposals for: • rules applied to reviews; • request for Article 9.3 review; • import period for dumping margin under Article 9.3; • review periods; • assessment of dumping and "likelihood of injury" under Article 11.2.
TN/RL/GEN/11 JOB (04)/60 TN/RL/W/156/ Rev.1	12/07/04	United States	New Shipper Reviews (ADA Article 9.5)	Proposals for: • clarifying and improving ADA Article 9.5 to: • provide that new shipper reviews may be conducted in two phases; • require the exporter to have made at least one shipment and establish its bona fide intention to export; • clarify circumstances when authorities may draw adverse inferences under Article 6.8; • provide that 9.5 reviews may be conducted on same schedules as normal duty assessment and review proceedings.
TN/RL/GEN/13 JOB (04)/89 TN/RL/W/162/	12/07/04	United States	Prompt Access to Non-Confidential	Proposals for: • clarifying ADA Article 6.4 to: • require authorities to establish a

Rev.1			Information (ADA Article 6.4)	central location where parties can easily review and copy non-confidential information; • require authorities to make promptly available copies of all non-confidential information; • clarify that interested parties have access to all non-confidential information submitted; • clarify that the public should be given equivalent access to review and make copies of all non-confidential information.
TN/RL/GEN/15 JOB(04)/119	13/09/04	United States	Conduct of Verifications (ADA Article 6.7 & Annex I)	Proposals for: • clarifying verification outline; • clarifying verification reports.
TN/RL/GEN/16 JOB(04)/121	13/09/04	United States	All-Others Rate (Article 9.4)[164]	Proposals for: • clarifying the ADA to provide that: • margins partly based on facts available may be included in the calculation of the all-others rate; • the all-others rate is needed whenever there may be an exporter which has not been examined and given its own individual rate of duty (not only in cases of sampling).
TN/RL/GEN/18 JOB(04)/124	13/09/04	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Republic of Korea; Norway; Switzerland; TPKM; Thailand	Proposals on Model Matching	Proposals for: • imposing disciplines on authorities' selection for the characteristics to be used in identifying "identical"/"most closely resembling" models; • imposing limits on products that may be deemed "closely resembling"; • calculating allowances for differences in physical characteristics; • requiring authorities to permit responding parties to comment on model matching.
TN/RL/GEN/19 JOB(04)/125	13/09/04	Brazil; Colombia; Costa Rica; Hong Kong, China; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM; Thailand	Proposals on Issues to Affiliated Parties	Proposals for: • definition of "affiliated party"; • calculation of dumping margins where affiliated parties are involved (including: sales to affiliated parties for determining normal value; sales expenses by affiliated service providers; costs by affiliated suppliers; and exports to affiliated parties).

[164] TN/RL/GEN/16/Corr.2 (15/02/2005) specifies that the title to document TN/RL/GEN/16 should read as follows: ALL-OTHERS RATE (ARTICLE 9.4 ADA).

TN/RL/GEN/20 JOB(04)/126	13/09/04	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM; Thailand	Proposals on Facts Available	Proposals for: • the purpose of using facts available; • the situation in which facts available can be applied; • the method of applying facts available.
TN/RL/GEN/21 JOB(04)/149	19/10/04	Canada	Explanations of Determinations and Decisions	Proposals for: • amending the ADA in regard to the initiation of an investigation; • amending the ADA in regard to the imposition of a provisional measure.
TN/RL/GEN/23 JOB(04)/152	20/10/04	Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM; Thailand	Proposals on Issues Relating to the Initiation and Completion of Investigations	Proposals for: • standing requirement to: • improve the standing threshold to require support by more than 50 % of total production of the like products; • clarify that the standing requirement is determined in terms of individual support by the domestic producers as a whole and that representation by trade associations or groups should not be counted collectively when such determination is made; • clarify that an application for an anti-dumping investigation must list all knows domestic producers who support the application; • opportunity for exporters and producers to comment before initiation of investigation; • duration of an investigation; • prohibition of back-to-back investigations.
TN/RL/GEN/24 JOB(04)/153	20/10/04	Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Republic of Korea; Norway; Switzerland; TPKM	Proposals on Comparison at the "Small Level of Trade"	Proposals for: • adjustment for selling expenses (amending Article 2.4); • burden of ensuring a fair comparison (amending Article 2.4).
TN/RL/GEN/25 JOB(04)/155	20/10/04	United States	Preliminary Determinations (ADA Article 6)	Proposal for: clarifying the ADA so that preliminary determinations: • must be issued in all investigations; • may not be issued prior to the time when responses from interested parties are due; • should take into account such responses.
TN/RL/GEN/26 JOB(04)/181	30/11/04	Canada	Proposal on Like Product and Product under Consideration	Proposals for: • approaches in product under consideration; • approaches in "domestic like product" and "foreign like product."

TN/RL/GEN/27 JOB(04)/182	30/11/04	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM and Thailand	Proposal on the Definition of Domestic Industry Article 4.1 of the Antidumping Agreement (ADA)	Proposals for: • amending Article 4.1 (clarifying that a major proportion refers to a major proportion of the domestic industry, that is to say, more than 50% of the total production); • adding a new provision to the ADA (to ensure that authorities for their injury determination make every effort to obtain all relevant evidence concerning all domestic producers of the like product).
TN/RL/GEN/28 JOB(04)/183	30/11/04	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM and Thailand	Proposal on Issues Relating To the Determination of Injury under Article 3 Of The ADA	Proposals for: • definition of material injury; • determination of material injury; • injury caused by dumped imports; • correlation between dumped imports and injury; • non-attribution requirement: injury caused by one or more domestic producers; • adequate and reasoned explanation in determination.
TN/RL/GEN/29 JOB(05)9	07/02/05	United States	Circumvention	Proposal for: • clarifying the ADA: • through explicit recognition of the two forms of circumvention traditionally recognized by Members using trade remedies; • through adoption of uniform and transparent procedures for conducting anti-circumvention enquiries.
TN/RL/GEN/30 JOB(05)10 TN/RL/GEN/30/ Rev.1	07/02/05	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM; Thailand and Turkey	Proposal on De Minimis Margins of Dumping	Proposals for: • amending the ADA to provide for a x % *de minimis* dumping margin (appropriate value of x to be elaborated on later).
TN/RL/GEN/31 JOB(05)11 TN/RL/GEN/31/ Rev.1	07/02/05	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM; Thailand and Turkey	Proposal on Negligible Imports	Proposals for: • modifying the basis for determining negligibility; • time period for determining negligibility.
TN/RL/GEN/32 JOB(05)38	22 /03/05	India	Proposal on Mandatory Application of Lesser Duty Rule	Proposals for: • amending the ADA to provide for mandatory application of the lesser duty rule, (requiring that the duty shall not exceed the dumping or the injury margin, whichever is lower); • two broad options for determining the injury margin).
TN/RL/GEN/33 JOB(05)39	22 /03/05	Turkey	Proposal on negligible	Proposals for: • amending the ADA to introduce a

			Imports	2nd methodology to determine negligibility on the basis of apparent market share; • amending the ADA to increase current 3 % threshold to x %; • deleting the cumulation clause.
TN/RL/GEN/37 JOB(05)45	22/03/05	Canada	Dispute Settlement	Proposals for: • including rules that prohibit enforcement action regarding a WTO inconsistent measure (such inconsistency confirmed by a DSB ruling) until the measure is brought into compliance with the ruling.
TN/RL/GEN/38 JOB(05)46	22/03/05	Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Norway; Switzerland; TPKM	Second Submission of Proposals on the Determination of Injury	Proposals for: • overarching framework of determination of material injury caused by dumped imports; • definition of material injury; • causation.
TN/RL/GEN/40 JOB(05)76	12/05/05	Egypt	Proposal on Material Retardation	Proposals for: • definition of the concept of material retardation; • material retardation test.
TN/RL/GEN/42 JOB(05)78	12/05/05	Japan	Illustrative List of Benchmarks for Determinations of Material Injury and Causation	Proposals for: • rebuttable presumptions on: • material injury; • causation.
TN/RL/GEN/43 JOB(05)79	12/05/05	Brazil; Chile; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM	Further Submission of Proposals on the Mandatory Application of the Lesser Duty Rule	Proposals for: • mandatory application of lesser duty rule (including three specific proposals); • calculation of the injury margin (including five specific proposals on: injury margin, calculation of the NIP, fair comparison, procedural requirements, evidence/data collection, application of lesser duty rule to reviews under Articles 9 and 11).
TN/RL/GEN/44 JOB(05)80[165]	12/05/05 19/07/05	Chile; Costa Rica; Hong Kong, China; Japan; Republic of Korea; Norway; Switzerland; TPKM	Further Submission on Proposals on Proceedings Under Article 9	Proposals for: • amendments regarding the: • applicability of Article 2 to reviews under Article 9; • applicability of Article 6 to reviews under Article 9; • relevance of Article 5 to reviews under Article 9.
TN/RL/GEN/46 JOB(05)/98	10/06/05	Brazil; Chile; Hong Kong, China; Israel; Japan;	Issues related to Limited	Proposals for • clarifying the rules regarding the

[165] See also TN/RL/GEN/44 (JOB(05)/80Suppl.1), which addresses these issues in turn, namely, the applicability of Article 2 to Article 9 proceedings; the relevance of the *de minimis* rule (Article 5) to Article 9 proceedings; and the applicability of Article 6 to Article 9 proceedings.

		Republic of Korea; Norway; Switzerland; TPKM	Examination (Article 6. 10)/ Single All Other's Rate (Article 9.4)	selection of a sample of exporters/producers ("respondents") under Article 6.10; • amendments regarding the: o application of one single all others rate under Article 9.4; o application of a single dumping margin for unexamined exporters/producers under Article 6.10.
TN/RL/GEN/49 JOB)(05)/132[166]	01/07/05	Norway	Proposals on Improving Objectivity and Transparence of Investigations	Proposals for • extension of a questionnaires reply period to 45 days under Article 6.1.1; • obliging investigation authorities to, amongst others, set up an available list of all file information (Article 6.1); to be clearer as regards the information they require (Article 6.6); to respond in timely manner and provide assistance if needed (Article 6.13); • amending Article 12, to make explicit the requirement for reasoned and adequate explanations for all determinations, to be set out in disclosure and in notices under Article 12.
TN/RL/GEN/50 JOB(05)/133	01/07/05	Brazil; Chile; Israel; Japan; Republic of Korea; Singapore; Switzerland; Thailand	Product under Consideration	Proposals for: • amending Article 5, so as to require investigating authorities to scope the product under consideration based on conditions of competition as a condition for initiating any investigation.
TN/RL/GEN/51 JOB(05)/134	01/07/05	Brazil; Switzerland; Thailand	Rule on Cumulation	Proposals for: • amending Article 3.3 of the ADA in order to properly apply the cumulation rule.
TN/RL/GEN/52 JOB(05)/132	01/07/05	Brazil; Chile; Israel; Republic of Korea; Singapore; Switzerland; Thailand	Review of Anti-Dumping Duties (Article 11.2)	Proposals for: • amending Article 11.2 to clearly articulate the rules and procedures applicable to reviews.
TN/RL/GEN/53 JOB(05)/136	01/07/05	Hong Kong, China; Israel; Japan; Republic of Korea; Norway; Singapore; Switzerland; TPKM	Further Submission on Public Interest	Proposals for: • amending the ADA to ensure that the effects of an anti-dumping measure on other sectors of economy would be taken into consideration before applying the

[166] For the document setting out the precise changes to the relevant provisions of the ADA, see TN/RL/GEN/49/Add.1, 14/10/05, Norway: "Proposal on Issues Relating to Evidence, Public Notice and Explanation of the Determinations under Articles 6 and 12 of the ADA".

				measure.
TN/RL/GEN/55 JOB(05)/138	04/07/05	China	Responding and Comment Procedure After Initiation	Proposal for: • establishing a response and comment procedure following the initiation of an investigation under Article 5 of ADA.
TN/RL/GEN/58 JOB(05)/145	13/07/05	United States	Further Comments on Lesser Duty Proposals	Comments on earlier proposals on the lesser duty submitted by the "Friends" and India.
TN/RL/GEN/59 JOB(05)/146	13/07/05	United States	Causation (Article 3.5 ADA)	Proposals for: • clarifying Article 3.5 ADA so as to ensure that it is clear and workable.
TN/RL/GEN/60 JOB(05)/148	12/07/05	South Africa	Material Injury	Proposals for amending: • Article 3 on material injury (overarching framework and definition in Art 3, causation); • Article 5 on the negligibility test and cumulation; • Article 9 on the lesser duty rule; • Article 2.2.1 on sales below costs; • Article 15 on treatment of developing countries; • provisions on deadlines for reviews (new shipper reviews in Article 9.5 and other reviews in Article 11.4); • provisions on the duration of AD duties and material retardation.
TN/RL/GEN/61 JOB(05)/181	15/09/05	Canada	Sunset Reviews	Proposals for: bringing more clarity and predictability to existing disciplines on sunset reviews; by: • amending Article 11.3 of the ADA; • adding new provisions, setting out an indicative, non-exhaustive list of factors to be considered by authorities.
TN/RL/GEN/62 JOB(05)/185	16/09/05	TPKM	Definition of Domestic Industry under Article 4.1 ADA	Proposals for: • amending Article 4.1 (i) to clarify the factors investigating authorities must take into account in order to exclude some producers from the definition of "domestic industry".
TN/RL/GEN/63 JOB(05)/186	16/09/05	Turkey	Proposal on Disclosure of Essential Facts	Proposals for: • amending Article 6.9 introducing requirements on the content of the disclosure and a time frame for providing comments on the disclosure.
TN/RL/GEN/64 JOB(05)/187	16/09/05	Chile; Hong Kong, China; Israel; Republic of Korea; Norway; TPKM	Further Submission on Facts Available (Article 6.8 and Annex II of	Proposals for: • amending Article 6.8 and Annex II of the ADA, to improve the current provisions on the use of facts available.

			ADA)	
TN/RL/GEN/65 JOB(05)/188[167]	16/09/05 28/09/05	Brazil; Chile; Hong Kong, China; Israel; Japan; Republic of Korea; Norway; Pakistan; Peru; Singapore; TPKM	Proposal on Dumped Imports	Proposals for: • clarifying Article 3.1 regarding the definition of dumped imports.
TN/RL/GEN/67 JOB(05)/288	12/10/05	Brazil	Proposal on Affiliated Parties	Proposals for: • amending Article 2 to clarify the concept of "affiliated parties".
TN/RL/GEN/68 JOB(05)/231	13/10/05	TPKM	Proposals on Article 5.8 of the ADA	Proposals for: • amending Article 5.8 ADA regarding the: o *de minimis* margin of dumping; o negligible dumped imports.
TN/RL/GEN/69 JOB(05)/232	13/10/05	Hong Kong, China	Further Submission on Initiation and Completion of Investigations	Proposals for: • changes to Article 5; • consequential amendment to Article 6.1.3; addressing: standing, opportunity to comment and 12-month gap with a view to strengthening disciplines on the initiation of proceedings.
TN/RL/GEN/71 JOB(05)/243	14/10/05	United States	Submission on Circumvention	Proposals for clarifying Article 9.6 ADA: • by explicitly recognizing the two forms of circumvention; • by adopting a uniform and transparent procedures for conducting anti-circumvention enquiries.
TN/RL/GEN/72 JOB(05)/244	14/10/05	Japan	Further Proposal on the Submission of Data Concerning Affiliated Parties	Proposals for: • amending Article 6.1 to clarify the criteria when the authorities can require the respondents to submit data concerning "affiliated parties".
TN/RL/GEN/73 JOB(05)/245	17/10/05	Canada	Product Under Consideration	Proposals for: • amending Article 5 to clarify the provisions as regards the selection of the product under consideration.
TN/RL/GEN/74 JOB(05)/246	17/10/05	Chile; Hong Kong, China; Japan; Republic of Korea; Norway; Switzerland; TPKM	Further Submission of Proposals on Sunset	Proposals for: • amending Article 11.3 to prevent cases of extending AD measures through a forward-looking analysis (*likelihood test*).
TN/RL/GEN/75 JOB(05)/249	17/10/05	Chile	Submission on Issues Relating to the Initiation (Article 5)	Proposals for: modifying Article 5 by: • improving provisions on the evidential requirements for an application;

[167] For a revision of the document issued the subsequent day, see TN/RL/GEN/65 JOB(05)/188/Rev.1.

				• establishing a mechanism for consultation with interested parties; • eliminating the current cumulation mechanism and amending the ratio for calculating negligibility; • establishing a 12 month investigation period; • prohibiting back-to-back investigations.
TN/RL/GEN/76 JOB(05)/250	17/10/05	Mexico	Price Undertakings	Proposals for: • amending Article 8 to clarify the rules about the right of exporters to offer price undertakings and conditions for their acceptance by the investigation authorities.
TN/RL/GEN/77 JOB(05)/251	17/10/05	Mexico	Right for Individual Dumping Margin Calculation	Proposals for: • amending Article 6 to better guarantee the calculation of individual dumping margins and clarify obligations as regards consultation with exporters.

ANNEX II

WTO AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby *agree* as follows:

PART I

Article 1

Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[168] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Article 2

Determination of Dumping

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

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[169], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general

[168] The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

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

costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[170] determine that such sales are made within an extended period of time[171] in substantial quantities[172] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[173]

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

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

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

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products

[170] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

[171] The extended period of time should normally be one year but shall in no case be less than six months.

[172] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

[173] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[174] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[175], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the

[174] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[175] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

Article 3

Determination of Injury[176]

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital

[176] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[177] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.
Article 4

[177] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

Definition of Domestic Industry

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related[178] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[179] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

[178] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

[179] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

Article 5

Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[180] by domestic producers of the like product, that the application has

[180] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

been made by or on behalf of the domestic industry.[181] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage 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 imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 6

Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

[181] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[182] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[183] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[184]

[182] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[183] It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

[184] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[185]

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

[185] Members agree that requests for confidentiality should not be arbitrarily rejected.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

Article 8

Price Undertakings

8.1 Proceedings may[186] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an

[186] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 9

Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[187] Any refund shall be

[187] It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such

producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10

Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

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

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

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

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

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

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[188] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[189] The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

Article 12

Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[190], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

[188] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

[189] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[190] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed;

(vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

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

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

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;

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

(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

Article 13

Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14

Anti-Dumping Action on Behalf of a Third Country

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

Article 15

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided

for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

PART II

Article 16

Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 17

Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

PART III

Article 18

Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[191]

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

[191] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I
PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 7 OF ARTICLE 6

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

ANNEX III

EXCERPTS FROM SELECTED WTO DOCUMENTS

NEGOTIATING GROUP ON RULES
TN/RL/13
19 July 2005

Report by the Chairman to the Trade Negotiations Committee

I. ANTI-DUMPING AND SUBSIDIES AND COUNTERVAILING MEASURES INCLUDING FISHERIES SUBSIDIES

A. STATUS OF WORK

1. Given the nature and timing of this meeting of the TNC, it is appropriate to step back and look at the work of the Group, in order to consider where we started, how far we have come, and how to move forward.

2. The Group has moved through three (overlapping) phases in its work in this area of its mandate.

- **The first phase**. *Description:* In a first stage, Participants submitted formal papers of a general nature, indicating those areas where they sought changes to the AD and SCM Agreements, which were then discussed in *formal meetings*. This general issue identification or "wish list" process continued up to the Cancun Ministerial. *Results:* Shortly before Cancun, my predecessor issued a "Compilation of Issues and Proposals Identified by Participants" on the basis of the **141** submissions received as of that time.[192] *Assessment:* While the range of issues identified was enormous, these submissions were in many cases very general and the discussion of them limited.

- **The second phase**. *Description*: After Cancun, the Group began meeting in *informal sessions* to consider more detailed and specific "elaborated proposals", which included in some cases draft legal texts. The goal of this process is to engage in a concrete discussion on the basis of precise proposals. *Results*: Participants have submitted 55 elaborated proposals, of which 45 relate to trade remedies (anti-dumping and to a lesser extent countervail), four to horizontal subsidies disciplines and six to fisheries subsidies. Many of these submissions contain multiple specific proposals. The elaborated proposals on antidumping and countervailing measures relate to: dumping margins; existence/amount of subsidization; injury; duties; procedures; circumvention and dispute settlement. A complete list of the elaborated proposals, organized by subject matter, is annexed. *Assessment*: While the range of issues discussed is very broad, this process has nevertheless proved extremely useful in giving the Group a clearer idea as to what proponents are seeking and in giving proponents an initial sense of the views of other Participants, feedback which is important to help proponents develop a realistic view of what may and may not attract broader support in the Group.

- **The third phase**. *Description*: While the plenary formal and informal process continues, in the spring of 2005, I proposed to add two instances to this process in

[192] TN/RL/W/143

order to supplement it with: bilateral and plurilateral consultations convoked by myself and an open-ended Technical Group that examines the possibility of a standardized anti-dumping questionnaire, a project which could significantly reduce costs and increase predictability for investigating authorities and exporters alike. The consultations are intended to work on the basis of "third generation" submissions proposing *specific changes* to Agreement text. This consultation process has a variable geometry since the number and composition of members consulted varies from issue to issue. In order to ensure transparency, the proposals discussed are previously circulated to the Group and discussed in plenary informal sessions before being the subject of consultations. I will also report to the full Group on any progress made. *Assessment*: As discussed below, I consider that these consultations will play a critical role in the negotiations, and I intend to intensify and develop them after Hong Kong.

B. FUTURE WORK

Anti-dumping/countervailing measures

3. In planning our future work and charting a course to Hong Kong and - more critically, in my view - to the conclusion of the Round, it is extremely important to take account of the specific characteristics of the negotiations on anti-dumping (and countervailing) measures, which are by far the most active area of the negotiations:

- *The mandate and the background*. The distinctive character of these negotiations arises from the combination of the general nature of the mandate and the very specific texts to which that mandate applies. To understand the dynamics of this Group it is indispensable to keep in mind that detailed rules on anti-dumping have already been negotiated in the Kennedy, Tokyo and Uruguay Rounds. Present legal texts on antidumping and countervailing measures reflect a succession of different equilibriums painstakingly reached in at least three multilateral rounds. We thus have before us, as the starting point, a highly detailed, painfully negotiated and complex text and the broad mandate to "clarify and improve" these rules. However significant the changes proposed, the nature of the result will depend upon the precise details of the drafting. Concepts such as "first approximation" and "modalities" fit awkwardly in this context. Further, we are not dealing with a very restricted number of big picture issues, but with a very large number of highly specific questions. Agreement on individual issues outside a global result is thus hard to visualize.

- *Internal trade-offs and external linkages*. The possibilities for internal trade-offs, and thus for a balanced and free-standing result within the anti-dumping area, are limited. While the anti-dumping negotiations are not exactly a one-way street, traffic flow moves heavily in one direction. And while other areas of the Rules mandate, such as fisheries subsidies, offer some limited possibilities for internal balance, an outcome on anti-dumping ultimately will be linked closely to other areas of the negotiations, such as agriculture and non-agricultural market access. Although history does not necessarily repeat itself, the evidence of past negotiations suggests that, given that any results in anti-dumping must be highly detailed and text-based, results are not likely to emerge before a comparable level of detail on the external trade-offs is clear.

4. Regarding the expected outcome for Hong Kong and beyond, while the Participants have expressed different views on a number of points, there is a remarkable degree of convergence on certain key elements. First, all Participants agree that Rules issues are closely linked to other aspects of the DDA, and that results in all areas of the Rules mandate are an essential component in the overall balance of the Round. Second, I do not believe that any Participant would dispute that as we move forward we must more clearly define the scope of

our negotiations. Third, there is a clear consensus that the time available is limited and that we must accelerate and intensify our work. Finally, there is a common understanding that we must have text-based negotiations in 2006 in order to conclude the negotiations on time. The differences among Participants relate not to these key elements but rather to the precise strategy and timing for achieving our objectives.

5. In my view, it is critical to recall as we move forward that this is a negotiation *among* Participants. My task as Chairman is to organize a framework that allows and stimulate Participants to negotiate with each other; not with me. If at an appropriate moment it is clear to me and to the Participants themselves that they are unable to reach results, I may be required to step in and propose compromises. But that moment has not yet arrived. For the moment, therefore, my duty is to create an environment that is conducive to productive negotiations between delegations and that will, should it prove absolutely necessary, provide me with a solid political and technical basis to table a credible and balanced Chairman's text which Participants could take as my best assessment of where the final compromise might lie.

6. The consultation process which we have launched in the past few months is a critical element in these negotiations. The process has the following objectives. *First*, we have a large number of issues before us; the consultations must help to identify those areas of particular and salient interest to Participants. If we diffuse our energy on too broad a set of issues, we may undermine our ability to make progress in areas that are really key to Participants. *Second*, the consultations must encourage a concrete and precise discussion involving real engagement with a view to identifying solutions. This will give the Group and myself the most realistic sense possible of areas in which some progress may be possible, and of the types of changes that might be acceptable to different Members.

7. What is necessary between now and Hong Kong is to further develop, intensify and supplement this plurilateral consultation process. While we have three meeting clusters in this area scheduled between summer break and Hong Kong, I intend to call additional intersessional consultations at the technical and, if necessary, at the political level. I also envision sharpening the process, by limiting our work to precise textual proposals to improve the AD and SCM Agreements. I will intervene where and when I believe that the Group's work requires greater focus or direction. In order to enhance our technical understanding and to seek areas of possible compromise, I expect to call upon individuals or groups of individuals to serve as "Friends of the Chair" to advance work on particular issues. I am not speaking of business as usual, but of an intense and rigorous process to ensure that in Hong Kong we will have a sold basis for the final stage of the Round.

8. *Alternatives and risks.* I am conscious that some Participants, with a legitimate concern that we do not "fall behind" other Groups, have urged specific actions to be taken before Hong Kong: some have suggested the early tabling of a comprehensive text, others have requested a list of priorities/objectives. Of course, I would welcome any text resulting from consultations among delegations and enjoying a minimum level of general support. However, no such text is at present in sight. As to the development of a list of priority issues or objectives, although some Participants have organized their demands around six objectives, which serve as policy guidelines for their initiatives, to have a <u>common</u> list of objectives, much less of prioritized issues, would require full-fledged negotiations during the few remaining months. It has been pointed out that this could distract the Group from the substantive work and could present a serious risk of failure.

9. *The main focus of our attention.* I think that we must keep our focus on the two key questions: what is the best way to ensure that anti-dumping makes its contribution to the overall conclusion of the Round? How can we make use of the very limited time everyone agrees we have? While I cannot predict with certainty the conditions that will prevail in late 2005, the timing of any comprehensive Chairman's text inevitably depends upon conditions

being ripe both within the Group and in other areas of the negotiations. A Chairman's text that is not politically and technically credible such that it could be accepted as the basis for final negotiations would be a brief illusion of progress, and even a good text, tabled at the wrong time, will be rejected.

10. I do not pretend that our negotiations in this area will be easy, and as with any negotiation a positive outcome is not guaranteed. I am however encouraged by the experience in past Rounds, which suggests that if we proceed with all deliberate speed and steady nerves, we will be able to achieve satisfactory results.

…

NEGOTIATING GROUP ON RULES
TN/RL/15
30 November 2005

Report by the Chairman to the Trade Negotiations Committee

II. ANTI-DUMPING AND SUBSIDIES AND COUNTERVAILING MEASURES INCLUDING FISHERIES SUBSIDIES

A. INTRODUCTION

1. This report updates my July 2005 report to the Trade Negotiations Committee, focusing in particular on the achievements of the Negotiating Group on Rules since then, in all areas of its mandate, as well as looking ahead to the Hong Kong Ministerial Conference, and to our work in 2006.

2. Members will recall that in my July report, I outlined five steps that I intended to implement so as to move the Group's work forward in an accelerated and intensified manner. First was a call to the Participants to bring more focus to their proposals, by submitting *specific legal drafting* for the changes they were seeking. Second was the creation of a process of plurilateral consultations on the basis of these proposed legal texts, with a view to sharpening the discussion to the greatest extent possible, so as to clarify the degree of acceptance of the proposals, and thus to identify areas of possible convergence. Third was my intention to request some individuals to assist me as "Friends of the Chair", as a further means of deepening the discussions and thus advancing work on particular areas. Fourth was the intensification of the Group's meeting schedule, including with intersessional meetings as appropriate. Fifth was establishment of a Technical Group, to examine possibilities for developing a standardized anti-dumping questionnaire, with a view to reducing costs and increasing predictability for investigating authorities and exporters; this group is making progress toward its goals. I am pleased to report not only that I have implemented all of these steps, but also that through this process, the Negotiating Group's work has substantively advanced this autumn.

3. Of course there is no room for complacency. An enormous amount of both technical and political work remains to be completed, and time grows ever shorter. That said, I firmly believe that the process that we have put into place in the Negotiating Group is fundamentally sound. Thus, as the Group even further accelerates its work in 2006, as it must, it is essential that we preserve and build upon this existing process.

4. The following sections provide a more detailed discussion of the negotiations in the areas of anti-dumping/countervailing measures, horizontal subsidies disciplines, and fisheries subsidies, and what I foresee for 2006.

B. STATUS OF NEGOTIATIONS ON ANTI-DUMPING/COUNTERVAILING MEASURES

5. Anti-dumping continues to be the most active area of the negotiations. Proposals tabled in this area are increasingly specific, to the point that the Negotiating Group's anti-dumping/countervail work is being carried out almost exclusively on the basis of specific legal texts. Taking an overall view of the anti-dumping negotiations, certain broad principles are discernible, in particular: avoiding unwarranted use of anti-dumping measures on the one hand, while preserving the basic concepts, principles and effectiveness of the instrument and its objectives where such measures are warranted, on the other hand; and limiting the costs and complexity of proceedings for interested parties and the investigating authorities on the one hand, while strengthening the transparency and predictability of such proceedings on the other hand.

6. In this regard, the Negotiating Group has been considering proposals to clarify and improve the rules regarding, *inter alia*, determinations of dumping, injury and causation, and the application of measures; procedures governing the initiation, conduct and completion of anti-dumping investigations, including with a view to strengthening due process and enhancing transparency; and the level, scope and duration of measures, including duty assessment, interim and new shipper reviews, sunset, and anti-circumvention proceedings.

7. Specific proposals that the Group has been discussing in detail include proposals on determinations of injury/causation, the lesser duty rule, public interest, transparency and due process, interim reviews, sunset, duty assessment, circumvention, the use of facts available, limited examination and all others rates, dispute settlement, the definition of dumped imports, affiliated parties, product under consideration, and the initiation and completion of investigations. The desirability of applying to both the anti-dumping and countervail rules any clarifications and improvements which are relevant to both areas is broadly recognized. Additional proposals continue to be submitted, and the process of detailed discussion will certainly continue, and accelerate, after Hong Kong.

…

E. POST-HONG KONG WORK

13. I believe that the process currently being used by the Group is the right one for achieving substantial results in all areas of the Rules mandate, including its development dimension. To this end, it is my intention, after the Hong Kong Ministerial, to build on and intensify this process, with a view to deepening all Participants' understanding of the proposals, and identifying possible areas of convergence. For anti-dumping, this means first and foremost an intensified schedule of negotiations on the precise textual proposals that already are before the Group or that may yet be submitted. For subsidies, the first priority is to obtain from Participants as soon as possible precise textual proposals on all of the areas in which they are seeking changes, as for the time being such proposals exist only in a few of the areas identified as being of interest. Only on the basis of such textual proposals can sufficiently focused discussion be undertaken to allow for identification of possible areas of convergence. For fisheries subsidies what is required in the first instance is for Participants to table much more specific proposals, in the form of proposed text; this is a prerequisite to further progress.

14. My goal for this intensified process in all areas of the mandate is for the Group to develop as quickly as possible the necessary elements that would allow me, if I am so mandated, to table a consolidated draft legal text of the AD and SCM Agreements that would be the basis for the final stage of the negotiations.

15. In this regard, I am fully conscious of the 2006 end date for the Doha Development Agenda and I recognize that for an eventual Chairman's text to serve its intended compromise-developing function, it will need to be preceded by very detailed work of the Participants that illuminates the political as well as the technical dimensions of each proposal, and facilitates the identification of the necessary balance. Thus, there is no time to be lost in completing this detailed work.

16. To conclude, I can only reaffirm my commitment to doing everything within my power to ensure that the Negotiating Group on Rules undertakes the necessary substantive work, at the necessary pace, to clarify and improve the rules according to the mandate in Doha and make its contribution to the final outcome of the negotiations.

…

MINISTERIAL CONFERENCE
Sixth Session, Hong Kong, 13-18 December 2005
WT/MIN(05)/W/3/Rev.2
18 December 2005

Doha Work Programme
Draft Ministerial Declaration

Revision

1. We reaffirm the Declarations and Decisions we adopted at Doha, as well as the Decision adopted by the General Council on 1 August 2004, and our full commitment to give effect to them. We renew our resolve to complete the Doha Work Programme fully and to conclude the negotiations launched at Doha successfully in 2006.

2. We emphasize the central importance of the development dimension in every aspect of the Doha Work Programme and recommit ourselves to making it a meaningful reality, in terms both of the results of the negotiations on market access and rule-making and of the specific development-related issues set out below.

3. In pursuance of these objectives, we agree as follows:

…

Rules negotiations

28. We recall the mandates in paragraphs 28 and 29 of the Doha Ministerial Declaration and reaffirm our commitment to the negotiations on rules, as we set forth in Annex D to this document.

…

Annex D

Rules

I. Anti-Dumping and Subsidies and Countervailing Measures including Fisheries Subsidies

We:

1. *acknowledge* that the achievement of substantial results on all aspects of the Rules mandate, in the form of amendments to the Anti-Dumping (AD) and Subsidies and Countervailing Measures (SCM) Agreements, is important to the development of the rules-based multilateral trading system and to the overall balance of results in the DDA;

2. *aim* to achieve in the negotiations on Rules further improvements, in particular, to the transparency, predictability and clarity of the relevant disciplines, to the benefit of all Members, including in particular developing and least-developed Members. In this respect, the development dimension of the negotiations must be addressed as an integral part of any outcome;

3. *call on* Participants, in considering possible clarifications and improvements in the area of anti-dumping, to take into account, *inter alia*, (a) the need to avoid the unwarranted use of anti-dumping measures, while preserving the basic concepts, principles and effectiveness of the instrument and its objectives where such measures are warranted; and (b) the desirability of limiting the costs and complexity of proceedings for interested parties and the investigating authorities alike, while strengthening the due process, transparency and predictability of such proceedings and measures;

4. *consider* that negotiations on anti-dumping should, as appropriate, clarify and improve the rules regarding, *inter alia*, (a) determinations of dumping, injury and causation, and the application of measures; (b) procedures governing the initiation, conduct and completion of antidumping investigations, including with a view to strengthening due process and enhancing transparency; and (c) the level, scope and duration of measures, including duty assessment, interim and new shipper reviews, sunset, and anti-circumvention proceedings;

5. *recognize* that negotiations on anti-dumping have intensified and deepened, that Participants are showing a high level of constructive engagement, and that the process of rigorous discussion of the issues based on specific textual proposals for amendment to the AD Agreement has been productive and is a necessary step in achieving the substantial results to which Ministers are committed;

6. *note* that, in the negotiations on anti-dumping, the Negotiating Group on Rules has been discussing in detail proposals on such issues as determinations of injury/causation, the lesser duty rule, public interest, transparency and due process, interim reviews, sunset, duty assessment, circumvention, the use of facts available, limited examination and all others rates, dispute settlement, the definition of dumped imports, affiliated parties, product under consideration, and the initiation and completion of investigations, and that this process of discussing proposals before the Group or yet to be submitted will continue after Hong Kong;

7. *note*, in respect of subsidies and countervailing measures, that while proposals for amendments to the SCM Agreement have been submitted on a number of issues, including the definition of a subsidy, specificity, prohibited subsidies, serious

prejudice, export credits and guarantees, and the allocation of benefit, there is a need to deepen the analysis on the basis of specific textual proposals in order to ensure a balanced outcome in all areas of the Group's mandate;

8. *note* the desirability of applying to both anti-dumping and countervailing measures any clarifications and improvements which are relevant and appropriate to both instruments;

9. *recall* our commitment at Doha to enhancing the mutual supportiveness of trade and environment, *note* that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, and *call on* Participants promptly to undertake further detailed work to, *inter alia*, establish the nature and extent of those disciplines, including transparency and enforceability. Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns;

10. *direct* the Group to intensify and accelerate the negotiating process in all areas of its mandate, on the basis of detailed textual proposals before the Group or yet to be submitted, and complete the process of analysing proposals by Participants on the AD and SCM Agreements as soon as possible;

11. *mandate* the Chairman to prepare, early enough to assure a timely outcome within the context of the 2006 end date for the Doha Development Agenda and taking account of progress in other areas of the negotiations, consolidated texts of the AD and SCM Agreements that shall be the basis for the final stage of the negotiations.

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