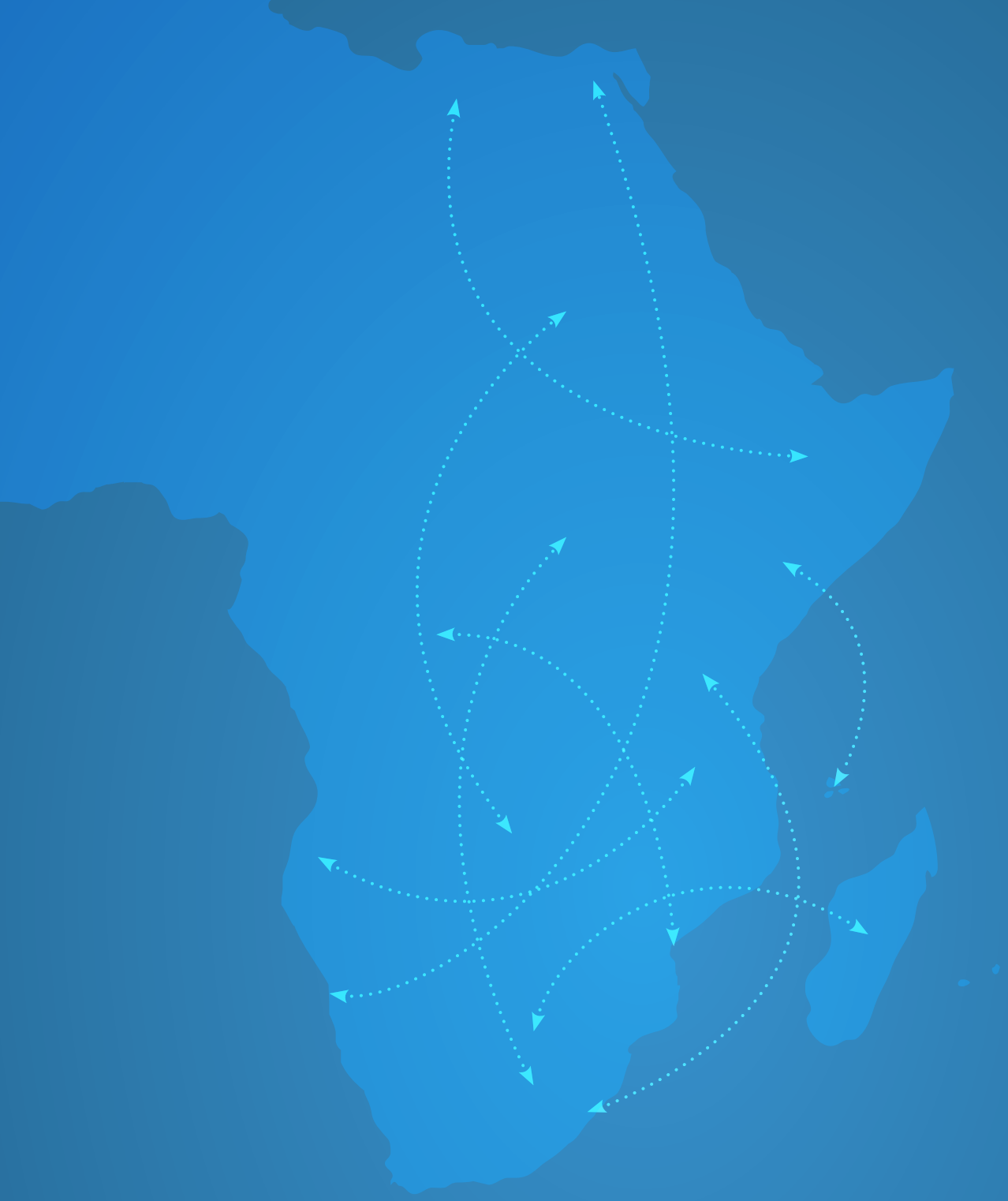

TRAINING MODULE
ON ANTI-DUMPING AND INJURY MARGIN CALCULATION METHODS

TMSA
TradeMark Southern Africa

NOTE

This Training Module is published under the auspices of TradeMark Southern Africa and addresses trade remedies in the context of the negotiating process leading to the establishment of the Tripartite Free Trade Area (TFTA).

The Module is designed for educational and divulgation purposes only. As such, no claim can be made to the publisher regarding its legal contents, which in no instance replaces or substitutes the official texts being reviewed.

The training exercise is intended to contribute to the negotiating capacity of TFTA actors, including government officials, private sector and civil society representatives.

PREFACE

This Module covers the anti-dumping regime as dealt with by the legal provisions of the Common Market for Eastern and Southern Africa (COMESA), the Eastern African Community (EAC), the Southern African Development Community (SADC), as well as the current Draft TFTA Text.

The legal provisions on trade remedies (anti-dumping, safeguards, subsidies and countervailing measures), adopted by the three Regional Economic Communities (RECs) and in the Draft TFTA Text, mirror and refer to the World Trade Organization (WTO) rules on trade remedies.

While examining the legal provisions of COMESA, EAC, SADC and the Draft TFTA Text, the Module presents the WTO's Agreement on the Implementation of Article VI (anti-dumping) of the General Agreement on Tariffs and Trade 1994 (GATT), often referred to as the Anti-dumping Agreement (ADA). This, in fact, remains the main reference source on the rights and obligations to conduct anti-dumping actions and to determine injury to the domestic industry.

Throughout the Module, selected contents, drawn from reports and judgements of the WTO's Panel and Appellate Body, are provided, as are other leading cases and sources from the TFTA region and its trading partners. This jurisprudence is instrumental to better understand the operational aspects of the trade remedies under review.

This Module was drafted by Edwin Vermulst, Founding Partner of VVGB Advocaten, under the supervision of Stefano Inama, Trade Lawyer at the United Nations Conference on Trade and Development (UNCTAD). Special thanks to Mwansa Musonda of the COMESA Secretariat, Geoffrey Osoro of the EAC Secretariat and Paul Kalenga of the SADC Secretariat for providing the relevant legal texts and advice during the drafting. This module draws from a former training module in the UNCTAD Dispute Settlements series. It has been adapted and updated to fit the particular needs of TFTA Member States.

What you will learn

You will learn the following from this Training Module:

- The international discipline of dumping and the regulation of anti-dumping actions under the WTO, as mirrored in the COMESA, EAC and SADC legal provisions, as well as in the current formulation of the Draft TFTA Text. This includes the identification of forms of dumping and injury according to the ruling of the Anti-Dumping Agreement (ADA) and its interpretation;
- The procedural obligations that national authorities must comply with for the determination of injurious dumping action. After mastering the flowchart of the anti-dumping investigation, you will be able to understand the implications of the due process rights such as notification, public notices, confidentiality, disclosure of findings and hearings, as well as restrictions on the use of facts available;
- The initiation of anti-dumping investigations at national level and national procedures, including provisional measures, price undertakings, anti-dumping duties, retroactivity, reviews, judicial review;
- Remedies of anti-dumping duties and undertakings, along with duty assessment systems;
- Options for TFTA Member States considering the adoption of anti-dumping legislation as related to procedural issues, circumvention and rules of origin;
- Dumping and injury margin calculation methods on the basis of practical calculations; and
- Reference to legal sources and supplementary legal discipline enabling you to deepen your knowledge and analysis of administering trade remedies in the light of the evolving jurisprudence and negotiations.

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Overview

Dumping occurs when a company sells products at a lower price in an export market than it does in its domestic market. Is this unfair competition? Well, if such dumping action injures the domestic producers in the importing country, the importing country authorities may, under certain circumstances, impose anti-dumping duties to offset the effects of the dumping.

National anti-dumping legislation dates back to the beginning of the 20th century. The GATT 1947 contained a special article on dumping and anti-dumping action, and Article VI of the current GATT *condemns* dumping that causes injury, but 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 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 issue 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 that, in 1960, agreed on certain common interpretations of ambiguous terms in Article VI.

An Anti-dumping Code was negotiated during the 1967 Kennedy Round and signed by the 17 parties present. This Code was revised during the Tokyo Round. The Tokyo Round Code had 25 signatories, including the European Communities (EC). Although the 1979 code was not explicitly mentioned in the Ministerial Declaration of the Uruguay Round, a number of GATT contracting parties, including the EC, Hong Kong, Japan, Korea and the United States proposed changes to the 1979 Code fairly early in the negotiations.

Article VI was carried forward into GATT 1994. A new agreement, the Agreement on the Implementation of Article VI, most often referred to as the Anti-dumping Agreement (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 of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement."*
>
> **Article 1 of the ADA**

While the WTO Agreement *does not pass judgment*, authority remains with the concerned governments to discriminate on the possibility of reacting, or not, to the dumping in compliance with the discipline in force.

This Module starts by examining the anti-dumping regime of the three RECs to which the TFTA Member States have adhered, as well as the current formulation contained in the Draft TFTA Text.

Since anti-dumping in the three RECs and in the Draft TFTA Text mirrors and refers, to a varied extent, to the multilateral discipline in existence under the WTO, the ADA is discussed both in its substantive and procedural contexts.

The Module provides extensive explanations on the calculation of dumping and injury margins based on practical methods and selected sampling of dumping and injury margin calculations.

Following the review of key terminology for the determination of dumping and injury, the Module concludes with the review of the compulsory procedures to conduct anti-dumping action and the situation of developing Member Countries.

1. Anti-dumping in the TFTA Member States

1.1 COMESA

Besides the provisions contained in the COMESA TFTA Treaty, the COMESA Council of Ministers adopted the Regulation on Trade Remedy Measures (hereinafter referred to as the Main Regulation) in November 2001, under Article 10(1) of the COMESA Treaty[1].

The purpose of having a set of trade remedy regulations is explicitly stated in Regulation 2 of the Main Regulation.

> *"1. These regulations are a binding instrument on COMESA Member States in their conduct of trade remedy investigations. Their purpose is to ensure that there is uniformity among COMESA Member States in the conduct of trade remedy investigations and to ensure, to the extent possible, that such investigations are undertaken in harmony and within the framework of the WTO Safeguard Agreement.*
> *2. These regulations establish rules for the conduct of trade remedy investigations and the application of trade remedy measures."*

Regulation 3 of the Main Regulation provides for the scope of application and the relation with national legislation adopted to implement WTO agreements as follows:

> *"1. These regulations shall apply to investigations or reviews initiated under national legislation of COMESA Member States on or after the day of entry into force of this Regulation.*
> *2. These regulations are to be applied in conjunction with the existing national legislation for conducting trade remedy investigations and reviews in the individual COMESA Member States. The Member States of COMESA recognise that most of them are also signatories in the WTO and may have national legislation, which is consistent with the WTO Agreement. All COMESA Member States recognise that these Member States have the right to apply their national legislation, without amendment, in conducting all trade remedy investigations from the date that this Regulation comes into force, as their national legislation complies with both the WTO Agreement and this Regulation.*
> *3. If an investigation initiated by a COMESA Member State finds that the industry under investigation includes imported products only from COMESA countries, the provisions to be applied are the COMESA trade remedy regulations.*
> *4. If an investigation initiated by a COMESA Member State finds that the industry under investigation includes imported products from only non-COMESA WTO member countries, the provisions to be applied is the WTO Agreement on Safeguards.*
> *5. If an investigation initiated by a COMESA Member State finds that the industry under investigation includes imported products from both COMESA and non-COMESA WTO Member Countries, the provisions to be applied are the WTO Agreement, and where not otherwise provided for by WTO, the provisions of the COMESA trade remedy regulations.*
> *6. In the case of Part III on Anti-dumping, only if an investigation is initiated by a COMESA Member State against fellow COMESA Members, the provisions of Part III of this Regulation shall apply. If an investigation is initiated by a COMESA Member State against non-COMESA WTO Member Countries, the provisions of the WTO Agreement shall apply. In cases where an investigation under Part III has been initiated by a COMESA Member State against fellow COMESA Members and non-COMESA WTO Member States, both this Regulation and the WTO Agreement will be applied in this investigation."*

When reading the above-mentioned regulations, the complementary nature of the COMESA Main Regulation on Trade Remedies and the WTO agreements becomes clear.

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[1] Article 10 of the COMESA Treaty provides as follows:

"Regulations, directives, decisions, recommendations and opinions of Council:

1. The Council may, in accordance with the provisions of this treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions;
2. A regulation shall be binding on all the Member States in its entirety;
3. A directive shall be binding upon each Member State to which it is addressed as to the result to be achieved, but not as to the means of achieving it;
4. A decision shall be binding upon those to whom it is addressed; and
5. A recommendation and an opinion shall have no binding force."

Available at: http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/comesa/2COMESA_Treaty.pdf

National laws implementing the WTO trade remedies agreements will prevail in investigation concerning non-COMESA countries and when non-COMESA countries and COMESA countries are concerned.

The COMESA trade remedies regulations under the Main Regulation will only apply when an investigation is initiated against other COMESA countries. However, even in this case, the second paragraph of Regulation 3 provides a caveat stating that COMESA–WTO Member States that have adopted trade remedy legislation have the right to apply it without amendments.

> *"The Member States of COMESA recognise that most of them are also signatories in the WTO and may have national legislation, which is consistent with the WTO. All COMESA Member States recognise that these Member States have the right to apply their national legislation,* ***without amendment*** *(emphasis added), in conducting all trade remedy investigations from the date that this Regulation comes into force, as their national legislation complies with both the WTO Agreement and this Regulation."*

It should be noted that, in various cases, the trade remedy regulations of the COMESA Main Regulation draws *verbatim* from the existing WTO agreements. Hence, the risk of potential conflict between the national legislation of COMESAWTO Members and the COMESA Main Regulation appears remote.

The main purpose for the COMESA adoption of the Main Regulation on Trade Remedies is to put in place a common platform within the region that could be used by COMESA non-WTO and WTO Members alike. It also aims at providing a forum for consultation and amicable solution-finding through COMESA organs in case of intraregional investigations on trade remedies as contained in Part IV of the Main Regulation.

1.2 EAC

The EAC Treaty establishing the East African Community[2] provides for an explicit prohibition of dumping in Article 16 of the Protocol of the EAC Customs Union and in the extensive Annex IV to the Protocol.

> *"1. The partner states recognise that dumping is prohibited if it causes or threatens material injury to an established industry in any of the partner states, materially retards the establishment of a domestic industry therein, or frustrates the benefits expected from the removal or absence of duties and quantitative restrictions of trade between the partner states.*
>
> *2. The Secretariat shall notify the World Trade Organisation of the anti-dumping measures taken by the partner states.*
>
> *3. The implementation of this part of the Protocol shall be in accordance with the East African Community Customs Union (Anti-dumping Measures) Regulations, specified in Annex IV to this Protocol…"*

Regulation 4 of the EAC Regulations on Anti-dumping Measures (hereinafter the Regulations) determines the scope of application and its relation to national legislation on anti-dumping measures. In the case of anti-dumping actions against a third county, WTO provisions will apply. In the case of investigation against an EAC Member State, the Regulations will apply in conjunctions with national legislation.

> **Regulation 4**
> **Application of the Regulations**
>
> *"1. These regulations shall apply to investigations or reviews initiated under national legislation of a partner state upon coming into force of the Protocol.*
>
> *2. These regulations shall be applied in conjunction with the existing national legislation of each partner state for the conducting of anti-dumping investigations and reviews in each partner state.*
>
> *3. Where an investigation is initiated by a partner state against another partner state, during the transitional period, these regulations shall apply.*
>
> *4. Where an investigation is initiated by a partner state against a foreign country, the provisions of the WTO Agreement shall apply."*

The Regulations do not differ from the provisions of the ADA. Regulations 7 to 17, which contain the core principle of determining dumping and administration, are identical, almost *verbatim*, to Articles 2 to 12 of the ADA. The main point of difference relates to Regulation 19 on Consultation and Dispute Settlement.

[2] As amended on 14 December 2006 and 20 August 2007 available at www.eac.int

In the case of disputes the Regulations refer the matter under dispute to the EAC Committee on Trade Remedies, established under Article 24 of the Protocol Establishing the EAC Customs Union, instead of the WTO Dispute Settlement Body (DSB).

1.3 SADC

Article 18 of the SADC Trade Protocol merely refers to the ADA and gives SADC Member States administration over anti-dumping laws.

Article 18
Anti-dumping Measures

"Nothing in this Protocol shall prevent any Member State from applying anti-dumping measures which are in conformity with WTO provisions."

1.4 TFTA

The Draft TFTA Text, dated December 2010, contains relevant articles and an annex dealing with trade remedies. In particular, Article 18 of the Draft TFTA Text provides as follows:

"1. Subject to the provisions of this Agreement, nothing in this Agreement shall prevent Tripartite Member States from adopting anti-dumping and countervailing measures in accordance with the relevant WTO agreements and Annex 2 to this Agreement.

2. In applying this Article, Tripartite Member States shall be guided by provisions of the WTO Agreement on the Interpretation of Article VI of the General Agreement on Tariffs and Trade and the WTO Agreement on Subsidies and Countervailing Measures."

Article 2 of Annex 2 on Trade Remedies establishes some principles in applying trade remedies, such as the requirement to carry out an investigation before imposition of a trade remedy, and entrusts the Sub-committee on Trade Remedies with the responsibility to conduct such investigation.

"1. Trade remedies relating to the trade of the Tripartite Member States with third countries and within the Free Trade Area may only be adopted after an investigation in accordance with the rules of natural justice and this Annex.

2. The Sub-committee on Trade Remedies shall have the authority to initiate and conduct the investigations and recommend the adoption of trade remedies, which shall be applied in accordance with the mechanisms on border measures relating to imports.

3. Notwithstanding paragraph (1) of this Article and paragraph (2) of Article 4, where a Tripartite Member State has entered other trade arrangements, the Sub-committee on Trade Remedies may recommend the trade remedies provided for in the instruments regulating those arrangements."

The relationship of the Sub-committee on Trade Remedies with the national investigation authorities of those TFTA Member States that have established such authorities, is dealt with in Article 8 of Annex 2.

"With respect to Tripartite Member States that are Members of the World Trade Organization, the notification of the Sub-committee on Trade Remedies as the investigating authority or competent authority to the WTO is hereby authorised, as well as any other notifications that may be made as and when necessary or required."

This Article seems to suggest that the TFTA Countries that are Members of the WTO, and which have adopted anti-dumping legislation and have established a national investigating authority, must indicate to the WTO that the Sub-committee on Trade Remedies will take up the duties and tasks previously exercised by the national investigating authorities. It remains to be seen whether TFTA Member States that have invested substantially in setting up a national investigating authority are willing to accept such a move.

Article 3 of Annex 2 provides for the initiation of investigations and the parties that are entitled to submit a petition for the initiation of an investigation:

> *"1. Applications seeking trade remedies shall be made to the Sub-committee on Trade Remedies.*
> *2. Applications under this Article may be made by:*
> *a) An industry, or a national, or regional business association;*
> *b) A Tripartite Member State on behalf of a domestic or regional industry; or*
> *c) Consumer organisation registered in a Tripartite Member State.*
> *3. When the Sub-committee on Trade Remedies is satisfied that investigations are necessary for the application of trade remedies, it may direct the initiation of the investigations and adopt the modalities, including the constitution of a Panel from among its Members to undertake the designated tasks."*

As examined further below, Article 3 is the only provision contained in Annex 2 that hints at the composition of the organ, in this case the constitution of a *Panel*, which will actually carry out the investigation. However, no further specifications are provided on the composition of the Panel and the appointment of the panellists.

Article 4 of Annex 2 provides for the kind of trade remedy measures that the Sub-committee may recommend:

> *"1. When it is established after an investigation that domestic or regional industries producing like, or directly competitive products, have suffered injury, or are threatened with injury, or the establishment of a domestic industry has been curtailed within the meaning of this Annex, the Sub-committee on Trade Remedies may recommend a measure in accordance with sub-paragraph (2) of this Article.*
> *2. Provided that the measures shall be necessary and appropriate to deal with the injury to the domestic, or regional industries, the measures may include:*
> *a) Safeguard action in the form of higher than otherwise applicable customs duties, or imposition of quotas allocated out among suppliers or exporters to the Tripartite Member States, on the basis of performance for a representative period;*
> *b) Anti-dumping duties not exceeding the margin of dumping;*
> *c) Countervailing duties to offset the subsidies;*
> *d) Price undertakings to appropriately raise the price of imported products, undertaken by the exporters and suppliers to the Tripartite Member States if accepted by the Sub-committee on Trade Remedies;*
> *e) Orders to enterprises doing business or having a presence in, or directly affecting the trade and industries in the Tripartite region, to ensure and maintain conditions for fair competition and for sustainable human development; or*
> *f) Any other measures in the public interest, consistent with the appropriate protection of a domestic or regional industry."*

As can be seen from the above-mentioned Article, the Sub-committee has ample discretion on the envisaged trade remedies. It is, however, not clear to whom the Sub-committee should address its recommendation on the adoption of a trade remedy measure, nor is it specified elsewhere in Annex 2 or in the Draft TFTA Text.

Article 38[3] of the Draft TFTA Text generically provides for the establishment of Tripartite committees on trade and customs, yet it does not explicitly make any reference to the Sub-committee on Trade Remedies or to its eventual composition. The specifications on the Sub-committee on Trade Remedies are neither contained in Annex 2, nor in the Draft TFTA Text.

The establishment of such a sub-committee, with extensive powers on the initiation of investigations and formulation of recommendations, does not have a precedent in FTAs and matters related to trade remedies are normally left to national authorities. Many FTAs contain provisions for previous consultation and notification of a trade remedy investigation through the joint organs and consultation mechanisms established by the FTA.

[3] Paragraph 2 of Article 38 of the draft FTA states:

"The functions of the Ministerial Committee on Trade and Customs shall be to: (a) regularly review the status of the TFTA and make appropriate recommendations; (b) initiate policy analysis on key issues affecting the TFTA; (c) receive and consider reports on trade, trade related and customs issues under this Agreement; (d) resolve through consultation, trade, trade related and customs matters referred to it by Tripartite Member States; (e) implement and monitor closely measures taken to promote trade within the TFTA; (f) decide on new annexes and regulations that may be required to facilitate the implementation of this Agreement; (g) amend existing annexes and regulations required to facilitate the implementation of this Agreement; and (h) discharge any other functions as may be required by the Tripartite Council or Tripartite Summit as established by the Tripartite."

1.5 The Status of Anti-dumping Legislation in TFTA Member States

There is no obligation for WTO Members to adopt national anti-dumping legislation.

The table below provides an overview of the current situation on notifications to the Committee on Anti-dumping Practices of the WTO. It shows that the TFTA Member States have notified the Committee about the non-existence of the anti-dumping legislation at national level, and the lack of notification by other TFTA Members.

It should be noted that the major users of anti-dumping among the TFTA Member States are Egypt and South Africa, which have also established national investigation authorities.

Anti-dumping legislation notifications as at 25 October 2011[4]

Member	Notification provided
Angola	G/ADP/N/1/AGO/1*
Botswana	G/ADP/N/1/BWA/1*
Burundi	G/ADP/N/1/BDI/1*
Democratic Republic of the Congo	None
Djibouti	None
Egypt	G/ADP/N/1/EGY/2/Rev.1 + Rev.1/Suppl.1
Kenya	G/ADP/N/1/KEN/2
Lesotho	None
Madagascar	G/ADP/N/1/MDG/1*
Malawi	G/ADP/N/1/MWI/1 + Corr.1
Mauritius	G/ADP/N/1/MUS/2
Mozambique	None
Namibia	G/ADP/N/1/NAM/1*
Rwanda	None
South Africa	G/ADP/N/1/ZAF/2
Swaziland	G/ADP/N/1/SWZ/1*
Tanzania	None
Uganda	G/ADP/N/UGA/2
Zambia	G/ADP/N/1/ZMB/1
Zimbabwe	G/ADP/N/1/ZWE/2 + Suppl.1

Key: * = Notification of no anti-dumping legislation
None = No notification submitted

[4] Excerpted and adapted from the Report of the WTO's Committee on Anti-dumping Practices, as updated at the time of writing (June 2012).

2. Dumping in the WTO

2.1 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 the WTO Committee on Anti-dumping Practices (ADP) and special rules for WTO dispute settlement relating to anti-dumping matters respectively. 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 the best information available in cases where interested parties insufficiently cooperate in the investigation.

2.2 Actionable Forms of Dumping

GATT 1947 applied only to goods, which implied that dumping of services was not covered. 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 long been accepted that neither Article VI, nor the ADA cover exchange rate, social, environmental nor 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, cyclical, market expansion, state trading and strategic dumping.

Conceptually, the calculation of dumping is a comparison between the export price and a benchmark price (normal value) of the like product. Depending on the circumstances in the domestic market, this normal value can be calculated in various ways. These will be discussed in Section 3 below.

2.3 Like Product

The term 'like product' 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' as used in the Safeguards Agreement. In the context of the ADA, the term is relevant for both dumping and injury determination.

Typical like products include polyester staple fibres, stainless steel plates, or colour televisions (CTVs). Such products can often be classified under a harmonised system (HS) heading. Thus, polyester staple fibres fall under HS heading 55.03, stainless steel plates fall under HS heading 72.19 and CTVs under HS heading 85.28.

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

2.4 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.

2.5 Investigation Periods

In order to calculate dumping and injury margins, importing Member authorities will select an investigation period (IP), often one year 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 initiated in order to determine whether the dumping has caused injury.

3. The Determination of Dumping

3.1 Overview of Article 2

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

Article 2.1 provides that a product must be considered 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 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 a particular market situation or low sales volumes 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, while Article 2.4 contains detailed rules for making a fair comparison between export price and normal value. Article 2.5 deals with trans-shipments and Article 2.6 defines the like product. 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.

3.2 The Export Price

According to Article 2.1 of the ADA, the export price is the price at which a 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.

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

Constructed export price

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

Article 2.3 of the ADA provides that the export price may then 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 accrued, should be made in accordance with Article 2.4 of the ADA. Such allowances decrease the export price, increasing the likelihood of a dumping finding. For this reason, the United States Steel Plate Panel interpreted 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."*[5]
>
> **United States Steel Plate Panel**

[5] United States Steel Plate Panel, para. 6.93–6.94.

3.3 Normal Value

The determination of normal value involves three major steps:

1. The investigating authority examines whether representative sales of the product exported in the domestic market exist. Article 2.2 of the ADA provides that if there are no sales of the like product in the domestic market, these sales are not representative. 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, sales can be considered sufficient for the determination of normal value (footnote two to Article 2.2 of the ADA).
2. The investigating authority examines whether sales are made in the ordinary course of trade. Where there are no sales in the ordinary course of trade, Article 2.2 allows investigating authorities to disregard domestic prices and establish normal value on the basis of appropriate third country prices or constructed normal values. Article 2.2.1 provides 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 provides that sales below per unit costs are made in substantial quantities when, *inter alia*, the volume of sales below per unit costs represents more than 20% of the volume sold in the transactions under consideration.
3. The investigating authority must calculate the normal value. For this purpose, sales below cost are excluded if they represent more than 20%.

These calculations are initially made on a model-by-model or type-by-type basis in order to result in a fair comparison.

3.3.1 Standard Situation: Domestic Price

Article 2.1 provides that a product is dumped if the export price of a product is less than the comparable price for the like product, in the ordinary course of trade, when destined for consumption in the exporting country. In a 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 a weighted average dumping margin is only later 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 exists in the ordinary course of trade.

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 25% (20 / 80 x 100).[6]

Sales below cost and constructed normal value

The relevance of determining whether sales in the domestic market are made in the ordinary course of trade has already been discussed above. Thus, determining that there are no sales in the ordinary course of trade means that domestic prices cannot be used to establish normal value. In such cases, Article 2.2 of the ADA gives investigating authorities various possibilities to determine normal value, including the use of 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 production cost (manufacturing cost) in the country of origin.

[6] 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 CIF level.

3.3.2 Alternatives: Third Country Exports or Constructed Normal Value

Article 2.2 provides that when there are no like product sales in the ordinary course of trade in the domestic market of the exporting country, or when such sales do not permit a proper comparison because of a particular market situation or low sales volumes, the dumping margin must be determined by comparison with the price of the like product when exported to an appropriate third country (provided that the price is representative), or with the production cost in the country of origin plus a reasonable amount of administrative, selling and general costs and 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 happen that different models are sold in the domestic and export markets. 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 happen that a producer does not sell the like product in representative quantities in the domestic market.

> *"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 percent 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 a lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison."*
>
> **ADA, footnote 2**

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). If this is not the case, an alternative normal value must be found, either for the like product or for specific models. This is sometimes called the home market viability test.

3.3.3 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. This practice was upheld by the Guatemala – Cement II Panel:

> *"Nothing in these provisions prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost."*[7]
>
> **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 fibre (PSF). The main raw materials used in the production of PSF are purified terephthalic acid (PTA) and mono ethylene glycol (MEG), 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 can be broken

[7] Guatemala – Cement II Panel, para. 8.183.

down in various types, for example, on the basis of quality, denier, decitex, lustre and silicon treatment. Each combination of these would constitute a separate type.

The 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."*
>
> **ADA, Article 2.2.1.1**

Article 2.2 distinguishes three elements of constructed normal value:

- Cost of production;
- Reasonable amount for administrative, selling and general costs (often called SGA); and
- 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."*
>
> **ADA, Article 2.2.2.**

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

3.3.4 Special Situations

Exclusion sales below cost

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

In this example we suppose that the full cost of production is 50, with four sales transactions of 10 units each.

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

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 150 (100 + 150 + 200 / 3). The average export price is 125 (50 + 100 + 150 + 200 / 4). 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 in the domestic market

> *"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."*[8]
>
> **United States Hot Rolled Steel AB**

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 arm's 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.

The United States Hot Rolled Steel 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 make a fair comparison.

Trans-shipments

In a 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 such situations. 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 must usually be compared with the comparable price in the country of export (country of trans-shipment).

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

3.4 Comparison of Normal Value and Export Price: 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 the ex factory level. Due allowance must be made in each case, on its merits, for differences which affect price comparability, including differences in terms and conditions of sale, taxation, trade levels, quantities, physical characteristics and any other differences which affect price comparability.

[8] United States Hot Rolled Steel AB, para. 166–173.

Investigating authorities will request that exporters submit information on the various sales adjustments made in the domestic and export markets in order to be able to fairly compare normal value and export price at ex works level.

In some cases, it is assumed that the adjustments correspond with actual amounts incurred by the exporters. This includes the reported amounts for discounts, freight, charges, packing and commission. For credit costs, where the actual cost incurred on a per-transaction basis might be difficult to determine, a notional amount is calculated based on the number of days for which the credit was granted and the applicable interest rate on short-term loans.

If, for example, an export sale is made on a cost, insurance and freight (CIF) basis, the seller pays for the inland freight in the exporting country, as well as 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 furthermore requires that 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 affect price comparability.

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

3.5 Comparison Methods

Where multiple domestic and export transactions exist, as will usually be the case, a question arises as to 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 (WA) or transaction-to-transaction (T-to-T) basis. A calculation example may be helpful:

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

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

In 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

As an exception, the weighted average normal value may be compared to the 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 exception method to the example above, the result will be quite different:

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

Zeroing

In the above example 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, some WTO Members do not allow such offset and attribute a zero value to negatively dumped transactions. This is known as the practice of 'zeroing'. As a result, the dumping amount in the example above will be 100 and the dumping margin: 100 / 500 x 100 = 20%.

The use of this method implies that if just one transaction is dumped, dumping will be found.[9] The method therefore facilitates dumping findings. Prior to the conclusion of the Uruguay Round, this method was a standard practice among WTO Members,[10] but because of pressure exerted by other WTO Members, Article 2.4.2 was adopted and Members generally resort to using the weighted average method.

However, some WTO Members applied a new type of zeroing in the weighted average method: 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. The European Communities (EC) – Bed Linen 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 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."*[11]
>
> **EC – Bed Linen AB**

The US – Steel Plate Panel ruled that the United States' use of multiple averaging periods in its plate and sheet investigations was inconsistent with the requirement of Article 2.4.2 to compare a weighted average normal value with a weighted average of all comparable export transactions. The US divided its 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 with the pre- and post-devaluation periods. It then 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 Department of Commerce (DOC) treated the period November–December (where the average export price was higher than the average normal value) as a sub-period of zero dumping, but there was in fact 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

[9] 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.

[10] The EC practice was unsuccessfully challenged by Japan in the GATT in EC-ATCs.

[11] EC – Bed Linen AB, para. 51–66.

appropriate in cases where it is necessary to ensure that comparability is not affected by differences in the timing of sales within the averaging periods in the domestic and export markets.

In the United States–Zeroing (EC)[12] case, the Panel concluded that the US acted inconsistently with Article 2.4.2 in 15 separate anti-dumping investigations by not properly accounting for negative dumping margins in its weighted average calculation. It also concluded, and the AB upheld this, albeit for different reasons, that the US DOC model zeroing methodology, as it relates to the original investigations in which the weighted average method was used to calculate dumping margins, is inconsistent, as such, with Article 2.4.2[13].

Since Article 2.4.2 contains the phrase "during the investigation phase", some questions remained about whether the obligation not to zero applied in the context of anti-dumping reviews, including duty assessment reviews in the US.

In the United States–Zeroing (Japan)[14] case, the AB issued the most encompassing indictment of zeroing to date, including 'as such' findings against zeroing under most other circumstances. Like the dispute initiated by the EC, Japan's dispute concerned several cases of dumping findings and contained allegations of 'as such' and 'as applied' violations of the ADA.

In the United States Zeroing (Japan) case, the AB found that the US:

"1. Acts (present tense of the verb, corresponds to an 'as such' finding) inconsistently with Articles 2.4 and 2.4.2 of the ADA by maintaining zeroing procedures when calculating dumping margins under the transaction-to-transaction method in the original investigation;

2. Acts inconsistently with Articles 2.4 and 9.3 of the ADA and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews;

3. Acts inconsistently with Articles 2.4 and 9.5 of the ADA and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in new shipper reviews;

4. Acted inconsistently with Articles 2.4 and 9.3 of the ADA and Article VI:2 of the GATT 1994 by applying zeroing procedures in 11 periodic reviews at issue;

5. Acted inconsistently with Article 11.3 of the ADA when it relied on dumping margins calculated in previous proceedings through the use of zeroing for purposes of conducting sunset reviews."

In spite of the wide indictment in the United States–Zeroing (Japan) case, the US practice of zeroing in anti-dumping proceedings was recently the topic of the United States Continued Existence and Application of Zeroing Methodology dispute.[15]

In this case, the EC challenged the continued use of zeroing by the US administration, in spite of the previous AB ruling. However, this challenge has to be put in perspective with US anti-dumping legislation. The United States operates according to a retrospective duty assessment system in which the dumping margin calculated during the initial investigation only establishes the deposit rate. Thus the actual dumping margin is established during annual administrative reviews, although they often occur less frequently in practice.

The United States responded to the previous AB determinations by no longer zeroing during its original investigations. It contended, however, that the ADA allows zeroing during administrative reviews. Given that the actual collected margins are determined during the administrative review phase, the United States was practicing zeroing when it really matters. Finally, even if the AB finds zeroing, as practiced in a review for a specific product/supplier, inconsistent, the United States' current policy is that the AB decision applies only to that particular measure. Therefore, if the US Department of Commerce does a new administrative review practicing zeroing, the onus is on the EC (or any other affected Member Country) to file another dispute with regards to that new review. The measure currently in effect is almost always different from the one that is being challenged at the WTO.

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[12] United States Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (hereinafter: US – Zeroing (EC)). WT/DS294/AB/R 18 April 2006, WT/DS294/AB/Corr.1 20 August 2007 and WT/DS294/R 31 October 2005.

[13] See for commentary: Thomas, J.P. and Vermulst, E. A One-Two Punch on Zeroing: US – Zeroing (EC) and US – Zeroing (Japan) which discusses the United States Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) and the United States Measures Relating to Zeroing. Also see: Sunset Reviews. In: World Trade Review (2009), 8: 1, 187–241

[14] United States Measures Relating to Zeroing and Sunset Reviews (hereinafter: US – Zeroing (Japan)). WT/DS322/AB/R 9 January 2007 and WT/DS322/R 20 September 2006.

[15] Continued Existence and Application of Zeroing Methodology. WT/DS350/AB/R 4 February 2009. See for commentary on this case: Thomas J.P. and Vermulst, E. United States – continued existence and application of zeroing methodology: the end of zeroing? In: World Trade Review (2011), 10: 1, 45–61.

In order to avoid such a cat and mouse game, the EC asked the AB to decide on zeroing in the context of a case rather than for each separate dumping calculation. Thus, the most important issue at stake in the dispute was the definition of what a 'measure' is.

The AB stated that "the measures at issue consist of the use of the zeroing methodology in a string of connected and sequential determinations"[16] and it saw "no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement"[17]. It remains to be seen what impact this AB ruling will have on the US zeroing policy.

3.6 Calculating normal value and export price: some examples

Article 2 of the ADA is the international basis for the calculation of dumping margins. A dumping margin calculation essentially involves five steps, namely:

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 to the same level;
4. The comparison of the netted back export price and normal value to get the dumping amount; and
5. The calculation of the actual dumping margin as a percentage of the export price.

Simplified calculation examples

Two observations must be made regarding the sample calculations below. Firstly, the sample calculations are based on the sales of one single model (or type) in both the domestic and export markets. Where two or more models (or types) of the like product are sold in the export market, separate calculations will initially need to be made for each type. The dumping margin for the like product will be obtained by dividing the total dumping amount for the various types exported by the total cost, insurance and freight (CIF) value.

Secondly, sample calculation 1 and 2 are based on sales to unrelated parties. If sales were made to related parties in the domestic or export markets, investigating authorities would normally consider the prices charged to the related party to be unreliable. When faced with this situation, investigating authorities normally use domestic and/or export prices starting from the selling price to the first unrelated party (for instance the distributor or the retailer) as in example 3. This leads to complicated additional adjustments in order to effect a fair comparison between domestic and export prices.

Example 1: Direct sale to unrelated customers

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

[16] US – Continued Zeroing (EC) AB, para. 181.

[17] As above

The dumping margin is 3% (82 – 79 / 100 x 100). 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 -2 (78 – 80 / 100 x 100). Invoking the exception in the last sentence of Article 2.4.2, some countries may not give credit for the negative dumping in the calculation of the weighted average dumping margin, and may attribute a zero value to it (zeroing). However, the CIF price will be taken into account in the denominator of the weighted average dumping margin calculation.

Export price

The calculation of the export prices is quite straightforward. The following steps are to be noted:

1. 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 can 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.
2. Subtract any quantities or values given by the exporters through credit notes. The net sales 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 on the date of sale (see above).
3. In order to bring the net sales turnover to ex works level, the adjustments mentioned in step 2 above will have to be applied.

Example 3: Construction of export price

Normal value	Export price
Producer X > unrelated customer: 140 - duty drawback: 5 - discounts subs.: 5 - inland freight subs.: 0.5 - packing: 1 - credit: 4 - guarantees: 2 - -level of trade: 24 (17.14%)	Producer X > related importer > unrelated retailer: 100–140 - discounts subs.: 5 - inland freight subs.: 0.5 - credit by subs.: 2 - guarantees by subs.: 2 - net SGA subs.: 17 (12.14%) - reasonable profit subs. (5%): 7 - 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 13.2% (98.5 – 85.3 =13.2 / 100 x 100).

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 the domestic and export markets. In the export market, the importer acts as a distributor. In the domestic market, however, the producer performs the distributor function in-house. An adjustment must be made for the indirect costs and profits relating to this function because, on the export side, the same costs and profits are deducted in the calculation of 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.

4. The Determination of Injury

4.1 Overview of Article 3

Introductory paragraph, Article 3.1, provides that the injury determination must be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect thereof 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 analyses of the volume and price factors, while 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, and Article 3.5 lays down the framework for the causation analysis, including a list of possible 'other known factors'. Article 3.6 contains the product line exception, while Articles 3.7 and 3.8 provide special rules for the determination of a material injury threat.

4.2 The Notion of 'Dumped Imports'

The notion of 'dumped imports' is used throughout Article 3. 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 Panel case, India argued that non-dumped transactions ought to be excluded from the injury analysis.

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

> *"It is possible that a calculation conducted consistently with the ADA would lead to the conclusion that one or another Indian producer should be attributed a zero or* de minimis *margin of dumping. In such a case, the imports attributable to such a producer/exporter may not be considered as 'dumped' for purposes of injury analysis. However, the Panel lacks legal competence to make a proper calculation and a consequent determination of dumping for any of the Indian producers. Its task is to review the determination of the EC authorities, not to replace that determination, where found to be inconsistent with the ADA, with its own determination. In any event, the Panel lacks the necessary data to undertake such a calculation. Thus, while the treatment of imports attributable to producers or exporters found to* ***not*** *be dumping is an interesting question, it is not an issue before the Panel and the Panel reaches no conclusions in this regard."*[18]
>
> **EC – Bed Linen Panel**

4.3 The Like Product/Product Line Exception

In Section 1 we explained that the like product classification plays a role in both the dumping and injury determination, because dumping and injury must be established with respect to this product.

Article 3.6 provides an exception to the principle of establishing whether the domestic industry producing the like product suffers injury due to dumped imports. The Article states that when available data do not permit the separate identification of the like product on the basis of the production process or the producers' sales and profits, the effects of the dumped imports must be assessed by examining 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 that the domestic industry brings an anti-dumping complaint against fresh cut red roses. It is possible that in such a case the domestic industry does not maintain specific data with regard to production processes, sales and profits of this product, but only with respect to the broader category of all fresh cut roses. In such a case, Article 3.6 would permit the investigating authority to assess the effects of the dumped imports with respect to all fresh cut roses.

[18] EC – Bed Linen Panel, para. 6.138.

4.4 The Domestic Industry

Article 4 of the ADA defines the domestic industry as all the domestic producers of the like product, or those whose collective output of the products constitutes a major proportion of the total domestic production. The ADA does not define the term 'a major proportion.'

There are two exceptions to this principle. Firstly, where domestic producers are associated with exporters or importers, or import the dumped products themselves, 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 founded a factory through an importing Member, thereby qualifying as a domestic producer. This domestic producer might be opposed to the imposition of anti-dumping measures on its related company and could therefore take the position that it is not injured by the dumped exports. Article 4.1(i) gives the investigating authority the power to exclude this producer from the injury analysis.

Secondly, Article 4.1(ii) states that a regional industry comprising only producers in a certain market of a Member's territory can exist if they sell all or almost all of their products in that market, and if that market's demand is not to any substantial degree supplied by producers located elsewhere in the territory. Injury may therefore be found, even when a major portion of the total domestic industry is not injured, provided that there is a concentration of dumped imports in an isolated market which causes injury to the producers of all or almost all of the products in that market. If the regional industry exception is applied, anti-dumping duties must be levied only on imports consigned for final consumption in that area. Where this is not allowed under the constitutional law of the importing Member, exporters should be given the opportunity to cease, or undertake to cease, exports to the area concerned. 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.

Finally, it is noted that the classification made by 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.

4.5 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 dumped imports, their effect on domestic prices 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 has overruled a Panel finding that follows from the words 'positive' and 'objective', finding that the injury determination should be based on all reasoning or facts disclosed to, or demonstrable by, the interested parties.

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

However, the AB emphasised the due process rights of interested parties, emanating from Articles 6 and 12 of the ADA, against which the injury determination must be scrutinised.

[19] Thailand – H-beams AB, para. 106–111.

Injury investigation period

A recommendation of the WTO Committee on Anti-dumping Practices provides that injury should preferably be analysed over a period of at least three years.[20] This period is often called the injury investigation period (IIP).

During the regular investigation period, the industry under review must be suffering material injury, while detailed injury margin calculations in the case of application of a lesser duty rule are based on existing data during this period. The analyses of injury and causation, however, needs a longer period in order to examine trend factors, such as those mentioned in Articles 3.4 and 3.5 of the ADA, hence the longer IIP.

Volume and prices

Article 3.2 provides more details on the volume and price analyses. It emphasises the relevance of a significant increase in dumped imports, either absolute or relative to production or consumption in the importing Member Country. 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, whether prices have been significantly depressed, or whether it prevented price increases, which otherwise would have occurred.

The wording is understandably broad because injury can ensue in many forms. Thus, in a typical situation there will be an increase in the volume of imports over the IIP, coupled with a decreasing trend in import prices. 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 not in absolute terms. Similarly, with regard to prices, domestic producers may be precluded from increasing prices, even when faced with increased costs for raw materials, due to the presence of low priced imports in the market which are sold at the same price as before.

Cumulation of dumped imports from various countries

The principle of cumulation, as contained in Article 3.3, means that when 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 and a cumulative assessment is appropriate considering the conditions of competition among 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 an examination of the impact of dumped imports on the domestic industry must include an evaluation of all relevant economic factors and indices affecting the state of the industry producing the like product in the importing country. The Article then mentions 15 specific factors and concludes that this list is not exhaustive and that no single or several of these factors can necessarily give decisive guidance.

The 15 Article 3.4 injury factors:

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

The scope of this obligation has been examined in four Panel proceedings thus far.[21] All four Panels, strongly supported by the Thailand – H-beams AB findings, held that the evaluation of the 15 factors is mandatory in each case and must be clear from the published documents.

[20] WTO Committee on Anti-dumping Practices – Recommendation Concerning the Periods of Data Collection for Anti-dumping Investigations. Adopted by the Committee on 5 May 2000. G/ADP/6 16 May 2000.

[21] Mexico HFCS, Thailand – H-beams, EC – Bed Linen and Guatemala – Cement II panels.

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

Thailand – H-Beams AB

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

EC – Bed Linen Panel

Threat of injury

It may happen that a domestic industry alleges that it is not yet suffering material injury, but is threatened with material injury which will develop into material injury unless anti-dumping measures are taken. Article 3.7 offers special provisions for a threat case, because such statements are easy to make and any investigation based on threat of material injury will necessarily be speculative since it involves an analysis of events that have not yet happened. Thus, a determination of threat must be based on facts and not merely on allegation, conjecture or remote possibility.

The change in circumstances in which the dumping would cause injury must be clearly foreseen and imminent. In making a threat determination, the importing Member authorities must 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 High Fructose Corn Syrup (HFCS) Panel concluded that a threat analysis must also include an evaluation of the Article 3.4 factors.

4.6 Causation/Other Known Factors

The evaluation of import volumes and prices and their impact on the domestic industry is not only relevant in the determination of whether the domestic industry has in fact suffered material injury, but will often be indicative of whether the injury has been caused by the dumped imports or by other factors.

Thus the first sentence of the ADA's Article 3.5 refers back to Articles 3.2 and 3.4, which states that the demonstration of the causal link must be based on an examination of all relevant evidence before the authorities. The authorities must also examine any known factors, other than the dumped imports injuring the domestic industry. The resulting injury must not be attributable to the dumped imports. Article 3.5 provides a non-exhaustive list of factors which may be relevant, depending on the facts of the case.

[22] Thailand – H-beams AB, para. 125.

[23] EC – Bed Linen Panel, para. 6.167.

Other factors as listed in Article 3.5:

"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."

The HFCS Panel addressed the Mexican authorities' analysis of an alleged restraint agreement between Mexican sugar refiners and soft drink bottlers.

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

Mexico HFCS Panel

Another 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. Such examination will instead depend on the arguments made by interested parties in the course of the administrative investigation.

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

Thailand – H-beams Panel

"While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry… Therefore, the Article 3.4 evaluation is also relevant in a threat case."[26]

Mexico HFCS Panel

4.7 Injury Margins

Article 9.1 of the ADA 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, there are two main calculation methods, namely price undercutting and price underselling.

4.7.1 Price undercutting: price comparison

For the purpose of calculating injury margins based on the price undercutting method, the authority normally compares the adjusted[27] weighted average resale price of foreign producers with the price of identical/similar models or products of domestic producers. The difference is the injury amount. As a percentage of the CIF

[24] Mexico HFCS Panel, para. 7.174.

[25] Thailand – H-beams Panel, para. 7.273.

[26] Mexico HFCS Panel, para. 7.126–7.127.

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

export price, the injury amount represents the injury margin. This method implies that if a foreign producer sells above the price of an identical model/product of the domestic 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 domestic producers;[28]
3. Selection of comparable models sold by foreign producers;[29]
4. Adjustment for differences in physical characteristics between the chosen models;
5. Adjustment for differences in the trade levels;
6. Calculation of weighted average resale price of representative domestic models;
7. Comparison of weighted average resale price of representative domestic models with adjusted prices of comparable foreign models (this gives the per unit, per model undercutting amount);
8. Undercutting per unit, multiplied by the quantity of the comparable foreign models sold (this gives the total undercutting amount);
9. Weighted average resale price of representative domestic models (7) multiplied by the quantity of comparable foreign models sold (this gives the total domestic resale value);
10. Total undercutting amount (8), divided by the total domestic 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 compared with the weighted average undercutting margin and the average domestic 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); and
13. Calculation of weighted average undercutting margin as a percentage of the weighted average CIF resale price.

The adjustment for physical differences (step 4) will normally be calculated on the basis of the differences in production cost, including selling, general and administrative (SGA) expenses. The profit in percentage terms, realised on sales of the finished product, will then be added to the cost. If, for example, domestic 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, and if the production cost including SGA of the timer is US$5 and the profit realised by producer S is 10%, a downward adjustment of US$5.50 would be made to the price of the foreign television. The price for the identical model would then be US$194.50.

With respect to the adjustment for differences in level of trade (step 5), it should be noted that the authority will usually 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 free on board (FOB) to an 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 price of the Hong Kong producer to arrive at the price at which he would have sold to a dealer in Germany. Such an adjustment would have to cover the ocean freight and insurance (e.g. 4%), customs duties payable at the EC border (14%), costs incurred (purchase costs, servicing, physical distribution, marketing, financing and overheads) and profit realised by the national distributor on sales to dealers (e.g. 20% in total). In the example above, this would then lead to the following adjustment:

US$194.50 x 1.04 (4% ocean freight and insurance) = 202.28 x 1.14 (14% customs duty on the CIF price) x 1.2 (20% margin distributor) = US$276.72.

[28] 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.

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

The example in Table 1 may clarify the calculation.

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

Domestic 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		

Step 1-3:	See steps 1 to 3, above
Step 4, physical difference adjustment:	Model B: 200 – 5.50 = 194.50
Step 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
Step 6, calculation of the weighted average resale price of domestic 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
Step 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
Step 8, total amount of undercutting	(3.28 x 150 =) 492 + (14.36 x 250 =) 3,590 = 4,082
Step 9, total domestic resale value:	(280 x 150 =) 42,000 + (263.33 x 250 =) 65,833 = 107,833
Step 10, weighted average undercutting margin:	4,082:107,833 x 100 = 3.79%
Step 11, adjusted average price level of the foreign producer:	100 – 3.79 = 96.21
Step 12, weighted average CIF price of the foreign producer:	96.21 x 100:138[30] x 104%[31] = 72.51
Step 13, weighted average undercutting margin as a percentage of the weighted average CIF resale price:	3.79:72.51 x 100 = 5.23%

4.7.2 Underselling: target prices

In some cases, the authority may find that it cannot simply compare the prices of domestic producers with those charged by foreign producers, because the former have been depressed or suppressed due to the dumped imports. This will typically be the case when domestic producers 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 price of the domestic producers and construct a target price, consisting of the full production costs of the domestic producers, including SGA, and a reasonable or target profit. This method also results in a zero injury margin when a producer is selling above the target price. The calculation steps will then be as follows:

1. Selection of the national markets to be investigated;
2. Selection of representative models produced and sold by domestic 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 trade levels;
6. Calculation of production cost of representative domestic 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 domestic models;

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

[31] CIF ratio = 104% of the selling price.

10. Comparison of the weighted average target price of representative domestic models with adjusted prices of comparable foreign models (this gives the per unit, per model underselling amount);
11. Underselling per unit, multiplied by the quantity of the comparable foreign models sold (this gives the total underselling amount);
12. Weighted average target price of representative domestic models (9), multiplied by the quantity of comparable foreign models sold (this gives the total EC resale value);
13. Total underselling amount (11), divided by the total domestic 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 compared with the average domestic 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.

As an example, Table 2 may clarify the calculation.

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

Domestic producer X				Foreign producer Y			
Model	**Cost**	**Target profit**	**Target 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		

Step 1–3:	See steps 1 to 3 above
Step 4, physical difference adjustment:	Model B: 200 – 5.50 = 194.50
Step 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
Steps 6–8:	See Table 2
Step 9, weighted average target price, domestic 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
Step 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
Step 11, total amount of underselling:	(48.08 x 150 =) 7,212 + (57.16 x 250 =) 14,290 = 21,502
Step 12, total EC resale value:	(324.8 x 150 =) 48,720 + (306.13 x 250 =) 76,532.5 = 125,252.5
Step 13, weighted average underselling margin:	21,502:125,252.5 x 100 = 17.7%
Step 14, adjusted average price level of the foreign producer:	100 – 17.17 = 82.83
Step 15, weighted average CIF price of the foreign producer:	82.83 x 100:138[32] x 104% = 62.42
Step 16, weighted average underselling margin as a percentage of the weighted average CIF resale price:	17.17:62.42 x 100 = 27.5%

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

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

5. Developing Country Members

5.1 Article 15 of the ADA

As mentioned earlier, developing countries have been active participants in WTO dispute settlement proceedings involving anti-dumping issues. At the ADA level, however, the position of developing countries does not differ from that of developed countries in most respects. 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, which remained unchanged from the Tokyo Round Code.

> *"It is recognised that special regard must be given by developed Member Countries to the special situation of developing Member Countries 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 Member Countries."*
>
> **Article 15, ADA**

5.2 Panel interpretation

Under the Tokyo Round Anti-dumping Code, Brazil challenged the EC for failing to apply Article 15 the EC – Cotton Yarns Panel however rejected these claims. As a result, many considered Article 15 a dead letter. However, the recent EC – Bed Linen Panel report 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 the imposition of an anti-dumping measure that would affect the essential interests of a developing country.*[33]
>
> *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."*[34]
>
> **EC – Bed Linen Panel**

5.3 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 a constructive remedy.

5.4 Timing

As Article 15 provides that constructive remedies must be explored before applying anti-dumping duties, a 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.

[33] EC – Bed Linen Panel, para. 6.233.

[34] EC – Bed Linen Panel, para. 6.238.

6. The National Procedures: Some Practical Issues

6.1 Introduction

It is relatively easy to adopt anti-dumping legislation and, in fact, the Rules Division of the WTO has developed an anti-dumping law template 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 section can however assist in this process. The section will also offer some suggestions for TFTA Member States contemplating the adoption and use of anti-dumping legislation, and provide a procedural flowchart outlining WTO obligations.

It must be emphasised that this Module does not advocate that TFTA Member States adopt and/or use anti-dumping measures to protect their domestic markets from dumped imports. The public and private sectors in these countries could, however, benefit from knowledge on anti-dumping calculations in order to better grasp this topic.

It is difficult to use anti-dumping legislation 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 ADA, which imposes many obligations on countries wishing to apply anti-dumping measures. The careless utilisation of anti-dumping duties may quickly lead to WTO challenges. Generally, TFTA Member States 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 challenges, it is nevertheless worth exploring the extent to which 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.

6.2 Procedural Issues

The ADA does not contain any provision on the institutional separation of dumping and injury determinations. In practice, most traditional users separate the determinations of dumping and injury, and in some cases these are even carried out by separate agencies. In spite of this, it seems preferable for TFTA Member States to have one single government agency to determine both dumping and injury, as it is unlikely that there will be many such cases in the beginning. Staff will also be efficiently trained by conducting an administrative proceeding from beginning to end and by investigating both dumping and the resulting injury.

A question often asked is which ministry should take charge of the daily administration of anti-dumping legislation. Considering the subject matter at hand, it makes 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. This department will maintain regular contact with domestic industries and will therefore be aware of the import competition faced by domestic producers. Key disciplines that could be represented in the department dealing with anti-dumping include law, economics and accounting. It is also recommended that the department is an independent technical entity as far as the conducting of investigations is concerned. However, the final decision on whether to impose duties might possibly be made at political level.

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.

In the process of conducting anti-dumping investigations, the authorities might, in the beginning, choose to be assisted by independent experts. This assistance might be helpful in preparing the questionnaire and during the verification of the responses, among others.

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 to promptly review administrative actions relating to final and review determinations. Such tribunals or procedures must be independent of the administrative authorities.

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

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; and
- **Article 13:** Judicial review.

It falls outside the scope of this section to discuss these procedural provisions in detail. However, the general tendency of the WTO Panel and Appellate Body has been to strictly interpret these provisions.

The Guatemala – Cement II Panel findings below may serve as an example of this, because they cover many of the procedural requirements.[35]

> *"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 its 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 investigation period 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 summarisation 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 …"*[36]
>
> **Guatemala – Cement II, Panel**

[35] The United States Hot Rolled Steel AB Report and the Argentina Tiles Panel Report offer interesting material on use of facts available.

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

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 alleviated retroactively in the course of the proceeding.

In its 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 at least 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 for the exclusion of the domestic producers' product from the definition of 'domestic industry'. This can arise in cases where the domestic producer is associated with an exporter or importer of the allegedly dumped product or imports that product themselves. 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 only adopt such time limits when provided for in the ADA. This is, for example, the case with regard to the eighteen month deadline for the conducting 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 some jurisdictions, the investigation period is a one year period preceding the official initiation of the proceeding. In other jurisdictions, 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. It therefore seems recommendable for developing countries to use a shorter investigation period.

Questionnaire format

Questionnaires are lists of questions addressed to the main interested parties, i.e. foreign producers/exporters, associated and separate importers and domestic producers. The responses to the questionnaires, as verified, form the basis for the calculation 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 including requests for information that are at most marginal to the real calculations. In spite of this trend, clear and simple questionnaires are preferable for both importing and exporting countries.

The information to be requested in these questionnaires 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 utilisation, employment, investments, stocks and sales in volume and value in the domestic and export markets of the product concerned. In some jurisdictions, questionnaires also request information on the production cost of the product concerned, while in others, data on production cost are generally not requested, unless the applicable industry alleges that sales below cost occurred. The latter 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, sending questionnaires and to conducting verifications at a limited number of companies. 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 questionnaires. In some jurisdictions, verifications tend to rely on random checking and cross-checking. These verifications generally take two to three days per company. In other jurisdictions, verifications are more thorough and take four to five days per company.

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, or only carry out short verifications, in order to avoid incurring unnecessary costs.

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. 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 disclosure system of some countries is more comprehensive, the 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, namely *ad valorem*, specific (fixed amount), or variable.

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

Specific and variable duties are more suitable 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 summary, specific and variable duties are easier to administer than *ad valorem* duties, and are better suited to stabilising domestic price levels. 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, these countries should keep in mind that it takes more resources to enforce minimum price undertakings as they require active monitoring.

Levy and suspension of duties

Another frequently asked question from developing countries is whether duties should be levied prospectively or retroactively. The WTO rules allow both systems.

In some jurisdictions, 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. In other jurisdictions, 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 later system arguably is much better and more precise. However, the prospective system seems more attractive, as it is simpler and experience shows requests for reviews and refunds only occur occasionally.

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

Finally, TFTA Member States 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 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 and hence were 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 motivated, or the motivation is insufficient. This requirement weighs heavy 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 official manner.

6.3 Dumping

Some countries have developed a number of discretionary practices in their dumping margin calculation methodologies, resulting in higher dumping margins. Some of them, such as the practice of inter-model zeroing, have been found to violate WTO rules. The application of these practices complicates the dumping margin calculations. For these reasons, TFTA countries are advised to keep the calculation straightforward.

6.4 Injury

Distinguishing injury and causation

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

With regard to the injury examination, WTO Panels, supported by the Appellate Body, have consistently held that all 15 injury factors mentioned in Article 3.4 of the ADA must be evaluated.[37] While not all 15 factors need to point to injury, it is nevertheless necessary to evaluate them in the published determinations. The HFCS Panel ruled that this obligation also exists when the investigating authority examines whether anti-

[37] See, for instance, the Panel report of 28 January 2000: Mexico Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States, WT/DS132/R, para. 7.128; and the Panel report of 30 October 2000, European Communities Anti-dumping duties on imports of cotton-type bed linen from India, WT/DS141/R, para. 6.159.

dumping duties should be imposed on the basis of threat of material injury to the domestic industry. The H-beams, Bed Linen and Cement II Panels took the same approach. In addition, the Appellate Body upheld the H-beams Panel approach.

As far as causation is concerned, the Hot Rolled Steel Products Panel ruled that Article 3.5 of the ADA requires investigating authorities to consider and examine other known factors that are at the same time injuring the domestic industry before determining that dumped imports are causing material injury within the meaning of Articles 3.2 and 3.4 of the ADA. The Panel continued: "it does not suffice to merely consider these other factors. The authorities must also make sure that imports are not regarded as causing injuries that are in fact caused by these other factors."[38]

Injury margins/lesser duty rule

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. For this reason, certain jurisdictions do not calculate injury margins. These countries impose the duty on the basis of the dumping margin. By contrast, other countries have implemented provisions of Article 9.1 and routinely calculate injury and 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, TFTA countries desiring a simple system might be better off not applying a lesser duty rule. If they nevertheless wish to apply this rule, they could use simple methods.

Public interest criterion

In addition to findings of dumping and injury, some jurisdictions require that anti-dumping duties be imposed only if they are shown to be in the interest of the domestic industry.

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, even if the technical conditions are met.

6.5 Circumvention

Despite the absence of multilateral rules on anti-circumvention, a number of jurisdictions have adopted anti-circumvention provisions unilaterally. The WTO legality of these provisions is doubtful, and for that reason it does not appear recommendable for TFTA countries to adopt such legislation. Customs laws, notably customs classification and non-preferential rules of origin, already offer ways to combat instances of importing country and third country circumvention.

If TFTA Member States nevertheless feel compelled to adopt anti-circumvention legislation, it is recommended that circumvention is very tightly defined and that strict conditions are imposed for the imposition of anti-circumvention measures.

[38] See the Panel report of 28 February 2001: United States Anti-dumping measures on certain hot-rolled steel products from Japan, WT/DS184/R, para. 7.251.

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,[39] 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[40] of the parts or components referred to in sub-paragraph (iii) is not less than 70 percent of the total cost of all parts or components used in the assembly or completion operation of the like product,[41] 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 percent of the ex factory cost[42] 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 the criteria in paragraph 1 are fully met. 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 mutatis mutandis *to investigations carried out under this Article. The provisions regarding refund and review shall apply to anti-dumping duties imposed, pursuant to this Article, on parts or components assembled or completed in the importing country."*

[39] 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 (footnote No. 2 in original).

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

[41] I.e. parts or components purchased in the importing country, parts or components referred to in sub-paragraph (iii), other imported parts or components (including parts or components imported from a third country) and parts or components fabricated internally (footnote No. 2 in original).

[42] I.e. cost of materials, labour and factory overheads (footnote No. 3 in original).

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

> *"When it became apparent that no agreement could be reached on the proposals made by the United States to amend the anti-circumvention provisions in the Dunkel text, the anti-circumvention provisions and country hopping provisions were deleted in their entirety, at the request of the United States."*[43] [44]

6.6 Rules of Origin

Anti-dumping duties are normally imposed on merchandise originating in or exported from a certain country. The imposition of anti-dumping duties on the basis of country of exportation may lead to easy circumvention by means of, for example, trans-shipment. Therefore, imposition of anti-dumping duties on the basis of the country of origin, while more complicated, may sometimes be more effective. 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 anti-dumping duties imposed.

6.7 Procedural Flowchart

The following flowchart shows the various procedural stages in an anti-dumping investigation. For easy reference, time limits are included where they are provided for under the ADA:

Day	Stage of the proceeding
	Lodging of a written complaint by the domestic industry.
	↓
	Analysis of the complaint 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 lodged.
	↓
1	The investigating authority rejects the complaint if there is insufficient *prima facie* evidence that injurious dumping has taken place, and proceeding is not initiated. Otherwise, the investigating authority initiates the investigation in which case public notice must be given.
	↓
	The full written application is submitted to the known exporters and authorities of the exporting Member *as soon as the investigation is initiated*. Upon request, 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 is effective 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 the appropriate diplomatic representative of the exporting Member. Extensions might 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.
	↓

[43] Koulen, M. The New Anti-dumping Code through its Negotiating History. In: The Uruguay Round Results: A European Lawyers' Perspective, eds Burgeois, H.J., Berrod, J.F. and Fournier, E.G. 1995. p 191.

[44] The WTO Committee on Anti-dumping Practices has a special working group on circumvention.

Day	Stage of the proceeding
	Analysis of questionnaire responses and submissions, on-the-spot verifications of interested parties. The investigating authority may carry out the above verifications after the imposition of provisional anti-dumping measures.
	Analysis of all data collected. Provisional determination reached.
No sooner than 60 days from day 1	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 opportunity to submit comments to the findings on the basis of which the investigating authority decided to impose provisional anti-dumping measures.
	Interested parties have the right to be heard, submit comments, access non-confidential (public) files and hold meetings.
	Analysis by the investigating authority of the comments and evidence collected. Definitive determination reached.
	Transmission of definitive disclosure to interested parties. This disclosure must take place in sufficient time for interested parties to be able to defend their interests.
	Expiry of deadline for interested parties to submit their comments on the investigating authority's findings.
	Analysis by the investigating authority of the comments submitted by interested parties.
No later than 12 months from day 1 or four months after the date of imposition of provisional anti-dumping duties. In exceptional circumstances, this can occur no later than 18 months after initiation or six months after the imposition of provisional anti-dumping duties.	Adoption and publication of the notice imposing definitive measures for up to five years. In the event that it has been found that sales did not take place at dumped prices or that the domestic industry did not suffer injury due to the imports from the targeted country/ies, a notice of termination of the proceeding must be published.

LIST OF ABBREVIATIONS

AB	Appellate Body
ADA	Anti-dumping Agreement
ADP	Anti-dumping Practices
CIF	Cost, insurance and freight
COMESA	Common Market for Eastern and Southern Africa
CTVs	Colour televisions
DOC	Department of Commerce
DSB	Dispute Settlement Body
EAC	Eastern African Community
EC	European Communities
FOB	Free on board
GATT	General Agreement on Tariffs and Trade
HFCS	High Fructose Corn Syrup
HS	Harmonised system
IP	Investigation period
IPP	Injury investigation period
MEG	Mono ethylene glycol
PSF	Polyester staple fibre
PTA	Purified terephthalic acid
RECs	Regional Economic Communities
SADC	Southern African Development Community
SGA	Selling and general costs
TFTA	Tripartite Free Trade Area
T-to-T	Transaction-to-transaction
UNCTAD	United Nations Conference on Trade and Development
US	United States
WA	Weighted average
WTO	World Trade Organization

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