EVALUATION OF THE EUROPEAN UNION'S TRADE DEFENCE INSTRUMENTS

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FINAL EVALUATION STUDY

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VOLUME 1: MAIN REPORT

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LIST OF ABBREVIATIONS

AB	Appellate Body
ACS	Australian Customs and Border Protection Service
AD	Anti-Dumping
ADA	Anti-Dumping Agreement
ADR	Anti-Dumping Regulation
ADS	Anti-Dumping System
APO	Administrative Protective Order
AS	Anti-Subsidy
ASCM	Agreement on Subsidies and Countervailing Measures
ASR	Anti-Subsidy Regulation
BOFT	Bureau of Foreign Trade
BPI	Business Proprietary Information
C.F.R.	Code of Federal Regulations
CAD	Canadian Dollar
CBSA	Canada Border Services Agency
CBSA	Canada Border Services Agency
CEGAT	Custom, Excise, and Gold (Control) Appellate Tribunal
CFI	Court of First Instance
CIF	Cost, Insurance, Freight
CITT	Canadian International Trade Tribunal
CT	Customs Tariff
CV	Countervailing
DA	Designated Authority
DG	Directorate-General
DGAD	Directorate General of Anti Dumping and Allied Duties
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECJ	European Court of Justice
EU	European Union
FDI	Foreign Direct Investment
FOB	Free On Board
FYROM	Former Yugoslav Republic of Macedonia
GAAP	Generally Accepted Accounting Principles
GAO	Government Accountability Office
GATT	General Agreement on Tariffs and Trade
GC	General Court
GDP	Gross Domestic Product
GVC	Global Value Chain
HHI	Herfindahl-Hirschman Index
HQ	Headquarter
HS	Harmonised System
IAS	International Accounting Standards
IBII	Investigation Bureau of Industry Injury
IMF	International Monetary Fund
IP	Investigation Period
IRR	Incidence Rate Ratios
ISO	International Organisation for Standardisation
IT	Individual Treatment
ITA	International Trade Administration
ITAC	International Trade Administration Commission
ITC	International Trade Commission
JIA	Japan's Investigating Authorities
LFI	Lafay Index
LTFV	Less Than Fair Value
MES	Market Economy Status
MET	Market Economy Treatment
MFN	Most-Favoured Nation
MIP	Minimum Import Price
MOFCOM	Ministry of Commerce
NIFOB	Non-Injurious FOB
NIP	Non-Injurious Price
NME	Non-Market Economy
NV	Normal Value
OECD	Organisation for Economic Cooperation and Development
OEM	Original Equipment Manufacturer
OJ	Official Journal
OMA	Orderly Marketing Arrangement
PAIA	Promotion of Access to Information Act
PCN	Product Control Numbers
R&D	Research and Development
RCA	Revealed Comparative Advantage
REER	Real Effective Exchange Rate
ROW	Rest of the World
Rxr	Real Exchange Rate
SACU	Southern African Customs Union
SARS	South African Revenue Services
SCM	Subsidies and Countervailing Measures

SDT	Special and Differential Treatment
SETC	State Economic and Trade Commission
SGA	Selling, General and Administrative
SIMA	Special Import Measures Act
SME	Small and Medium Sized Enterprises
SOE	State Owned Enterprise
TD	Trade Defence
TDI	Trade Defence Instruments
ToR	Terms of Reference
TQM	Total Quality Management
TSI	Trade Specialisation Index
UAE	United Arab Emirates
UNCTAD	United Nations Conference on Trade and Development
USITC	United States International Trade Commission
USP	Unsuppressed Selling Price
VAT	Value Added Tax
VER	Voluntary Export Restraint
VFDE	Value for Duty Equivalent
VRA	Voluntary Restraint Agreement
WTO	World Trade Organisation

EXECUTIVE SUMMARY

Trade is a cornerstone of the European Union's (EU's) economic prosperity. For EU consumers, trade provides access to a wider variety of goods at lower prices than could be produced domestically. For EU businesses, it provides larger markets and access to essential production inputs, including technology developed abroad. For EU workers, it creates the basis for higher paying jobs as the EU specialises in doing what it does best. And for trading partners abroad, access to the large and dynamic EU market provides reciprocal benefits.

International trade takes place within a framework of rules developed through negotiations, refined through practice, and clarified through litigation before the national courts and international trade dispute settlement mechanisms under the World Trade Organisation (WTO). These rules are designed to ensure that trade works to the mutual benefit of the trading partners and is based on genuine competitive advantages.

The rules-based international trade system provides remedies against unfair trade practices. It allows for the imposition of anti-dumping measures if imported goods are sold at less than fair market value ("dumping"), and for countervailing measures if the imported goods benefit from subsidies provided by foreign governments, provided that the dumped or subsidised imports cause or threaten to cause injury to the domestic industry in the importing country. The EU's (and other WTO members') use of these trade defence instruments (TDI) is based on the relevant rules and procedures set out in the WTO Agreements on anti-dumping and subsidies and countervailing measures.

This report evaluates the EU's use of TDI. The review is timely on several grounds. Firstly, there have been profound changes in the global division of labour and organisation of production over the last decade. This has led the WTO to coin the term "made in the world" to describe how products are made today. Secondly, macroeconomic stress in the context of economic crisis has led countries to resort to extraordinary policy measures with significant implications for global trade flows. Finally, the increased use of TDI by the EU's trading partners, in particular by emerging economies, has led to an increasing risk of retaliation against EU producers requesting the application of TDI. These changes in the global trading environment raise fundamental questions – not only for the EU but for all countries using TDI – as to the ability of trade defence to deliver its intended results. This report takes up these questions, focussing on the issues of relevance for the EU.

Scope of the Evaluation

This evaluation is made pursuant to the EU regulatory requirement that policies be evaluated regularly and systematically. In line with the Terms of Reference for the evaluation, this report has **five inter-related objectives**, namely to provide: Section 1.3

1) a concise description of the EU's TD system and practice;
2) a balanced economic analysis of the EU's use of TDI in the context of the current international legal and regulatory framework and in light of economic realities;
3) a review of the EU basic Anti-dumping and Anti-subsidy Regulations in light of the administrative practice of the EU institutions, the judgments of the Court of Justice of the European Union and the recommendations of the WTO Dispute Settlement Body (DSB);
4) a comparison of EU policy and practice to that of a selected group of EU trading partners, i.e. Australia, Canada, China, India, New Zealand, South Africa and the USA; and
5) in light of the foregoing, an evaluation of the performance, methods, utilisation and effectiveness of the present TDI scheme in achieving its trade policy objectives.

The evaluation period is 2005-2010. This period was chosen in view of the fact that the previous evaluation of EU TDI was undertaken in 2005 and covered practice until the end of 2004. The evaluation does not cover the rarely used safeguards instrument.

Evaluation methodology and sources of information

Section 1.4

The evaluation applied a three-dimensional methodology, combining an economic analysis of causes and effects of TDI with a cross-country evaluation of TD policies and procedures and a legal review of the two basic Regulations. The documentary sources for the evaluation were:

- a review of documents: official EU documents (notices of initiation, regulations), reports and guidelines, secondary literature;
- interviews and written consultations of 65 stakeholders, including the European Commission, other EU institutions and Member States, Union industry representatives, exporters/ importers/users and other stakeholders (consumers, trade unions, trade lawyers, etc.); and
- an online survey among EU firms with 245 responses, to collect their views on, and experience with, the EU's use of TDI.

How the EU uses TDI

See appendix I1 for a description of EU TDI

The EU's use of TD measures is driven by complaints from industry alleging dumping and/or subsidisation of imports and providing evidence of injury or threat of injury. The European Commission investigates the claims, determines whether they are substantiated, calculates the level of duties necessary to remedy the injurious effects, and determines whether imposition of measures would be in the interests of the Union. If measures are imposed, they normally remain in place for five years, unless removed earlier pursuant to an interim review, or extended for an additional term pursuant to an expiry review.

Section 1.2

While the **EU is the third most frequent user of TDI after India and the USA**, its **use of TDI is moderate in relation to its share in world trade**: the EU accounted for 17.8% of world imports (excluding intra-EU trade) during the evaluation period, but only for 10.7% of all TD investigations and 9.4% of all measures imposed. The **amount of EU imports affected is also quite small: in-force measures affect about 0.6% of EU imports**. Measured this way, on the basis of available evidence, the EU's use of TDI is moderate, covering a greater share of imports than Australia, Canada and South Africa but a smaller share than China, India and the United States.

In the evaluation period 2005-2010, the European Commission initiated 68 anti-dumping and 10 anti-subsidy investigations. 80 new measures were imposed. 79 expiry reviews led to the extension of measures in 54 cases. At the same time, the European Commission terminated measures pursuant to interim and expiry reviews in 28 cases; an additional 75 measures expired under the sunset provisions. The stock of in-force measures (excl. undertakings and measures extended following anti-circumvention investigations) decreased from 140 at the beginning of the evaluation period to 117 at the end.

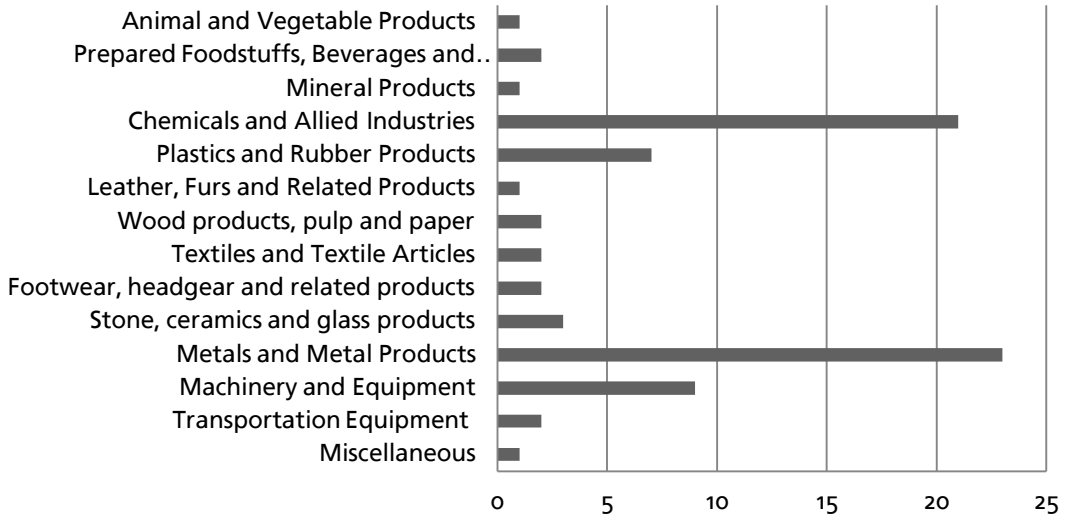
Section 2.2.1

TD measures were taken in a wide range of agricultural and industrial sectors in the evaluation period. However, there was a heavy concentration of cases in the chemicals and metal products sectors, with lesser spikes in the plastics and machinery and equipment sectors.

In terms of exporting countries, 130 countries were named in the new 78 investigations; most of these were developing economies, with China accounting for over one-third of all individual investigations.

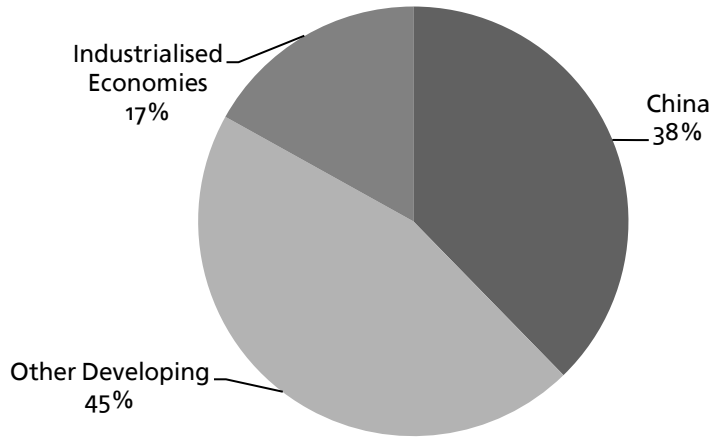
The majority of the TD cases opened in the evaluation period concerned fairly basic industrial goods that compete largely on price. Such goods are therefore likely to attract competition from emerging market exporters. Exporters from these countries were involved in 83% of the investigations initiated in the evaluation period.

EU TD investigations, by Major Industrial Sector, 2005-2010 (number of cases)



Source: Authors' calculations based on DG Trade investigations database

Countries Named in EU TD investigations, 2005-2010



Source: Authors' calculations based on DG Trade investigations database

Findings

The economics of the EU's TD practice

The observed effect of TD measures is to raise the price and reduce the volume of imports of the subject goods. This is simply the effect of tariffs and thus indistinguishable from ordinary trade protection: domestic producers benefit but consumers or downstream industries are negatively affected. Since standard economic analysis indicates that the costs to consumers or downstream industries of the higher prices induced by tariffs are normally larger than the benefits to domestic

producers, the economic rationale for TD depends crucially on whether the practices addressed by trade defence measures are anti-competitive or market-distorting, or entail excessive adjustment costs by the EU industry.

Section 2.1

The economic analysis in chapter 2 demonstrates that trade defence is not ordinary protection: it is targeted, contingent and (in the normal course) temporary. All three features are important. TDI target practices, such as forms of price discrimination by firms and subsidies provided by government, which imply a transfer of economic welfare from the origin country to the EU. In a global perspective, such transfers of welfare are largely neutral as they net out each other. By the same token, the reversal of such practice through trade defence measures is also largely neutral. At the same time, the remedy of injury to the importing country producers can make the intervention globally welfare-improving. Finally, in a multilateral trading system, with many sources of imports and many export markets, imposing trade defence measures on one or a few bilateral flows has limited effects on welfare because trade flows mostly rearrange (trade diversion and deflection) rather than disappear.

Section 2.2.2

The review of the motives for TDI confirmed the general view in the economic literature that the stated rationale for EU TDI, i.e. countering unfair trading practices, finds little support based on the actual pattern of use. Only a handful of the TDI cases examined involved pricing practices (on the part of the foreign firms) which would be likely to prompt domestic competition authorities to intervene, if similar pricing behaviour had occurred within the domestic market. It would therefore appear that **TDI are not usually countering anti-competitive predatory dumping**. That being said, in a certain number of cases, primarily those in which measures have been in place for an extended period of time, usually involving countries in transition to market economies, the circumstances suggest TD measures are countering large and persistent distortions in the global economy.

Sections 2.2.3-2.2.8

If the EU's TD practice does not appear to act for the most part as the international trade analogue of domestic competition policy, it is legitimate to ask what it does do. The evaluation therefore examined the following potential roles of TDI:

- as a macroeconomic buffer;
- as a tool of industrial policy;
- as a retaliatory mechanism to protect domestic exporter interests;
- as the policy tool of choice to deliver insurance against excessive trade pressures stemming from trade liberalisation; or
- as protection for communities vulnerable to disruptive change stemming from trade (e.g., relatively isolated communities heavily dependent on particular plants for local employment).

Section 2.2.6

Most of these motivations appear to be present, in varying degrees, in the EU's use of TDI in the evaluation period. However, the most important function of TDI appears to have been to safeguard the EU's economic interests in the wake of the integration of major emerging markets such as China into the global economy. The EU, in liberalising emerging markets' access to its market, has *de facto* retained the right to use TDI as a form of insurance policy. This perspective on TDI reconciles trade liberalisation with the simultaneous occasional recourse to protection. The fact that **anti-dumping has been the main instrument of this insurance policy, rather than the provisions in the WTO intended for the purpose (safeguards and renegotiation of commitments)**, appears to reflect weaknesses in the design of these latter instruments. At the same time, in a "second best" sense, it can be considered as a legitimate use of TDI.

This systemic benefit of TDI comes with certain systemic costs. First, TDI have been shown to have a "chilling" effect on firms' international business decisions, both as importers of

intermediate inputs, as exporters and as participants in global value chains. This has negative impacts on their longer-term productivity and innovation performance. Second, when firms respond to TDI duties by re-arranging their global market presence, there is an implied write-off of assets associated with the sunk costs of market entry; these costs are not measured but could be significant. Third, TDI may at times increase the scope for anti-competitive collusive practices by domestic firms. Finally, there are administrative costs of applying TDI.

Section 2.2.8

As in all public policy areas, it is important to assess whether the implementation of TDI achieved its objectives and whether the benefits of the instrument outweighed the costs. In the present evaluation, it could not be confirmed, as stated above, that TDI generally achieve the *stated* objective of restoring competitive conditions. The question then is whether TDI fulfil the *implicit* objective as suggested by the observed pattern of use: that is, whether they deliver the protection that the insurance role implies – i.e., is trade defence an effective insurance policy?

Section 2.3.2

The level of protection that the EU provided to industry through TDI in the evaluation period was moderate in international comparison. Anti-dumping duties applied by the EU in the evaluation period ranged from 5.4% to 90.6% with a simple average of about 33%. Countervailing duties ranged from 4.3% to 53.1% with a simple average of 22.7%. This is high compared to the EU's average applied most-favoured nation duty in 2011 which was 6.4%. However, compared to duties imposed on the same sectors by the USA, the most comparable jurisdiction to the EU, the evaluation shows that US duties were three times as high as those of the EU on average. The "lesser duty rule" that the EU applies (which results in duties sufficient only to offset injury, not necessarily the full amount of dumping or subsidisation found) contributed to this outcome, but only moderately: the average reduction of the EU duty rates as a result of the lesser duty rule was about 9.3 percentage points, resulting in duties 28% lower than they would have been without the lesser duty rule. This means that even without the application of the lesser duty rule EU TDI duties would have still been lower than US duties.

Section 2.3.3

Nonetheless, the available evidence suggests that the level of protection provided is more than sufficient to offset injury:

- industries applying for protection tend to have below average price mark-ups prior to protection;
- protection allows them to increase mark-ups;
- the increase in mark-ups more than compensates for the under-performance in the pre-protection period compared to peer industries; and
- the higher mark-ups persist after protection is terminated.

While trade defence thus appears to be effective in a static sense, questions have been raised concerning its dynamic effects. Firm-level studies suggest that firm exit rates are reduced in protected industries relative to comparable unprotected industries. Accordingly, protection slows the normal pace of renewal of the industry and the transfer of market share from low-productivity to high-productivity firms, apparently weakening productivity growth at the industry level. At the same time, the evidence suggests that lower-productivity firms invest and make structural adjustments to improve their competitiveness during the period of protection. The evaluation raises a caveat concerning this finding: the literature on capital investment shows that young firms investing heavily in new technology and still gaining experience with the new technology are less profitable than older firms that are investing less but are extracting returns from their prior investments and experience capital. However, the extent to which this consideration affects the dynamic effects of TDI would require further in-depth analysis based on firm-level data. Accordingly, only **a provisional conclusion is possible here, namely that trade defence measures deployed to protect industries with many young firms and in**

which the pace of process innovation is rapid will likely have more positive welfare effects than TDI in other sectors.

Trade defence measures might in principle be enforced indefinitely if the conditions that gave rise to injury do not change (e.g., if foreign government subsidy policies remain in place). However, the EU extends only a minority of measures. 52% of EU trade defence measures are revoked during the initial five-year period or expire at the end of it without an expiry review, and an additional 14% are terminated following the expiry review. Another 13% of measures are in force for between ten and 15 years and only 4% of measures were in place for 15 and more years. Most measures which are in place for long periods (more than ten years) are in the chemical sector (fertilisers, organic chemicals and salts). In terms of countries affected by long-term measures, China and Russia are over-represented. Accordingly, **TDI protection in EU practice is typically temporary in nature**. This is important from a systemic perspective since the provision of protection implicitly comes with the likelihood of trade liberalisation in due course, which firms must take into account.

Section 2.3.2.2

In summary, the evidence assembled in the study suggests that the **protection given by EU TDI is on the whole effective and reasonably well calibrated, although the protection is moderately greater than what would be required to offset injury, even with the application of the lesser duty rule.**

In a forward-looking sense, three main concerns are raised by the review. First, TDI rules were developed with national production systems rather than global value chains in mind. Effectively, measures are designed so as to protect the last stage of value creation, i.e. the stage which gives a good its definitive character for customs valuation purposes (e.g., a tariff classification). Thus, EU firms that choose to outsource *intermediate* stages of productions can be protected by TDI. However, EU firms that outsource the *final* stage of transformation may be targeted by TDI, even though this strategy may add more value to the EU economy. In the evaluation period, the complications for policy posed by this issue arose only in few instances. This reflects the fact that global value chains in which EU firms participate feature predominantly north-north, intra-firm trade, much of it in business services. EU TD measures, by contrast, targeted predominantly north-south trade in goods. However, in some cases identified in the evaluation period, problems did arise. Moreover, in the future, growing use of global production systems can only work to further complicate matters for TDI administration.

Section 2.3.4

Second, the study finds that the EU TD system is comparatively slow and somewhat costly for industry to use: on average, it takes almost 2.5 years from the onset of injury to the implementation of measures. The cost to a complainant of participating in an investigation is typically around EUR 200,000 but can be as high as EUR 1 million. **In international comparison, the EU system fares worse in terms of duration of investigations (several peer countries take considerably less time to complete investigations) but better on costs**: in the USA, the typical cost for a complainant may easily exceed EUR 700,000 to EUR 1.1 million. While the relatively lengthy process and the associated costs serve as a discipline against overuse, for small and medium-sized enterprises, this compounds the problems of obtaining TDI relief where it might be warranted.

Section 2.3.2.3 and 4.8

Third, the growing threat of retaliation against EU producers – mainly from emerging markets – and the perceived problem of circumvention by foreign exporters of TD measures, are contributing to making TDI a less attractive solution for EU industry.

To summarise, in a larger policy framework, in which it is recognised that trade liberalisation is facilitated by contingent protection, the **EU's TDI use in the evaluation period can be shown to be welfare enhancing. Given the importance of an open trading regime to domestic competitiveness, TDI can therefore be argued to be competitiveness-enhancing. At the same time, it is not appropriately designed for the actual function it fulfils; moreover, basic design features make it increasingly inappropriate for the emerging world of globally fragmented production systems.** Section 2.4

The consistency of EU TD practice with EU regulations and WTO obligations

Over the evaluation period, there were 35 judgments on EU Court cases related to anti-dumping and anti-subsidy instruments (i.e. on average six cases per year). This is only a fraction of the number of TDI court cases in the USA, which has a similar number of TD measures in force. However, the number of cases decided per year rose more or less steadily over the period 2005 to 2010. Also, cases tended to become more complex and to cover more legal issues. Thus, the total number of main legal issues addressed in the 35 cases reviewed amounted to 82, i.e. an average of 2.3 per case, rising from 1.0 in 2005 to 3.1 in 2010. Section 3.1

The "success rate" of EU institutions in EU Court cases, i.e. the share of claims dismissed by the Courts, stands at 80.5% over the six-year period (66 out of 82 claims), with an increasing trend over time. In 2010 Court decisions, all claims were dismissed (i.e. the success rate was 100%). Compliance of the EU institutions with the basic Regulations is very high and the interpretation of the Regulations by the Commission during investigations and determination of measures is usually confirmed by the Courts to be in compliance with the spirit of the law.

As regards the compliance of EU TDI with WTO rules, since 1995 the EU has experienced fewer challenges than its share in global trade defence measures. Thus, while the EU imposed 11.1% of all anti-dumping measures over the period 1995-2010, it was involved as a respondent in only 9.5% of WTO disputes on anti-dumping. The corresponding shares for countervailing measures were 17.5% (EU share in measures) and 12.6% (EU share in disputes on countervailing measures). In the evaluation period, in the three cases against the EU brought forward by China, South Korea and Norway, the EU's success rate, as measured by the share of rejected claims was over 50%. It is concluded that, despite recent findings of violation of specific WTO rules by EU TDI (such as individual treatment), the degree of compliance of EU TDI law and practice with WTO rules is satisfactory. Section 3.2

Overall, the **degree of compliance of EU TD practice with the two basic Regulations and WTO rules is satisfactory; the number of legal challenges (in EU Courts or at the WTO) is comparatively low, and the EU's success rate is high**. Accordingly, only a limited number of amendments to the two basic Regulations that implement the EU's TD system are recommended in response to decisions handed down by the EU Courts or by the WTO Dispute Settlement Body. At the same time, performance trends during the evaluation period (increased number of legal challenges, rising number of issues disputed, and only an average success rate in WTO disputes) show that a **certain degree of alertness is warranted**. It is understood that the Commission is aware of these trends, and part of the objectives of its internal management programme is to ensure that trade defence practice is in line with the provisions of the basic Regulations and WTO rules.

EU TD practice in international comparison

The international comparison in chapter 4 provides a structured examination of international TD practice. This analysis focuses on a number of contentious issues bearing on the efficiency and perceived fairness of practice, drawing on more complete reviews of the peer country systems assembled in the course of evaluation.

Section 4.1

Institutional structure of TDI and the question of independence from political influence: Different countries have adopted different institutional structures to administer TDI. A central question concerns the objectivity of the system and whether decisions are rules-based or subject to political influence. Several countries (including Australia and New Zealand) rely on the established and institutionalised neutrality of their civil service to deliver objective decisions consistent with the rules and principles of the WTO rules-based system; others (including Canada, South Africa and the USA) have established independent investigating authorities to distance TDI proceedings from overt political influence.

In the EU framework, by contrast, the investigating authority is a Directorate within the Commission, and definitive decisions are taken by a political body (the Council). Notwithstanding the direct involvement of political bodies in the EU's decision-making process, there is only anecdotal evidence in the context of particularly contentious cases regarding politicisation of decisions; the evaluation team could find no systematic evidence for such interference. In terms of decisions rendered, the **EU TD system does not appear to be more politicised than that of most peer countries**, an interpretation supported by the degree to which decisions have withstood legal challenge.

Section 4.2 and 4.3

The implications of globalisation of production for the ability to benefit from TDI protection: The emergence of global value chains calls into question the established understanding of what constitutes the "domestic industry" under TD practice. With inward and outward FDI, and various business outsourcing and offshoring strategies, a divergence in interests within the domestic industry can emerge, depending on the business strategy chosen by different firms, thus making it more difficult to meet standing requirements for the initiation of investigations. As well, a divergence between the interests of mobile capital and immobile labour emerges which raises the question of whether TDI will be effective in protecting domestic value-added in the emerging global framework.

In this context, the question has emerged for the EU of whether labour unions should have the right to bring cases and/or whether the Commission should initiate cases *ex officio*.

International practice varies in both regards. Australia and the USA provide for labour union-initiated complaints; New Zealand and South Africa do as well, but only in cooperation with industry; the EU, along with Canada, China and India do not allow such proceedings. Clearly, given the importance of confidential business information to investigations, such an innovation would have far-reaching procedural implications, including the possible need to impose obligations on industry to cooperate, a power which the Commission does not presently have. Nonetheless, although it is not a panacea for all of the situations mentioned where domestic producers might refrain from submitting or supporting a complaint, it is recommended that the right to submit complaints and have standing be extended to labour representatives. Regarding conflicts between employees and management of domestic producers, guidance could be taken from US rules.

The main alternative is for the TDI authorities to step in with *ex officio* investigations, particularly in respect of subsidies, given that subsidy investigations directly target a foreign government's policies and firms might be reticent to take such steps because of the possibility of retaliation or pressure on their business interests in that country. Most peer countries (New Zealand being the exception) provide for *ex officio* investigations but seldom use it. The **EU system also provides for this option but the authorities have not made use of in the past except for reviews; the Commission has indicated that it is willing to consider *ex officio* cases against subsidies in some cases.** The evaluation team recommends that the EU continue to use *ex officio* initiations of new investigations only in special circumstances where the business interests of some EU firms in the country of export might militate against their joining a specific complaint and thus compromise the ability of the industry to gain standing for a complaint.

Transparency and confidentiality: WTO rules require that non-confidential information be made available to interested parties but allow members the discretion of whether to provide access to confidential information and the design of the system of controls regarding such access. Countries have used the policy space afforded by WTO rules to develop different systems with differing implications for cost and transparency. The USA through its Administrative Protective Order (APO) system, and Canada through individual confidentiality agreements, provide legal counsel for the parties access on a controlled basis, with sanctions for unauthorised disclosure. Other peer countries and the EU do not allow access to confidential information, although the EU does provide access to confidential information to the courts. Section 4.4

The evaluation team notes that an alternative to an APO system such as the one in the USA is to provide for the possibility of having the **Hearing Officer check, upon request by interested parties, that confidential information has been taken into account correctly by the Commission in the investigations.** This option has in fact already been selected by the Commission and awaits full implementation. The introduction of a system to provide access to confidential information (such as the APO system) is therefore not recommended at this stage. However, it is recommended that a review be undertaken once some experience has been gained with the Hearing Officer's role of verifying that confidential information has been duly considered in an investigation.

Treatment of non-market economies (NMEs): Although the WTO Anti-dumping Agreement does not specifically refer to NMEs, in the case of a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, or in which a "particular market situation" exists, WTO rules provide for TD authorities to determine normal value on a basis other than the normal domestic selling prices in the exporting country. Significant trading countries for which NME status is an issue internationally include China, Vietnam, Russia, the Ukraine and other former Soviet Republics (notably, the EU treats Russia and the Ukraine as market economies whereas some of the peer countries do not). However, international practice varies in terms of how the latitude for NME status is used, ranging from the absence of the concept of NME (in China), a case-by-case assessment (most peer countries), to fixed lists of NMEs (India, USA, and the EU). Likewise, the modalities for a country being granted market economy status (MES) or market economy treatment (MET) for exporters from NMEs vary considerably. Section 4.5

In the EU, NME countries are listed in the ADR. By contrast, in some peer countries, the determination of whether non-market conditions exist is determined by the administrative authorities on the basis of the factual context of the industry and country concerned. The establishment of MES by the EU tends inherently to be a long process and so far has been completed only by two countries. Regarding the treatment of NMEs at the country level, the EU

system provides less flexibility than others that are presently in use. On the other hand, requests for MET, which is treated on an enterprise level (rather than on a sector/industry level as in Canada or the USA), are frequent.

Changes in TD practice will be required with the expiry of China's NME status in 2016, and Vietnam's in 2019. Moreover, recent **WTO DSB decisions will require EU practice regarding Individual Treatment to be changed or abolished**. The practices of Australia, which has granted China market economy status and utilises the "particular market situation" provisions to address cases where domestic Chinese prices may be distorted, and Canada, which applies market treatment as the default but has used the latitude in its system to successfully apply non-market treatment where warranted, are worth examining as the EU considers its next steps.

Lesser duty rule: The WTO rules urge countries to consider applying lesser duties than those indicated by the dumping or subsidy margin, if that would suffice to eliminate injury. The method of calculation of an injury margin is not however specified. Practice internationally varies and no approach grounded in economic theory has so far been developed. Practice in Australia and New Zealand is most comparable to that in the EU, which applies the lesser duty rule in each case. Both countries apply a "non-injurious price", although different calculation methods are used. The concept of the non-injurious price is based on levelling import prices with what domestic industry prices would be in the absence of dumping or subsidisation (i.e., a price that the domestic industry could have charged absent the price suppression caused by dumping or subsidisation, and thus sometimes referred to as an "unsuppressed selling price" or a "pre-injury price"). The USA does not apply lesser duties, while Canada only rarely does pursuant to a public interest test and with no established methodology. In none of the countries reviewed is the effect of the lesser duty rule on the number of measures affected and the reduction in the level of measures comparable to the EU. In view of the findings in the economic evaluation part, the **EU approach is considered preferable to that practiced in the peer countries**. Section 4.6

Public Interest test: WTO rules require that countries provide opportunities for parties adversely affected by duties (industrial users or consumer organisations) to be heard, and urge countries to make the imposition of duties voluntary, rather than mandatory. However, there is otherwise no detailed provision for a public interest test. International practice varies. The USA has no provision for a public interest test. Australia, New Zealand and South Africa have no formal provisions but the Minister responsible for TDI can exercise discretion as to whether to apply duties or not. India and China mention public interest in their legislative framework but no evidence of application was found. Only Canada among the peer countries has provisions for a public interest inquiry and case history of use. However, whereas the EU applies the test in every case, Canada rarely does and only in a separate procedure after measures have been imposed. **EU practice thus clearly stands out.** Section 4.7

As regards its impact, although the number of cases terminated based on public interest considerations is limited, a more comprehensive assessment suggests that the role of the test in the EU's TD system should not be underestimated. At the same time, the EU's **methodology remains underdeveloped, opening up the test to criticisms of discretionary application and limiting the predictability of the system**.

The WTO Agreements provide both for the prospective and retrospective collection of anti-dumping or countervailing duties. In a prospective system, the level of the duty is determined during the investigations then applied at this level for the duration of its application, unless reviewed at an earlier stage. Conversely, under a retrospective system, the duty rate established in investigations is for deposit purposes only; the final level of duties due is determined only after Sections 4.9 and 4.10

products have been imported, and then based on the actual level of dumping or subsidisation. Moreover, duties can be applied on an *ad valorem* basis, as specific duties, or based on reference prices (which involves applying duties equal to the difference between the amount at which imports are priced and the reference price indicated). Based on the analysis of peer country experience, reference price based systems are used often; as well, there is a tendency towards greater use of *ad valorem* duties (see, for example, Australia and New Zealand).

The various approaches to applying duties have their advantages and disadvantages. In principle, the retrospective method is more accurate as parties only definitively pay whatever duties were in fact due, i.e. if the export price increases subsequent to the imposition of duties lower duties will be collected, while higher duties will be collected if the export prices decreases subsequent to the imposition of the duties. This negates the requirement for refund proceedings and also negates the possibility of absorption of the duty. However, since the definitive level of a duty collected retrospectively can only be determined after the importation has already taken place (and, in most instances, after the imported products have been sold) and as the importer has no control over domestic price movements in the exporting country, this adds uncertainty to the market, which may have a dampening effect on trade. Prospective reference price systems induce exporters to raise their price to avoid duties, which also means that the economic benefits to the importing country from TDI are reduced. Meanwhile, prospective *ad valorem* duty systems, such as the one used in the EU, are simpler to administer but have a built-in bias against fair exporters (the higher the price charged, the higher will be the duty). One way for exporters to remedy this is by requesting a partial interim review of their dumping. This has been done in a number of cases during the review period. However, it is contingent upon the finding of a lasting nature of the alleged changes and only has an effect on future duties, while not addressing past duty payments. For this, refunds are the only option.

Complex systems such as the retrospective system used by the USA or the prospective reference price systems applied by Canada and Australia would be difficult to implement in the EU, given that 27 different customs authorities would need to apply these measures in the same way. In view of these considerations, and given that no system is clearly superior in all respects, **the EU need not consider a change in its duty collection system**.

Section 4.11

The WTO Agreements provide that trade defence measures may only remain in place to the extent and for the duration required to counter the injurious effects of dumping and subsidised exports. No duty may remain in place for a period of more than five years from imposition or the last substantive review thereof. The two agreements provide for a variety of reviews, including expiry reviews, interim reviews and new exporter reviews.

The comparative review shows that there are few differences in the policies on reviews among peer countries. Apart from the relatively long duration of reviews, the use of and methodology for reviews in the EU is in line with international practice. Regarding the duration of measures, **EU TD measures have a low degree of institutionalisation, with long-standing measures being concentrated in few sectors**. The EU policy on the duration of measures can thus be considered good international practice. One area where a change in practice could be warranted is the limited use of (full) interim reviews. The relatively high degree of measures expiring automatically without an expiry review is an indication that such measures have actually been in force longer than necessary. At the same time, the practice in peer countries in this regard is not significantly different from the EU practice.

Section 4.12

The effectiveness of anti-dumping or countervailing measures may be jeopardised by various practices aimed at circumventing them in order to avoid payment of duties. Although the

evaluation team found no evidence that there has been a systematic increase in circumvention, the issue has received increasing attention from policymakers internationally. However, only a minority of countries – among the peer countries, only South Africa and the USA – has designed special anti-circumvention instruments. **The EU's anti-circumvention instrument is comparatively well developed** and counters circumvention to a certain extent.

Anti-absorption tools are even less common internationally. In the EU, anti-absorption reinvestigations aim at providing an early, "accelerated" and simplified alternative to an interim review of the level of dumping or subsidisation. However, their **practical importance is negligible** – in only one case in the evaluation period (of three anti-absorption reinvestigations undertaken) have measures been revised upwards.

Recommendations

Based on the analysis, the evaluation team has proposed a number of recommendations. These are grouped into three categories: those that concern issues which require multilateral attention; those that concern the EU's policy regarding the use of TDI; and those that address narrower issues regarding the framing of the two basic Regulations or specific administrative practices in implementing them.

Recommendations concerning issues to be dealt with at the multilateral level

Section 6.2.1

The evaluation team reached major conclusions in respect of the rationale for and the relevance of TDI. These conclusions relate to the nature of TDI and not to their implementation by the EU. As a result, most recommendations following from these conclusions would not have to be addressed by the EU (or any other WTO member) unilaterally but in the context of multilateral discussions and approaches, as unilateral approaches might introduce distortions into the international trading system and lead to unintended negative consequences. The evaluation team is aware of the fact that the likelihood of a multilateral agreement on these issues (or even an agreement about the need to discuss these issues) is limited; nevertheless such discussion is considered desirable in order to ensure that TDI remain a relevant trade policy instrument in the medium and longer term.

The issues identified for such a multilateral approach include:

- The ***de facto* role of the AD instrument in particular as a substitute for grey area measures and safeguards**: The main benefits that can be attributed to TDI as practiced have been ascribed in the present evaluation report to its stand-in role for deficient trade liberalisation insurance instruments, i.e. the majority of TD measures do not protect EU producers against unfair trade practices but rather against import surges. It is important to recognise in this context that the Uruguay Round reforms, which abolished informal diplomatic tools to manage the kind of pressures posed by the integration of major emerging markets into the global division of labour, failed to replace them with effective formal tools. An improved safeguards instrument (or a new instrument) would be required which, given the analysis here, should be framed in insurance terms with no connotation of "unfairness" concerning the disruptive changes caused by trade liberalisation.

- The **treatment of NME countries**: Differences in treatment of NMEs across WTO members' AD systems introduce inconsistencies in the international trading system which should be avoided. A harmonisation of NME concepts at the multilateral level would therefore be desirable. Conceptual changes are likely to be required not least in response to the changes in status of China and Vietnam, the two major economies with significant NME characteristics, in 2016 and 2019, respectively. In this context, the evaluation showed that

flexible systems that do not rely on lists of countries established by regulation have not apparently impaired the application of NME status to countries/sectors where such treatment is warranted. These considerations suggest that a flexible system of NME treatment such as practiced in some peer countries could be more appropriate than the current system applied by the EU, in particular with regard to the lists of NMEs and the granting of country-wide MES. The practices of Australia, which has granted China MES and utilises the "particular market situation" provisions to address cases where domestic Chinese prices may be distorted, and Canada, which applies market treatment as the default but has used the latitude in its system to successfully apply non-market treatment where warranted, are worth examining as the EU considers its next steps.

- The **application and calculation of lesser duties**: Current international practice regarding the application of the lesser duty rule varies and is largely not grounded in economic theory. As mentioned, the EU's consistent application of the lesser duty rule is however consonant with an understanding of TDI as a remedial instrument, and must therefore be considered best international practice. Still, the evidence adduced in this evaluation report concerning the higher profitability of EU firms in protected sectors than in comparable non-protected sectors indicates a trade deterrent effect of TDI that is stronger than required to simply offset injury, even with the application of lesser duties as presently calculated. Given the high proportion of cases which target industrial inputs, the further implication is that, even with the lesser duty rule, the costs imposed on downstream industries, including firms participating in global value chains, are greater than necessary. Based on these findings it would be desirable if the WTO members, first, made the application of the lesser duty rule compulsory internationally and, second, agreed on certain minimum standards for the calculation of lesser duties.

- The **alignment of TDI with patterns of trade in global value chains**: trade defence measures at present systematically favour domestic firms that outsource their intermediate inputs over firms that outsource the final stage of manufacturing, without regard to the domestic value-added in the two business strategies. In other words, trade defence measures are designed to protect the last stage of value creation, not the domestic contribution to the overall value of the good. Goods are increasingly "made in the world", but TDI has no metrics at the moment to address this. While in the EU the public interest test provides the necessary flexibility to address value chain issues, a better – and internationally shared – conceptual integration of global value chain issues in TDI would be desirable.

- **Reflecting heterogeneous firm theory and empirics in TDI rules**: When the WTO rules for TDI were developed the economics profession worked in terms of a "representative firm" model – in theory, industries were assumed to be homogenous in technology and thus in costs. Modern heterogeneous firm theory and empirics show that firms are highly skewed in terms of all performance factors. This is one area where trade defence practices have not kept up with the empirical evidence on firms in international trade. For example, the practice, in cases where sampling is used, of selecting the largest firms of the population, may distort the investigation findings if the characteristics of large firms are different from SMEs. While the economic impacts of trade defence measures have been addressed in a growing number of studies using firm-level data, a systematic assessment of the implications of firm heterogeneity for TDI rules and procedures (e.g., sampling methodologies), has not, to the knowledge of the evaluation team, been done. This is a major undertaking that should be done at the multilateral level.

- Finally, **policy coherence between industrial policy and trade defence**: Economic theory indicates that, if subsidies are structured to address local market failures, they are not market distorting. However, in current TD practice, all direct countervailable subsidies are assumed to pass-through entirely to export prices and thus to distort markets. Given the widespread reconsideration of industrial policies to address market failures and economic development needs, there is potential for increased frictions with trade defence. One way to establish the basis for policy coherence between industrial policy and trade defence would be to introduce a pass-through analysis into subsidy investigations. This step would introduce greater internal consistency of WTO rules while also providing for more discriminating application of TDI.

Section 6.2.2

Recommendations concerning EU policy choices

An officially-accepted **intervention logic** for the EU's use of AD and AS instruments does not currently exist. However, in communications materials, TDI is justified by the absence of a competition policy regime in the multilateral trading system and the divergence of conditions under which international trade takes place from the conditions prevailing in intra-EU commerce, where the "four freedoms" are ensured by the EU economic regulatory framework. The mission statement sets the overall objective for TDI policy to contribute to the competitiveness of EU industry and to the welfare of EU consumers.

Recommendation 1	See report section(s)
In order to provide better guidance for the implementation of EU TDI and in order to facilitate future evaluation of TDI, it is recommended that DG Trade's mission statement be complemented by an officially accepted intervention logic.	1.4.1 Development of intervention logic

The report also presents ideas (in section 6.2.1.2) which could serve as an input for the development of such intervention logic.

Initiation of investigations and treatment of non-cooperation: Global economic developments in recent years have raised doubts that current rules for and practice of the initiation of proceedings continue to be effective. In particular, the emergence of global production patterns has resulted in differences of interests among domestic producers, depending on the business strategy chosen. A similar divergence of interests regarding dumped or subsidised imports may occur in the relationship between EU producers and their employees. Finally, increasing international exposure makes EU firms susceptible to retaliation and threats thereof. In the view of the evaluation team, reforms are required to ensure continued effective access to TD for EU industry where it is warranted.

Recommendation 2	See report section(s)
It is recommended that the Commission use its capacity to initiate new investigations *ex officio* in circumstances where the business interests of some EU firms in the country of export might militate against their joining a specific complaint and thus compromise the ability of the industry to gain standing for a complaint. Examples of such circumstances include: ▪ There is a history of firms requesting anonymity in respect of TDI actions in respect of the country concerned. ▪ There is prima facie evidence of tit-for-tat retaliatory behaviour by the country concerned (e.g., a pattern of launching of reciprocal investigations immediately following decisions to apply measures against that country either in the same product group or on an equivalent amount of exports). ▪ The producer has significant investments in the country concerned	4.2 Policy choices regarding the initiation of proceedings

or exports a significant portion of its production to that country. ▪ The structure of the industry and circumstances of the case do not allow the retaliation threat to be addressed by maintaining the identity of the complainant confidential, an approach the Commission has successfully used in the past. It is also recommended that the right to submit complaints, and have standing, be extended to labour representatives, in order to ensure that access to TDI is also guaranteed in situations where interests between EU producers and their interests diverge (notably in situations of fear of retaliation).	

A logical consequence of recommending that labour submit complaints is that options for compelling interested parties to cooperate need to be considered. Furthermore, obligatory cooperation in investigations would also enable EU companies to better handle pressure which may be exerted by allegedly dumping exporters or subsidising governments. At the same time, ensuring that interested parties (both those based in the EU and exporters) provide accurate information is important.

Recommendation 3	See report section(s)
In order to ensure that investigations initiated in line with the previous recommendations can be based on sufficiently detailed and accurate information, it is recommended that DG Trade be provided with instruments to ensure the cooperation of interested parties (both those based in the EU and exporters) in TD investigations. These instruments should be comparable to those which DG Competition has as part of its investigating powers. In this regard, sanctioning mechanisms (such as fines) for the provision of false information should also be introduced.	4.3 Obligation to cooperate 5.2.2.2 Investigation instruments

Changes in the Union interest test: The growing complexity of the trading environment due to fragmentation of production across borders raises new challenges for applying TDI. In the longer run, these changes may necessitate fundamental reforms to TD practice at the multilateral level, as outlined above. For the immediate future, the EU is well positioned to address these issues due to the routine application of the Union interest test.

Recommendation 4	See report section(s)
The evaluation team recommends that the Commission take into consideration out-sourcing strategies (domestic and international) of businesses in its public interest evaluations. In the first instance, following past practice, the Commission could request documentation of EU value added from complainants and from exporters. It is also recommended that, in addition to the assessment of potential effects of measures as currently undertaken, the following considerations be applied in evaluating the Union interest in any individual case: ▪ Where the Union industry's market share is low, the welfare impacts of TDI are likely to be negative. ▪ Where concentrated impacts on particular communities can be expected from not applying TDI, the welfare case for TDI is strengthened. ▪ Where the goods in question are intermediate products used by downstream industries, the larger the share of production costs, the greater the likelihood that TDI could have adverse effects on EU industry as a whole.	2.1.3.4 Systemic Effects: TDI and Fragmented Production Systems 6.1.1.7 Competitiveness impacts on the EU economy in the evaluation period 5.1.6.3 Methods applied in determining the Union interest

▪ Conversely, where the inputs for the like products produced by the Union industry constitute a large share of the EU upstream industries' output, the welfare case for TDI is strengthened. ▪ The Commission could also consider excluding those products which are not produced by the EU industry from the product definition. Furthermore, the role of interested parties should be clarified: in line with the practice in other parts of the investigations, their main role should be to provide information and comment on the Commission's findings, but the actual analysis of public interest should be reserved for the Commission. In consequence, this would require collection of information on Union interest issues (e.g. through questionnaires) at the same time as information for the dumping/ subsidisation and injury analysis. Basing the Union interest test on representative information would help the Commission to arrive at more robust findings. While these suggested changes are likely to enhance the robustness and validity of the Union interest test findings, they would also require additional resources.	

Shortening the process for provisional determinations: Although substantially reducing the overall duration of EU trade defence investigations seems infeasible given the procedural requirements of the EU system, a realistic option, in the view of the evaluation team, would be for the Commission to focus on threat determination in the initial phase of its investigation and impose provisional measures earlier. Emphasis also needs to be placed on existing WTO rules that provide for short-term responses in cases of "massive importation" in the form of retroactive provisional duties.

Recommendation 5	See report section(s)
It is recommended that the Commission address stakeholders' concerns regarding the length of the period until protection is granted by shortening the investigation up to the imposition of provisional measures, including by taking decisions on provisional duties prior to verifications. The evaluation team recognises that this would be contingent on the ability to impose disciplines (including the use of sanctions) to ensure full and accurate reporting by interested parties (including exporters) prior to verification processes (see recommendation 3 above). It is also noted that an earlier imposition of provisional measures would reduce the overall duration of an investigation due to the limited time during which provisional measures may remain in place. Accordingly, this recommendation may require additional resources which allow speedier investigations.	2.3.2.3 Timeliness of measures 4.8 Duration of Investigations and Use of Provisional Measures 5.2.2.1 Duration of investigations

Provision of access to confidential information: The evaluation team has concluded that further improvement in the transparency of proceedings is recommendable, with the provision of access to confidential information being a key element. The EU approach of appointing a Hearing Officer is one that addresses transparency concerns without raising the cost of accessing the TD system for EU industry, especially small and medium-sized firms. At the same time, the team recognises that the full possibilities of the Hearing Officer model that has only recently been introduced by the EU have not yet been fully explored.

Recommendation 6	See report section(s)
The evaluation team recommends that the Commission actively promote the role of the Hearing Officer within the stakeholder community to ensure that the potential effectiveness of the model is demonstrated in practice. The introduction of a system to provide access to confidential information is not recommended at this stage. However, it is recommended that a review be undertaken once some experience has been gained with the Hearing Officer's role of verifying that confidential information has been duly considered in an investigation.	4.4 Transparency and confidentiality 5.2.3 Transparency and Confidentiality of Proceedings

Duration of measures and dynamic impacts of TDI: Given the highly particular nature of TD cases, there can be no objective foundation for generalisations concerning the appropriate duration of measures. EU performance in terms of limiting the length of term of measures stands up well in international comparison. Nevertheless, two modest policy adjustments could ensure further that the duration of measures corresponds to the practice addressed; thereby strengthening incentives for firms in protected sectors to prepare for the trade liberalisation implied by the expiry of TDI, rather than counting on the extension of protection.

Recommendation 7	See report section(s)
It is recommended that the Commission reduce the threshold for *prima facie* evidence for changed circumstances regarding dumping/subsidisation or injury to be submitted in requests for interim reviews by interested parties. In expiry reviews, the Commission could raise the threshold level for a positive finding of likelihood of recurrence of dumping/subsidisation or injury that must be demonstrated to warrant extension of measures. Also, it could be envisaged to extend measures, given a positive finding of continuation or likelihood of recurrence of dumping/subsidisation and injury, by five years as a general rule (except for Union interest considerations) and balance this with a more active use of (full) interim reviews.	2.3.2.2 Duration of measures 4.11 Policy of Reviews and the Duration of Measures 5.3 Review mechanisms and procedures

Other recommendations

Based on the detailed evaluation of the EU's implementation of TDI, a number of **recommendations regarding certain specific substantive and procedural issues** are made. Also based on analysis of EU court judgments and WTO rulings, the present evaluation concludes that a number of specific **amendments to one or both of the two basic Regulations** are warranted. Last but not least, the evaluation team noted that the Commission is already in the process of change with regard to a number of issues also addressed in this report. The last group of recommendations reinforces these processes of change.

Section 6.2.3

Section 6.2.4

Section 6.2.5

Conclusion

The evaluation conducted in this report of the European Union's policy and practice in respect of TDI, namely anti-dumping and countervailing measures, took place against a background of:

- Divided views among Member States as to the efficacy of the instruments.
- An assessment by practitioners that the instruments were procedurally burdensome to use.
- Virtually unbridled hostility towards the use of TDI in the professional literature.
- And a growing sense in the policy community that the instruments were out of step with the times as the global organisation of production evolved.

In short, the prevailing perspective on TDI that confronted the evaluation team may be summarised as follows. On the one hand, it is seen by some as a costly, cumbersome, and possibly counterproductive instrument constructed for a system of nation-based production that has been in good measure superseded by one in which goods are "made in the world". On the other hand, it is seen by others as an indispensable tool to ensure a level playing field for EU firms by addressing unfair pricing by foreign firms and market-distorting subsidies by foreign governments in the context of an incomplete system of market regulation and disciplines in the international domain.

The evaluation identified a number of considerations that greatly mitigate the perceived negative economic effects of TDI, and indeed, depending on what function TDI are understood to serve, that suggest a positive welfare impact. However, it also confirmed that TDI, as established under current WTO rules, are not designed to function effectively in a world of domestically and globally fragmented production chains or webs. This emphasises the importance of the EU's regular application of the public interest which leaves it better placed than the other countries reviewed in terms of having established procedures to address the emerging issues flexibly. The review of EU practice shows a high degree of compliance with EU law and WTO obligations and validated most of the methodologies and procedures applied by the Commission, while also highlighting certain areas where EU TD practice may benefit from drawing on peer countries' experience. In conclusion, the evaluation team considers that the EU's application of TDI as framed under the two WTO Agreements constitutes good practice in many respects. The purpose of the recommendations which have been made throughout this report, the main ones of which are summarised above, is to further strengthen and improve an already good system.

1 INTRODUCTION

Trade is a cornerstone of the European Union's (EU's) economic prosperity. For EU consumers, trade provides access to a wider variety of goods at lower prices than could be produced domestically. For EU businesses, it provides larger markets and access to essential production inputs, including technology developed abroad. For EU workers, it creates the basis for higher paying jobs as the EU specialises in doing what it does best. And for trading partners abroad, access to the large and dynamic EU market provides reciprocal benefits.

International trade takes place within a framework of rules developed through negotiations, refined through practice, and clarified through litigation before the courts and trade dispute settlement mechanisms. These rules are designed to ensure that trade works to the mutual advantage of the trading partners and is based on genuine competitive advantages. The EU's openness to international trade depends on these rules being observed.

The rules-based international trade system provides remedies against unfair trade practices. It allows for anti-dumping (AD) measures if imports are sold at less than fair market value ("dumping"), and for countervailing (CV)[1] measures if imports benefit from subsidies provided by foreign governments, if the dumped or subsidised imports cause injury to domestic industry in the importing country.

The EU's use of these trade defence instruments (TDI) is based on the relevant rules and procedures set out in the World Trade Organisation (WTO) Agreements.[2] The legal basis for the EU's TD system is provided, apart from safeguards (which are not covered in this report), by two regulations, the Anti-dumping Regulation (ADR)[3] and the Anti-subsidy Regulation (ASR),[4] jointly referred to as the two basic Regulations. These regulations, which have historical roots in rules originally adopted in 1968, have evolved through a series of revisions, the most recent of which took place in 2009 and mainly constituted a consolidation of various amendments made to the previous two basic Regulations of 1995 and 1997, respectively.[5]

The present evaluation of the EU's use of TDI, which came about as a result of the explicit regulatory requirement that EU policies be evaluated regularly and systematically, is timely on several grounds.

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1 The EU's terminology of anti-subsidy/countervailing measures is not uniform. This paper refers to the instrument and investigations as "anti-subsidy" (AS), whereas measures imposed are referred to as "countervailing" (CV) measures.

2 The three main WTO agreements in this context are the Agreement on Subsidies and Countervailing Measures (ASCM; also see GATT Art. XVI), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement, ADA; and GATT Art. VI), and the Safeguards Agreement which regulates defensive measures in the presence of sudden surges in imports threatening domestic industries (also see GATT Art. XIX).

3 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community. Following the adoption of the Lisbon Treaty the term "Community" has become obsolete and replaced by "Union". Hence, in this report the term "Union" will be used throughout except in quotations as in the preceding reference.

4 Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community.

5 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community.

First, the most recent review of the EU's use of TDI, conducted in 2005, focussed primarily on the legal and operational aspects of the system; accordingly, a more fundamental review of the economic role of these instruments has not been conducted for some time. In the interim, the European and global economic contexts have evolved considerably. In the EU, the internal market has been deepened and broadened, and transformed by the introduction of the euro. Abroad, the economic success of the major emerging markets has had a profound impact on the global division of labour. Globally, the trading environment has been transformed by the on-going revolutions in information technology and trade logistics that have enabled firms to divide their operations across borders though outsourcing and off-shoring. The resulting emergence of global value chains has led the WTO to coin the term "made in the world" to describe how many goods are produced today.[6]

Second, the global economy witnessed unprecedented economic stresses in terms of massive global imbalances, very large real exchange rate swings, and a boom-bust cycle of exceptional amplitude in the first decade of the 2000s. These had profound consequences in terms of real activity, wealth effects, fiscal situations, unemployment, social and political stresses, and consequent resort to extraordinary policy measures which directly or indirectly have had significant implications for global trade flows.

Third, the expanded use of TDI in the 2000s by major emerging markets has changed the relative importance of considerations bearing on the EU's own use of TDI, including increasing risks of trade deflection as third-party use of TDI redirects exports to the EU market and of retaliation.

These changes in the global trading environment raise fundamental questions concerning whether TDI can deliver its intended results. Can TDI still be effectively used? If so, how and in which contexts is its use best advised? Does the changing economic context change the impacts of TDI on the EU economy (in particular, what are TDI's welfare effects, distributional effects, and their impact on competitiveness)? If so, how should these changes be reflected in the EU's rationale for TDI? How well are current procedures and methods adapted to the changed environment? Are there useful lessons for EU practice to be drawn from the experience of other major users of TDI? This evaluation report takes up these questions.

1.1 The EU TD system in Outline[7]

The two basic Regulations establish the rules for carrying out investigations, determining AD and CV measures, as well as undertaking reviews of measures in place. The rules as defined in the two basic Regulations are primarily based on the corresponding rules in the WTO ADA and ASCM, which aim at ensuring that investigations are transparent, fair and objective, and not subject to protectionist abuse. Thus, the Regulations establish rules for both the *substantive aspects* of the AS and AD instruments and the conduct of investigations, consultation and notification requirements, i.e. the *procedural aspects*.

Regarding substantive aspects, AD measures can be imposed if an investigation determines that "there is dumping and injury caused thereby, and the Community interest calls for intervention"[8].

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6 See, WTO, "Made in the World," http://www.wto.org/english/res_e/statis_e/miwi_e/miwi_e.htm; accessed 25 November 2011.

7 A more detailed description of the EU TD system is provided in appendix I1.

8 Article 9(4) ADR.

The ASR establishes the equivalent rule for CV duties.[9] According to EU AD/AS rules, four conditions must be met in order to take measures:

1. there is dumping, i.e. products are being sold in the EU at less than the *normal value* in the domestic market, respectively imports benefit from countervailable subsidies;
2. there is *injury* to the Union industry producing like products;
3. the injury is caused due to the importation of products that are being sold below normal value, respectively due to the importation of subsidised products, i.e. there is a *causal link* between 1 and 2 above; and
4. taking the measure is not against the interest of the Union.

It is the Commission's task, in investigations, to determine if these four conditions are fulfilled.

Investigations usually take place in two main phases (Figure 1). The first phase, initiation, includes the preparation of a complaint about alleged dumped or subsidised imports, usually by or on behalf of EU producers,[10] and the Commission's review of the complaint. If the complaint provides sufficiently substantiated evidence concerning each of the first three conditions mentioned above, an investigation is initiated. Otherwise, the complaint is rejected.

The second phase, the actual investigation, comprises two stages. The first one, which usually lasts nine months, comprises the investigative work until preliminary findings have been reached and, potentially, provisional measures are imposed. The second stage primarily consists of the finalisation of the investigation, the collection of comments from interested parties and the determination of the definitive duties (if any). Altogether, the investigation must be completed, and measures (if any) imposed, within 15 and 13 months for AD and CV measures respectively.

Investigations are primarily based on information provided by interested parties, specifically exporting producers, Union producers and importers. Interested parties are invited to make themselves known to the Commission within 15 days of the notice of initiation in order to participate in the proceedings. Information is then collected by means of questionnaires, responses to which must normally be provided within 37 days. These responses are verified in verification visits by Commission officials at the premises of the cooperating parties. Special rules apply if interested parties do not cooperate or if the number of interested parties is large.

On the basis of the collected information the Commission determines if the four conditions are fulfilled, and if so calculates the level of measures needed to remedy the injury. According to the lesser duty rule applied by the EU, the rate of the duty is set at the level of the dumping/subsidy margin or injury margin, whichever is lower. If not all of the conditions are met, or if the complaint is withdrawn and it is not against the Union interest, the investigation is terminated without imposing measures.

Under the current EU TDI regime, definitive measures are imposed by the Council, although under the new rules for the Commission's exercise of implementing powers, it will be the Commission which imposes definitive duties. Before the imposition of measures, Member States' views will be heard under an examination procedure, which will replace the current consultation procedure through the Advisory Committee, in which EU Member States are represented.

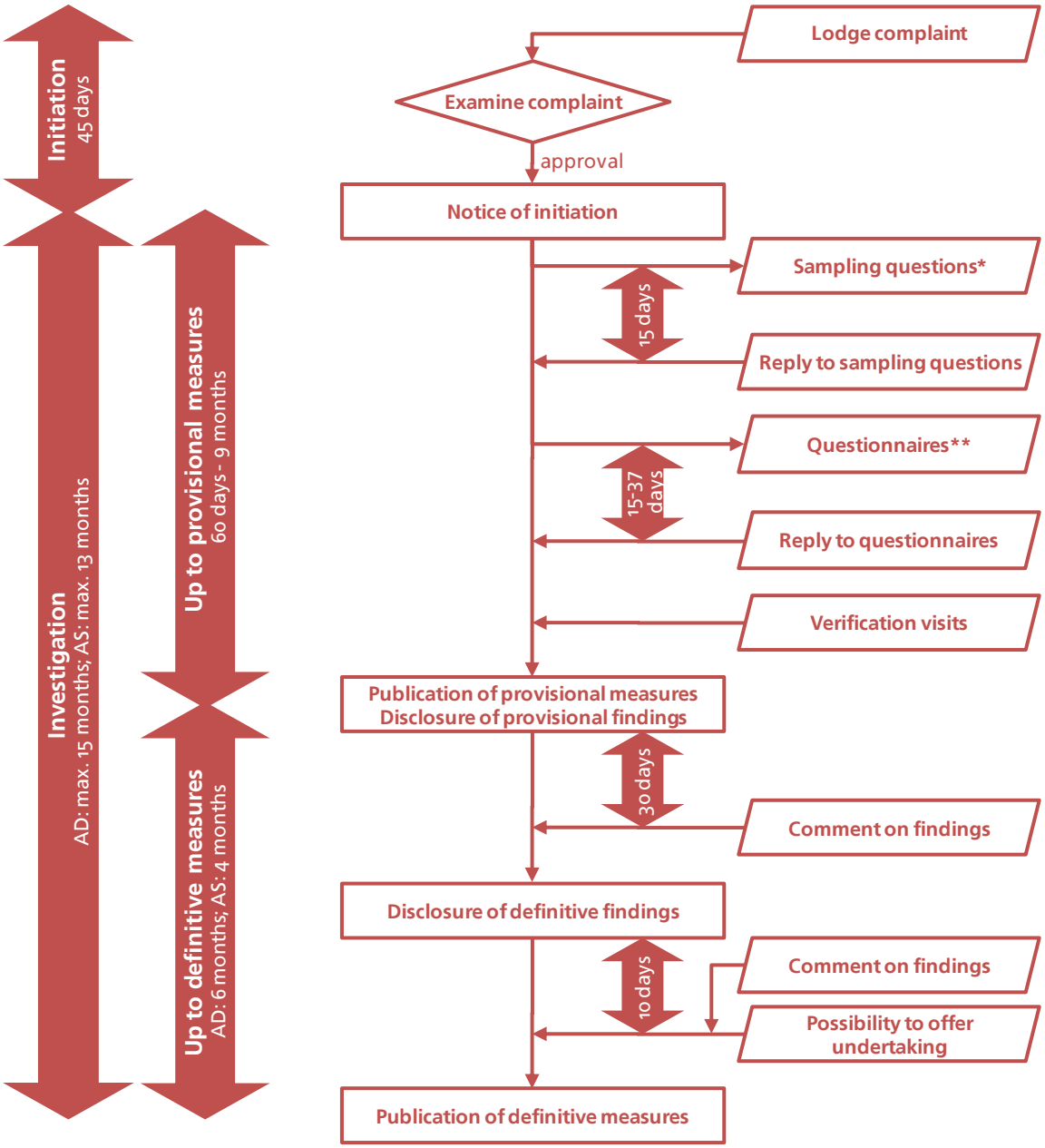
AD/CV measures are usually imposed in the form of *ad valorem* duties which are levied in addition to the normally applicable customs duties and normally are in place for five years, after which a review may be carried out to determine if an extension of the measure is necessary. As an

9 Article 15(1) ASR.

10 In special circumstances, the Commission can also initiate an investigation on its own initiative ("*ex officio*").

alternative to the imposition of duties, the Commission may accept undertakings offered by exporters which would eliminate the injurious effects of dumping or subsidies.

Figure 1: Flowchart of original AD/AS investigations initiated based on Article 5 ADR/Article 10 ASR



* Sampling may be applied where the number of EU producers, exporters and importers is large in order to limit the investigation to a reasonable number of parties. Companies wishing to be included in the sample should make themselves known within 15 days from the date of the notice of initiation and provide the information required therein.

** Questionnaires are sent to known exporters, EU producers, importers and EU users; in case of sampling questionnaires are sent only to interested parties included in the sample. The deadline for reply is minimum 37 days. All interested parties can make themselves known within 15 days from the date of the notice of initiation.
AD only: MET/IT claim forms for exporting producers in certain NMEs – the deadline for reply is minimum 21 days. Producers in analogue country (in cases against NME countries) will also receive questionnaires and will be subject to verification visits.

Source: Adapted from DG Trade website; http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/anti-dumping-flowchart.pdf, http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/anti-subsidy-flowchart.pdf, ADR and ASR.

In order to ensure rights of defence, investigations are subject to a number of provisions regarding confidentiality and transparency. Furthermore, decisions are subject to judicial review by the EU courts.

1.2 EU TDI Use in Global Perspective

The EU is generally considered to be one of the main "traditional" users of TDI, along with the USA, Canada, Australia, and New Zealand. In the 1980s, these economies accounted for 95% of all AD actions (Prusa 2001). However, in the last two decades, and particularly since the establishment of the WTO, the number of users has expanded greatly and the share of TDI actions accounted for by the traditional group has fallen sharply, even though they remain amongst the most important individual users of these instruments.

AD has historically been by far the more frequently used measure by the EU, accounting for well over four-fifths of all TD investigations.

Table 1 and Table 2 present the number of AD and AS cases initiated by the EU in the evaluation period (2005-2010) and, for comparison purposes, in the preceding decade (1995-2004). As can be seen, during the evaluation period the Commission initiated AD investigations against 118 countries and AS investigations against 15 countries (the detailed list of cases is presented in appendix D).

Table 1: Number of EU AD/AS cases and share in global cases, 2005-2010 (evaluation period) v 1995-2004

	1995-2004		2005-2010	
	Number	EU Share of World Total	Number	EU Share of World Total
AD				
Number of investigations	303	11.3%	118	10.2%
Measures Imposed	198	11.6%	73	9.3%
AS				
Number of investigations	42	23.9%	15	19.2%
Measures Imposed	23	20.9%	5	10.4%
Total AD and AS				
Number of investigations	345	12.0%	133	10.7%
Measures Imposed	221	12.1%	78	9.4%

Source: Authors' calculations based on WTO statistics on anti-dumping and on subsidies and countervailing measures.

As can be seen from the two tables, the number of AD cases in the evaluation period was lower than during the preceding decade but the EU's share of the global total fell substantially due to the spread of TDI use in the past two decades. During the evaluation period, the EU was the fourth most important user of AD measures worldwide, after India, the USA and China, and the third most important user of CV measures, after the USA and Canada.

Table 2: Number of EU AD/AS cases, 1995-2010

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total
AD investigations	33	25	41	22	65	32	28	20	7	30	25	35	9	19	15	15	421
AD measures	15	23	23	28	18	41	13	25	2	10	21	12	12	15	9	4	271
AS investigations	0	1	4	8	19	0	6	3	1	0	3	1	0	2	6	3	57
CV measures	0	0	1	2	3	10	0	2	3	2	1	0	0	0	1	3	28
Safeguards investigations	0	0	0	0	0	0	0	1	1	1	1	0	0	0	0	1	5
Safeguards measures	0	0	0	0	0	0	0	1	0	1	1	0	0	0	0	0	3

Source: WTO statistics on anti-dumping and on subsidies and countervailing measures.

In part, the decline in the EU share of world TDI actions is consistent with the overall decline in its share of global imports, as emerging markets expand their share (Table 3). However, even in this perspective, the EU's share of global TDI activity is very moderate: the EU's average share over the evaluation period of 9.4% in global AD and AS measures imposed is substantially lower than the EU's share of 17.8% in global imports over the same period.

Table 3: Global Share of Imports, European Union and other Major Users of TDI

	2005	2006	2007	2008	2009	2010	2005-2010 Ave.
USA	21.4%	20.6%	19.0%	17.3%	16.6%	16.4%	18.3%
EU27	18.1%	18.3%	18.5%	18.4%	17.4%	16.5%	17.8%
China	8.1%	8.5%	9.0%	9.0%	10.4%	11.6%	9.5%
India	1.8%	1.9%	2.2%	2.6%	2.7%	2.7%	2.3%
World	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: WTO, World Trade Statistics, 2011. Table A7.

The share of EU imports affected by TDI at any point in time is small. In its Trade Policy Review of the EU, the WTO reports this share to be about 0.6% (WTO 2011). The latter figure covers measures in force from investigations initiated prior to the evaluation period. However, as reported in Bown (2010c, Table 2), the share of all EU product groups at the Harmonised System (HS) 6-digit level affected by at least one TDI in the period 1990-2009 was 9.62% (by comparison, the figure for the USA was 13.37%).

During the recent global recession, the EU like other major economies expanded its use of TDI only marginally (Bown, 2010c; Figure 1).

1.3 Objectives and Scope of the Evaluation

As stated in the Terms of Reference, the evaluation has five inter-related objectives:

1) To provide a concise description of the European Union's TDI and of the current practice in this area;
2) To provide a balanced economic analysis of the fundamental arguments in favour of and against the use of TDI and their application in the context of the current international legal framework (e.g., in view of the absence of international competition laws) and economic realities;
3) To provide an evaluation of the performance, methods, utilisation and effectiveness of the present TDI scheme in achieving its trade policy objectives;
4) To provide an evaluation of the effectiveness of the existing and potential policy decisions of the European Union (e.g., the Union interest test, the lesser duty rule, the duty collection system) in comparison with the policy decisions made by the following EU trading partners: Australia, Canada, China, India, New Zealand, and the USA[11];
5) To provide an examination of the basic AD and AS Regulations in light of the administrative practice of the EU institutions, the judgments of the Court of Justice of the European Union and the recommendations of the WTO Dispute Settlement Body (DSB).

Also, an important purpose of the evaluation is to assist citizens to exercise their right to scrutinise, criticise and influence the policies and activities conducted by the Commission on their behalf. This is especially relevant as TDI have positive and negative effects on different groups in

[11] South Africa has been added to the peer countries because it has been one of the more active users of TDI during the past decade.

the EU, i.e. domestic producers of goods that compete with imports subject to AD/CV measures benefit, while consumers of the imported goods incur a loss – at least in the short run – because of higher market prices.

With regard to the temporal scope of the evaluation, the evaluation period was defined as 2005 to 2010. This period was chosen in view of the fact that the previous evaluation of EU TDI was undertaken in 2005 and covered practice until the end of 2004 (Stevenson 2005). Where deemed appropriate and where information was readily available, data for the evaluation period were compared with the period 2001 to 2004.

Furthermore, the evaluation is limited to two of the three TDI, excluding safeguards measures. This is justified for the following reasons: First, safeguards measures are conceptually different from AD and CV measures because they do not address unfair trade practices. Second, as stated in the Terms of Reference, the EU hardly uses safeguards measures (only one investigation was initiated in 2010, the first one since 2005).

1.4 Evaluation Methodology

In line with standard approaches to policy evaluation, the starting point for the evaluation was the development by the evaluation team of an intervention logic for the EU's TDI (section 1.4.1), based on stated TDI objectives of the Commission and economic considerations, in order to formulate evaluation questions and indicators (section 1.4.2) and thus to structure the evaluation exercise.

1.4.1 Development of Intervention Logic

An officially accepted intervention logic for the EU's use of AD and AS instruments does not currently exist. Nevertheless, the Trade Defence Directorate of the European Commission's Directorate-General for Trade (DG Trade) has developed a mission statement which presents trade defence as one building block of the EU's commitment to the liberalisation of international trade. It states that:

> "the EU's commitment to the liberalisation of international trade depends on a level playing field between domestic and foreign producers based on genuine competitive advantages. The European Commission's role in achieving open and fair trade includes the defence of European production against international trade distortions, by applying trade defence instruments in compliance with EU law and WTO rules. [...]
> Our main mission is to defend the European production against international trade distortions, such as subsidization or dumping. [...]
> We endeavour to prevent that trade distortions undermine the overall Common Commercial policy goals, by:
> - Maintaining and improving a system to combat distortions in international trade.
> - Ensuring that EU economic operators, including SMEs, can rely on the best service in the conduct and follow-up of our trade defence investigations.
> - Ensuring a level playing field by promoting adequate standards in third countries and by acting against abusive use of TDI against EU trade."[12]

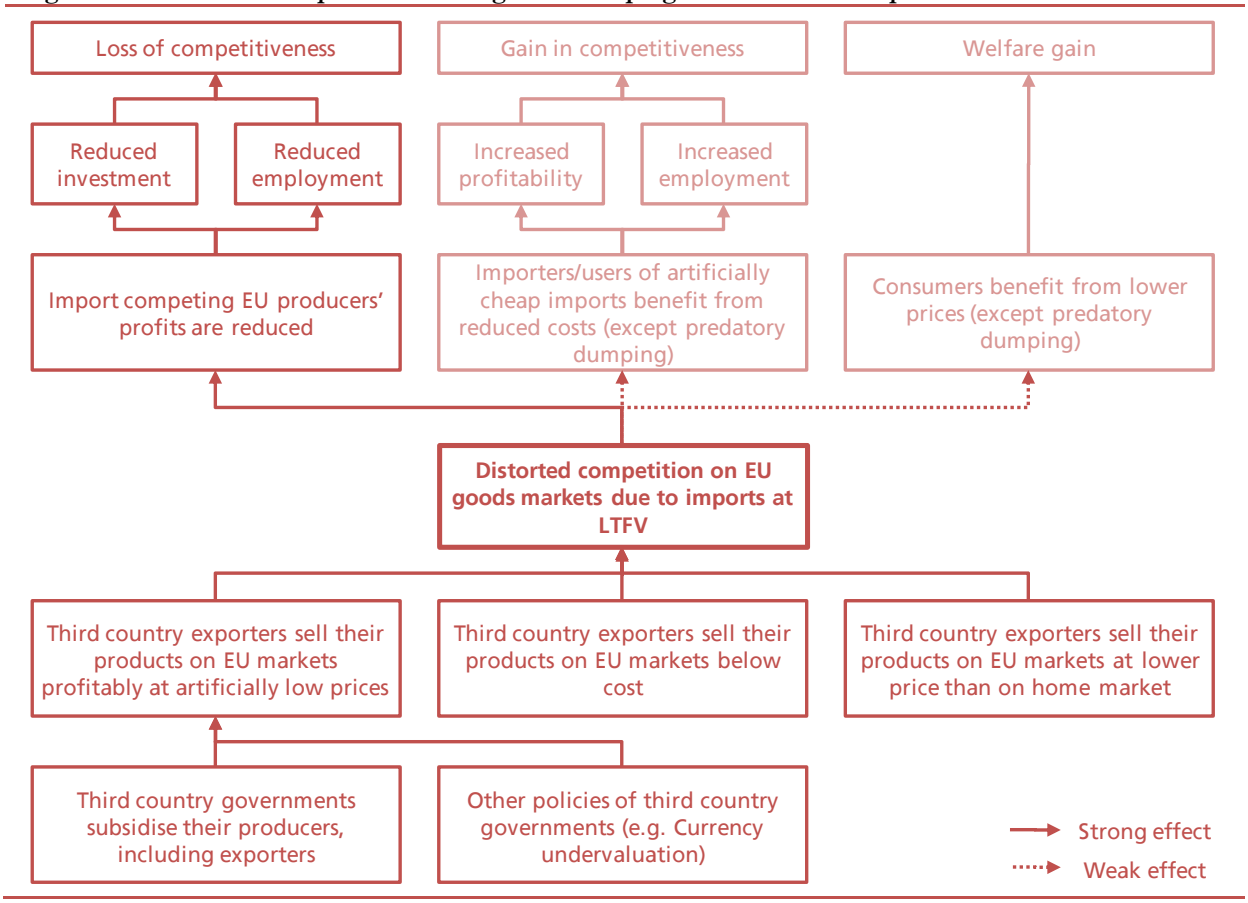
This mission statement provides a first indication as regards the hierarchy of objectives and the role of TDI in the wider trade policy framework. Furthermore, the Annual Management Plans are structured in line with the logical framework approach, i.e., establishing a hierarchy of

[12] Trade Defence Directorate Mission Statement, available at http://trade.ec.europa.eu/doclib/html/146391.htm.

objectives and corresponding results and activities. All of these various sources have been used by the evaluation team to develop a working intervention logic which was assumed to underlie the use by the EU of AD and AS instruments.

The problem tree (Figure 2) acknowledges, in line with the conventional economics of trade remedies, that dumped and subsidised imports may also have positive effects for some parties in the EU. At the same time, it does not assign weights to the positive and negative effects of such imports on EU producers and consumers. Thus, it does not allow a determination of whether the overall effect of TDI is a net increase or decrease in competitiveness and welfare.

Figure 2: Identification of problems arising from dumping and subsidised imports

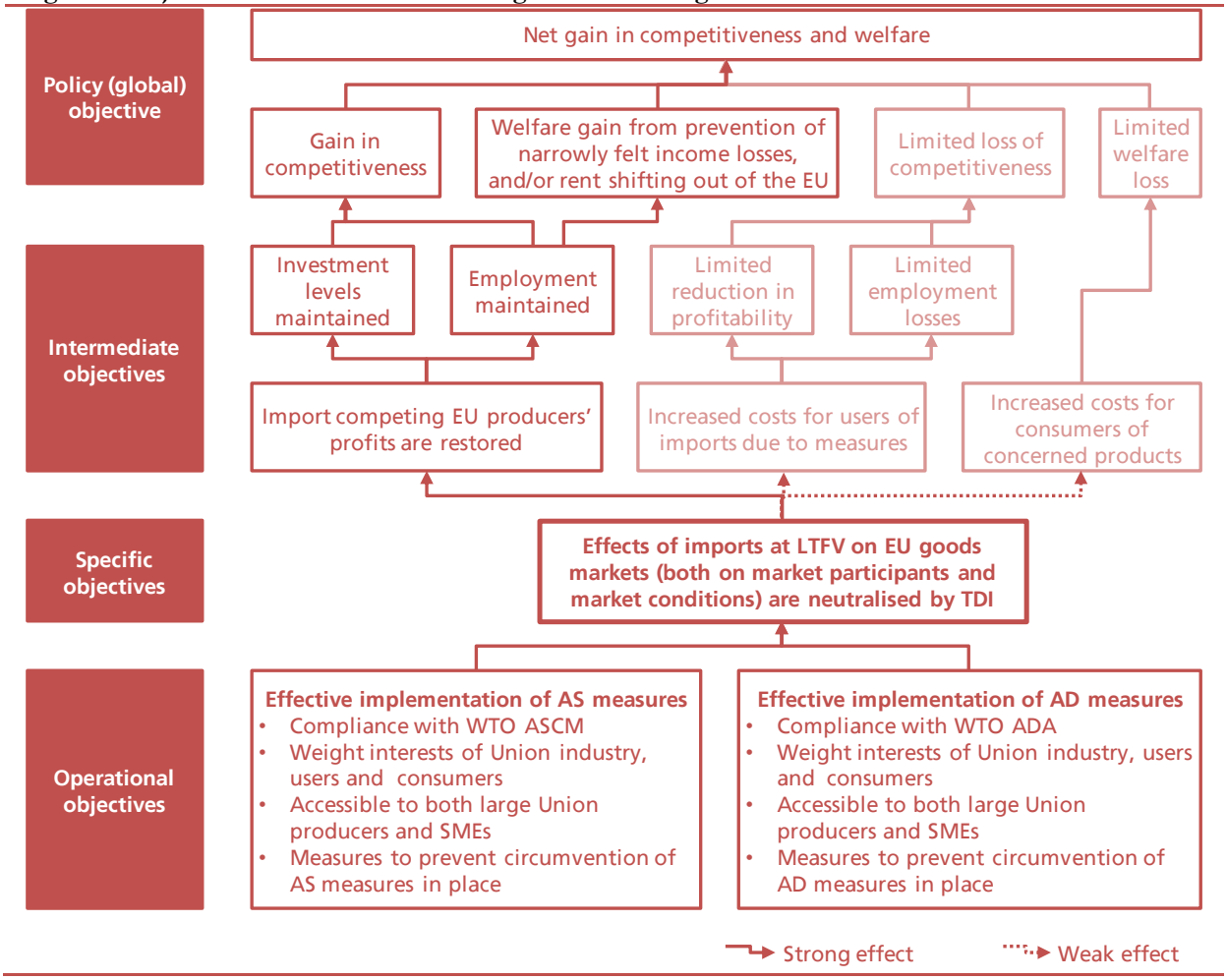


The underlying premise of EU AD and AS instruments can be summarised as follows:

1. Markets in goods are often "distorted" by imperfect competition arising from various sources:
   - "Anti-market" policies of foreign governments, presumably mainly subsidies but also other policies such as currency undervaluation etc.;
   - Government acquiescence/inaction in the face of anti-competitive commercial behaviour of firms;
   - Monopolistic, oligopolistic or cartelised market structures.
2. Dumping is one specific damaging activity that can arise due to these distortions. Subsidised imports have the same effect on the importer market.
3. AS and AD measures are the only available timely and legal remedies for dumping and subsidised imports in the absence of international analogues to domestic competition policy. These measures remedy the distortion by restoring fair competition.

The objectives of EU TDI policy are to address these problems. Essentially, by restoring fair competition in the industries affected by goods imported at less than fair value, they focus on the increase of EU competitiveness and employment generation (overall objective), and the increase of competitiveness and maintenance of jobs in sectors adversely affected by unfair imports (intermediate objectives). The use of TDI is thus *premised* on a net positive effect. The intervention logic as summarised in Figure 3, which has been used as the working hypothesis in the evaluation, summarises TDI objectives in the form of an objective tree.

Figure 3: Objective tree of EU TDI – working intervention logic



Taking into account the findings of the various components of the evaluation, the above intervention logic was reassessed at the end of the evaluation; this reassessment is presented in section 6.2.1.2.

1.4.2 Formulation of Evaluation Questions and Indicators

In line with the intervention logic, seven evaluation questions were developed (Table 4). This was done in order to focus and summarise the findings of the evaluation coming from the various evaluation dimensions. A summary of the findings organised according to the evaluation questions is provided in section 6.1.

Table 4: Evaluation questions, judgement criteria and indicators

Evaluation question	Judgement criteria	Indicators
Relevance		
1. To what extent do TDI as applied by the European Commission contribute to DG Trade's mission, i.e. increase competitiveness and welfare?	• Net economic cost or benefit in terms of competitiveness • Net impact on welfare	• Shipments, profits, valuation of firms (e.g., equity), innovation, employment, firm entry in import-competing v import-using industries • Producer and consumer welfare • Government revenue
2. To what extent does the use of TDI adequately respond to the international environment and its recent developments?	• The range of factors that can induce dumping and/or subsidisation is taken into account in deciding whether the effects are positive or negative. • Dynamism of the EU market is enhanced by improved market conditions • EU firms' participation in global value chains (GVCs) is taken into account in applying TDI • Risk of retaliation addressed by measured & judicious use of TDI • Strategic behaviour of foreign firms and governments and transient impacts related to global volatility countered appropriately	• Share of undertakings changing exporters' anticompetitive behaviour • Changes in export country policies affecting exports to EU (subsidies, currency undervaluation) • Investment (incl. new firm entry), innovation and new product introductions into export markets in industries benefiting from TDI protection are enhanced • Investment (incl. new firm entry), innovation and new product introductions into export markets in industries using imports or contributing intermediate inputs to products targeted by TDI protection are minimally damaged.
Effectiveness		
3. To what extent do TDI restore profits of EU producers competing with dumped or subsidised imports from third countries?	• Short- and long-term effects of AD and AS instruments on EU producers' competitiveness, growth and jobs	• Market share, profits, investment (incl. new firm entry), new product introductions into export markets, and jobs in Union industries affected by dumped or subsidised imports
4. To what extent do TDI restore competitive conditions in EU markets distorted by anti-competitive behaviour, i.e. subsidised or dumped imports	• Short- and long-term effects of AD and AS instruments on other Union industries • Effects of TDI on consumers • Unintended consequences	• Profits, investment and employment in other Union industries • Price level • Sales of targeted products • Changes in direction of trade (diversion/deflection)

5. Do EU policy decisions regarding TDI (e.g. zeroing, Union interest test, lesser duty rule, etc.) contribute to achievement of objectives?	• Balance of costs/benefits in terms of
	  • Competitiveness
	  • Welfare
		• Share of cases in which consideration of these factors modifies decisions
		• Challenges to EU TDI use at the WTO

Efficiency		
6. To what extent are AD and AS investigations undertaken efficiently?	• Duration of investigations • Cost of investigations • Transparency of investigations • Acceptance of investigation results by foreign producers • Consistency and coherence of investigations[13]	• Time required to take (provisional & definitive) measures • Resource requirements for the Commission and interested parties • Circumvention of measures in place swiftly dealt with • No. and outcomes of court cases and disputes at WTO DSB
7. Is efficient and effective	• Active use of support by Union	• Use of support services by Union

[13] While consistency measures the degree of how stable and, hence, predictable investigation methods are applied over time, coherence refers to the fact that the same methods are applied across cases provided that conditions are comparable.

Evaluation question	Judgement criteria	Indicators
support provided to the interested parties in relation to TDI?	industry without artificial increase in the number of complaints • Availability of support to non-complaining interested parties • Financial, resource and time costs of support	industry and other interested parties • Use of TDI by SMEs • "Success rate" of complaints made by SMEs

1.4.3 Sources of Information

The starting point for the evaluation was an extensive review of the literature on TDI, the basic legal documents and the procedural notices and guidelines used by DG Trade. Furthermore, a detailed analysis of Commission notices and regulations published during the evaluation period was undertaken. Finally, position papers prepared by stakeholders as well as stakeholder contributions to the following consultations held by the European Commission were reviewed:

- Public consultation on "Global Europe. Europe's trade defence instruments in a changing global economy. A Green Paper for public consultation" (European Commission 2006), closed March 2007.
- Public consultation on a future trade policy, closed 04 August 2010. In particular, responses to questions 16 and 17 were analysed.[14]

The key sources of information for the legal examination were, apart from the two basic Regulations:

- all judgments of the General Court (GC)/Court of First Instance (CFI)[15] and Court of Justice of the European Union (ECJ) made during the evaluation period on the EU's application of the AD and AS instruments; and
- rulings of the WTO DSB issued in the evaluation period on AD and CV measures, regardless of whether the EU was a party in the dispute or not.

Information provided in written sources was complemented by both oral and online consultations of a wide range of TDI stakeholders.

Oral consultations/interviews took place with:

- institutions responsible for implementing TDI and EU policy makers (DG Trade and other Commission services, the European Parliament, Council and Member State representatives);
- representatives of domestic industries in the EU (claimants or potential claimants);
- exporters having been the subject of investigations or their representatives and other interested parties negatively affected by TDI (i.e. importers and users of the imported products under investigation); and
- other stakeholders, including consumer associations, lawyers, economists, etc.

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14 "Question 16: How can the EU best safeguard its firms or interests against trading partners who do not play by the rules? Are the existing tools and priorities sufficient to address unfair competition from third countries? [...] Question 17: How can the EU best safeguard its firms or interests against major trading partners who maintain an asymmetric level of openness and resort to protectionist measures? Are the existing tools and priorities sufficient to address practices such as keeping EU suppliers out of government procurement markets, market access restrictions, restricted and insecure access to energy and raw materials?" (Consultation's issues paper, p. 8f., see http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146220.pdf).

15 Following the entry into force of the Treaty of Lisbon on 1 December 2009, the Court of First Instance was renamed as the General Court. In this report, judgments made before that date are referred to under the old name.

Interviews were guided by open questionnaires. Some stakeholders preferred to provide written contributions. In general, the stakeholder response rate was very high. In some rare instances, stakeholders preferred not to participate in the consultations, mainly citing the high degree of technicality of TDI as the reason. In total, 65 stakeholders contributed to the evaluation. A complete list of stakeholders providing contributions is presented in appendix C.

Furthermore, an online survey of EU firms was undertaken. The purpose of this consultation was to learn to what extent EU firms consider subsidised or dumped imports as a threat or have been affected by them, as well as their knowledge of and views about EU TDI. Known firms which were involved in TD cases since 1995 were contacted and invited to participate in the survey. Furthermore, associations and Member States were asked to distribute information about the survey among their members respectively domestic firms. The online survey was open from 01 June to 31 July 2011. In total, 585 responses were received. However, many of these were highly incomplete, and several firms submitted multiple responses. After eliminating incomplete and duplicate responses, as well as responses submitted by associations (which were considered as part of the oral consultation described above), 245 responses remained.

A detailed summary and analysis of both the stakeholder consultations and the responses to the online survey is presented in the consultations report in appendix F.

Finally, for the review of peer country TD systems, the following sources have been used:[16]

- The respective country's trade defence laws, regulations and guidelines;
- Selected case reports;
- Policy documents and secondary literature; and
- Interviews with representatives of the trade defence administration and stakeholders.

1.5 Report Structure

The findings and recommendations of the evaluation are presented in this report in four main chapters, corresponding to the four main evaluation dimensions (economic, legal, policy, institutional & procedural) and objectives as stated in the ToR.

Chapter 2 undertakes an **economic analysis** of TDI and their use by the EU, discusses the economic rationale for TDI, the identified motives for the use of TDI in the EU, and the effects of the use of TDI on the EU economy. The chapter addresses the **second evaluation objective** as well as analyses the effectiveness of EU TD practice from an economic point of view (part of **evaluation objective 3**).

Chapter 3 presents a legal review of the two basic Regulations and their implementation based on an analysis of EU court judgments and reports issued by the WTO DSB during the evaluation period. This chapter addresses the second and third part of the fifth evaluation objective. The first part of the fifth objective, the evaluation of the two basic Regulations in view of administrative practice, is addressed in **chapter 5**.

Key policy issues of TDI are addressed in **chapter 4 (evaluation objective 4)**. This chapter discusses how the seven peer countries – Australia, Canada, China, India, New Zealand, South Africa and the USA – have used the policy space which WTO rules leave for members'

16 For China, only limited primary information could be obtained. Therefore, secondary sources have been used extensively.

application of AD and AS instruments, and determines the extent to which EU practice can be considered good practice, or can learn from peer countries' experience.

The results of the economic, legal and policy analysis, along with a review of EU TD cases, as well as stakeholder contributions and the evaluation team's own assessments are then synthesised in **chapter 5**, which presents a detailed evaluation of the institutional and procedural aspects of EU TDI operations (**evaluation objective 3**, except effectiveness). This chapter also derives recommendations for changes in EU TD practice and identifies certain issues which, in the view of the evaluation team, would call for a codification of practice in the two basic Regulations.

Chapter 6 summarises the conclusions and recommendations.

Complementary reports that provide further details regarding each of the evaluation dimensions are included in the appendices. Notably, the first evaluation objective, a summarised description of the EU AD and AS regime, is covered by appendix I1. Some of the appendices, such as the peer country reports (appendix I2-I8), the analyses of European court and WTO decisions (appendix H1 and H2) or the stakeholder consultations report (appendix F), can also be read independently from the main report.

2 ECONOMIC ANALYSIS OF TDI AND THEIR USE BY THE EUROPEAN UNION

This chapter provides an in-depth economic analysis of trade defence instruments (TDI) and their use by the European Union. It reviews the theoretical and empirical economic literature on the effects of TDI on trade flows and economic welfare; describes the economic consequence of the absence of both rules governing competition and of other rules associated with well-functioning markets (i.e., conditions comparable in effect to those provided by the "four freedoms" of the EU) in the international sphere; and analyses the extent to which TDI can correct for these defects and thus improve economic welfare, taking into account short-run and long-run dynamic perspectives and the range of market structures that exist across sectors. Against this background, it analyses the economic consequences of the EU's use of TDI in the evaluation period (2005-2010), and draws out policy implications.

TDI evolved historically as the international trade analogue of domestic market competition policies.[17] Exemplifying this conceptual relationship, TDI have been replaced by competition laws within the EU's internal market and in at least two bilateral trade agreements, the Australia-New Zealand Closer Economic Cooperation Agreement and the Canada-Chile Free Trade Agreement.[18] This characterisation of TDI informs the EU's intervention logic in applying TDI.

Given this characterisation, TDI address predatory and other anti-competitive business practices of foreign firms and market-distorting measures of foreign governments. The economic benefit of TDI is thus analogous to that of competition policy. There is a short-run cost to consumers since the policy intervention to prevent cut-throat price competition from foreign suppliers raises market prices in the first instance. However, by preserving competition, the policy intervention assures, in the longer run, lower prices than would have been the case had predation been allowed to succeed and domestic rival firms been forced out of the market, or new firms prevented from entering. Similarly, by countering foreign government subsidisation of particular activities, which shifts market share to less efficient foreign suppliers, TDI assures that efficient domestic firms are not driven out of the market forcing domestic consumers to rely on what may eventually be higher-cost sources if and when the foreign subsidies are withdrawn. By the same token, TDI assures that the global division of labour is based on genuine comparative advantage.

In reality, this neat conceptual analogy breaks down in a number of ways.

First, TDI and competition law procedures, criteria for legality, and evidentiary standards are different. As well, competition law in many jurisdictions applies criminal sanctions, which sharply limits the use of these measures compared to TDI. Demonstrating the gap between competition

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17 For example, the first AD law, which was introduced in Canada in 1904, was motivated by concerns over predation (see Finger 1992 and Sykes 1998 for accounts). New Zealand which followed Canada in adopting anti-dumping legislation in 1905, targeted selective price cutting by US-based International Harvester which threatened to create a monopoly on agricultural equipment in the New Zealand market (Ciuriak 2005). Similarly, the US Antidumping Act of 1916, which was in substance an extension of its antitrust law (Finger 1992), included a requirement that the dumping had to "be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States" (Committee on Ways and Means 1993: 417, cited in Stiglitz (1997). The formal articulation of TDI in the economic literature as the international analogue to domestic competition policy goes back to at least Viner (1923).

18 A proposal for replacement of TDI with competition law was also put forward by Canada, unsuccessfully, during the negotiations for the Canada-US Free Trade Agreement (Dutz 1998: 100).

law and AD measures, the US 1916 anti-dumping statute, which was modelled explicitly on antitrust law, was ruled by a WTO panel to be inconsistent with the WTO Agreement.[19]

Second, where competition policy has always retained a motive test (i.e., anti-competitive intent must be established for sanctions to be applied), TD practice abandoned this in its infancy. As early as 1921, the scope of US AD law was widened to provide governmental relief against *any* instances of dumping, regardless of intent. As Finger (1992: 129) notes:

> "The 1921 act completes the shift of criteria. Any mention of antitrust criteria – conspiracy, combination, or restraint of competition – is gone. Antitrust's injury-to-competition standard has been replaced by a diversion-of-business standard."

It is the latter standard that has prevailed: current WTO law does not consider the motive for dumping. AS disciplines in international trade, which were first introduced in the context of the Tokyo Round of GATT negotiations, have never incorporated a motive test, notwithstanding that subsidisation can be either for industrial policy motives (which TDI implicitly are framed to counter) or to offset market failures in the exporting country.

Third, adjustment costs of disruptive competition across borders are higher than domestically because not all productive resources are equally mobile across borders. In particular, workers with acquired industry-specific skills can move from failing or contracting firms to expanding firms within the same economy but not to expanding firms in other countries. TD measures that temper competition when injury occurs may therefore be justified on economic welfare grounds where similar interventions into competition in a purely domestic market context would not.

Finally, further muddying the waters, some practitioners have rejected *any* consonance between the objectives of TDI and competition measures.[20]

The observed effect of TDI – to raise the price and reduce the volume of imports of subject goods – is simply the effect of tariffs and thus indistinguishable from ordinary trade protection. Accordingly, assessment of the welfare effects of TDI depends crucially on whether or not the pricing practices of foreign firms or the subsidies provided by foreign governments that are targeted are indeed anti-competitive or market-distorting, or entail excessive adjustment costs. The modern legal definition of dumping captures a wide spectrum of firms' pricing behaviour that might be motivated by factors other than predation (e.g., Shin 1998: 82). Similarly, as observed by Sykes (1995), the pervasive presence of externalities (positive and negative), increasing returns, information asymmetries, imperfect information, and other sources of market failure motivate a wide range of government interventions; particular subsidies might be market-distorting industrial policies or corrections for market failures. Since a motive test for TDI is not applied in investigations, it is not clear from the case documentation and the deliberations of the administrative authorities whether firm pricing or government policy interventions targeted by TD measures are in fact anti-competitive or market distorting. Motive and by extension the welfare implications must, therefore, be inferred from the patterns and contexts of TDI use.

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19 The 1916 legislation was used only once and without success; the legislative basis for active US TDI use is the 1921 anti-dumping law, as modified over the years (Finger 1992).

20 USITC Commissioners Janet Nuzum and David Rohr, remarking on the results of a study showing welfare costs from TDI use, commented as follows:

> "it must be remembered that the purpose of the antidumping and countervailing duty laws is not to protect consumers, but rather to protect producers. Inevitably, some cost is associated with this purpose. However, unlike the antitrust laws, which are designed to protect consumer interests, the function of the AD/CVD laws is, indeed, to protect firms and workers engaged in production activities in the United States" (cited in Tavares 2001).

As the literature documents, evidence for competition concerns in dumping cases is rarely found. As regards subsidies, calculation of the net impact of government interventions (including both expenditures and tax measures) is for all practical intents and purposes simply not possible and no empirical study to our knowledge has even contemplated broaching this issue. Because of this gap between stated rationale and apparent practice, numerous theories have emerged as to the *de facto* role of TDI – simple protection awarded to rent-seeking firms, "surge" protection or a safety valve to manage competitive pressures in international trade, a buffer for macroeconomic shocks, a tool of industrial policy to capture market share of strategic industries, a retaliatory threat to safeguard market access abroad, domestic political economy "grease" to enable governments to push through trade liberalising measures, and so forth.

Within the legal literature, the concept of TDI as enforcing "fair trade" is often invoked; however, the economic meaning of this is rarely made precise.[21]

The general consensus that has emerged within the economic literature is that TDI lacks a sound economic basis. Thus, Leidy and Hoekman (1990: 874) conclude: "Most international economists would agree that the rationale for an AD law and AD procedures is very weak, probably nonexistent". Prusa (2001: 592) describes AD as "universally decried by economists". Quantitative assessments of TDI use suggest negative impacts on economic welfare. Moreover, the recent firm-level studies of the impact of TDI suggest that the uncertainty concerning market access created by TDI results in a "chilling" effect on firms' participation in export markets, with resulting negative impacts on productivity-enhancing innovation and investment and the reallocation of market share to more productive firms.

This consensus is reviewed critically in this chapter. Section 2.1 reviews the theory of dumping and subsidies and the implications of TDI in countering these practices when they cause injury. The welfare, trade and dynamic efficiency effects are discussed as well as the more general systemic implications of TDI mechanisms given the increasing fragmentation of production within and across borders. The implications for TDI of recent theoretical and empirical findings concerning the heterogeneous nature of firms are examined. Section 2.2 reviews the scale and pattern of use of TDI by the EU to determine its economic welfare and efficiency implications. Since the observed trade effect of TDI is to reduce trade, the welfare effects would be presumed, absent a sound intervention rationale, to be negative, in line with the overwhelming consensus in the economic literature that trade is welfare-enhancing. In this regard, the section considers the extent to which the EU's TD practice is consistent with competition policy objectives, a macroeconomic buffer role, industrial policy objectives, as a retaliatory mechanism to safeguard EU firms' market access abroad, as a *de facto* insurance mechanism to deal with unanticipated pressures associated with trade liberalisation, and attenuating excessive impacts of vulnerable communities. Section 2.3 considers the effectiveness of the EU's TD practice. Section 2.4 summarises the conclusions and draws the policy implications.

[21] The antitrust literature has had a similar difficulty of pinning down the meaning of "unfair" price competition; see Giocoli (2011) for a review of the evolution of this concept in antitrust law). Ciuriak (2005) discusses the compatibility in principle of "free trade" and "fair trade" and the role of disequilibrium conditions which disturb the marginal conditions that underpin the normative aspects of market outcomes in similarly driving a wedge between "free traders" and "fair traders".

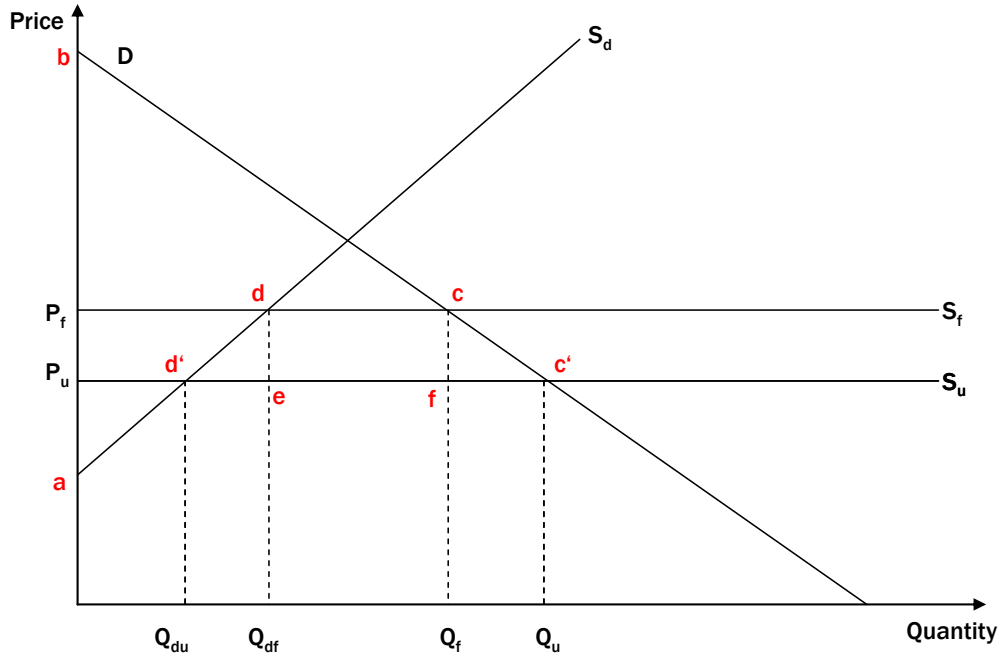
2.1 The Economics and Economic Consequences of Dumping, Subsidies and Trade Defence Instruments

This section reviews the economics of dumping, subsidies and the trade effects of AD and CV measures; summarises the economic literature on the use of trade defence measures; and provides a critical review.

2.1.1 Dumping

The conventional analysis of dumping is based on the economic impacts in the destination country. Figure 4 provides an illustration. D is the demand schedule in the importing country for the subject goods, and S_d is the domestic supply schedule of the like goods. In this simplified analysis, imported supply is perfectly elastic at price P_f when no dumping or subsidisation takes place. Thus, in this situation the market equilibrium is price P_f with a total import quantity sold Q_f (point c). Domestic producers sell an amount equal to Q_{df} with Q_f -Q_{df} being supplied by imports. National welfare can be measured by the sum of consumer and producer surplus.[22] In the situation without dumping or subsidisation, consumer surplus is given by the triangle P_fbc and producer surplus by the triangle aP_fd. In the presence of dumping or subsidisation, producer surplus is reduced to aP_ud' and consumer surplus expands to P_ubc'. As the increase of consumer surplus is larger than the reduction of producer surplus, national welfare *increases* as a result of dumping or subsidisation – the net welfare increase is given by the area $d'dcc'$.

Figure 4: Effects of dumped imports on the importing country



[22] Consumer surplus or rent is the benefit which consumers derive from the fact that they can purchase a product at a cheaper price than they would have been willing to pay. In the graphical presentation of the model, it is depicted as the area between the demand curve and the price in equilibrium. Likewise, the producer rent is the benefit of producers derived from the fact that they would have been willing to sell at a lower price than the price in equilibrium. Graphically, it is depicted as the area between the supply curve and the price in equilibrium.

While the national welfare test is generally considered to be appropriate, it should be noted that frequently only consumer surplus, or the closely related concept of equivalent variation[23], is used for welfare measures in TDI analyses, as it is in competition studies.[24]

Ethier (1982a: 489) observes that "the formal theory of dumping essentially consists only of the theory of monopolistic price discrimination between two markets." Price discrimination is a common practice. Economists distinguish between three types: first, second and third-degree price discrimination. First degree price discrimination is based on the customers' willingness to pay; examples include negotiated discounts on car sales based on how hard the customer bargains, and peak/off-peak pricing by firms such as telecommunications providers, vacation resorts and recreational facilities. Second degree price discrimination is based on the quantity sold; examples include bulk purchase discounts in industrial supply markets, and subscription discounts compared to retail sales of magazines and on season tickets for sporting events. Third degree price discrimination is based on demographic or geographic market segmentation. Student or senior citizen discounts are examples of the former, dumping of the latter.

Analysis of the welfare effects of price discrimination goes back to Pigou (1920) and Robinson (1933). This literature divides the impact of price discrimination into a misallocation effect and an output effect. While price discrimination is generally inefficient (except in the limiting case of the perfectly discriminating monopolist), under certain conditions, the negative misallocation effect can be more than fully offset by an increase in output, resulting in greater economic welfare. It is not possible to say on a priori grounds which effect dominates; this depends on the variation of demand conditions across the markets in which discrimination is practiced. Aguirre, Cowan and Vickers (2010) provide an up-to-date analysis and review of the literature; they conclude as follows: "In many cases discrimination reduces welfare but our analysis has shown that the conditions for discrimination to raise welfare are not implausible." It is ultimately an empirical question as to whether the welfare effect is positive or negative; for the most part, however, the empirical evidence is lacking, one way or the other (e.g., see Varian 1989). Willig (1998: 59), in his analysis of the economic effects of dumping, captures the sense of the literature:

> "It is generally understood that price discrimination is a common business practice in domestic and international settings, and that economic theory does not take price discrimination to be harmful to the general welfare."

Price-based dumping as described above can be distinguished from cost-based dumping, which involves export pricing that does not permit full cost recovery over a reasonable time frame.

Various conditions have been identified in the literature that could lead firms to charge different prices in different regional markets in a way that meets one or both of these definitions of dumping without necessarily being damaging to welfare.

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23 Equivalent variation takes into account the *de facto* increase in real incomes from a fall in import prices. Technically, consumer surplus measures consumer gains on the basis of a Marshallian demand schedule; equivalent variation measures the same concept using a Hicksian income-compensated demand schedule. For most practical intents and purposes, the distinctions are of no consequence.

24 For example, the often-cited study by Gallaway, Blonigen and Flynn (1999), which found, in its highest (and usually cited) estimate that US AD measures inflicted a welfare cost on the US economy in 1993 of close to USD 4 billion, or about 0.06% of its GDP that year, used equivalent variation as its measure of welfare. A more recent estimate of the impacts of TDI on a global basis by Eggers and Nelson (2007) found that, for the average country pair, the decline in bilateral exports between 1960 and 2000 attributable to AD investigations was only on the order of about one tenth of a percentage point. As they note, "consistent with the small impact on trade flows, the estimated welfare effects of antidumping are small". This study also measured welfare using equivalent variation. Hutton and Trebilcock (1990: 124) discuss the evolution of the standard in competition law towards exclusive focus on consumer surplus: "Following the transformation in thinking in much antitrust literature over the past two decades, we translate economic efficiency into a consumer welfare standard."

- When demand in the export market is more price elastic than in the domestic market, profit maximisation leads firms to set lower prices in the export market.
- When a firm faces decreasing costs, pricing at marginal cost results in lower prices in export markets than in the domestic market (Viner labelled this long-term or continuous dumping).
- Firms may engage in "local market pricing" or "pricing to market" in the face of macroeconomic shocks such as large exchange rate fluctuations.[25] Empirical studies find that only about half of the movement in real exchange rates is offset by destination-price adjustment. This can give rise to both price-based and cost-based dumping.
- It may also be rational for firms to price below costs at an early stage of introducing a new product where learning-by-doing curves are very steep (e.g., many high-technology products) and marginal cost pricing would prevent development of the market demand for the product.
- Firms that produce differentiated products, where quality, reliability of deliveries and customer support services are important, may have to offer discounts to break into new markets served by firms with established reputations which allow them to command premium prices. This form of dumping falls under Viner's category of "intermittent dumping".
- Foreign firms may cut prices to defend their market share in the face of aggressive spot competition from rival, including domestic, competitors.

Alongside these benign and possibly beneficial forms of pricing behaviour are others that can have negative consequences.

- Firms may set predatory prices, where the intention is to drive out domestic-market competitors and, having achieved a dominant or monopoly position, to then raise prices (Stiglitz 1997).
- "Sporadic" or "intermittent" dumping can arise when the dumping firm seeks to get rid of an unexpected excess inventory, disrupting market conditions for other firms pursuing longer-term investment and market development strategies. Sporadic dumping also can induce exit and entry costs for domestic firms; see Hutton and Trebilcock (1990: 130-131).
- Brander and Spencer (1984), in their articulation of strategic trade policy, observed that resort to price discrimination can be "to the advantage of a country to capture a large share of the production of profit-earning imperfectly competitive industries", which they refer to as a "profit-shifting" motive. As noted by Stiglitz (1997), such rent transfer to the foreign firm is a welfare cost to the country in which dumping is taking place that is additional to the deadweight welfare loss from monopoly pricing that follows successful predation.

Vermulst (2005) also identifies state-trading dumping to earn hard currency as a possible rationale for dumping.

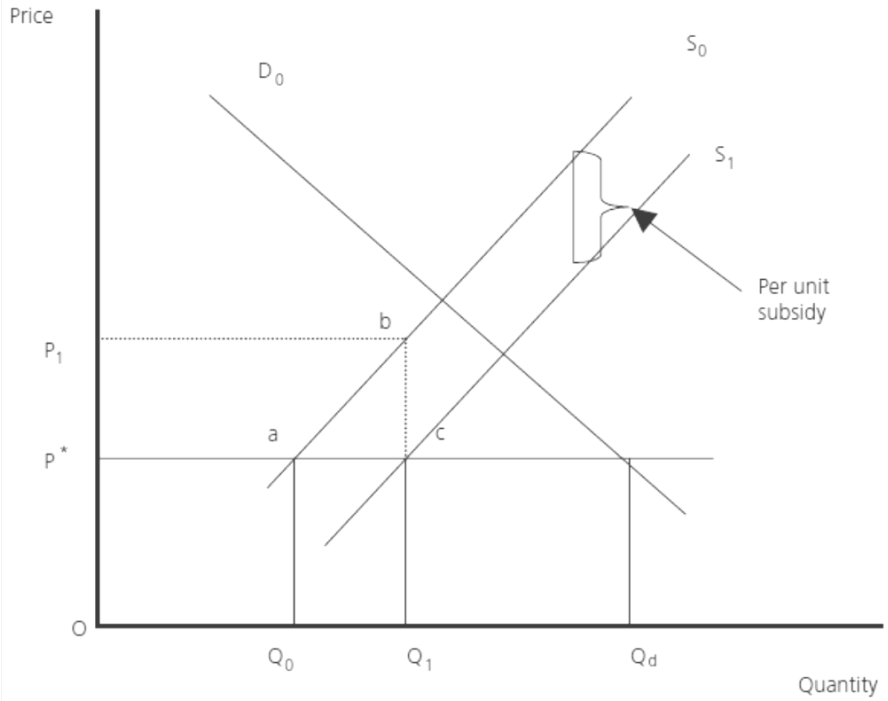
For dumping to be subject to sanctions, it must cause injury. To the extent that the benign forms of dumping do not tend to cause injury, the application of TDI would then naturally tend to target only harmful forms of dumping. However, since the welfare effects of dumping are not clear on a priori grounds, whether dumping is harmful in a given instance must be determined on a case-by-case basis.

[25] There is an extensive literature on local market pricing and the factors that can prompt firms to adopt this strategy. Dickey (1982), Leidy and Hoekman (1990) and Knetter and Prusa (2003) discuss the AD implications.

2.1.2 Subsidies and Trade

The conventional analysis of the effect of subsidies, as illustrated in its most simple form by the WTO (2006: 56), considers the effect of a government programme on a particular good in isolation (i.e., on the basis of a partial equilibrium demand-supply model – see Figure 5).

Figure 5: The effect of production subsidies on trade and economic welfare

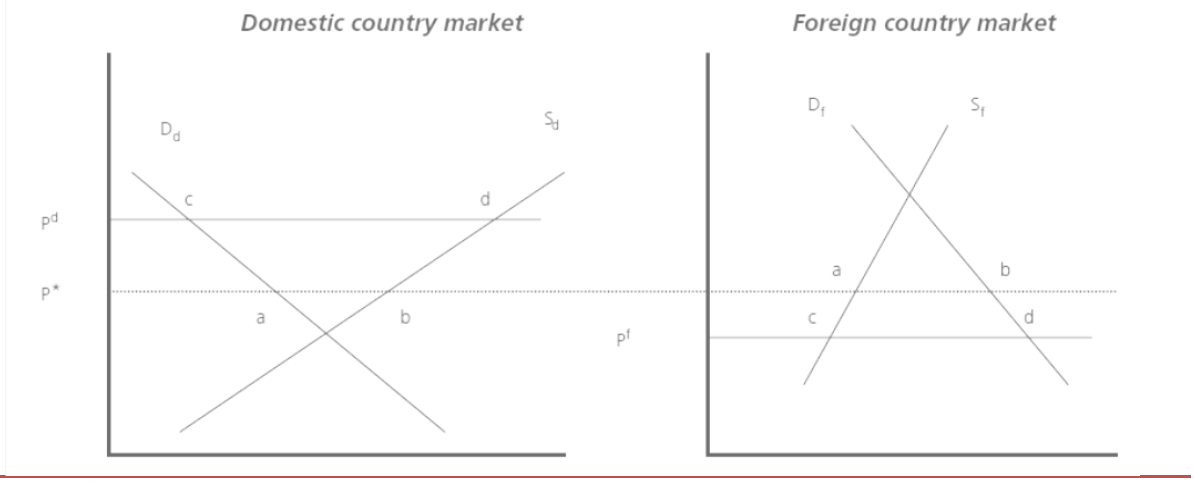


Source: WTO (2006), Box 2: Trade Effects of Production Subsidies.

As the associated text notes, the domestic supply schedule before the subsidy is given by S_0, the domestic demand schedule by D_0, and world price of the product by P^*. Domestic production in this illustration is equal to Q_0 and domestic consumption by Q_d, with imports filling the gap, $Q_d - Q_0$. Following the WTO analysis, if the government, for political or redistributive reasons (i.e., reasons not related to efficiency), subsidises production, the domestic supply curve shifts out, expanding domestic production to Q_1. Imports shrink by a corresponding amount to $Q_d - Q_1$. The cost to the economy of producing goods that could have been produced at lower resource costs abroad is represented by the area *abc* in the chart.

The WTO (2006: 57-58) also provides a straightforward analysis of an export subsidy in a large country context where the subsidy lowers world prices for the good in question (see Figure 6). At the non-subsidised price P^*, domestic consumption in the exporting country is at point *a*; exports are equal to the distance between *a* and *b* (equal to the imports in the importing country). An export subsidy shifts some production to foreign markets, expanding exports from the amount *ab* to the amount *cd* and reducing domestic consumption in the exporting country to the point *c*. Assuming no arbitrage, a wedge is driven between the domestic price p^d and the world price p^f.

Figure 6: The effect of export subsidies on trade and economic welfare



Source: WTO (2006), Box 3: Export subsidy in a large country case

From a welfare perspective, subsidies benefit consumers in the importing country while producers, forced to compete with lower-priced imports, are net losers, with some uncompetitive producers being forced to exit the industry. Overall, however, the importing country is usually better off, since the increased benefit to consumers typically more than offsets the loss to the producers. At the same time, the WTO analysis highlights the impact of the subsidy on the exporting country, namely the fact that the diversion of production to export markets tends to raise prices in the domestic market (assuming domestic consumers cannot re-import the product), leading to welfare losses for consumers. Producer surplus in the exporting country expands by more than the loss of consumer surplus, but this is due to transfers from government. For the exporting country as a whole, there is a net welfare loss since the subsidy is transferred to foreign consumers.

Subsidies are of concern from a trade perspective, even where they are not aimed at trade, since they can affect trade flows by undermining market access commitments (e.g., by effectively replacing border measures that have been negotiated away[26]); and by affecting the competitive position of firms in internationally contested markets. The basic purpose of WTO rules that allow selective intervention by Members to counter subsidies offered by other countries is thus "to preserve a level playing field between companies, when governments provide financial support" (WTO 2005: iv).

Implicitly, the notion of a "level playing field" takes what is the economist's natural point of departure in analysing subsidies: namely, a hypothetical general market equilibrium without the presence of government (Sykes 2005: 3). Underlying the theoretical general equilibrium is the assumption that agents in the economy are rational and best placed to maximise their individual welfare through their production and consumption choices, under conditions of perfect information (including about the future), no externalities, and no indivisibilities of consumption or production (i.e., no public goods), and thus no need to take regard of others' choices. With these assumptions (which can be traced back to the work of Arrow and Debreu in the 1950s), the market equilibrium is also Pareto optimal (no one can be made better off without someone being made worse off).[27] From this starting point, *any* tax, subsidy, regulation or other policy

[26] For example, this is a recurring theme in the *Canada-US softwood lumber* dispute, where Canadian government policies to deal with the impacts of the softwood lumber agreement on the forest product sectors and forest product communities are seen by the American side as violations of the agreement.

[27] See Geanakoplos (2004) for a recent review of the Arrow-Debreu neoclassical general equilibrium model which lies at the heart of the broad modern consensus concerning economic policy.

intervention that alters equilibrium prices and output by imposing costs and/or providing benefits moves the economy away from this optimum and necessarily therefore detracts from welfare.

However, the real world has many features that do not conform to the assumptions that allow this conclusion. These non-conformities include the pervasive presence of externalities (positive and negative), increasing returns, information asymmetries, imperfect information, and other heterogeneous features of markets. Because of the issues raised by these non-conformities, governments intervene in a wide variety of ways:

- supporting industrial or regional development (including through strategic use of government procurement);
- imposing regulations (e.g., certification requirements to practice medicine or law, consumer disclosure requirements on packaging, environmental emissions standards and so forth);
- providing supporting economic infrastructure; and
- directly engaging in economic production through state-owned corporations where there are perceived market gaps (e.g., small business development banks and export credits agencies), or to ensure provision of goods and services deemed of strategic importance from political or national security perspectives (e.g., telecommunications, postal services, transportation equipment with military applications, etc.).

This activity is financed through a wide range of measures with complex and internationally heterogeneous features, including taxes on income, profits, payrolls, capital, value-added, sales, and property as well as various user fees.

These various measures *pervasively* change the net returns to any specific activity, with some experiencing a net boost (i.e., they are on balance subsidised) and others facing a net cost (i.e., they are on balance taxed). As Sykes (2005) points out, working out these nets is impossible since the hypothetical equilibrium cannot be observed and is in any case scarcely a realistic benchmark since it abstracts away the institutional framework which gives rise to a market in the first place (e.g., a government to create property rights). Moreover, the information to evaluate the effects of all government interventions is lacking.[28]

Under the WTO Agreement, subsidies were originally classified into three categories, which were often referred to in terms of a traffic light metaphor:

- The "red-light" category is reserved for subsidies contingent on exporting and which thus are presumed to provide unfair advantage in foreign markets; or that require use of domestic goods instead of imported goods and which thus are presumed to unfairly disadvantage foreign goods in domestic markets. These are prohibited outright.
- The "green-light" category (since expired) was reserved for measures that provided support for research, disadvantaged regions and adaptation of existing facilities to meet environmental regulations that impose greater burdens on some industries. These were safeguarded from CV measures (i.e., they were "non-actionable"), subject to some limitations.
- Subsidies that fall into the "yellow-light" category may be subject to CV measures (i.e., they are considered "actionable"), if they cause injury to (i) a domestic industry in an importing country; (ii) rival exporters from another country when the two compete in third markets; or (iii) exporters trying to compete in the subsidising country's domestic market.

[28] The long lists and wide-ranging nature of domestic policy actions that are found to be specific subsidies in trade disputes is eloquent testimony to the complexity of the area – and these disputes entirely ignore offsetting costs, which are equally complex and heterogeneous. The US-EU large aircraft disputes are a good case in point as are many of CV measures brought against China.

Subsidies can be structured to affect the marginal costs of production or export; in this case, theory predicts that they will influence the price of the product. However, many types of subsidies go to offset fixed or sunk costs of market entry, including subsidies to support acquisition or development of technology or investment in plant and equipment. Such non-recurring subsidies affect competition over the longer-term by expanding capacity in the relevant market (Grossman and Mavroidis 2003). In industries where firms face increasing returns, subsidies which transfer investment risk from firms to government can provide significant first mover advantages to the subsidised firms if they gain market share and capture the rents implied by increasing returns; such subsidies can shift benefits to the exporting country, as described in strategic trade theory (Brander and Spencer 1984).

The key test as to which domestic subsidies are "actionable" is specificity. The specificity test has a clear connotation of determining legitimacy[29] – although there is no requirement to examine whether the subsidy addresses particular market failures in the context of the economy in question. Accordingly, a country must structure its support in a socially inefficient manner to sectors where there are no market failures as well as to those where there are, in order to be safeguarded from CV measures (and even then might fall afoul of the *de facto* specificity test if the utilisation of the subsidy is disproportionate across industries). Moreover, the AS regime addresses domestic policy measures that are non-neutral in terms of *benefits* to industrial activity, specifically those that take the form of a financial contribution, while ignoring the panoply of measures that are equally non-neutral in terms of *costs* to the specific industrial activity under consideration, not to mention ignoring benefits that might not be construable as a financial contribution but which might nonetheless covey specific benefits. Given the degree of heterogeneity of public policy across national systems, this is a conceptually unsatisfactory state of affairs, and thus one which has elicited critical commentary over the years.

The emergence of a general consensus amongst OECD countries concerning the appropriate formulation of industrial policy was reflected in a relatively low frequency of use of CV measures in the WTO era. However, there has been a revival of interest in industrial policy worldwide in the wake of the supply shock emanating from the rapid integration of large emerging markets into the global economy over the course of the past decade. The European Commission for its part has stated that "Europe needs industry" and has proposed a "fresh approach to industrial policy" (European Commission 2010). The implications for TDI of this re-thinking of industrial policy are not yet clear.

WTO rules, consistent with the prevailing OECD consensus, provide a green light to "horizontal" support, which promotes industrial development without seeking to influence the sectoral structure of the economy and is sometimes referred to as "soft" industrial policy; but frowns on vertical support that does seek to promote specific sectors or firms (e.g., "national champions"), which is referred to as "hard" industrial policy.

The distinction between horizontal and vertical subsidies is, however, crude and does not withstand close scrutiny. For example, Harrison and Rodriguez-Clare, who find no support for vertical or "hard" policy interventions[30] and argue for "soft" interventions, provide as examples of soft interventions "programs and grants to help particular clusters by improving the formation

[29] The debate over "legitimacy" of public policy measures was part of the negotiating history of the ASCM. For example, the UNCTAD manual on subsidies and countervailing duties observes that: "the ASCM provides that certain subsidies are to be regarded as legitimate depending on their purpose."

[30] Notwithstanding this general conclusion, this study provides some examples of infant industry policies that relied on either trade protection or subsidies to nurture eventually highly successful industries (e.g., Denmark's support for the wind turbine industry, which resulted in a global leader at no welfare cost to consumers).

of skilled workers, regulation, and infrastructure." (2010: 4043) However, such support would likely be considered specific and countervailable subsidies under TDI law – for example, the runway extension at Bremen Airport to accommodate transport flights for Airbus wings manufactured in Bremen was found to be a specific subsidy by the WTO (WTO 2010).

Moreover, the main rationales for industrial policy do not typically apply across the board:

- the existence of positive externalities in activities such as innovation (which motivate public support for research and development);
- market failures in activities that require large and risky initial investments but potentially yield are subject to large economies of scale;
- the existence of steep learning curves in particular goods which may not develop without a period of government support (the traditional "infant industry" argument); and
- coordination failure where potentially successful industrial activities are not undertaken because they rely on simultaneous investments in a range of areas to generate the necessary inputs.

This point was acknowledged in an influential survey by Grossman (1990: 118):

> "arguments for industrial policy do not apply across the board, nor is there any presumption that the prerequisites for intervention to be beneficial will be satisfied for a majority of high-technology ventures. *The nature of the problem makes case-by-case analysis unavoidable.*" [emphasis added]:

Further, the firm-level trade literature suggests that there is a close linkage between exporting, innovation and productivity. Importantly, it can be read to demonstrate that government export promotion programmes that assist firms in dealing with the various fixed costs of foreign market access can induce innovation, spur productivity growth within the supported firm and also generate local spillovers to other firms through learning effects associated with engagement in international trade and investment. Innovation and productivity growth are prime public policy objectives of governments around the world and governments hardly need convincing of the importance of exports to the health of their economies. Given this, policy activism by governments is more likely to wax than to wane, implying greater challenges for AS policies.

Finally, as the on-going technological revolutions in transportation and communication enable the fragmentation of production across regions, borders and continents, activities that were formerly anchored locally as part of vertically integrated production processes are now routinely outsourced and off-shored. For the immobile factors of production – land, people and sunk capital – the challenge has become one of continuously acquiring new specialisations on the basis of which to make returns and a living. Thus, notwithstanding the doubts expressed about the possibility of successfully implementing industrial policy ("governments cannot pick winners"), identifying and fostering a basis for local competitiveness has become a burning issue for many regions and municipalities. For example, the Global Cluster Initiative Survey 2003 identified more than 500 cluster initiatives worldwide which are aimed precisely at that. And, increasingly, international trade has come to be seen as the fulcrum for sustained local economic growth (Gereffi 1999), in part because the increasingly fine level of specialisation enabled by globalisation means that products must have global markets to be viable.

In summary, there is a nexus of conundrums for the trade system in general and for TDI policy in particular in the following set of facts concerning the interaction between subsidies and trade:

- the economic literature (including the WTO's own research) acknowledges that many specific subsidies can be welfare enhancing, in particular those that seek to harness local externalities, and are thus quite legitimate;

- the globalisation of production intensifies competitive pressure on local communities which respond by seeking to exploit local externalities to sustain themselves – given local specialisation, any such government support may be found to be specific;
- as globalisation induces an ever finer specialisation of production, local communities increasingly rely on global markets; but
- AS rules apply a connotation of illegitimacy to specific subsidies, which are often provided by local municipalities, and especially to subsidies that promote exports, although there is much evidence that exporting drives innovation and investment and thus competitiveness.

2.1.3 The Economics of TDI

2.1.3.1 Welfare effects

The conventional analysis of the effects of TDI focuses on the market in which dumped or subsidised goods are sold and in which TDI countermeasures are put in place.[31] Since the remedy for dumping or subsidies is a tariff, the vast body of economic analysis dealing with tariff effects is relevant. Just as a tariff reduction expands economic welfare by providing the economy with access to imported goods at a cost less than would be required to produce the good at home, so a tariff increase makes the imported product more expensive and thus reduces economic welfare.[32]

Moreover, the conventional analysis of TDI treats AD as simple trade protection and not as an offset to price discrimination or subsidisation. To draw out the implications of the assumptions underlying the conventional approach, a case study is constructed for analysis using computable partial equilibrium models. The objective of these simulations is to demonstrate two key points:

- First, the welfare gains in the destination country from the lower prices resulting from price discrimination by a foreign exporter or the pass-through of a foreign government subsidy are transfers from the origin country. Globally, transfers net out.
- Second, the effect of TDI in countering such price discrimination or subsidisation is to restore an initial set of conditions that would have prevailed if there were no dumping or subsidisation in the first place. Evaluated against this initial (unobserved) equilibrium, TDI is essentially neutral in its global welfare impacts.

For this purpose the 2005 case *Side-by-side Refrigerators from Korea* is taken. In this case, the EU applied AD measures against several Korean firms, Samsung, LG and Daewoo, amongst others, with an average duty of 6.95%. While the specific details of the trade flows cannot be used due to business confidentiality of the information, it is possible to construct a mock-up of this case based on the case information that is adequate to illustrate the welfare issues in a realistic trade setting. The full discussion of the analysis is provided in appendix E1.

The analysis of the welfare effects of TDI is conducted first with the COMPAS series of partial equilibrium models developed for these specific purposes for the US International Trade Commission by Francois and Hall (1997). Table 5 compares the impact of dumping to the impact of TDI in the destination market (the EU) alone under alternative assumptions about the degree to which consumers switch from domestic to imported goods based on price differences.[33] As

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31 For example, the often-cited study by Gallaway, Blonigen and Flynn (1999) measures the cost of AD on the basis of the consumer welfare impact in the USA alone.

32 The main exception to this general conclusion is the optimal tariff case, where a large country that applies a tariff may realise terms of trade gains that exceed the deadweight loss from the tariff. For a recent discussion and empirical analysis of the extent to which this effect is exploited, see Broda, Limão, and Weinstein (2008).

33 The COMPAS models are based on the Armington framework. Under this framework, products are differentiated by country of origin. They are imperfect substitutes, with the degree of substitutability represented

can be seen, dumping improves EU welfare by about EUR 11 million which results from a large consumer surplus gain together with a minor boost to tariffs (induced by the increased volume of dumped imports). These gains are only modestly offset by a loss of producer surplus (the small loss reflects the relatively small domestic market share held by EU producers). Countering dumping meanwhile has predictably negative impacts on domestic (EU) welfare. The imposition of tariffs reverses the gains in consumer surplus[34] due to dumping but results in only a small overall welfare loss for the EU since the consumer surplus losses are largely offset by tariff revenues collected by the government. This quantification corresponds to the graphic illustration in Figure 4 above. To put these impacts in perspective, total sales of the product in the EU market from domestic sources, dumped imports and non-dumped imports were about EUR 300 million.

Table 5: COMPAS Model simulation – impact of dumping and of TDI (EUR million)

	Alternate Substitution Elasticity Assumptions		
	Low	Medium	High
Effects of Dumping			
Consumer Surplus	11.58	12.07	12.32
Producer Surplus	-0.05	-0.75	-1.20
Tariff Revenue	0.01	0.10	0.16
Domestic Economic Welfare	**11.54**	**11.42**	**11.28**
Effects of TDI			
Consumer Surplus	-14.28	-15.54	-16.25
Producer Surplus	0.06	1.10	1.92
Tariff Revenue	13.53	12.82	12.55
Domestic Economic Welfare	**-0.70**	**-1.62**	**-1.79**

Source: Authors' calculations using COMPAS Model, Effects of LTFV Exports Version for Effects of Dumping and Target Version for the effects of TDI.

The intuition is straightforward: if a foreign supplier chooses to transfer benefits to the EU by charging lower prices (whether because of the firm's pricing strategy or pass-through of a subsidy), the EU is largely indifferent whether to allow the benefits to flow to consumers (at some expense to its producers) or to tax those benefits away (with some benefit to its producers). If the EU accepted an undertaking from the Korean suppliers to raise prices, in which case the EU would forgo the tariff revenues, the negative effect of the application of TDI would be much greater since there would be no tariff offset to the consumer welfare losses.

Analysing the same scenarios in a multilateral trade setting, where the welfare impacts in all the countries that are part of the trading web in the subject goods are taken into account, sheds further light on the welfare impacts of dumping and TDI. To illustrate this, a multi-country

by the elasticity of substitution. The model results are driven by assumptions concerning the elasticity of demand for the product (the degree to which demand for the product responds to price changes), the elasticity of supply (the corresponding responsiveness of supply of the product to a change in the price) and the substitution elasticity. Some empirical evidence is available for the general magnitude of these elasticities but precise estimates are not available. Model results are only modestly affected by varying the demand and supply elasticities over plausible ranges; however, the results are sensitive to variation in the elasticity of substitution. Three sets of substitution elasticities are used in the assessment in this study: empirically estimated elasticities for refrigerators (low at 1.13 between imports and domestic production; source: Francois and Hall 1997); GTAP elasticities for machinery and equipment (4.1 between imports and domestic production); and the GTAP elasticity between competing sources of imports based on the fact that the product is identified with a US multinational, notwithstanding that it is produced in Europe and the fact that the dumping was in the UK and French markets, whilst the European production facility is in Italy.

[34] The impacts of the AD measure are not perfectly symmetrical with the effects of dumping, in part because the supply elasticity in Korea becomes infinite to replicate the full pass-through of the AD duties. This modelling convention is standard to illustrate the effect of AD or CV duties.

partial equilibrium model is used.[35] In these simulations, first the initial, unobserved trade flows pre-dumping are identified in a pre-simulation. When dumping by Korean producers is introduced into this pre-simulated trade setting, the actual observed trade flows documented in the case materials emerge from price discrimination exercised by Korean firms (i.e., by dumping). Subsequently, TD measures are applied to these observed trade flows. The welfare results of these two experiments are shown in Table 6.

As can be seen, the welfare results for the EU are similar to those obtained in the COMPAS simulations but all the effects are marginally stronger due to differences in the model specifications. However, now the source of the welfare gains of EU consumers from dumping by Korean producers is laid bare: it is a transfer of Korean producer surplus to EU consumers and thus a transfer of welfare from Korea to the EU. At the same time, the increase in Korean supply to the EU market (as the lower, dumped prices induce increase sales in that market) reduces supply to other markets, including to the Korean suppliers' domestic market. Accordingly, the EU consumer welfare gain is partially offset by consumer welfare losses elsewhere. The producer impacts of Korean dumping in the EU market vary: EU and competing suppliers from the USA suffer losses, but elsewhere in the world, the diversion of Korean supply to the EU market reduces Korean supply and thus increases producer surplus in these other countries. Overall, there is a small global loss of welfare which is consistent with the general understanding of price discrimination as discussed above that it results in welfare losses due to a misallocation effect that is fully offset by positive output effects only under particular conditions.

Table 6: GSIM Model simulation – welfare impacts of dumping and of TDI (EUR million)

	EU	Korea	USA	ROW	Total
Effects of Dumping					
Consumer Surplus	12.82	-2.50	-0.69	-1.10	8.53
Producer Surplus	-0.69	-10.47	-0.12	0.10	-11.19
Tax Revenue	0.64	0.02	0.00	-0.15	0.50
Total	**12.76**	**-12.95**	**-0.81**	**-1.16**	**-2.16**
Effects of TDI					
Consumer Surplus	-14.66	2.14	0.59	0.95	-10.98
Producer Surplus	0.62	-4.26	0.11	-0.08	-3.61
Tax Revenue	11.83	-0.02	0.00	0.13	11.95
Total	**-2.21**	**-2.14**	**0.70**	**1.00**	**-2.65**

Source: Authors' calculations using GSIM V2.

Second, as is to be expected, the imposition of TD measures on Korean imports shifts the direction of Korean shipments to the Korean domestic market and to third markets. The expansion of supply into those markets works to expand consumer surplus worldwide by lowering prices in those markets. Thus, the overall negative impact on consumer surplus in Europe is mitigated by positive impacts elsewhere (although the negative impact in the EU dominates the global consumer welfare effect). However, since a tariff results in a transfer rather than imposing additional costs on exporters, most of the negative impact on consumers is offset by increases in tax revenues. Again, there is a small overall negative welfare effect registered in the EU and globally, although this result reflects the fact that the modelling framework does not exactly replicate the initial equilibrium pre-dumping or subsidisation.

Note that a still more complex modelling approach would be required to analyse the welfare effects of a case where a market equilibrium is first disturbed by the initiation of a predatory pricing strategy by an exporter, followed by the application of TDI. Klemperer (1989) notes that a four-period model is required to analyse a price war where a dominant firm employs predatory

[35] The model used is version 2 of the Global Simulation (GSIM) model developed by Francois and Hall (2003). For a discussion of the additional assumptions concerning trade flows, see appendix E1.

pricing to counter new entry in a context where switching costs make predation a potentially profitable strategy: one period before the entry of the new competitor, the period of entry, and two periods after entry. Since the initiation of predatory dumping in a trade setting is analogous to a price war in a domestic competition policy setting, a similarly complex modelling approach is required to analyse the welfare effects of predatory dumping. In Klemperer's theoretical analysis of a price war, the low prices during the price war are followed by a return to higher prices. By analogy, it is more appropriate to measure the welfare effects based on the higher post-predatory dumping (post-price-war) prices than on the basis of the (temporarily) lower prices during the episode of predatory dumping. Evaluated this way, the welfare effects of TDI would likely be unambiguously positive since competition would be greater and consumer prices lower than if predation was not countered. However, for this analytical approach to be valid, predatory intent must first be established.

To summarise, the lower prices in the destination market that result from exporters' decisions to price discriminate or from the pass-through of a foreign government subsidy generate consumer welfare gains in the destination market (and tariff revenues, if a tariff normally applies) that typically substantially exceed the domestic producer welfare losses. However, these gains represent transfers from the exporting countries. Globally, the welfare effects largely net out. The balance, whether marginally positive or negative, depends on the particular demand conditions across all markets. In some cases, the positive output effect from the price discrimination or subsidisation might exceed the negative misallocation effect, but not necessarily. In general, the information required to assess the global welfare effects is not available; however, consistent with the general conclusion regarding price discrimination in a domestic market context, dumping or subsidisation can be seen as generally benign and essentially neutral from a global welfare perspective. By the same token, countering dumping or subsidisation with TDI where there is injury to domestic producers redirects the welfare transfers to the destination country implicit in dumped or subsidised prices from consumers to governments, at some benefit to domestic producers, and at a small aggregate welfare loss in the destination country; the global welfare effects however remain small reflecting the fact that the main impact of TDI is to reallocate welfare gains and losses across the trading system. In cases where actual predatory intent is countered, TDI is pro-competitive and the welfare effects from a consumer perspective are likely to be positive.

Revisiting the welfare standard

A final qualification to the discussion of the welfare effects of TDI concerns the basis on which costs and benefits are added up to evaluate the economy-wide impact. The approach to evaluation of the welfare impacts of TDI outlined above is based on Harberger's (1971) conventions for cost benefit analysis which stipulate that:

- the competitive demand price for a given unit measures the value of that unit to the demander;
- the competitive supply price for a given unit measures the value of that unit to the supplier;
- when evaluating the net benefits or costs of a given action (project, programme, or policy), the costs and benefits accruing to each member of the relevant group (e.g., a nation) should normally be added without regard to the individual(s) to whom they accrue.

Harberger himself noted several possible objections to this framework, of which two are particularly salient here:

- the analysis is valid only when the marginal utility of real income is constant; and
- the analysis does not take account of changes in income distribution caused by the action(s) being analysed.

In dumping cases, consumer benefits are typically widely diffused and represent a small change in welfare to each consumer. The real income effect for consumers of lower prices due to dumping and conversely the higher prices due to the application of AD measures can therefore be realistically assessed on the assumption of constant marginal utility of real income. Harberger himself justified the assumption of constant marginal utility of real income precisely on grounds that the per capita real income effects of public policy measures are likely to be small. However, the producer impacts, which are ultimately borne by the underlying factors of production – labour and capital – if large enough to have significant impacts on employment (e.g. when plants close), result in large negative impacts on a comparatively small group of individuals. In these cases, it is not simply a question of excess profits being transferred to consumers but a loss of factor incomes. Moreover, the effects spill over from the sector directly affected to the local business community at large.

For those bearing the brunt of a loss of factor income, including workers and others in communities severely disrupted by plant closures, the assumption of constant marginal utility of real income is invalid in measuring the cost of dumping, or conversely the benefit of AD measures. Note in this regard the documented tendency of people losing jobs to withdraw from society, to stop contributing to their communities, and indeed to have their lives shortened (Koller 2010). This is an important point of differentiation between the application of a domestic tax which is spread over a large group of people to fund public programmes which also benefit a large group of people. Such distributional effects are at times the most important political consideration faced by governments in the decision of whether or not to implement TDI.[36]

It is appropriate to note here that the issue of "balance" in the evaluation of the use of TDI necessarily requires engagement with political economy choices. In modern treatments, the economic welfare test applied focuses, often entirely, on consumer welfare. This, however, is a choice; other standards have a claim to be considered – and have in the past been used.

Sykes (1998), in his comparison of antitrust and AD, provides an insightful review of the evolution over the decades of the construction of US antitrust law by the Supreme Court from early interpretations by Judge Learned Hand to more recent interpretations by Judge Robert Bork. In the 1945 case, *United States v. Alcoa*, Judge Learned Hand observed

> "It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of the few."

In his reading, the statute's intent was "to perpetuate and preserve, for its own sake and in spite of possible cost, an organisation of industry in small units which can effectively compete with each other."[37] Hand's opinion was cited favourably by the court in the 1962 case, *Brown Shoe v United States*. This sparked a debate in the USA, which was eventually decided by a wave of articles by Richard Posner and Robert Bork in favour of a pure efficiency standard (Gifford and Kudrle 2002). Thus, a recent assessment of US antitrust law concluded that consumer welfare had become the only articulated goal of antitrust law in the USA, having attained that status following the 1978 publication of Robert Bork's *The Antitrust Paradox*. Bork endorsed the fact

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36 An alternative way to look at this issue is in terms of the height of exit costs. Aggarwal, Keohane and Yoffie (1987) suggest a way to categorise protection according to ease of exit. When the industry is large and exit is difficult, protection tends to institutionalised; when the domestic industry is small and exit is easy, only temporary protection tends to be provided; and when barriers to entry are high, sporadic protectionism is likely. The idea of exit costs is comparable to the notion of weighing transitional factor income losses against consumer welfare gains in instances where plants close.

37 *United States v. Alcoa*, 148 F.7.d. 416, 429, 1945, cited in Bowman (1996: 173).

that "[b]y and large, with some ambiguity at times, the more recent cases have adopted a consumer welfare model" (Sykes 1998: 12). However, it is to be noted that Orbach (2011), surveying the more recent evolution of this issue, argues that "whatever good ends the 'consumer welfare' phrase may have once served, antitrust law should now lay it to rest."

The take-away point here is that the standard is not immutable. Reasonable people disagree and the consensus does at times change.

Further, standards applied in welfare analysis may indicate community preferences. It is instructive in this case to note the documentation by Alesina, Glaeser, and Sacerdote (2001) of the significant differences in government spending between Europe and other OECD countries, in particular the USA; they demonstrate that the higher European spending is primarily due to larger transfers to households and subsidies in times of need. Hacker (2005) points out that the difference in social expenditure between the USA and Europe is in part due to the fact that American social spending is in good measure delivered through tax breaks. However, as he further points out, while this serves to raise the overall level of social expenditure in the USA, the verticality of the US system is much less than in Europe since tax breaks go predominantly to those who pay the most taxes. Accordingly, Europe has a greater revealed preference for redistributive policies than other OECD countries and particularly the USA.

On this basis, one would infer, all else being equal, that the EU would use TDI more intensively than other jurisdictions where social concerns are raised. For example, EU TDI use would be expected to be greater in instances such as those described by Hutton and Trebilcock (1990), where welfare benefits associated with stable family and community ties are at risk when import penetration impacts on small communities heavily dependent on local producer interests. Moreover, when such concerns are in play, the welfare calculation is more favourable for TDI, all else being equal, than otherwise. The extent to which such communitarian concerns figure prominently in TD cases is addressed below in the consideration of the *de facto* motives for EU TDI use.

2.1.3.2 Trade effects

The basic trade effects of TDI are straightforward. In a multilateral trade setting, the impact of TDI on one particular trade flow redirects trade: the bilateral flow is reduced, supply from the origin country of the dumped or subsidised product to third markets is increased (trade deflection) and supply from third countries to the destination country in which TDI was applied increases (trade diversion). There is also trade destruction as domestic shipments in the origin country of the dumped or subsidised product increase (as some exports are redirected to domestic consumers) as well, as do domestic shipments in the destination country where domestic producers take up part of the market formerly held by the dumped or subsidised imports. In the general case where the domestic import-competing producers also export, their exports to markets in which they compete with the dumped or subsidised product fall. These various effects are illustrated in the case study described above and shown in Table 7.

Comparing the initial equilibrium without dumping and the final equilibrium with dumping and TDI shows that TDI is for the most part trade-neutral when seen as a response to a disturbance rather than as the disturbance itself. If the TD measures were perfectly calibrated to just offset the effect of dumping or subsidisation, the result would be to reproduce exactly the initial equilibrium trade flows pre-dumping or subsidisation. Evaluated against this (unobserved) equilibrium, the effects of TDI would be found to be perfectly neutral (ignoring the administrative costs of maintaining the TD system and the cost of the investigation).

Table 7: Trade flows, observed, pre-dumping, and post-dumping and TDI (EUR M)

	EU	Korea	USA	ROW	Total
Trade flows in initial equilibrium without dumping					
EU	61.3	0.0	0.0	0.0	61.3
Korea	174.1	680.1	213.2	258.0	1,325.3
USA	33.8	30.2	1,518.6	499.0	2,081.6
ROW	0.0	0.0	0.0	508.6	508.6
Total	**269.2**	**710.3**	**1,731.8**	**1,265.6**	**3,976.9**
Observed trade flows in the presence of dumping					
EU	57.8	0.0	0.0	0.0	57.8
Korea	210.2	674.9	210.2	254.6	1,349.8
USA	30.4	30.4	1,520.2	500.0	2,081.1
ROW	0.0	0.0	0.0	509.1	509.1
Total	**298.4**	**705.3**	**1,730.4**	**1,263.7**	**3,997.8**
Final equilibrium with dumping and TDI					
EU	60.9	0.0	0.0	0.0	60.9
Korea	178.7	679.4	212.8	257.5	1,328.5
USA	33.4	30.2	1,518.8	499.1	2,081.6
ROW	0.0	0.0	0.0	508.7	508.7
Total	**273.0**	**709.7**	**1,731.6**	**1,265.4**	**3,979.7**

Source: Authors' calculations using GSIM V2. Note that in this table, each entry represents a flow from the country listed in the row to the country listed in the column; the data in the diagonal represents domestic shipments. Thus the initial panel shows EUR 61.3 million of domestic shipments in the EU, EUR 174.1 million in Korean shipments to the EU, and so forth.

Several studies have empirically examined the trade diversion/deflection effects of TDI and confirmed their importance. Prusa (2001), studying the effects of the use of TDI by the USA, found that TDI not only reduce imports from named countries, but also lead to an increase in imports from non-named countries. Bown and Crowley (2007), examining the impact of US AD measures on Japan, found that US duties on Japanese imports deflect Japanese trade to third parties;[38] they also found that US duties on third countries reduce Japanese exports to those countries, presumably because the domestic industries in those countries divert supply from the US market to their own domestic market. Konings and Vandenbussche (2009), examining France's exports in sectors subject to EU TDI found that, at the product-level, exports to target countries of goods protected by TDI fell by as much as 66% following protection. The effect was strong enough to reduce France's global exports of those products by 36%. Avsar (2011) found that Brazilian exporters hit by AD duties expanded exports to alternative countries to which they export the same product or (to a lesser extent) to countries to which they export other products; moreover, they introduced the targeted product into other countries to which they had previously exported.

Thus, while the rearrangement of trade identified works in the direction of restoring the competitive situation pre-dumping/subsidisation, it is quite likely that the impact of TDI may "overshoot" and thus change global trade patterns compared to the counterfactual situation in which there had been no dumping/subsidisation and no TDI response.

Trade deflection would appear to be a particularly serious issue where a bubble of excess capacity globally in an industry results in a surge of exports that is seeking a final market. The EU acknowledged the possibility of trade deflection in applying safeguards on steel following the US action in this sector, noting that the change in US trade policy would re-route or "deflect" Asian steel exports – initially destined for the newly closed US market – to what would have otherwise

[38] For example: "Imposition of a US antidumping duty against Japanese exporters is associated with substantial deflection of trade: the median antidumping duty against Japan leads to a 5-7 percent average increase in Japanese exports to a non-US trading partner." Bown and Crowley note that, relative to Japan's trade-weighted average export growth over this period of 15% per annum, this represents an increase in export growth of roughly one-third to one-half.

been a relatively open EU market (Bown and Crowley 2007). In such cases, the use of TDI deflects the surge to those markets where it does the least harm (i.e., where there are no producer interests to be harmed) and provides the greatest final benefits to consumers or downstream industries. This changes the welfare calculation considerably compared to an analysis based on a bilateral flow with the assumption that TDI simply reduce trade.

2.1.3.3 Dynamic efficiency effects

An important empirical question is how firms respond to the temporary protection provided by TDI. In some cases, firms may take advantage of the breathing space to address competitiveness issues that might have been contributing factors to the loss of market share that led them to file for protection. The application of TDI in such cases stands in much better light than if firms utilise the protection to extract rents and then face the same competitiveness issues upon expiry of the measures. There is anecdotal evidence for both types of responses. Crowley (2006), for example, contrasts the American experience with steel versus motorcycles. In the case of steel, the US industry fell behind its main global competitors in terms of adopting widely available, leading technologies and failed to make up the ground during the period of protection, leading to repeat petitions for protection. In the case of motorcycles, the US producer Harley-Davidson used the period of protection to regain its competitive edge.

It is of course usually the case that it is import *competition* rather than *protection* from imports that drives firms to innovate. However, TDI combines both features: it provides protection, but only on a temporary basis and thus also involves an expectation of trade liberalisation pursuant to the sunset provision. The incentive structure of TDI thus points to heterogeneous responses by firms. The general patterns of TDI use appear to bear out this expectation. The heavy concentration of TD cases in certain sectors suggests that some industries "learn the ropes" of obtaining protection and find that the additional profitability afforded by TDI pays for the next round of protection seeking. Rather than investing in process and product innovation, these industries invest in protection. This response may be dictated by features of these industries and thus may be endogenously determined. For example, the steel sector, a traditional heavy user of TDI, features a small number of large firms that face low coordination costs and that can easily cover the resource costs of investigations. At the same time, new process technology in this sector involves large, lump-sum investments that must be amortised over a lengthy period of time during which firm profitability improves as the firm gains experience with the new technology. Accordingly, at a time of rapid technological change, as firms in emerging markets leapfrog established firms in adopting newer technology, the established firms may opt for protection in order to extract the full returns from their earlier investments. By contrast, other industries may take advantage of the breathing space – and increased profitability – afforded by temporary protection to reinvest to meet the competitive challenge that may have prompted their petition for TDI protection in the first place. The observed response to TDI in this case would be similar to the response in the face of trade liberalisation – which is of course what these industries eventually face given that TDI protection is temporary.

The systematic evidence described below suggests that the dynamic behavioural effects on firms in the shadow of TDI are heterogeneous with some aspects of firms' behaviour consistent with taking advantage of the temporary protection, other aspects consistent with preparing for the imminent removal of protection, and still other aspects reflecting the uncertainty introduced by the contingent nature of TDI protection. In particular:

- Protected firms take advantage of protection to increase mark-ups.
- Protected firms are less likely to exit the industry, slowing the pace of reallocation of market share to higher productivity firms, as per the core heterogeneous firm trade theory. At the

same time, protected firms also undertake investments which serve to improve their productivity on average, although this reflects gains among lower-productivity firms and some decline in productivity of high productivity firms.

- Faced with competition from low-wage countries, firms in high-wage countries shift production to goods that do not compete head-to-head with low-wage imports; since firms' response to TDI is partly conditioned by the anticipated termination of protection, they also likely move in this direction during the period of protection.
- The uncertainty associated with the contingent nature of TDI protection adds to the fixed costs that firms face in their decision of whether to take advantage of international markets, either as exporters or to source intermediate inputs.

Firms take advantage of protection to increase mark-ups

Konings and Vandenbussche (2005) compare price-cost mark-ups for EU firms benefiting from protection to those exiting from protection and to a randomly selected control group. Their overall results, reported in Table 8, suggest that:

- industries applying for protection had below average mark-ups prior to protection;
- protection allowed them to increase mark-ups;
- the increase more than compensated for the under-performance in the pre-protection period; and
- the higher mark-ups persisted after protection was terminated.

Table 8: AD measures and price-cost mark-ups

Price-Cost Mark-ups	Before AD Protection	Change During AD Protection	During AD Protection
Protection Cases	1.163	0.079	1.242
Termination Cases	1.257	0.011	1.268
Control Cases	1.213	-0.006	1.207

Source: Konings and Vandenbussche (2005), Table 2.

As to whether industries with market power increased mark-ups to a greater extent than more competitive industries, the results are less clear. An earlier version of the study using a smaller sample (Konings and Vandenbussche 2002) reported such an effect; this result suggests successful rent-seeking behaviour on the part of applicants. In the published version, reported here, the authors decline to draw any inference along these lines. Examination of the seven protection cases they study suggests that sectors that had more market power initially, as evidenced by a higher price-cost mark-up in the pre-protection period, were able to expand the mark-up by more than other sectors (the simple correlation coefficient between the increase during protection and the initial level is 0.74). However, this result is entirely driven by two outliers, *Seamless Steel Pipes and Tubes* and *Bed Linen*. Excluding these two cases, the increase in mark-ups following protection is inversely related to their initial level.

The overall impression from these results is that, for the most part, TDI allow depressed margins to be restored but that successful additional rent-seeking by firms with initial market power is the exception (*Bed Linen* in this case) rather than the rule. The failure of imports from third countries to prevent the increase in mark-ups beyond the average observed for the control group is noteworthy but the authors decline to propose why import diversion effects in the presence of above-average mark-ups should be less powerful in the EU than in the USA, where strong diversion effects have been reported.

At-risk firms take productivity-enhancing measures

Konings and Vandenbussche (2008) provide evidence that protected firms appear to enjoy some respite from the creative destruction of exit of the least fit, but also undertake some positive responses that boost their productivity. The response is, however, heterogeneous:

- Firms that file for protection tend to have, on average, a lower initial productivity than firms in control groups.
- The average productivity of the protected firms increases during the period of protection by 2% to 8% under alternative specifications. The effect is stronger for single-sector firms which would imply that the gains registered by multi-sector firms are concentrated in the protected sector.
- The gains reflect an increase in the productivity of the least productive and a decrease in the productivity of the most productive firms in the industry.
- Firm exit rates are lower during the period of protection (about 1.8%) compared to industries that did not benefit from protection (about 3%).
- Wages rise in protected firms during the period of protection. This is consistent with an increase in protected firms' rents that is partly shared with labour but also, as the authors acknowledge, with changes in the skill mix of employees, which in t urn would be consistent with the productivity improvements that the authors identify at the firm-level during protection including through labour shedding, increased R&D spending, and increased investment in fixed assets.

Notwithstanding the productivity gains they find, Konings and Vandenbussche conclude that TDI protection weakens the dynamic performance of industry.[39] Implicit in this critique is the assumption that all low-productivity firms are on the "exit ramp"; slowing the pace of exit then necessarily slows industrial dynamism. Konings and Vandenbussche explain this as follows:

> "trade protection increases the market size of domestic firms to the detriment of foreign importers. This increase in market size allows lowly productive domestic firms that would have exited in the absence of trade protection, to engage in productivity-improving investment. The most productive domestic firms that already operate at competitive cost levels and that are in no danger of exiting are much less affected by the increase in market size and have less incentive to improve their productivity during protection" (2008: 373)

Accordingly, the motivating factor for low-productivity firms to undertake productivity-enhancing investment is the expansion of the domestic market created by TDI.[40]

An alternative explanation is also available. The core heterogeneous trade model explains the variation of productivity levels of firms as due to a random draw of technology which determines how productive they are. In this model, firms with sufficiently low productivity self-select out of

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39 Note that Pierce (2011) reaches similar conclusions in a study on US firms. This study finds that the increases in revenue-based productivity associated with temporary protection are primarily due to increases in prices and mark-ups. "For the subset of plants reporting quantity-based output data, increases in prices and markups artificially inflate the effect of antidumping duties on revenue productivity, while physical productivity actually falls. Moreover, antidumping duties allow low-productivity plants to continue producing protected products, slowing the reallocation of resources from less productive to more productive uses."

40 Konings and Vandenbussche interpret the profitability decline of more productive firms in protected sectors as due to the reduction of competitive pressure to make productivity-enhancing investments, citing general models of the relationship between competition and innovation proposed by, for example, Aghion et al. (2005). This is a curious result because (a) one would expect market share opportunities opened up by exit of foreign firms targeted by TDI to be captured disproportionately by the high productivity firms (implying increased rents and still higher measured productivity); and (b) more productive firms are likely to be exporters and thus face unmitigated – and indeed intensified – competition in global markets given the diversion of TDI-affected product to other markets. The competition implications of TDI are sufficiently complex that the general models of the interaction between competition and innovation may not be directly applicable.

existence by exiting, just as high-productivity firms self-select into exporting. However, as observed by Lileeva and Trefler (2010), in contradiction to the prediction of this model, some small, low-productivity firms export and, moreover, they respond to trade liberalisation in the same way that Konings and Vandenbussche found lower-productivity firms responding to TDI protection. Lileeva and Trefler found that Canadian firms that were induced by tariff cuts to start exporting or to export more increased their labour productivity, engaged in more product innovation, and had higher adoption rates for advanced manufacturing technologies; importantly, they found that these responses were heterogeneous with smaller, initially less productive firms making the largest gains.

A further perspective on this issue is provided by the literature on capital investment which documents that young firms investing heavily in new technology and still gaining experience with the new technology are less profitable than older firms that are investing less but are extracting returns from their prior investments and experience capital (Lin 2010; Feichtinger et al. 2006). Whether TDI is predominantly preventing an efficiency-enhancing reallocation of market shares from (statically) low productivity firms to (statically) high productivity firms and thus generating dynamic welfare costs, or is providing a window for young firms investing intensively to gain experience and thus generating dynamic welfare benefits, is thus unclear on *a priori* grounds.

Firms respond differently to low-wage competition

A further element of heterogeneity in firm responses to TDI is suggested by Bernard, Jensen and Schott (2006). They find that exposure of US firms to low-wage country competition increases the likelihood of plant exit and employment reduction, reallocates manufacturing activity disproportionately towards capital-intensive and skilled-labour-intensive plants, and causes plants to adjust their product mix and switch industries. Pierce (2011), in a study of US anti-dumping practice, finds that protected firms continue to produce protected products while unprotected firms adjust to import competition by producing other, potentially higher-productivity products.

Insofar as product-switching is part of the productivity-improving response of EU firms in their adjustment strategies under the shadow of TDI protection from low-wage countries, there is by implication product and process innovation that is being undertaken by some firms, even as others simply use protection to increase rents.

Summary of dynamic efficiency effects

The evidence on dynamic efficiency effects of TDI on firms is mixed. These effects can be reconciled by recognising that firms respond to both features of TDI – the fact that TDI provides trade protection and the fact that it is temporary, implying the rational expectation of a future loss of protection. The fact that firms undertake productivity-enhancing investment in the shadow of TDI protection is more plausibly explained by anticipation of future withdrawal of protection than by hope of capitalising on a temporary expansion of the domestic market (an expansion that could be quite modest given the potential for trade diversion effects that result in a shift of import sourcing to non-named countries). By the same token, the welfare costs associated with short-run postponement of exit by (some) low productivity firms that actually are candidates for exit are offset by the welfare gains from the renewal of the industry by the enhanced growth of (other) low productivity firms, possibly young and heavily investing firms, that use the breathing space to gear up for the future removal of protection.

The tentative conclusion from consideration of the dynamic effects of TDI is that the market-share shift to lower productivity firms needs to be re-examined in terms of the age and

investment rates of those firms and the strategic behaviour of industries. An independent firm-level analysis to examine this question could not be undertaken within the time and resource constraints of the present project. Accordingly, only a provisional conclusion is possible here, namely that TDI deployed to protect industries that feature many young firms and in which the pace of process innovation is rapid will likely have more positive welfare effects than otherwise.

The importance of the temporary nature of TDI, which provides protection immediately but promises trade liberalisation upon expiry, is also highlighted as it implies a heterogeneous response of firms to TDI protection, with firms responding to the trade liberalisation implied by the sunset clause as well as to the interim protection. TDI is not ordinary protection; it is both contingent and temporary. Emphasis on these features both in policy communication and practice improves the likelihood that TDI will be welfare enhancing.

2.1.3.4 Systemic Effects

TDI and Fragmented Production Systems

The increased possibility to distribute production across firms within an economy ("outsourcing") and across borders ("offshoring") enabled by the evolution of information technology and transportation/trade logistics has had transformative impacts on the organisation of production domestically and internationally. Complex new forms of production, often described as "global value chains" (sometimes "webs"), have emerged. International commerce has been transformed through "integrative trade" in which trade in goods and services, foreign direct investment and technology flows are co-determined.[41] These developments have greatly complicated the application of economic policies that impact on trade, including TDI policy.

In brief overview, the theory of value chains is rooted in the theory of the firm and the determinants of which functions are carried out within the firm and which are contracted out to the market.[42] The division of labour between what is done within firms and what is assigned to markets is dynamic. Over time, certain functions or processes become standardised (e.g.,

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41 Global value chains are not new phenomena. Intermediate goods and services have always been important components of trade. Awareness of supply chain management issues dates back at least to the development of assembly line manufacturing in the early 20th century. The term value chain entered into use in the business management literature as early as 1985 (e.g., Kogut 1985; and Porter 1985). With the progressive development of globalization, the terms "global commodity chain", "global value chain", and "global manufacturing" gained currency (see WTO and IDE-JETRO 2011 for a discussion). What is new is the substantial blurring of the national identity of goods caused by the sharply expanded use of such chains.

42 The seminal work in this case is Coase (1937). Coase observed that using markets entails costs (the "costs of using the price mechanism"), resulting in some transactions being conducted within firms and others using markets. Firms exist, in other words, because markets are not costless – there are search costs and contracting costs involved in their use. In the modern theory, the decision of whether to internalise an element of a production process depends on whether *ex ante* non-standard and thus "relationship-specific" investments are required, with associated rents to be captured, and whether contracts can be specified and enforced to allow the firm to capture them. Contractual terms or obligations may be harder to enforce when the contract involves an international transaction versus a domestic transaction (e.g., because one of the parties to the contract operates in a country with weaker contracting institutions); accordingly functions that might be outsourced domestically may be kept internal in the form of a foreign affiliate if offshored. An extensive theoretical literature has developed that explores the organisational choices of firms in the face of incomplete contracts (given unforeseen contingencies, the excessive cost of specification of a large number of contingencies, or institutional weaknesses in enforcing contracts), search and matching issues, and the need for relationship-specific investments. Spencer (2005) and Helpman (2006) provide surveys of the literature in this area. Antràs and Helpman (2004, 2008) demonstrate how trade, investment, and firms' organizational forms are jointly determined; firm-level differences, differences in fixed costs of contracting, and wage differentials across countries all influence the equilibrium organisational structure.

International Standards Organisation (ISO) standards are formulated). Specific inputs become modularised (e.g., standard random access memory chips) allowing them to be used in a wide range of products. Firms can choose to have internal divisions dedicated to the function or turn to market sources if other firms specialising in those functions attain efficiencies through scale economies and provide lower-cost inputs. Thus, as markets develop, processes that at one point are generally conducted within firms over time tend to become sourced from the market (outsourcing). With the integration of markets through globalisation, the migration of functions from within the firm to markets tends to generate trade in intermediate goods and services (offshoring). This can be arm's length trade (outsourced and offshored) or intra-firm trade (kept internal but offshored).[43]

Complementary insights into the organisation of production domestically or internationally are provided by the business management literature. Five types of observed value chain governance are distinguished: market, modular, relational, captive and hierarchical. Which form of governance emerges in a particular context depends on the complexity of transactions, the ability to codify transactions, and the capabilities in the supply-base. The different types range across a spectrum from low to high levels of explicit coordination and power asymmetry (see Figure 7). Gereffi, Humphrey, and Sturgeon (2005) provide a discussion of this theoretical framework.

Figure 7: The Global Value Chains Governance Framework

	Complexity of transactions	*Ability to codify transactions*	*Capabilities in the supply base*	*Degree of explicit coordination and power asymmetry*
Market	Low	High	High	*Low*
Modular	High	High	High	
Relational	High	Low	High	
Captive	High	High	Low	
Hierarchy	High	Low	Low	*High*

Source: Sturgeon (2007).

Power in this context refers to the ability of a firm to influence and control other firms in the chain and to appropriate the value generated by the chain. Lead firms can be producers or buyers. In producer-driven chains, power is held by the final-product manufacturer; this type of chain is often found in high-end manufacturing (automobile producers) where capital, technology and skills are used intensively. Power in these industries often stems from advertising which develops brand loyalty and command of market share. In buyer-driven chains, power is held by retailers who control distribution.

A further perspective on the fragmentation of production is provided by firm-level trade theory. Within an industry, some firms use imported intermediate products but most do not. This heterogeneity has been explained by Kasahara and Lapman (2007) based on the presence of fixed costs of importing intermediate inputs; thus only more productive firms seek out these inputs. Andersson, Lööf and Johansson (2008) provide an intuitive motivation for the presence of fixed costs of importing intermediates. They note that an importing firm must establish exchange agreements with foreign suppliers; this typically involves a search process for potential suppliers, inspection of goods, negotiation and contract formulation, and other related costs, which are by their nature sunk. Kugler and Verhoogen (2009), meanwhile develop a quality-complementarity

[43] Costinot, Oldenski and Rauch (2011) analyse international sourcing from the perspective of trade in tasks, based on the degree of "routineness" of specific functions; and Naghavia, Spies and Toubal (2011) discuss outsourcing based on the complexity of the goods. The papers also provide a guide to the more recent literature.

hypothesis, in which use of intermediate inputs is correlated with quality of outputs: use of imported intermediates is greater in industries with more scope for quality differentiation.

Competitiveness can depend in part on the length and complexity of the supply chain:

> "The intermediate goods imported by China come through relatively long and complex supply chains, characterized by a high degree of fragmentation and sophistication. The competitiveness of Chinese exports is not only attributable to its low production costs, but also to the complex intermediate goods imported from other countries, be they from Asia or the rest of the world." (WTO and IDE-JETRO 2011: 6).

However, there are risks as well as benefits for firms participating in value chains. As noted by Sturgeon (2007), the firm's ability to respond to market developments may be reduced by search and contracting costs, intellectual property and business sensitive information can leak to competitors through shared suppliers, the ability of lead firms to innovate and design successive product generations may suffer from the atrophying of manufacturing and component knowledge (the "modularity trap" noted by Chesbrough and Kusunoki 2001), use of standard inputs can lead to loss of product distinctiveness, and of course the supplier can become a competitor of the buyer (as alleged in the Facebook litigation case). Accordingly, business strategies vary from firm to firm depending on their own weighing of these risks and benefits.

In short, differences in the relative efficiency of market mechanisms versus internal firm processes, differences in the degree of standardisation of products and processes, differences in the nature of products produced by industries, differences across firms in their ability to use international sourcing, and different business strategies based on consideration of short-run cost advantages and longer-run implications for their own capabilities combine to generate patterns of industrial organization that range from vertically integrated firms to complex modular value chains with global dimensions, to local clusters with strong relational ties between suppliers and clients, and to arm's length market sourcing (Sturgeon 2007). Movement between the forms can be in both directions – towards greater use of the market as standardisation and codifiability increases, or towards internalisation if technology change results in new non-standard elements. Changes in trade costs – which is where TDI enters the equation – similarly can alter the equation for firms sourcing locally or internationally.

The problems posed for interventionist trade policy by global value chains is illustrated by the Airbus case, which is widely considered an example of the successful application of strategic trade policy and industrial policy at one level, namely in terms of establishing a major European branded product in global markets. However, as Seabright (2005) observes, the gain for Europe of displacing Boeing production was less than implied by overall market share gains because:

> "Airbus has many sub-contractors in the United States and Boeing has many in Europe, so that in terms of value-added there may be much less to choose between the projects from the perspective of the European economy than its political sponsors may realize."

While in this case European policymakers might see substantial overall benefits for the EU economy, irrespective of the scale of the value-added gains, it is easy to see how in particular cases the balance of benefits might tip – the greater benefits might come from supplying complex, technologically advanced inputs to final products assembled abroad for global markets, including for import into the EU.

The implications of international sourcing for understanding of where a country's value-added is can be extreme as shown by the often-cited example of the Apple iPod. As shown by Linden, Kraemer and Dedrick (2007), only 1% was contributed by the assembly function carried out in China. In the case of the iPhone4, De Backer (2011) shows that an important slice of the value chain came from EU Member States. Indeed, the value-added of Germany and France was not

far short of the value-added in the USA (see Table 9). Moreover, the situation is fluid: Samsung recently opened a factory in Austin, Texas, to supply Apple the main processor for the iPhone4S.[44] This would complicate the calculation of value added further as physical value added would shift to the United States while Samsung's intellectual property valued added would be reflected in profit repatriation to Korea.

Table 9: International source of value added (at the victory gate) in the Apple iPhone4.

	USA	China	Korea	Germany	France	Japan	ROW	Factory Gate Price
iPod Value added	$24.63	$6.54	$80.05	$16.08	$3.25	$0.70	$62.79	$194.04
Percentage Share	12.7%	3.4%	41.3%	8.3%	1.7%	0.4%	32.4%	100.0%

Source: De Backer (2011).

Whereas Apple (and several other companies, such as Motorola and Ericsson) adopted production strategies that involved outsourcing large parts of the value chain of their products, other firms manufacturing similar products chose to remain vertically integrated. For example, as reported in Lanz and Miroudot (2011), in 2009, Nokia shipped more than 400 million mobile devices to over 160 countries. Its production process involved the manufacture of more than 100 billion parts in ten factories around the world, including several in OECD countries (Finland, Germany, Mexico and the United Kingdom) and others in emerging economies (Brazil, China and India). Whereas in Apple's case, the international movement of goods in the value chain involved mostly arm's length trade, in Nokia's case, the flows were to a greater extent intra-firm trade. Moreover, where Apple chose to locate final assembly off-shore for its North American sales, in the case of Nokia's N95, as analysed by Stehrer et al. (2011), smartphones for the EU market were assembled in the EU while smartphones for the Asian and North American markets were assembled in China.

Accordingly, awareness of the value-chains that stand upstream and downstream of individual products that are featured in TD cases is of critical importance in ascertaining whether imposing measures is in the EU's interest – indeed, it suggests a straightforward indicator for evaluating the Union's interest: value added impacts.[45] At the same time, full transparency is almost impossible. For example, the average Japanese automaker's production system comprises 170 first-tier, 4,700 second-tier, and 31,600 third-tier subcontractors (Miroudot et al. 2009: Box 2 at 10). TDI authorities lack the information base to evaluate the effects of measures on any specific part of such enormously complex production webs. Stehrer et al. (2011: 109) provide a discussion of the difficulties of identifying the geographic source of inputs for vendors and the guesswork required to evaluate regional value content of products.

The main problems for TDI authorities thus relate to lack of systematic data mapping global value chains. The data on trade flows and domestic shipments on which market share analysis in TD investigations is based are recorded on a gross value basis, not a value-added basis. At the industry level, input-output tables provide some information on inter-industry flows of intermediate goods and services and on the extent of imported intermediate inputs. These provide some insight into the relationship between gross value and domestic value-added in traded goods. However, at the product level, value chain analysis has been undertaken for only a limited number of individual products.

Coming to grips with these issues is a high priority for national statistical agencies. At the 2011 Global Forum on Trade, the desirability of bringing together all relevant information on trade-

44 See Poornima Gupta, "Exclusive: Made in Texas: Apple's A5 iPhone chip," Reuters, Fri Dec 16, 2011.

45 This view was supported by a study conducted by the Swedish National Board of Trade (Kammerskollegium (Swedish National Board of Trade) 2007).

related activities, including trade flows in goods and services, foreign direct investment and financial settlements, and employment through a trade satellite account was discussed.[46] There it was observed that this would link trade statistics directly to what matters for trade policy, namely domestic value added and jobs. The WTO's "Made in the World" initiative is about identifying value-added in trade flows precisely because the gross-value-based measures of trade result in misleading impressions about trade imbalances and where the benefits from trade accrue. However, such integrated data bases are not yet available and will not be for some time. Accordingly, second-best approaches must be used to take into account the impact of TDI on value-added and jobs, preventing injury to which is the ultimate objective of TD interventions.

The fragmentation of production raises another issue. In TD practice, the definition of the domestic "industry" is narrowly focussed on the final producer, not the value chain that precedes it or that follows it in getting the goods in question to market. The issue posed for TDI is well illustrated by a couple of uncomplicated Canadian cases. In *Unprocessed grain corn*[47] a submission argued that not only corn growers but also grain elevators and grain dryers were all "producers" of grain corn in Canada. The Canadian administrative authority was not sympathetic to this argument, although it acknowledged that commercial market sales of grain corn are transacted on a "dry" basis. Since elevators and drying are non-traded services associated with the primary goods and thus dependent on the base production, an injury to growers in terms of reduced production has commensurate implications for these service providers. A similar issue arose in *Aluminum extrusions*. Extrusions are in some cases outsourced to finishers and fabricators for certain processing but remain the extruder's property and are generally returned to the extruder for final sale. The Canadian TDI authorities were also unconvinced in this case that the provision of processing services to the extruders warranted including the finishers and fabricators in the definition of "domestic industry" for injury determination purposes.[48] However, a narrow conception of "domestic industry" is increasingly inconsistent with actual value chain/web practices just as ignoring the international aspects of the fragmentation of production leads to potentially adverse impacts from TDI policy.

TDI addresses itself to the competitiveness of EU firms; however, in a world of fragmented production, TDI intrudes into a particular value chain, much of which may be located outside the EU. Imposing a TDI duty into the middle of a supply chain that runs through the EU can cause the supply chain to re-route, cutting out the EU value-added entirely. A reformulation of the purpose of TDI to address this issue would be to ensure the competitiveness of EU factors of production.

Sunk assets

A generally overlooked aspect of the use of TDI is the welfare cost associated with the rearrangement of trade patterns induced by duties. The heterogeneous firm literature emphasises the sunk costs incurred by firms in establishing themselves in new markets. These are reflected in (presumably "soft") assets. When firms abandon a market, these assets must be written off. As well, if the firms revert to their domestic market, they may also suffer a productivity decline because their scale of production had been geared to include serving the abandoned export

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46 See, Report of the Global Forum on Trade Statistics. 2011. Measuring Global Trade - Do we have the right numbers? organized jointly by UNSD and Eurostat in collaboration with WTO and UNCTAD, 2-4 February 2011, Geneva, Switzerland.

47 *Unprocessed Grain Corn from the United States* – CITT, Determination and Reasons, Preliminary Injury Inquiry No. PI-2005-001, November 15 and November 30, 2005, at 11, para. 67.

48 *Aluminum Extrusions from China* – CITT, Findings and Reasons, Inquiry No. NQ-2008-003, March 17 and April 1, 2009, at 23, para 141.

market. If they seek out new export markets, they must incur new sunk costs. Accordingly, at the firm level, the re-arrangement of trade is not costless.

The empirical literature in this area is very thin. One study found that sunk costs per firm of entering export markets ranged between about USD 605,000 and USD 755,000 (in 2010 US dollars), depending on the industry.[49] However, this may not be representative of all trading relationships because of differences in border costs across country pairs and heterogeneity of firms and industries.[50] As well, it is possible that some of the costs of entry might be reflected in assets such as knowledge of the market that can be redeployed and thus would not be entirely written off upon exit, allowing the firm to re-enter the market relatively costlessly at some future point in time, as suggested by the findings of Avsar (2011) concerning the responses of Brazilian exporters hit by TDI who tended to return to markets to which they had previously exported). That being said, very little is known about sunk costs of entry or the rate of depreciation of soft assets associated with expenditures incurred in entering foreign markets.

Given the limited empirical evidence on these entry/exit costs, the policy implications are necessarily derived from more general information concerning firms in international trade. Exporters that are large firms that have committed significant resources to the EU market (e.g., as evidenced by affiliates, representative offices, after-sales support networks etc.) are unlikely to abandon the associated assets. Meanwhile firms that export to the EU through intermediaries (which likely includes many small exporters) are unlikely to have incurred significant sunk costs of entry. Between these polar cases are medium-sized firms that are engaged in markets that may require product certification or the development of relationships with EU clients. Such firms may have incurred substantial costs to enter the market and may find that the additional costs associated with compliance with the investigation, together with the uncertainty about future market access, are sufficiently large to cause them to abandon the EU market altogether. This issue bears narrowly on the decision to initiate an investigation. Given that not 100% of initiations result in definitive duties, the level of evidence concerning dumping or subsidisation, the extent of injury, or causality required by the Commission to initiate is clearly well short of conclusive. Given firm and market heterogeneity, a uniform standard for the level of evidence results in non-uniform costs in this case. Hence, a conservative bias is indicated in initiating cases in market contexts where, as described above, the potential un-measured costs of TDI may be high. The general description of the market and the nature of trading relationships of exporters contained in the complaint, together with the characteristics of named exporters, provide the EU authorities the information base to take this consideration into account.

Chilling effect on trade

An additional cost of TDI identified in modern heterogeneous firm trade theory and empirics involves the chilling effect of TDI on firms' engagement in international markets. Given the tight nexus that appears to exist between such engagement and innovation and productivity, there are dynamic efficiency costs to the very presence of a TDI regime.

As regards entry into exporting, firm-level studies generally confirm self-selection of more productive firms into export markets, consistent with the predictions of Melitz (2003) and Bernard, Eaton, Jensen and Kortum (2003). However, some also find that exporting increases

[49] Das, Roberts and Tybout (2007); the data are for Colombian firms in 1986.

[50] Different export strategies might also influence the size of the costs: Aw, Chung and Roberts (2000), contrasting the behaviour of Taiwanese and Korean firms make the conjecture that the greater emphasis of Korean firms than Taiwanese firms on product differentiation and advertising may result in greater reluctance to abandon export markets than shown by their Taiwanese counterparts.

productivity through learning effects,[51] while other studies suggest that firms preparing to enter into export markets undertake process and product innovation in preparation.[52] Similarly, empirical studies show that firms that import intermediate inputs tend to outperform firms that do not trade.[53] Moreover, use of imported intermediates is associated with the decision to enter into export markets; accordingly, part of the productivity growth advantage of new exporters reported in the literature may be due to the switch to imported inputs.[54]

Against this background, the finding in the heterogeneous firm trade literature that the mere presence of an active AD policy has a "chilling effect" in terms of restricting trade in general, not just on the specific products targeted by duties (Gormsen 2008; Vandenbussche and Zanardi 2010), implies that there are dynamic efficiency costs that must be taken into account. This effect can be readily understood as an intangible cost generated by TDI that raises the threshold of profitability for entry into export markets or committing to using imported intermediates. By the same token, this uncertainty reduces the number of firms that engage in trade.

While the empirical evidence is still thin, insofar as the chilling effect can be attributed to inconsistent application of trade defence laws or inconsistency between stated policy and actual practice, the policy implication is that the intervention paradigm needs to be closely aligned with actual practice. In this regard, the analysis in the present evaluation bearing on the intervention hypothesis gains added importance. Given that the central theme in the existing intervention hypothesis concerning anti-competitive practices and the absence in the international domain of appropriate rules governing competition cannot be demonstrated to underpin actual practice, it follows that foreign firms cannot interpret the intervention hypothesis with any certainty as regards what constitutes "anti-competitive practices", since the targeted practices are commonplace in domestic contexts and not considered "anti-competitive" there.

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51 A large literature has emerged on whether firms' productivity improves from entry into exporting. Case studies demonstrate quite conclusively that there are significant knowledge spillovers to firms that enter export markets but the econometric evidence is mixed; the usually stated conclusion is that there is strong evidence for self-selection of firms into export markets but no conclusive evidence of learning by exporting (e.g., see Wagner 2007). That being said, most econometric studies do find some evidence for learning effects. For a discussion see Ciuriak (2011). The econometric issues are far from settled: Wagner (2011) raises new methodological issues concerning the extent to which statistical methods used to identify exporter premia have adequately dealt with the issues posed by "outliers" – that is, whether the results are being driven largely by a small number of extreme observations that might not be of relevance for the vast mass of companies involved in trade.

52 Lileeva and Van Biesebroeck (2010) demonstrate that firms entering into export markets adopt newer, mass production technologies which increase their productivity relative to older, more flexible technologies suited for a smaller domestic market. Damijan, Kostevc and Polanec (2008) present evidence for Slovenia that entry into exporting drives process innovation. Bustos (2011b) shows that firms upgrade technology and skills in response to new export opportunities. As well, a major OECD research project on innovation shows that firms that enter export markets also are more likely to introduce product innovations than their stay-at-home peers and that sales of innovative products contribute significantly to labour productivity (OECD, 2009 and 2008, chapter 5.)

53 See for example Bernard, Jensen, Redding and Schott (2007) for US firms; Muuls and Pisu (2007) for Belgium; Halpern, Koren and Szeidl. (2005) for Hungary; Kasahara and Lapham (2008), and Kasahara and Rodrigue (2008) for Chilean manufacturing plants; and Castellani, Serti and Tomasi (2010) for Italy.

54 This suggestion is made by Muuls and Pisu (2007). Altomonte and Békés (2009) using Hungarian firm-level data also find that, to the extent there is a correlation between exporting and using imported inputs, failing to take into account imported inputs overstates the exporter premia. This effect appears to be heterogeneous across countries: Vogel and Wagner (2008), using panel data for German manufacturing enterprises, find no evidence for such a "learning-by-importing" effect that could compromise estimates of exporter premia. At the same time, there is a suspicion in the literature that these effects work primarily for firms that have lower productivity and thus may not show up in some datasets. In the latter regard, see Lileeva and Trefler (2010).

The deterrent effect of TDI and the Lesser Duty Rule

There is extensive evidence that the costs of contingent protection are greater than the direct costs associated with reduction of targeted trade flows (see surveys by Blonigen and Prusa 2003; and Nelson 2006). The presence of these additional costs is consistent with the large product-level trade effects found by Prusa (2001). One specific additional cost is that associated with complying with an investigation which, as noted, can lead some exporting firms simply to abandon the market altogether. The fixed costs associated with TDI are additional to the eventual tariff that is levied. Accordingly, imposition of a tariff in the full amount of dumping or subsidisation implies an overall weight to the countermeasures that is greater than the measured effect of dumping or subsidisation.

The evidence concerning the higher profitability of EU firms in protected sectors than in comparable non-protected sectors indicates a trade deterrent effect that is stronger than that which is sufficient to simply offset injury; the existing evidence suggests it not only offsets injury but permits higher profits. Since this empirical result emerges from a context in which the lesser duty rule applies, the implication is that, even with that rule, the level of protection is higher than necessary. Given the high proportion of cases which target industrial inputs, the further implication is that, even with the lesser duty rule, the costs imposed on downstream industries, including firms participating in global value chains, are excessive.

Accordingly, the evidence adduced in this chapter supports the continued application of the lesser duty rule and, moreover, for consideration to be given in establishing the level of the lesser duty to the extent to which the deterrent effect of the investigation itself has altered competitive conditions in the market sufficiently to have caused supplier firms to abandon it.

Anti-dumping and collusion

Several papers have focussed on instances where the domestic industry has market power and the use of TDI has heightened that power, including by facilitating collusion within the domestic industry and between domestic and foreign firms. Zanardi (2004) and Veugelers and Vandenbussche (2009) provide recent analyses; Blonigen and Prusa (2003) survey the earlier literature. Overall, there is little direct evidence on this issue.

Messerlin (1990) comparing AD and parallel competition cases over the period 1980-1987 found that one-fourth of EC AD cases involved the same products and firms as one-fourth of the EC's anti-cartel investigations. He concludes that the AD system is captured by domestic firms that would not be able to collude without such protection to enable cartelisation. Davis (2009; 15) observes that the EU candle industry which filed for protection on 3 January 2008 was investigated and fined EUR 676 million by the Competition Directorate on 2 October 2008 for illegal price fixing and artificially inflating the price of EU-produced candles.

Examining the US record, Prusa (1992) observes that the US Noerr-Pennington doctrine, which was intended to ensure that private entities could coordinate efforts to petition government, effectively safeguards AD petitioners from antitrust investigations and thus opens the door for collusive settlements between domestic and foreign firms. Prusa points to the high rate of withdrawal of petitions (about 25% were withdrawn over the period 1980-1998) as possible evidence of collusion. Zanardi (2004) provides indirect evidence that cases where petitions are withdrawn tend to involve industries where coordination costs are lower, adding suspicion to the possibility that AD law, in the shadow of Noerr-Pennington, has abetted cartelisation.

Given the clandestine nature of collusion, the frequency of such cases can only be inferred from contextual data. The possibility of such effects however suggests the need for caution on the part of TD authorities when considering applying measures.

2.2 How the European Union uses Trade Defence: Motives

The review of the theory of dumping, subsidies and trade defence in the preceding section demonstrated that a wide range of pricing practices of firms and of public policy interventions can fall within the definitions of dumping and actionable subsidies. Many of these practices and interventions are benign and some possibly beneficial. Some, however, can involve anti-competitive or market-distorting intent. The evaluation of the welfare impacts of TDI depends importantly on whether the actual practices targeted fall into the former or latter categories. As established above, the benefits to domestic consumers of favourable price discrimination or the pass-through of foreign government subsidies are transfers which, at the global level, net out; and the impact of TDI in instances where these practices injure domestic producers is essentially neutral when evaluated against the counterfactual case with no-dumping or subsidisation. If actual predation is countered, the welfare effects of TD measures are likely to be positive.

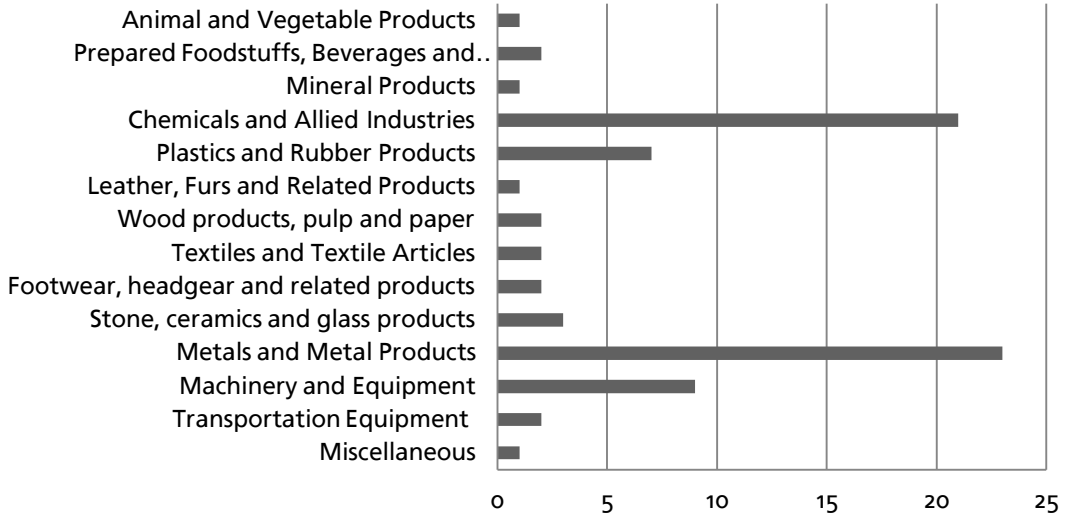
However, there are fixed costs of maintaining a TD system and significant costs posed in mounting investigations. Moreover, the presence of a TD regime generates a risk factor that effectively heightens the cost hurdle that firms must be able to clear in order to confidently enter into export markets. And TDI can slow the on-going reallocation of market shares in the domestic economy from low-productivity firms to high-productivity firms that drives industrial dynamism. Given the positive effects on firm-level innovation and productivity associated with engagement in international markets, including both commitment to exporting and to utilising production inputs, and the importance of maintaining dynamism in the internal economy, it is important for EU economic policy effectiveness that TDI be used judiciously.

Since there is no motive test applied in TD investigations, the intent of firms' pricing practices and foreign government policy interventions cannot be read from the case documentation but must be inferred from context. By the same token, the *de facto* rationales for the EU's TD interventions must also be similarly inferred. This section reviews the actual pattern of the EU's use of TDI and comments on the effectiveness of such use in light of the findings.

2.2.1 Some Descriptive Statistics

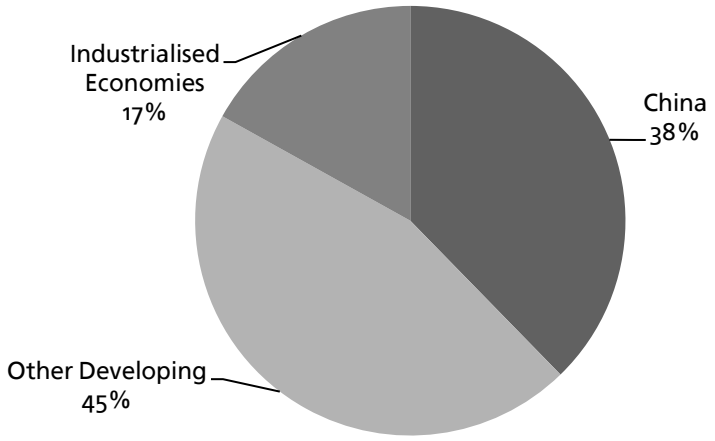
As can be seen in Figure 8, TD measures were taken in a wide range of agricultural and industrial sectors in the evaluation period. However, there was a heavy concentration of cases in the chemicals and metal products sectors, with lesser spikes in the plastics and machinery and equipment sectors. In terms of target countries, 130 countries were named in the 78 investigations. Most of these were developing economies; China accounted for over one third of individual citations (Figure 9).

Figure 8: EU TD investigations, by Major Industrial Sector, 2005-2010 (number of cases)



Source: Authors' calculations based on DG Trade investigations database

Figure 9: Countries Named in EU TD investigations, 2005-2010



Source: Authors' calculations based on DG Trade investigations database

The majority of the TD cases in the evaluation period concerned fairly basic industrial intermediate goods that compete largely on price. Such goods are likely to attract competition from emerging market exporters. Exporters from these countries were involved in 83% of the investigations initiated in the evaluation period. In this regard, EU TDI use continued the pattern of the preceding years (for example, see in this regard the analysis of Davis 2009). This suggests that TDI are used less to address strategic firm-level or foreign government behaviour as to address issues of system friction as emerging markets are integrated into the global trading system. In the latter regard, China stands out as something of a special case; however, the total number of other instances in which a developing country was cited outnumbered the individual citations of China.

Table 10 and Table 11 provide more detailed statistics on the country and industry distribution of the EU's TD investigations initiated since 2005. Against the background of these general observations, the following sections seek to determine the underlying or *de facto* rationales that can be discerned for EU TD practice.

Table 10: EU TD investigations by broad industrial sector, distinct investigations initiated 2005-2010

HS Description	HS Code	AD	AS
Edible fruit, nuts, peel of citrus fruit, melons	08	1	
Animal fat, oil, fractions not chemically modified ne	20	2	
Beverages, spirits and vinegar	22	1	
Mineral fuels, oils, distillation products, etc	27	1	
Inorganic chemicals, precious metal compound, isotope	28	4	1
Organic chemicals	29	11	2
Soaps, lubricants, waxes, candles, modelling pastes	34	1	
Fireworks, signalling flares, pyrotechnic articles ne	38	1	1
Plastics and articles thereof	39	5	2
Raw hides and skins (other than furskins) and leather	41	1	
Paper & paperboard, articles of pulp, paper and board	48	1	1
manmade filaments	54	1	
manmade staple fibres	55	1	
Footwear, gaiters and the like, parts thereof	64	2	
Ceramic products	69	1	
Glass and glassware	70	2	
Iron and steel	72	7	1
Articles of iron or steel	73	7	1
Aluminium and articles thereof	76	1	
Other base metals, cermets, articles thereof	81	2	
Tools, implements, cutlery, etc of base metal	82	1	
Miscellaneous articles of base metal	83	3	
Nuclear reactors, boilers, machinery, etc	84	2	
Electrical, electronic equipment	85	6	1
Vehicles other than railway, tramway	87	2	
Optical, photo, technical, medical, etc apparatus	90	1	
Total		**68**	**10**

Source: Authors' calculations based on DG Trade investigations database

Table 11: Countries of origin addressed by EU TD investigations, cases initiated 2005-2010

Exporting country	Non-market economy	Developing	AD	AS
China	X	X	47	2
Malaysia		X	6	2
Thailand		X	6	2
Taiwan			6	
India		X	5	3
USA			5	2
Ukraine	(X - granted MES Dec 2005)	X	5	
Korea (Rep. of)			4	
Russia		X	4	
Turkey		X	3	
Pakistan		X	2	1
Belarus	X	X	2	
Bosnia & Herzegovina		X	2	
Hong Kong			2	
Kazakhstan	X	X	2	
Romania		X	2	
Armenia	X	X	1	
Brazil		X	1	
Croatia		X	1	
Egypt		X	1	
F.Y.R.O.M		X	1	
Guatemala		X	1	
Indonesia		X	1	
Iran		X	1	1
Japan			1	
Moldova (Rep. of)	X	X	1	
South Africa		X	1	
UAE			1	1
Vietnam	X	X	1	
Total			**116**	**14**

Source: Authors' calculations based on DG Trade investigations database.

2.2.2 Competition Policy Motives for TDI

As previously discussed, TDI have been traditionally characterised as the international trade analogue of internal market competition policies, notwithstanding important differences between the substantive construction of TDI and competition law provisions that emerged at a very early stage of their development, and notwithstanding a modern pattern of TDI use that in the view of many observers lends little evidentiary support for the characterisation.

Competition policy concerns itself with a wide variety of corporate business practices that restrain competition in the market place. The practices targeted are primarily those that either (a) raise consumer prices through monopolisation, cartelisation, collusive practices such as market-sharing agreements, price fixing, retail price maintenance and so forth; or (b) exclusionary practices that deny access to markets to competitors, such as refusal to supply, denial of access to networks, exclusive dealing arrangements, price discrimination in selling to competing businesses (typically dominant sellers favouring firms associated with them, or vertically integrated firms selling at discriminatorily high prices to downstream un-integrated competitors) or abusing a dominant position in one market to gain market share in another through tied selling. Many of these practices raise trade frictions; this has prompted multilateral initiatives to develop stronger competition policy disciplines into the WTO rules. TDI address just one segment, and a fairly narrow one at that, of the range of competition policy concerns: predatory pricing.[55]

Under competition law, predatory pricing is understood as a deliberate strategy to drive competitors out of the market by setting very low prices (e.g., "cut-throat pricing"), including at below average variable costs. Since the price undercutting strategy reduces profits in the short run, and possibly results in losses that must be cross-subsidised from profits in other areas of the firm's activity, the presumption is that, having established a dominant position or outright monopoly, the predator firm will then seek to recoup the losses by eventually raising prices to generate monopoly profits. Accordingly, for the strategy to succeed, arbitrage must not be possible (which is not an unlikely condition in international trade given the fixed costs of market entry) and the firm must be in a position to subsequently prevent competitive entry into the market by erecting barriers to entry (e.g., through advertising), or through resort to exclusionary practices on the gamble that these might escape sanctions from competition policy authorities.

Dumping or subsidisation, to trigger TDI, must create injury to domestic industry. Hence, parallel to predatory pricing in a domestic context, it too involves price competition that is injurious. In both instances, the remedial provisions contemplate foregoing the welfare benefits to consumers of temporarily lower prices in order to prevent injury to the competitors of the dumping/predatory firm, which would lead in the longer term to damage to consumers.

At first blush, the rarity of successful predation prosecutions stands in stark contrast to the frequency of successful AD claims. However, the punitive nature of the sanctions in competition cases also stands in sharp contrast to the remedial nature of the measures in TDI. So it is difficult to draw inferences concerning the frequency of predatory behaviour from frequency of application of the two types of measures.

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[55] Note that predatory pricing through foreign affiliates is addressed by competition policy authorities; it is only in cross-border trade that TDIs come into play. In light of the fact that foreign affiliate sales now exceed cross-border trade by a good margin, TDI must be considered to have only a subsidiary role in addressing international competition issues involving predation by multinational firms. As well, in an intra-EU context, anti-subsidy measures that are in other jurisdictions dealt with through TDI are addressed through competition measures dealing with state aid.

The approach in the economic literature to evaluating the consonance between competition policy and TDI use has been to apply a suite of criteria to individual cases to determine whether successful predation could be possible (see Bourgeois and Messerlin 1998; Shin 1998; and Hutton and Trebilcock 1990). Synthesising the approach in the literature, the present study applies a series of tests that "screen out" TD cases that do not meet the criteria that point strongly to the possibility of anti-competitive practices (for a more detailed discussion of these studies and the screening process see appendix E2).[56] The set of screens applied is as follows:

1. Four or more countries are targeted. This screen rules out cases where an implausible level of coordination across countries would be required.
2. Eight or more foreign firms targeted. This screen similarly rules out cases where an implausible level of coordination, across firms in this instance, would be required.
3. Combined market share of targeted firms is less than 40%. This screen rules out cases where the targeted firms do not have a sufficient base to plausibly capture sufficient market share to successfully execute a predatory scheme. The 40% threshold is based on the history of EU competition law enforcement as to what constitutes a dominant position.[57]
4. The EU domestic market is competitive. This screen rules out cases where domestic industry concentration is sufficiently low, which indicates that market structure is such that achieving market dominance is unlikely (including because barriers to entry are likely to be low). An approximate range for the Herfindahl-Hirschman index (HHI), which measures market concentration, is calculated based on available case documentation. Following Bourgeois and Messerlin, if the upper end of the calculated range of the HHI is 0.18 or lower the case is screened out.
5. The case was terminated. This screen rules out cases that did not proceed to application of measures on grounds that predatory intent was unlikely if there was insufficient evidence of injury.[58]
6. The targeted firms do not have a dominant position internationally. This screen rules out cases where the targeted producers do not have sufficient global market dominance to prevent producers from third countries from stepping in and competing away excess profits once the domestic industry has been driven from the market.

As regards the previous studies, Messerlin and Bourgeois (1998) found that only 12 of the 461 EU cases they assessed met the minimum criteria for potential predation and none of these involved sophisticated products for which entry barriers would be high. Shin (1998) found only 39 of the 451 US cases assessed potentially involved predatory motives. Hutton and Trebilcock (1990) found none of the 30 Canadian cases assessed met their criteria for predatory intent; the absence of international market power was the most consistent reason for the impracticality of a predatory strategy in the Canadian cases.

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56 The screens applied capture all the criteria applied in the three previous studies except for several circumstantial criteria applied by Hutton and Trebilcock (1990), namely that (a) there was global excess capacity in the industry; (b) cyclical lags in production and climatic variation in agriculture resulted in pricing below marginal cost to sell of unexpectedly large quantities of agricultural product; and (c) firms were pricing below market to break into the market. As shown in the study, these would have been redundant in the case of EU TD practice.

57 The specific features of this test in the present study are based on Messerlin and Bourgeois (1998). Shin (1998), who examined US TD practice, eliminated those cases where the case documentation showed import penetration of 20% or less, and those where negative findings were issued by the USITC on "critical circumstances", which indicates in US practice a massive importation surge.

58 Termination is the least compelling criterion in the literature since cases with negative outcomes may contain features that prompted the authorities to undertake investigations and it is possible that complaints are withdrawn because the firms involved strike an agreement; agreements struck under duress are not necessarily indicative of an absence of competition policy concerns, they might signify quite the opposite. Accordingly, we consider this screen late in the sequence as compared to the Bourgeois and Messerlin and Shin studies.

Echoing the views of the previous studies, the tests applied in the present study should be viewed as conservative in that they allow many cases to be considered as potentially predatory where the number of countries targeted and the number of exporters involved are still quite large, and where industry concentration is apparently low. On the other hand, in the modern context of hyper specialisation of production due to the increasingly refined division of labour amongst firms, a low level of concentration of an industry may mask a high degree of concentration in very specialised niche products. Often, in industries that supply what appear to be highly substitutable commodity inputs into production processes, the ability of firms to produce to the exact specifications required by the industrial users varies. In some of these cases, there may be significant non-tariff barriers to entry into a market since the customers may have to pre-clear the supplier's production processes. For example, in the case of steel pipe that is used for drilling oil and gas exploration wells, end users need to approve a product from a new source after site visits to confirm that specification requirements have been met, and to receive a guarantee of the quality and availability of the new products, since the risk of using an unknown product in the drilling business, even if it has an international certification, is simply too high.[59] Accordingly, it is possible that the screens applied may have ruled out some cases where competition concerns would actually have applied; the confidential business information available to the investigating authorities might therefore yield a somewhat different list of cases in which predatory intent was uncovered.

The results of application of the above-mentioned screens to the 64 EU AD cases initiated in the 2005-2010 evaluation period are as follows. Four cases are screened out immediately for targeting four or more countries while 37 others are eliminated from consideration because the exporters targeted numbered more than eight. Sixteen others are screened out because the combined market share of the targeted exporters is too low to be considered as providing the base for acquiring a dominant position. None of the remaining cases are eliminated from consideration by screens 4 or 5. Note that all the terminated cases were ruled out on other grounds. Only seven cases therefore pass the first five screens; these are listed in Table 12.

Table 12: EU AD cases which may represent cases of predatory dumping, 2005-2010

Year of Initiation	Product	Source of dumped imports
2005	Certain Tungsten Electrodes	China
2005	Refrigerators	Korea
2006	Certain Manganese Dioxides	South Africa
2006	Dicyandiamide	China
2006	Certain Compressors	China
2009	Cargo Scanning Systems	China
2010	Certain Fatty Alcohols and their Blends	India, Indonesia, Malaysia

Source: calculations by the authors.

Of these cases, the only one which would appear to pass the sixth screen is *Refrigerators*. In *Refrigerators*, the firms found to be dumping were several large Korean multinationals that have (a) a large global presence in a number of differentiated products where they actively compete on a market-share basis; (b) brand-name recognition achieved in part through extensive advertising; (c) the ability to exploit economies of scale in mass production of consumer goods; (d) the ability to create barriers to entry for competitors through an established presence in distribution channels (which newcomers might have difficulty penetrating due to quantity discounts etc.), and (e) the technological capacity to sustain market share over the long term. As well, they faced relatively low costs of coordination.

[59] See the discussion of this issue in connection with Korean suppliers of pipe to the Canadian oil and gas industry in *Oil and Gas Well Casings from Korea and the United States* – CITT, Orders and Reasons: Expiry Review No. RR-2000-001, July 4, 2001; at 10-11.

To summarise, the review of the EU's use of TDI through the lens of competition policy, for which TDI is characterised as a substitute given the absence of adequate competition rules in international trade, suggests that only in seven of 64 AD cases were criteria met for predatory practices to likely be in play. Of these only one had all the characteristics that would strongly hint at the possibility of predatory intent, although case handlers may have a better of sense of the full extent of predatory behaviour than the statistics presented here. Nonetheless, overall, the present study concurs with previous findings in the literature that EU TD practice does not appear to be largely oriented towards preventing anti-competitive practices.

2.2.3 Macroeconomic Buffer Motives for TDI

This section considers the role of TDI as a buffer for cyclical and real exchange rate fluctuations, a view that has received much attention in the literature. The basic arguments are as follows.

A slump in economic activity in the destination country naturally leads to lower prices, increasing the likelihood of pricing below fair value if foreign firms follow price declines posted by domestic firms, thereby increasing the likelihood of dumping being found. Further, weaker conditions in the destination market imply weaker economic performance of domestic firms, increasing the probability of an affirmative injury finding if investigating authorities attribute injury to dumping that properly should be assigned to the business cycle. Accordingly, domestic firms have a greater likelihood of obtaining a successful judgment during a domestic market downturn, increasing the likelihood that they will file for protection.

Weaker growth in the origin country, meanwhile, increases the likelihood that foreign firms will cut prices to maintain overall levels of output, raising the probability of dumping being found under cost-based calculations of normal value (although not under the price-based methods). Moreover, it increases the supply available to serve export markets, increasing the chances of import surges in destination countries, causing injury to domestic firms.

The implications of currency fluctuations are less clear cut. Higher real exchange rates for the destination market currency make imports more competitive, increasing the likelihood that a domestic industry will come under pressure. At the same time, they also decrease the likelihood that a foreign firm will be found to be pricing below cost or below the price it sets in its own domestic market. Conversely, lower destination market real exchange rates make domestic firms more competitive, reducing the likelihood of competitive pressure from imports but raising the likelihood that firms that "price to market" will be found to be dumping.

Knetter and Prusa (2003) examine the relationship between AD filings, real exchange rates, and business cycle developments. Using annual data, they find that the probability of a filing in one of the major traditional AD users (Australia, Canada, EU, and the USA) against any one of the countries which were targets in any AD case in their evaluation period (1980-1998) increased by 33% for a one-standard deviation appreciation in the bilateral exchange rate of the destination country and by 23% for a one-standard deviation decline in the destination country's GDP; cyclical developments in the origin country's GDP were not significant. They conclude that the construction of trade defence laws allows them to be used successfully by complainants to address macroeconomic stresses rather than anti-competitive behaviour of foreign rivals.

Other studies have been less successful in identifying macroeconomic determinants for the EU's use of TDI. Bourgeois and Messerlin (1998), examining the record over 1980-1997, found no correlation between the initiation of the cases by the EC and the business cycle. Jallab, Sandretto

and Gbakou (2006), examining the filing record over the period 1990-2002, similarly fail to find a significant effect of the business cycle on filings; they do find a weak negative relationship between industrial production growth and filings. The latter study finds the expected effect that a rise in the real exchange rate increases filings but the effect is small and its strength varies depending on the specification of the equation, which suggests interaction between the independent variables in their alternative equations.

Following Knetter and Prusa (2003), the present study adopts a negative binomial regression model to study the relationship between EU TDI filings and macroeconomic variables. These relationships are examined on both an aggregate and bilateral basis:

- EU aggregate filings: annual filings over the period 1995-2010 are estimated as a function of the EU real exchange rate, cumulative EU real GDP growth in the three-year period preceding the year of initiation,[60] and world real GDP growth over the same period;
- EU bilateral filings: annual bilateral filings over the period 1995-2010 are estimated as a function of the bilateral real exchange rate, cumulative EU real GDP growth in the three-year period preceding the year of initiation, and world real GDP growth over the same period.

Aggregate filings

Table 13 presents the data for the analysis of aggregate filings. Table 14 presents the correlation coefficients between the variables. The data suggest that the relationship between filings and macroeconomic developments is rather weak. The number of filings over the years 1995-2010 has almost no correlation with the value of the euro (correlation coefficient of 0.06), and only a moderately negative correlation with EU real GDP growth (correlation coefficient of -0.25) and with world GDP growth (correlation coefficient of -0.35). Accordingly, weak results are to be expected from regression analysis using these variables.

Table 13: Aggregate filings and macroeconomic factors, 1995-2010

Year	AD initiations	EU Rxr (t-1)	EU GDP t-4 to t-1	World GDP t-4 to t-1
1995	34	101.49	1.78	6.67
1996	24	103.31	3.56	7.92
1997	42	101.94	5.76	9.05
1998	21	96.75	8.15	10.81
1999	66	102.32	8.02	11.74
2000	31	100.00	7.98	10.97
2001	27	88.33	9.03	10.67
2002	20	88.82	10.35	11.21
2003	7	93.10	9.44	10.90
2004	29	103.76	7.70	10.24
2005	24	108.96	5.14	9.03
2006	35	105.07	5.64	11.84
2007	9	104.17	6.47	13.69
2008	18	108.49	8.52	15.47
2009	14	108.61	9.16	15.99
2010	15	105.14	7.55	14.10

Notes: The time series have been constructed as follows (i) For AD initiations, a count of each filing/country observation was performed based on the World Bank database developed by Chad Bown. (ii) For the real effective exchange rate at t-1, data comes from EUROSTAT. (iii) For the EU and World real GDP growth rate, the cumulative 3-year GDP growth rate between t-4 and t-1 was constructed using data from the IMF's World Economic Outlook database.

[60] This matches the period over which the EU evaluates developments in TD cases. Knetter and Prusa adopted a three-year period that included the year of initiation.

Table 14: Correlation coefficients between filings and macroeconomic factors, 1995-2010

	Number of Initiations at t	EU Rxr (-1)	EU GDP t-4 to t-1	World GDP t-4 to t-1
Number of Initiations at t	1.00			
EU Rxr (t-1)	0.06	1.00		
EU GDP t-4 to t-1	-0.25	-0.42	1.00	
World GDP t-4 to t-1	-0.35	0.27	0.63	1.00

Source: Calculations by the authors.

To explore the relationship between aggregate filings and the macroeconomic factors, aggregate filings are regressed on the following variables in models A1 through A5:

- A1: the EU real exchange rate in the year prior to initiation.
- A2: EU real GDP growth in the three years prior to initiation.
- A3: world real GDP growth in the three years prior to initiation.
- A4: the EU real exchange rate and EU real GDP growth rate.
- A5: the EU real exchange rate and world real GDP growth rate.

The nature of the data did not allow a regression with all three explanatory variables included at the same time. This restriction was also present in the Knetter and Prusa (2003) study.[61]

Table 15 reports the incidence rate ratios (IRR) associated with the parameter estimates in these five regressions. The IRR is the change in the number of initiations predicted by the model when the explanatory variable (the exchange rate or cumulative real growth rate as the case may be) is one unit above its mean value. Overall, the results are very weak, which is possibly due to the small number of observations. The results may be summarised as follows:

- The IRR for the EU real exchange rate is statistically insignificant in each regression in which it is included and is extremely unstable in its value across regressions (with values of 4.2 in regression A1, 0.38 in regression A2, and 28.61 in regression A5), permitting no inference whatsoever as to the possible role of real exchange rate fluctuations on TDI filings.
- The IRR for EU real growth is stable but statistically insignificant; the coefficient value implies a decrease in filings of about 6% to 8% for a 1% increase in three-year cumulative growth in EU real GDP, consistent with expectations as regards the direction of change.
- The IRR for the world real growth rate is also stable and borders on being statistically significant; the coefficient value implies a decrease in filings of about 8% to 9% for a 1% increase in three-year cumulative growth in world real GDP, which suggests that stronger growth abroad reduces import pressures in the EU, consistent with expectations.

Table 15: Impact of macroeconomic factors on aggregate filings

Model	(A1)			(A2)			(A3)		
	IRR	Z-score	P>|z|	IRR	Z-score	P>|z|	IRR	Z-score	P>|z|
EU Rxr (t-1)	4.2	0.29	0.775						
EU GDP t-4 to t-1				0.94	-1.05	0.294			
World GDP t-4 to t-1							0.92	-1.72	0.08

Model	(A4)			(A5)		
	IRR	Z-score	P>|z|	IRR	Z-score	P>|z|
EU Rxr (t-1)	0.38	-0.18	0.86	28.61	0.73	0.467
EU GDP t-4 to t-1	0.92	-1.02	0.31			
World GDP t-4 to t-1				0.91	-1.84	0.07

Notes: See Table 13.

[61] This may reflect collinearity between EU and world real GDP growth, as suggested by the correlation coefficients in Table 14.

In short, there is no compelling evidence that aggregate filings in the EU are influenced to any statistically significant degree by macroeconomic conditions.

Bilateral filings

Following Knetter and Prusa (2003), the relationship amongst the above variables is next explored at the bilateral level. The dataset now includes the number of filings per year and per filing country, bilateral real effective exchange rates (from the US Department of Agriculture Economic Research Service), EU real GDP growth, and origin country real GDP growth (from the IMF online statistical database). Number of observations in this data set increases to 672. Six regression models are developed in which bilateral filings are regressed on:

- B1: the relevant bilateral real exchange rate in the year prior to initiation.
- B2: EU real GDP growth in the three years prior to initiation.
- B3: the relevant origin country real GDP growth in the three years prior to initiation.
- B4: the relevant bilateral real exchange rate and EU real GDP growth rate.
- B5: the relevant bilateral real exchange rate, EU real GDP growth rate, and origin country real GDP growth rate.
- B6: the same variables as in model B5 but including origin country fixed effects.

The inclusion of country fixed effects in the sixth model was motivated by findings that stronger origin country growth was associated with more filings, contrary to expectations. This appeared to be driven by the surging exports from emerging market economies that were generating import pressures in industrialised countries – and filings in the EU. Accordingly, the positive coefficient was apparently picking up a secular "surge" effect rather than the cyclical effect that the regression was designed to capture. Including country fixed effects controls for this "surge" factor. The results are set out in Table 16.

Table 16: Impact of macroeconomic factors on bilateral filings

	(B1)			(B2)			(B3)		
	IRR	Z-score	P>|z|	IRR	Z-score	P>|z|	IRR	Z-score	P>|z|
Rxr (t-1)	1.55	0.93	0.351						
EUGDP t-4 to t-1				0.94	-1.66	0.10			
TGDP t-4 to t-1							1.04	6.06	0.00

	(B4)			(B5)			(B6)		
	IRR	Z-score	P>|z|	IRR	Z-score	P>|z|	IRR	Z-score	P>|z|
Rxr (t-1)	1.41	0.72	0.471	0.93	-0.13	0.89	0.90	-0.22	0.823
EUGDP t-4 to t-1	0.95	-1.55	0.12	0.93	-1.92	0.05	0.92	-2.68	0.007
TGDP t-4 to t-1				1.04	5.97	0.00	1.00	0.39	0.698
Origin country fixed effects	NO			NO			YES		

Notes: See Table 13. Note that the bilateral regressions were run using different "EU group" definitions for the construction of the EU real exchange rate and growth rate to control for the expanding membership of the Union over the estimation period. The results were qualitatively similar.

In summary:

- The IRR for the exchange rate continues to be consistently statistically insignificant and unstable across regressions. It is not possible to draw any inference regarding the impact of exchange rate fluctuations on bilateral filings.
- The effects of the EU growth rate are of the same magnitude as before but now become borderline significant in some regressions; a 1% increase in cumulative EU real growth in the preceding three-year period reduces filings by 5% to 8%.
- In regressions without fixed effects, origin country growth has a positive and statistically significant effect on filings, albeit a small one (a 1% increase in the origin country growth rate

increases EU TDI filings by 4%). However, this effect disappears in the fixed effects regression which controls for the "surge" factor; in this regression there is no effect of origin country real GDP growth on filings.
- As expected, countries such as China, India, Korea, Taiwan and Thailand show a fixed effect that is statistically significant at the 1% level.

The results of the analysis of potential macroeconomic motives for the use of TDI can be summarised as follows:
- The real exchange rate has no identifiable, statistically significant effect on EU filings, whether the relationship is analysed on an aggregate filings basis or on a bilateral filings basis. This result differs from the findings of Knetter and Prusa (2003) over the 1980-98 period. One possible explanation is that the introduction of the euro may have blurred the relationship.
- EU real growth appears to have a modest but statistically significant impact on filings: in the regression with fixed effects, a 1% decrease in 3-year real GDP growth leads to an 8% increase in the number of filings. This result is consistent with expectations and in line with the findings of Knetter and Prusa.
- There is no reliable evidence that the number of initiations is affected by GDP growth in the origin country; once the "surge" effect is controlled for, the IRR for origin country GDP falls to 1.00, implying no impact. This result is also similar to the Knetter and Prusa findings.
- The "surge" effect associated with countries like China, Korea, Thailand and Taiwan is positive and highly significant. The issue of the effect of "surge" economies on EU TD practice is revisited below.

2.2.4 Industrial Policy Motives for TDI

Historically, it is reasonably clear that TDI have been used by states, at least on occasion, for industrial policy purposes such as capturing a significant share of a strategically important industry, often as part of a larger toolkit of instruments.[62] Since such purpose is not formally stated when TDI are applied, it must be inferred from the pattern of use. This issue has received attention in the economic literature. For example, Leipziger and Petri (1993) identify TDI and Section 301 as instruments of industrial policy in the USA. Hindley and Messerlin (1996) examine the interconnections between TDI and industrial policy in the USA, Europe and Asian emerging markets; they argue that TDI are widely used as a means of fostering and protecting "strategic industries". Konings and Vandenbussche (2005) suggest that, "Among trade economists, there is a growing consensus that in many cases, Antidumping (AD) policy is an industrial policy tool in disguise." In a recent contribution, Abrami and Zheng (2010) consider whether the pattern of use of TDI by China indicates industrial policy motives on its part.

The EU has an active industrial policy. Formally, it is stated mainly in terms of horizontal support for industrial development (promoting innovation, reducing regulatory and tax burdens on business and so forth) but it also has vertical elements (e.g., the key emerging technologies

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[62] Perhaps the most clear-cut example is that of the competition between Japan and the USA in the 1970s and 1980s in the DRAM sector. As recounted by Flamm and Riess (1993: 270):

> "By the end of July 1986, antidumping cases were in play for three different types of memory chips (as well as a Section 301 unfair trade practices complaint and a private antitrust suit against Japanese chip producers). At that point, after almost a year of negotiations, agreement was finally reached on the first bilateral US-Japan Semiconductor Trade Arrangement. Dumping cases in 256K (and higher) DRAMs and EPROMs, and the 301 case, were suspended after these talks were successfully concluded in late July. The STA was officially signed on September 1, 1986."

initiative which targets nanotechnology, micro-nanoelectronics, advanced materials, photonics, industrial biotechnology and advanced manufacturing systems).[63] Accordingly, it is relevant to ask whether the pattern of the EU's TD practice is consonant with industrial policy motives.

One basic indicator of industrial policy use is a concentration of measures in particular sectors. EU TDI is disproportionately heavy in a handful of sectors. However, the heterogeneous structure of industries means that some industries face lower coordination costs to mount a complaint and also are comprised of larger firms that can better afford the associated costs of participating in investigations than SME-dominated sectors. Moreover, some industries may have greater ability to obtain ordinary protection through greater lobbying influence.[64]

To test whether the EU's use of TDI indicates industrial policy purpose in the core sense of this term – i.e., to promote the development of strategic industries and in particular to correct for market failures that stand in the way of the development of particular industries – the evolution of the EU's revealed comparative advantage in the products protected by TDI is examined.

A precise estimate of the EU's evolving comparative advantage in TDI-protected sectors is not possible because the actual trade data in TD cases is often confidential; moreover, the subject goods often constitute a subset of the total goods traded under the Harmonised System (HS) codes that are listed in the case documentation; the discrepancies can be large (Nye 2006). As a second-best alternative, the evolution of comparative advantage is assessed based on the product groups defined at the HS 6-digit level in which the subject goods are classified.

Various measures of revealed comparative advantage have been developed in the economic literature for various purposes. For the present purposes, a modified version of the Trade Specialisation Index (TSI) is used which measures revealed comparative advantage in a sector on the basis of a country's net exports in that sector expressed as a proportion of its total trade in that sector[65]. Lafay (1992) proposed a modification to the TSI which controls for overall trade imbalances due to macroeconomic developments (e.g., exchange rate fluctuations and asynchronous business cycles) that could distort the reading on the simple TSI. The Lafay index (LFI) for good *i* is as follows:

$$LFI_i = (X_i - M_i)/(X_i + M_i) - \sum_i (X_i - M_i) \Big/ \sum_i (X_i + M_i)$$

A negative LFI score indicates comparative disadvantage in the specific sector, while a positive reading indicates comparative advantage. The evolution of the LFI vector over time reveals changes in the EU's comparative advantage.

The LFI index for each HS 6-digit sector identified in a TD case mounted in the review period, 2005-2010. An important correction to the raw trade data is to adjust for differences in valuation of imports versus exports. For intra-EU trade, the International Trade Center data show significant margins between the reported value of intra-EU exports ("free on board" or FOB valuation) versus intra-EU imports ("cost including insurance and freight or CIF). The CIF/FOB

63 *Final Report of the Expert Group on Key Emerging Technologies*, June 2011.

64 In the extensive literature on the political economy of TDI, the role of political influence of powerful lobbies, the desire to protect jobs, or simple protection for declining industries are sometimes conflated with industrial policy. In the present study, industrial policy comprises measures aimed at countering market failures, the classic rationale for industrial policy, which may include use of trade protection as in the *DRAM* case.

65 The TSI for good *i,* is as follows: $TSI_i = (X_i - M_i)/(X_i + M_i)$. TSI reveals the pattern of net trade by product or product group (values run from -1 for only imports to +1 for only exports; 0 indicates balanced trade).

ratio observed on intra-EU trade is applied to EU exports to the rest of the world to put the valuation on a comparable basis to imports.[66]

The evolution of these indicators is tracked over the period 2001-2010. Because of changes to the HS classifications in 2002 and 2007, some of the series of interest were either split into sub-series or consolidated into new or existing series. On this basis, the evolution of the LFI was calculated for 155 HS6 sectors involved in TD investigations initiated over the period 2005-2010. Table 17 reports summary statistics (unweighted mean, maximum and minimum) for the LFI of these sectors one year prior to initiation, by case outcome (duties imposed or case terminated).

Table 17: LFI Summary Statistics, HS 6 level, one year prior to initiation, investigations initiated in 2005-2010

	Measures Imposed (Provisional or Final)	Investigations terminated	Total
Number of EU Trade Flows at the HS 6 digit level	114	41	155
Mean LFI	0.04	-0.08	0.01
Maximum LFI	0,96	0,89	0.96
Minimum LFI	-0.97	-0.92	-0.97

Source: Authors' calculations based on data from the International Trade Centre online database

The unweighted mean LFI value of all sectors seeking protection one year prior to imitation is close to zero, with the mean LFI in sectors in which investigations are terminated somewhat lower than in sectors that succeed in obtaining protection. The dispersion around the mean is large, demonstrating that TDI are initiated across a broad spectrum of industries ranging from those with very strong revealed comparative advantage to some facing severe disadvantage. These results do not support the notion that TDI are mainly initiated in sectors at a relative comparative disadvantage. The fact that protection is more likely to be *denied* to sectors with weaker comparative advantage also contradicts the often-expressed criticism that "governments pick losers" – or, as Baldwin and Robert-Nicoud (2007) put it, that "losers pick government". At the same time, there are competing explanations for the latter result: (a) the EU might be exercising discretion and applying an industrial policy criterion for selective TD intervention; or (b) weaker sectors may launch less supportable complaints as desperation tactics to obtain protection even absent "unfair" competition.

Aggregating the HS6 sector trade flows to the case level gives greater weight to larger flows, which are presumably more important to complainants. The results are shown in Table 18.

Table 18: LFI Summary Statistics, case level, one year prior to initiation, investigations initiated in 2005-2010

	Measures Imposed (Provisional or Final)	Investigations terminated	Total
Number of Cases	48	18	66
Mean LFI	-0.12	-0.29	-0.16
Maximum LFI	0.78	0.53	0.78
Minimum LFI	-0.97	-0.92	-0.97

Source: Authors' calculations based on data from the International Trade Centre online database

[66] The International Trade Centre reports EU global exports but does not report world imports from the EU; this would have to be assembled for each product by searching for imports from the EU. For the purposes here, the intra-EU CIF/FOB margins should correct for the major part of the valuation issue.

At the case level, the mean LFI is now negative, in line with the hypothesis that "weaker" sectors seek TDI protection. However, the mean is low and the dispersion of values around the mean remains considerable, indicating significant heterogeneity across cases. Significantly, the LFI remains lower in terminated cases than in those where protection is obtained (-0.29 v -0.12) and the gap between the two is wider at the case level than at the product level.

To shed light on the nature of the industries that seek protection, trends in the LFI scores for 65 of the reported cases are examined to identify the prevalence of the following patterns:

- Positive and rising (consistent with industrial policy motives). and
- Positive and declining (indicative possibly of a defensive industrial policy response to declining global competitiveness).
- Negative and rising (indicative possibly of industrial policy for emerging areas).
- Negative and falling (indicative of declining industries with comparative disadvantage suggesting protection to slow adjustment rather than industrial policy).
- Reversal: a V-shaped pattern, with the LFI falling from positive to negative and rebounding (indicative of a successful restoration of competitiveness, the clearest case for TDI).

The results are set out in Table 19 (see appendix E4 for the individual charts). Overall, the ranges of patterns evident in the data show a considerable amount of dispersion. Roughly half the sectors might be interpreted as consistent with industrial policy motives. Meanwhile a similar proportion is comprised by declining sectors that start out with negative LFI scores, indicative of comparative disadvantage that is worsening over time.

Table 19: Summary of patterns in Lafay Indicator of EU HS 6–digit sectors affected by TDI, 2005-2010

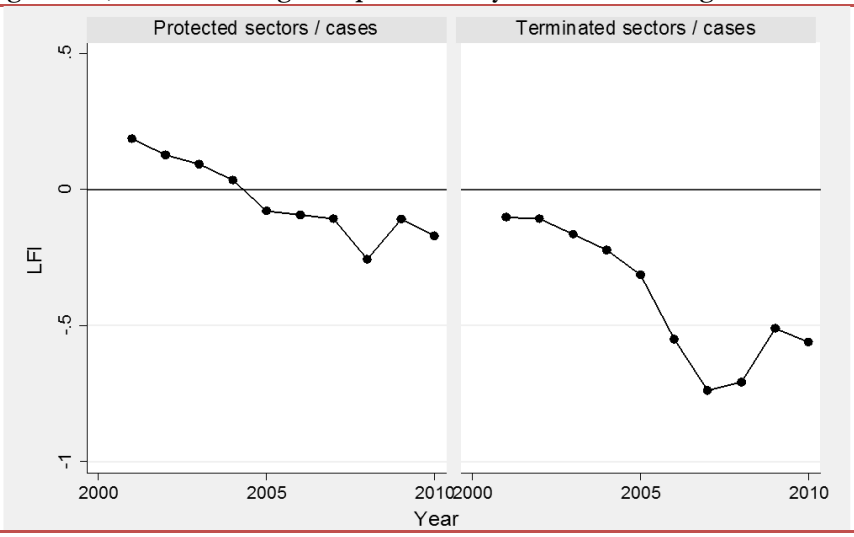
	Positive and Rising	Positive and Declining	Negative and Rising	Negative and Declining	V-Shaped	Total
Protected	6	13	7	22	0	48
Terminated	1	4	1	9	2	17
Total	7	18	8	31	2	65
%	10.61%	27.27%	12.12%	46.97%	3.03%	100.00%

Source: Calculation by the authors. Note: In the case of CDRs (AD500) and Recordable DVDs (AD501), which involve the same product codes, it was not possible to splice the series with reasonable confidence for the full period; this product code was therefore dropped for the pattern analysis.

Taking this analysis one step further, the trade flows for all sectors that sought TDI protection over the 2005-2010 are aggregated and the evolution of the group's LFI over the 2001-2010 period is examined for those sectors that received protection and for those sectors that had their cases terminated. The visual evidence provided in Figure 10 is coherent with the previous findings that the disadvantage is deeper in sectors for which investigations were terminated.

To summarise, industries that seek protection feature considerable dispersion in terms of their evolving pattern of comparative advantage/disadvantage. Industries that succeed in receiving protection tend to have stronger performance and thus greater future prospects. Thus there does appear to be some *prima facie* support to the argument that EU TDI is at least somewhat influenced by industrial policy considerations. Notably, none of the cases receiving protection showed the V-shaped pattern that one would expect from a combination of injurious dumping followed by successful relief through the implementation of TDI (although at a finer level of disaggregation, some product groups did show such a pattern). Thus, at this *prima facie* level of analysis, the data do not provide a strong case for the overall effectiveness of TDI, even if import flows from the subject countries are sharply attenuated, as they almost invariably are. This issue is further investigated in section 2.3.3 below.

Figure 10: Aggregate LFI, sectors seeking TDI protection by outcome: Investigations initiated in 2005-2010



Source: Calculation by the authors

2.2.5 Retaliatory Motives

A specific form of strategic use of TDI is to retaliate against countries' that impose measures on domestic industries' exports. With the spread over the past few decades of TDI use beyond the traditional core users, the possibility of "tit-for-tat" retaliatory TDI actions has clearly increased and a growing number of cases appear to be motivated by retaliation. Concern about retaliation is expressed bluntly by EU complainants in TD cases (e.g., in the recent expiry review in Magnesia bricks, the Union producers requesting the review, who are heavily dependent on the supply of a major raw material from China, requested anonymity out of concern for possible retaliatory action.)[67] And indeed, the EU appears to have been the target in at least some instances.

For example, following the initiation of a dumping investigation by the EU into fasteners imported from China on 9 November 2007, Chinese fastener producers filed a dumping case against the EU on 1 December 2008. The EU final determination on 26 January 2009 was followed shortly by the initiation of an investigation by the Chinese authorities into fastener imports from the EU on 25 March 2009. This case has been interpreted as clearly retaliatory in nature (see, e.g., Cherniak 2009). Shortly after China imposed provisional duties, the EU requested consultations at the WTO in respect of the Chinese action. Another case of apparent retaliation involved scanning equipment. In its 2010 Annual Report on third party use of TDI against the EU,[68] the Commission noted that a Chinese investigation into X-ray security scanning equipment initiated in October 2009 concerned a product similar to the product subject to an AD investigation initiated by the EU against China, i.e. cargo scanning equipment. Moreover, the Chinese complainant was the same producer affected by the EU investigation, and the named EU exporter was the complainant in the EU's investigation (the Commission diplomatically described this circumstance as "remarkable" rather than "retaliatory").

Another clear-cut recent example of retaliation, this time not involving the EU, was China's response to the Obama Administration's decision on 11 September 2009 to institute safeguard

67 OJ L 166/1 (termination of expiry review), 25.06.2011, at recital 11.

68 European Commission. 2010. Seventh Annual Report From The Commission To The European Parliament: Overview Of Third Country Trade Defence Actions Against The European Union. Annex I – Trends and main cases by country. Brussels, 25.6.2010, SEC(2010) 772 final.

measures on light truck and automobile tires from China for three years. Three days later, on 14 September 2009, China announced that it was launching AD and AS investigations into imports of chicken meat and automobile parts produced in the USA; the investigation happened to target an exactly equivalent volume of imports. US industry charged that the Chinese investigation was "obviously in direct retaliation for the US action in putting tariffs on tires made in China" (Johnson and Becker 2010).

The question of the extent to which retaliation has motivated TDI actions has been addressed in the economic literature. To briefly summarise the main results, Prusa and Skeath (2002) find that retaliation is a plausible motive for over 45% of "traditional users" AD actions. Blonigen and Bown (2003) find that US industry is influenced by the threat of foreign retaliation in its decision of which foreign countries to name in their AD petitions, and that US authorities' decisions are influenced by the threat of foreign retaliation. Vandenbussche and Zanardi (2010) find that the cumulated number of AD measures with which a country has been targeted strongly increases the probability that it will adopt an AD law itself. Abrami and Zheng (2010) examine the common assumption that China's use of TDI is primarily for strategic purposes, including retaliation against countries taking TDI actions against its own exports (they conclude otherwise). Thus, the literature appears to consider retaliation to be a significant factor in shaping TDI use.

While in the first instance recognition of this type of behaviour raises concerns about the reversal of trade liberalisation gains, upon further consideration it has been suggested that the rising threat of retaliatory AD actions actually might have the reverse effect (i.e., a "cold war" equilibrium of low use might set in; see Blonigen and Bown 2003). In either case, if TDI actions are retaliatory in nature, the economic impact analysis becomes significantly more complicated.

Table 20 shows the number of cases brought against EU Member States by countries with data in the World Bank's Global Antidumping Database and compares those totals to the number of cases brought by the EU against those countries.

Examining the pattern of use of AD measures by the EU against countries that have targeted EU Member States with their own AD measures, in aggregate there is no apparent evidence that TDI is used by the EU in any systematic fashion to retaliate. Indeed, the simple correlation coefficient between the two series is -0.001. This perspective differs quite sharply with the literature and raises questions about the framing of the issue in the literature. For example, the Prusa and Skeath retaliation model allows the two EU actions against Australia, which has filed 117 AD actions against the EU, to be interpreted as retaliation; similarly some of the 38 cases mounted by the EU against Japan might be classified as retaliation for the single case filed by Japan. The massive differential in cases for and against on a bilateral basis is illustrated by the fact that four countries (Australia, Canada, Argentina and Israel) alone mounted a total of 268 cases with the EU only mounting five "in response" over the timeframe covered by the World Bank dataset.[69]

The lack of any semblance of balance on a bilateral basis in TD cases is inconsistent with game theoretic models that suggest immediacy of response is needed in order to establish credibility of threat (e.g., see Feinberg and Reynolds 2006: 879). Moreover, it contrasts with the often overtly "tit-for-tat" responses in trade disputes brought under the WTO's Dispute Settlement Understanding (Garrett and McCall Smith 2002) and strategic state behaviour in exercising the retaliation privileges awarded by panels (Bown and Pauwelyn 2010). In summary, there is no

[69] Note that the fact that AD cases against individual EU member states are counted as separate cases inflates the total against; for example, the 300 US cases involve 149 separate case files. However, the method of counting does not affect the overall conclusion of no relationship, which is driven by the large number of extreme cases of virtually no actions on one side and a large number on the other side.

compelling evidence that EU TD practice to date has involved to any significant extent a tit-for-tat retaliatory motive, even if individual cases may have.

Table 20: EU AD compared to AD against the EU, by Country

	Cases Against EU	EU Cases
USA	300	19
Australia	117	2
South Africa	100	8
Canada	80	2
India	77	39
Brazil	45	12
Mexico	38	7
Argentina	36	1
Israel	35	0
China	30	135
Korea	22	52
Turkey	14	30
Pakistan	13	10
Colombia	10	0
Taiwan	9	32
Indonesia	7	20
New Zealand	5	0
Malaysia	3	24
Philippines	2	2
Thailand	2	33
Chile	1	1
Ecuador	1	0
Japan	1	38
Peru	1	0
Uruguay	1	0
Venezuela	1	2

Source: Authors' calculations based on Bown (2010).

2.2.6 TDI as Insurance

This section considers TDI as "surge" protectors to attenuate the impact on the EU economy of disruptive change in the global economy. The WTO safeguards instrument allows Members to temporarily restrict imports of a product in cases where a surge in imports injures or threatens to seriously injure a domestic industry.[70] An import "surge" is defined as either an increase in imports in absolute terms or relative terms (e.g., if the level of imports do not go up but their share does in a shrinking market). As well, the GATT has included, from the beginning, provision to renegotiate commitments.

Nonetheless, it has been widely argued that TDI is used in lieu of safeguards to deal with import surges (e.g., Stiglitz 1997), because the design of TDI makes it more attractive to both governments and industry than the safeguards instrument. In contrast to AD and CV measures, safeguard measures cannot be targeted at imports from a particular country but rather must be applied on a most favoured nation basis. Also unlike AD and CV measures, the Safeguards Agreement allows countries whose exports are restrained to seek compensation through consultations and in the event that none is forthcoming to retaliate by raising tariffs on the country imposing the safeguard. The measures must be progressively liberalised while in force. And the cumulation rules for safeguards against developing country imports are also more generous to the developing country. The *de facto* role of TDI as safeguard policy since the 1980s is elaborated in Finger, Ng and Wangchuk (2001).

70 GATT Article XIX – Safeguards.

The extent to which TDI serves as a preferred from of surge protection is, however, difficult to establish. Historically, safeguard measures were provided for in Article XIX of the original GATT, "Emergency Actions on Imports of Particular Products," which was referred to as the escape clause or safeguard clause. This provision, which allowed temporary restrictions on imports where domestic industries faced "serious injury", was used in only some 150 actions over the entire pre-WTO period from 1947-1994. The European Community was the second most frequent user of this provision (behind Australia), accounting for 26 of such actions (Bown and Crowley 2005: Table 1). As well, the GATT has included, from the beginning, provision to renegotiate commitments.

The more frequently used tools to manage import surges in the pre-WTO era were "grey-area" measures. These were variously labelled as voluntary export restraints (VERs), voluntary restraint agreements (VRAs), and orderly marketing arrangements (OMAs). Other informal measures were also used. With the entry into force of the WTO Agreement in 1995, new grey-area measures were banned and in-force measures were required to be brought into conformity with the Safeguards Agreement or phased out within four years. All Members had the right to one exception which allowed an extra year for phase-out; only the EC elected to make use of this option. Thus, all EU grey area measures were eliminated by the beginning of the 2000s.

Many suspect that the action simply shifted over to AD/CV measures. This is indeed plausible. In the pre-WTO era, almost half of the AD and AS initiations (348 of 774) over the period 1980-1988 were superseded by negotiated restraints (Zlate 2002). Accordingly, there was no clear distinction in the pre-WTO era between the use of surge measures and the use of AD and CV measures. By the same token, there was no obvious discontinuous surge in AD actions when grey-area measures were banned.

The history of use of grey-area measures is of interest in analysing the *de facto* role of TDI because of the blurred distinction and because the use of the latter instruments was documented and discussed more or less openly. In particular, the motives for use of grey-area measures were discussed at length in context of the Uruguay Round on the basis of a list prepared by the GATT Secretariat of measures notified under Article XIX together with other measures that appeared to serve the same purpose.[71]

Reviewing the history of US grey-area measures, Coleman and Yoffie (1990: 138) emphasise the heterogeneous nature of the products concerned:

> "the United States has employed VERs to protect capital-intensive (automobiles) and labor-intensive (apparel) businesses, differentiated products (machine tools) and commodities (steel), and concentrated industries (automobiles) as well as fragmented sectors (machine tools)."

Many other products were also caught up in grey area measures imposed by other countries.[72]

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[71] The list of grey area measures was originally prepared prior to the launch of the Uruguay Round and incorporated as annexes in the GATT document Spec(82)18 dated 26 March 1982. The list was subsequently revised three times and served as the basis for a 1987 discussion of the issue by GATT Members: MTN.GNG/NG9/W/6, dated 16 September 1987. The list here is taken from the third revision: Spec(82)18/Rev.3 dated 22 May 1984.

[72] See MTN.GNG/NG9/W/6, dated 16 September 1987. Notable by its omission from both the GATT list and the summary by Coleman and Yoffie is the case of semiconductors. The US-Japan rivalry in this sector resulted in a series of VERs adopted by Japan and eventually in the bilateral US-Japan Semiconductor Trade Arrangement that was signed on 1 September 1986. This agreement led to a GATT challenge by the EEC in respect of the aspect of the STA which involved undertakings by the Government of Japan to monitor cost and export prices on the products exported by Japanese semi-conductor firms from Japan to third country markets, and the exhortations for Japan to open its market to foreign companies which in the opinion of the EEC

The same appears to be true of the EU. The members of the present-day European Union used such measures in respect of a vast range of goods.[73]

Just as product coverage does not suggest a unifying theme for grey area measures, neither does motive. The range of rationales for grey area measures offered by countries using them included the desire to guarantee domestic producers stable prices where production conditions were cyclical, to provide "breathing space" for producers facing structural adjustment, to allow affected communities to adjust, and in some cases simply to protect incomes. However, what is very important for the purposes at hand in the present study is that the word "dumping" appears only twice in the WTO documentation of these measures. The word "unfair" does not appear at all. GATT members discussed the use of the measures to manage the frictions involved in the course of the across-the-board liberalisation that was then in full swing under the multilateral process.

Exporting countries that accepted VERs offered a number of reasons why they found it preferable to enter into an agreement rather than insisting on their GATT rights. It was suggested by various parties that VERs or other bilateral restraints allowed solutions to be worked out that corresponded to the particular nature of the problem in each case, and often involved less risk to exporters than taking their chances in investigations. In some cases, exporting countries apparently accepted importing countries' arguments that time was necessary to allow positive structural adjustment in the importing country; in other cases, however, exporters did insist on their GATT-negotiated rights.

The second key take-away point from the history of grey area measures is the very prominent roles of Japan and to a lesser extent Korea, the "surge" countries of the 1970s and 1980s, as the most frequently targeted exporters. Alongside the general liberalisation under the GATT Rounds, the era of grey measures also featured the integration of the rapidly growing East Asian countries into what had previously been largely a North Atlantic trading system. The grey area measures were used to manage this major structural adjustment in the global trading system. China has since replaced Japan and the other East Asian "Tigers" as the surging economy that is integrating itself rapidly into the global system – and it has also displaced them as the main target of AD actions. This is brought out best with reference to US AD actions against Japan and China in particular, since data for US actions for the early 1980s are most easily available (see Figure 11).

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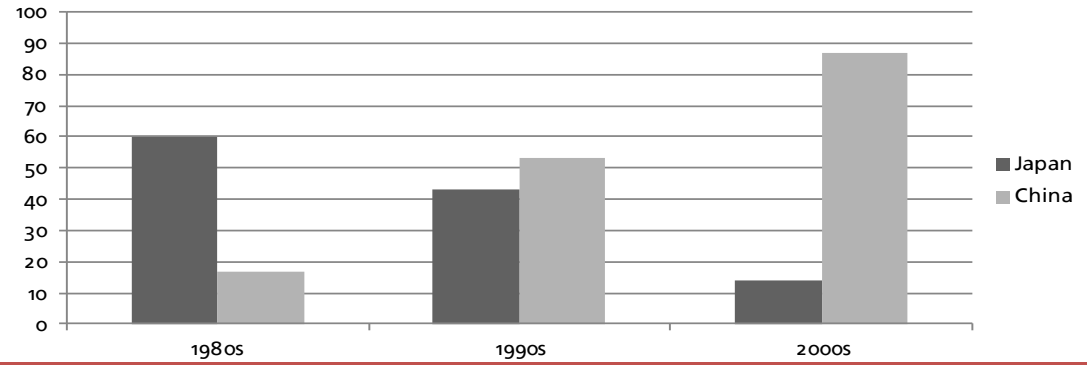
favoured US interests. Consultations were held on 20 November 1986 and 29 January 1987; the issue was not resolved and went before a panel. The panel found that external monitoring was not consistent with GATT but upheld the measures to open the Japanese market. For a discussion of this episode see Flamm and Reiss (1993).

[73] The list is as follows: Apples (five EEC measures in respect of five countries); Automobiles (four EEC measures on behalf four EEC members in respect of automobile imports from Japan); Black and white TVs from Korea; Certain electronic piezoelectric quartz watches with digital display; Certain Fabrics; Certain species of timber; Certain textile products; Cheese/cheese and curds (seven separate measures, including five by Spain and two by the EEC); Colour TV sets from Japan; Colour TV tubes from Japan; Cultivated mushrooms in brine; Dried grapes; Motorcycles of a cylinder capacity of 50cm or less; Flatware (cutlery) (three separate measures by three EEC members, all against Korea); Footwear (five separate measures against three countries); Forklift trucks from Japan; Fresh or chilled garlic; Frozen cod fillets; Grooved carped shells and other mollusks; Hard coal and hard coal products; Jute products (two separate measures against different countries); Jute yarn; Light commercial vehicles (two separate measures, both against Japan); Sheep and goats/sheep and goat meat (11 separate measures targeting 13 different countries); Steel (15 measures targeting 15 countries); Synthetic rubber; Tableware and other articles of a kind commonly used for domestic or toilet purposes, of stoneware (two measures); Tunny for industrial purposes; Video tape recorders (four measures, all against Japan); and Yarn of synthetic fibres.

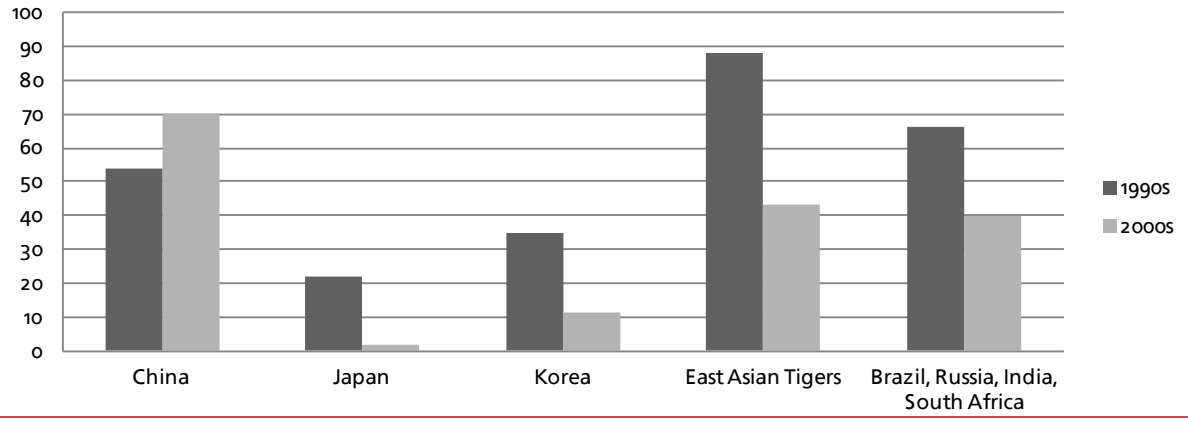
Figure 11: US AD Cases versus Japan and China, 1980s, 1990s, and 2000s, number of cases



Source: World Bank, Global Anti-Dumping database (GAD-USA).

The pattern for the EU is far less clear as data for the full period are not available on the World Bank's database – the EU data are available for only 1987 and onwards. The transfer of trade pressures from Japan and the other dynamic East Asian economies during the "Asian Miracle" era of the 1980s and 1990s to China in the 2000s is evident; however, EU actions fell off in the 2000s against the other surging major emerging markets, namely Brazil, Russia, India and South Africa (Figure 12).

Figure 12: EU TDI initiations versus dynamic emerging market economies, 1990s, and 2000s, number of cases



Source: World Bank, Global Anti-Dumping database (GAD-EU).

Taking all the evidence into account, this comparison suggests that, in the 2000s, EU TDI was used to deal with the frictions emanating from China's surge, in lieu of the diplomatic measures used to help manage the integration of the other dynamic East Asian economies in previous decades. This historical perspective suggests that the rise in the use of TDI in recent decades was transitory and not a trend.

This issue has important implications for how TDI is evaluated. A general argument in support of TDI is that it acts as an insurance policy that allows countries to take on deeper commitments in trade negotiations than they would otherwise have been willing to make. Nelson (2006) reviews the history of this argument and shows that it is based on observed behaviour:

> "Going back to Viner, the academic literature on antidumping has recognized that antidumping law was often adopted as part of a strategy of tariff reduction or protection resistance. However, it was only with the adoption of the Reciprocal Trade Agreements Act of 1934 (RTAA) that antidumping became part of a system explicitly linking administered protection to liberalization ... The architect of the RTAA, Secretary of State Cordell Hull, realized that Congress would not agree to a program of systematic trade liberalization without a number of assurances that American industry would be protected from serious injury. From the RTAA to the present, omnibus trade legislation makes this

> link explicit by presenting both tariff cutting authority and the details of the administered protection mechanisms in the same legislation. It seems clear that no one involved in the politics of the RTAA saw it as transformative. On the contrary, it was simply a practical measure to accomplish the tariff reduction that had long been part of the Democrat party's core agenda." (2006: 573; internal references omitted).

Dam (1970) observes that the inclusion of TDI in GATT rules from the beginning greatly increased the extent of liberalisation achieved in the early GATT rounds by diffusing using domestic political opposition toward trade liberalisation. Much of that regulation concerned itself with contingent measures (surveillance and safeguards). More recently, the accession of China to the WTO, which involved the further dismantling of a massive array of individual protectionist measures both within China[74] and on the part of WTO Members against China, was also contingent on the inclusion of special contingent protection measures.[75]

Compelling evidence for this role of TDI is provided by India's record. In the early 1990s, in the context of a balance of payments crisis, India reduced tariffs sharply on a unilateral basis and relaxed or removed a wide range of non-tariff trade-restrictive controls. At the same time, it became a heavy user of TDI.[76] The heaviest use of TDI was during the initial period of reforms when India moved from a tightly controlled, near autarkical trade regime with a simple tariff average of 113% and comprehensive import licensing towards a largely decontrolled regime with tariffs cut to roughly one-third their initial levels. The secondary phase of liberalisation in the 2000s, which saw the dismantling of the remaining import licensing measures and a further reduction in tariffs by half, was accompanied by a less intense use of TDI.[77]

Importantly, Fischer and Prusa (2003) show that, with incomplete insurance markets, contingent measures can be *welfare enhancing* when the economy is subject to sector-specific trade shocks. In this regard they write:

> "Trade negotiators have long argued that the inclusion of the most popular sector-specific tool – antidumping actions – is a precondition for the approval of any trade agreement. The main result of the paper affirms this intuition by showing that there is an insurance role for antidumping that had not been considered in the theoretical literature" (2003: 751).

Again, when the assumption of perfectly functioning and complete markets and full information is relaxed, the conventional evaluation of TDI acquires important new qualifications. This argument is of course not a justification for any *specific* form of contingent protection, but rather for the availability of an effective form of contingent protection. Insofar as AD and CV measures are the instruments of choice for exercising the contingent protection that is available, their use must be understood in light of this larger process of liberalisation.

The importance of the availability of contingent protection for EU trade liberalisation appears to have been considerable but the evidence is anecdotal. For example, the EU's progress towards completion of the single market involved the elimination of a vast number of quantitative trade

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74 For example, Erixon, Messerlin and Sally (2008) observe that, "In 2005 [China] reported that 1,416 national standards had been abolished as a result [of WTO accession commitments.]"

75 China's WTO accession Protocol included special provisions allowing the use, with essentially full flexibility, of the "non-market economy" status in AD investigations, of the "Transitional Product-Specific Safeguard Mechanism" for 15 and 12 years from the date of China's entry into the WTO; and of the extended clothing and textiles safeguard, which was used by the EU (and the USA); see Bown (2007: note 27).

76 In fact, the World Bank's Antidumping Database lists 629 individual cases initiated by India since mid-1992, just ahead of the USA with 619 over the same period. Over this period, imports of goods as a share of GDP rose from 8.8% in 1990 (Panagariya 2004) to 25% in 2008 prior to the global crisis.

77 A contrasting interpretation of this liberalisation episode is provided in Vandenbussche and Zanardi (2010); they interpret the Indian experience in the 1990s as one of TDI largely offsetting the gains from liberalisation, rather than enabling the liberalisation that did take place.

restrictions which was only possible because of the availability of contingent protection. In this regard, the WTO's 1995 Trade Policy Review of the EU notes:

> "6,318 quantitative restrictions applied by the member States against imports of non-textile products from third countries, including some 4,700 restrictions vis-à-vis China, were abolished by Council Regulation 519/94 of 7 March 1994" (Part IV, paragraph 18).

A major part of that regulation concerned itself with contingent protection (safeguards and surveillance).

In China's WTO accession, it was however the USA that played the major role in exacting special terms in the form of extraordinary contingent protection measures: as noted by Ma (2004), except for minor changes, the Transitional Product-Specific Safeguard Mechanism is the same as the relevant part ("Product-Specific Safeguard") in the Protocol Language of the US-China WTO Market Access Agreement of 15 November 1999.

In summary, the negotiating history of major trade liberalisation initiatives makes clear that across the board liberalisation in the absence of perfect knowledge about the possible consequences in terms of trade pressures is contingent on the availability of contingent protection. Economic theory demonstrates that such an insurance role is welfare enhancing. The history of use of grey area measures in the pre-WTO period as successive waves of trade liberalising initiatives were being implemented to manage excessive pressures in a context where the trade flows were not characterised as "unfair" but simply disruptive makes clear that that they were clear substitutes for TDI. This history provides the linchpin that allows the identification of the on-going use of TDI in ways that are strikingly similar to the pattern of use of grey area measures in the absence of recourse to the latter measures with the management of excessive pressures of adjustment related to the on-going liberalisation of trade and deepening integration of economies under globalisation. While the use of TDI may be defended as welfare enhancing on these grounds, with the individual instances of application of measures analogous to claims on a pre-existing insurance policy, the design of trade defence laws and the emphasis on "unfair" trade in their justification, makes them ill-suited for this role.[78]

The policy challenge is to better understand why the mechanisms provided for in the WTO Agreement for insurance purposes – most particularly, safeguards and the provisions for renegotiation or withdrawal of specific commitments – have not been used more frequently to deal with pressures.

2.2.7 Communitarian Motives for TDI

As noted in the discussion of welfare effects, TD cases involve at times a balancing of widely dispersed consumer benefits and highly concentrated costs to workers and local communities if plant closures are at stake. In such cases, the impact on factor incomes cannot legitimately be compared dollar-for-dollar with widely distributed and shallow consumer surplus gains, since there is an obvious violation of the assumption of constant marginal utility of real income on which Harberger's (1971) surplus test is explicitly based.

[78] Finger and Zlate (2003) observe that: "GATT/WTO rules offer a number of provisions that might be described as escape valves, antidumping has become by far the most frequently used one. Yet as a tool to help governments to maintain a political momentum toward openness, antidumping has few of the qualities of a good management tool."

While a direct approach to this issue in terms of devising weighting schemes for income gains of consumers and income losses of affected workers and communities is not possible (reflecting a longstanding consensus in the economics profession on this issue), an indirect approach is available in the form of the "communitarian" argument for TDI advanced by Hutton and Trebilcock (1990). To motivate their application of this test, Hutton and Trebilcock observe that

> "economists do the world a disservice by conjecturing a one-value world where the only legitimate justificatory criterion against which to measure the appropriateness of particular policy responses is an efficiency criterion (here translated into a consumer welfare test). Clearly, every community widely shares other values which policy responses should legitimately reflect. [... Communitarianism] stresses the important role of stable family and community ties, roots and networks for individual and societal welfare, and would see a justification for policy responses designed to reduce the disruptive impacts of foreign imports on the integrity of long-standing communities. This perspective would presumably require some demonstration of significant and deleterious community impact as a pre-condition to the invocation of anti-dumping remedies. Again, protection of domestic producers *per se* would seem to be ruled out as a primary goal of unfair trade remedies." (1990: 124)

A similar comment is made by Jenny (2000: 24) on essentially the same nexus of issues but using a different analytical construct and in a different but closely related field, competition policy:

> "Overall, what may sometimes appear to the economist to be an 'economic failure' of competition policy regimes or competition laws and their enforcement may be in fact 'a failure of economists' to recognize the potentially legitimate desire of society to produce (at a cost) intangible public goods of a socio-political nature. For example, until economists have demonstrated that a collective sense of 'fairness' or 'social cohesion' can be socially produced at a cheaper cost than through 'fair competition laws' (which typically restrict competition) they may be misguided in criticizing such laws."

What Hutton and Trebilcock characterise as a welfare criterion, Jenny characterises as the production of a public good. Implicit in Hutton and Trebilcock is a trade-off between welfare gains from preserving the community's stability and welfare gains from consumption. Implicit in Jenny is the trade-off between the production of public goods which generate welfare gains of an essentially identical nature at the cost of production of some consumer goods, which is the unstated consequence of the restriction of competition to which he refers.

The present study adapts the communitarian test developed by Hutton and Trebilcock and applies it to the EU TD cases initiated in the evaluation period. The objective is twofold: to identify the extent to which TDI use might be, on an *ex post* basis, evaluated to be substantially better on a welfare accounting than under conventional welfare treatments, and to shed light on whether this concept has played a role – even if not explicitly articulated – in influencing EU TDI use on an *ex ante* basis.

It is not straightforward to apply a communitarian test for TDI. If factor market adjustment is largely frictionless, there is little cost from disruptions due to trade – labour and capital are redeployed to equivalent if not more profitable uses. In certain contexts – e.g., Silicon Valley where it is joked that individuals can change jobs without changing parking lots – this may be close to the reality. But in many cases, it is quite the opposite – closure of a key employer in a town can have large and long-term negative impacts on dependent individuals and communities. Job mismatch issues might constitute a major problem. Very much depends on the context of the community – and these contexts are highly heterogeneous.

Consistent with the approach taken by Hutton and Trebilcock, a series of "screens" is applied to rule out cases where communitarian concerns would not be of major concern. A total of 63 EU TD cases initiated in the period 2005-2010 are examined. The approach is as follows; a more

detailed exposition is provided in appendix E3. First, a preliminary set of screens are applied at the industry level:

- The case was terminated. In such instances the complainant may have suffered erosion of profitability and some workers may have been laid off but the dumping cannot have represented an existential threat to the domestic industry.
- A large number of EU producers are involved, spread across a large number of EU Member States. In such cases, the impacts of dumped or subsidised imports are spread over a large number of communities of varying sizes and economic contexts. Communitarian concerns might arise in particular cases; however, it would be impractical to evaluate each instance.
- Industry concentration is low. In such cases, trade impacts are likely to be diffuse as well.

In all, 16 cases are screened out on the first test. Of these cases, however, several involved potentially concentrated impacts. For example, *Cameras* involved one community producer, Grass Valley in the Netherlands; *Silicon Carbide* appears to have involved two community producers;[79] *Sodium Metal* involved a single producer, Métaux Spéciaux in Savoie, France; and *Ring Binders* involved only Ring Alliance Ringbuchtechnik GmbH, a Vienna-based company that reintroduced a complaint two years after withdrawing the first. One terminated case (*Wireless Area Networks*) is left in for communitarian consideration because the resolution to this case, which led to the withdrawal of the complaint, was based on the company reaching a working arrangement with one of the competing Chinese exporters.

An additional seven cases could be excluded on the basis of highly dispersed EU production as per the second screen.

In some cases the extent of dispersion of EU production is less clear. For these cases, a similar procedure was followed as in the competition policy analysis: measures of industry concentration (Herfindahl-Hirschman index values or HHIs) were constructed, using available information from the case documentation. A minimum HHI can be constructed by assuming even market shares for the firms within the stated segments. A higher HHI can be estimated by assuming that, in the largest segment, there is a dominant firm (subject to plausibility judgments based on the case information). On this basis, minimum and maximum HHIs were calculated for the questionable cases. Another 19 cases were excluded as unlikely to have sufficient concentration of impact to make communitarian concerns an important factor in the welfare calculation as the maximum HHI reading was 0.18 or less.

The above criteria together screen out 42 of the 63 cases under examination. The remaining cases all involve a relatively small number of firms. For these, factors are considered that might bear on whether the firms involved face existential threats from the dumping. Clearly, in terms of externalities for local communities, there is a discontinuous increase in harm when the level of damage leads to a plant shutdown compared to the situation in which a plant gears down, even with layoffs related to production cutbacks. Of course, the case documentation does not allow us to determine the financial condition of the firms involved. Accordingly, the extent of existential threat to a firm must be based on general characteristics. Two such characteristics in particular are considered, which provide additional screens.

- The establishment carries out headquarter functions. Headquarter functions often include research and development and other support services for a larger group of establishments. Accordingly, a headquarter operation is much less likely to be shut down than a branch plant or subsidiary.

[79] Neither the initiation nor the termination reports listed the community producers; however, these were named in another AD case, *Silicon carbide* (AD175, R370); see OJ L232/1, 25.08.2006.

- The firm has a diversified product base. A specialised establishment, focused largely or entirely on production of the like good, is more likely to face an existential threat than a diversified establishment.

The HQ/branch status of an establishment is determined from the firm's published documentation as is the extent of product diversification. These screens eliminate 21 of the 65 firm-municipality cases, which still leaves 44 instances of possible communitarian concern in 15 TD cases to consider.

Next, the size of the community involved is considered. For this purpose, cases are identified in which the firm involved is based in an Urban Audit Core City.[80] With one exception in our list, Urban Audit Cities are all communities with over 100,000 population and typically are at the centre of larger agglomerations. If a complainant firm is located in one of these cities, or in the agglomeration immediately surrounding it, and the job loss is moderate, those cases are excluded from further consideration as well on grounds that the business diversification of the agglomeration is probably sufficient to limit the knock-on effects of a single firm's failure. Moreover, job transition is easier and less disruptive for workers in larger agglomerations. In these instances, the static consumer welfare gains and the dynamic efficiency gains from not intervening to prevent firm exit are more likely to dominate the accentuated welfare losses associated with the loss of factor incomes. Five of these firm-community instances can be excluded on this basis. This leaves 39 firm/community cases to be considered.

What further guidance can be brought to bear in terms of how to take communitarian impacts into account? Four criteria are suggested that can help screen out cases where communitarian concerns may not warrant intervention:

- The domestic (EU) industry share in the market for the like goods is very low or very high. The lower the EU industry's market share in the like good, the less likely it is that even deep and narrowly felt negative impacts which are accorded a high weight would dominate the welfare costs of imposing TDI in terms of foregone consumer surplus. This criterion is consistent with the Commission's invocation of the public interest in not applying measures in the CDR and DVD cases, where EU market shares were very low. For high EU market shares, the factor income losses are likely to dominate consumer welfare in a static analysis but here additional considerations need to be brought to bear (e.g., the dynamic efficiency gains from not slowing the firm exit/entry process and also the possibility for collusive, anti-competitive behaviour on the part of the domestic industry).
- The employment/population ratio in the affected region is above average. The higher this ratio (e.g., compared to the EU average), the less the community is dependent on the existing jobs and the lower the negative externalities for a given direct shock from a plant closure on the surrounding community.
- The unemployment rate in the affected region is below average. The lower the unemployment rate in a region (again, compared to the EU average), the lower would be the job transition costs for laid-off workers and the lower the negative externalities for a given direct shock from a plant closure on the surrounding community.
- The firm is part of a recognised cluster. In dynamic clusters, the constant cycle of firm creation and destruction means that workers let go by one firm can find equivalent employment at a new start-up or existing competitor which facilitates job transition for workers with industry-specific skills.

[80] Eurostat. *Population and living conditions in Urban Audit cities, core city: Total population in Urban Audit cities*, http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tgs00079&plugin=1

Applying these screens to the 39 communitarian cases that have passed the previous screens, 15 can be screened out on the basis of low EU market shares (below 30%); seven are screened out because EU firms have a high market share (over 80%); and 11 are screened out because they feature a combination of relatively high employment ratios and relatively low unemployment rates. None were screened out on the basis of being part of a recognised cluster.[81] This leaves only eight instances in four TD cases where a clear-cut communitarian case could be made on static welfare grounds alone for the use of TDI.

On the basis of the above analysis, communitarian concerns would appear to figure prominently only in a relatively small number of TD cases. At the same time, in a welfare analysis of the use of TDI, these are important considerations.

2.2.8 EU Motives for TDI: Summary and Discussion

The perceived gap between the stated policy rationales for TDI and actual global practice, as well as the potential application of TD measures to a wide range of what is considered ordinary course of business firm pricing behaviour, and to public policy interventions for recognised market failures, has exposed TDI to often scathing criticism in the economic and trade policy literature and to extensive forensic research to determine what *de facto* roles TDI actually plays. Numerous "theories of the case" have been advanced. Appreciating the extent to which EU TD practice reflects these various alternative motivations is important for better understanding the economic efficiency and welfare implications. The pattern of TDI use by the EU has been examined through a number of analytical lenses.

- As an international trade analogue for domestic competition policy.
- As a macroeconomic buffer.
- As a tool of industrial policy.
- As a retaliatory mechanism to protect EU exporter interests.
- As the policy tool of choice to deliver insurance against excessive trade pressures.
- As protection for vulnerable communities from disruptive change emanating from the trading system.

Most of these motivations can be read, at least in some cases, into the EU's use of TDI in the evaluation period. At least one case in the evaluation period and possibly several others appear to be plausible instances where the stated policy rationale of countering anti-competitive practices of foreign firms could be invoked. There is also some weak evidence that TDI serves to buffer cyclical downturns, that the EU's discretion in applying TD measures is more likely to be exercised in cases where complaining industries have stronger revealed comparative advantage, suggesting the influence of industrial policy considerations, and that the EU's use of TDI was at least justified if not necessarily motivated by communitarian welfare considerations in at least a handful of cases. While there is evidence for apparent retaliation against the EU for using TDI, the evidence does not suggest that the EU's use of TDI in the evaluation period involved strategic retaliation. Overall, these theories are only faintly echoed in EU TD practice.

This leaves unexplained the apparent inconsistency between the observed behaviour of the EU to drive towards a more liberalised trading regime with the simultaneous recourse to protection.

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[81] In one instance the establishment was part of a non-recognised cluster – this was a firm in Lutherstadt-Wittenberg (Piesteritz), which was part of the local AgroChemistry Park. The case was *Melamine* (AD554) from China.

There are two ways in which this apparent contradiction is described in the literature, with diametrically opposed implications for the analysis of economic welfare.

One is the "substitution effect" whereby governments substitute administered protection for tariffs; since administered protection is far more costly than a simple statutory tariff, the implication is that governments are moving in a welfare-damaging way from efficient to inefficient protection.

The second is the "insurance effect" whereby governments, in the absence of knowledge about the future effects of liberalisation, include escape clauses which make it politically feasible to commit to sweeping liberalisation initiatives such as the multilateral GATT rounds, the creation of the EU internal market, and the integration of major new economies such as China into the global economic division of labour. Consistent with the general literature on insurance, TDI as the instrument to instantiate an implicit insurance contract is welfare enhancing.

In this regard, this study draws on the history of major liberalisation episodes and notes the following facts:

- The sweeping tariff reforms of the postwar period were explicitly linked in the negotiating documentation to the availability of selective safeguards. This feature has been a part of the multilateral system starting with the US reciprocal trade agreements of the 1930s, which served as the model for the GATT.
- Similarly, the equally sweeping trade reforms made in the context of the European Single Market exercise were accompanied by explicit safeguards and surveillance mechanisms to redress ex post the problems that could not have been anticipated ex ante.
- The accession of China into the WTO depended on a range of special safeguards.
- The pattern of use of TDI against China in recent years mirrors the pattern of use of grey area measures in the pre-WTO period against the "surge" economies of the 1970s and 1980s – Japan and the other East Asian "Tigers".

On the basis of this strong circumstantial evidence, it is concluded that, for the most part, a significant portion of modern-day TDI use can be likened to claims on various insurance policies put in place to permit the major trade liberalisations of the postwar period. Seen in this light, they do not represent substitution for liberalisation but the *ex post* adjustment of the degree of liberalisation agreed to under conditions of lack of perfect knowledge of future conditions and in the absence of the appropriate insurance markets. The fact that AD is the instrument of choice to give effect to these insurance claims, rather than the formally proposed instruments (safeguards or Article 28 renegotiation of commitments), appears to reflect the design of the instruments but does not for the most part detract from the force of the argument.

This perspective on TDI provides a coherent explanation of government policies that is consistent with the documented linkages in liberalisation agreements and with the broad pattern of use of TDI, including its often random pattern of incidence. In our view, this is by far the strongest support for TDI as currently practiced by the EU and globally. However, this conclusion also emphasises that contingent protection under the WTO rules is not well framed, leaving it poorly understood and thus open to widespread criticism, susceptible to inefficient application by administering authorities, and open to potential abuse by rent-seeking industries. While there are relevant policy implications for the EU's use of TDI, the main message concerns the need for WTO reforms in this area that (a) encompass TDI, safeguards (including the special safeguards negotiated in the context of China's accession to the WTO), and the Article 28 renegotiation provisions; and (b) revisit, critically, the effectiveness of substitution of poorly framed legal instruments for the diplomatic measures in use in the pre-WTO era.

2.3 The European Union's Use of Trade Defence: Effect and Effectiveness

In this section, the effects and effectiveness of the EU's use of TDI is examined. The commercial significance of the EU's use of TDI is first considered in terms of the overall share of imports that TD measures affect. Second, the extent of protection provided for EU industry is described in terms of the level of measures; the duration of measures; the time it takes until measures are imposed and the actual injury period; and extent to which circumvention and absorption of measures may have eroded the effectiveness of measures. The next section considers the effectiveness of TDI in restoring competitiveness of protected sectors in terms of the impact of TDI on the sectors' revealed comparative advantage. This approach takes into account not only the effects of trade destruction but also of trade diversion and deflection and the impact of TDI on the export performance of protected sectors. Fourth, the section discusses the extent to which the fragmentation of production has compromised the ability of TD measures to be used for their stated purpose, or indeed for the *de facto* purposes that it appears to have been used as the most flexible instrument of trade intervention available to authorities.

2.3.1 Impact of the EU's Use of TDI on Trade

Over the evaluation period the European Commission initiated a total of 78 investigations against a total of 130 countries affecting trade in a total of 155 sectors at the Harmonised System (HS) 6-digit level. Establishing the commercial significance of these measures is, however, less straightforward. First, the actual volume of trade affected cannot be determined from case documentation since the actual data on trade in goods affected by investigations is typically not provided due to business confidentiality reasons. The HS codes listed in case documentations cover a wider range of goods than actually are affected in TD cases. Second, the actual trade levels would have to be compared to a non-observed counterfactual case where TD investigations had not been launched and measures not imposed. Establishing such a counterfactual requires resort to a computable trade model that relies on a large number of assumptions concerning the response of producers and consumers to the price changes induced by TD measures and to the direct costs imposed by investigations. Reliable empirical evidence on which to base these assumptions is for the most part lacking. Third, the very presence of a TD system affects trade by creating uncertainty about market access for firms considering committing the resources required to enter into export markets and for firms considering utilising production inputs sourced from foreign markets. On the export side, these costs, which have been termed "beachhead costs", can be considerable; they include costs associated with obtaining market intelligence, identifying foreign partners, dealing with foreign regulatory requirements, setting up distribution and after-sales service networks and so forth. On the import side, they include the costs involved in ascertaining that imported inputs meet the firm's quality criteria. Uncertainty in this context is simply an added cost that heightens the hurdle that firms must be able to clear in order to participate in international markets. Thus, at the margin, TDI deter some firms from such participation with detrimental impacts on their innovation and productivity performance without leaving a trail of evidence in the trade data.[82]

The share of EU imports affected by TDI is reported by the WTO in its Trade Policy Review of the EU to be about 0.6% (WTO 2011). This figure covers measures in force from investigations

[82] See, for example, Vandenbussche and Zanardi (2010) and Egger and Nelson (2010) for discussions of the potential "chilling effect" of TDI on trade flows due to a variety of spillover effects, and empirical estimates of the importance of such effects.

initiated prior to the evaluation period. Therefore, the evaluation team calculated the amount of trade affected by EU TD investigations initiated in the 2005-2010 period. For each HS 6-digit sector, the percentage of the import flow of the relevant product from the target country one year prior to initiation relative to total EU imports from the world (all products) was calculated. Then, the individual product/target country pair HS 6-digit ratios over the period were aggregated. If all the TD measures had been implemented in the same year, the calculation would reduce to the aggregate level of trade in the preceding year that would be targeted by TDI. The result is that TD cases initiated between 2005 and 2010 targeted flows in HS 6-digit sectors represented about 0.56% of overall EU imports one year prior to initiation of the case (Table 21).

Table 21: Share of EU imports affected by TDI – Investigations initiated in 2005-2010

	Measures Imposed (Provisional or Final)	Investigations terminated	Total
No. of TDI-affected trade flows at the HS 6-digit level	197	90	287
TDI-affected trade flows as a share of total imports (one year prior to initiation)	0.024	0.032	0.056
Percentage of total cases by outcome	43%	57%	100%

Source: Authors' calculations based on International Trade Centre online database

The estimated ratio of 0.56% may be an overestimate since the data are HS 6-digit aggregates which include HS 8-digit products that were not affected by the investigations.[83] The figure may also be inflated by the inclusion of all investigations, regardless of their status: thus, terminated and on-going investigations are treated like flows receiving protection. By doing so, it is assumed that the mere fact that a case is initiated has an impact on import flows regardless of the outcome of the investigation; this is consistent with the literature. On the other hand, it ignores the deterrent effect of TDI on firms entering into export markets in the first place.

In international comparison, the EU's use of TDI, measured in this fashion, appears to be moderate, although there is very limited systematic information available on this issue. One recent study, (Bown 2010c; Table 1 at 48) places the EU in the middle of the peer countries studied in the present report. This study also suffers from the use of HS 6-digit data which covers a wider share of imports than actually affected by TDI.

The impact of TD measures is of course very substantial for the sectoral flows from all source countries. In Table 22 below, the proportion of the imports from the target countries relative to the total EU imports for the products cited in each case one year prior to initiation is computed. The ratios range from 6% to 87% with a mean percentage of 47% (note that the mean for terminated cases – marked with an asterisk in Table 22 – and those in which measures were imposed is almost the same). These results indicate that, while TDI are marginal from a macro-economic point of view, they are quite deeply felt at the product level. Again, caution must be applied in interpreting these data since the percentages are for the 6-digit flows in which the targeted flows are classified; however, other flows in these categories might have a different distribution as to source country.

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83 Information on the extent of divergence of actual trade covered by measures and trade in HS codes indicated in investigations is generally not available. Nye (2006; Table 1 at 5) provides an example of the potential seriousness of the problem based on a US case for which firm-level data were available. As can be seen, the discrepancy can be very significant:

US Imports of Helical Spring Lock Washers from Taiwan ('000 of pounds)	1990	1991	1992
Sunset Report data	388,000	1,056,000	735,000
HTUSA7318210000 ('Spring washers and other lock washers)	1,888,560	1,515,246	1,720,506
Covered Imports as percentage of HS code imports	21%	70%	43%

Table 22: Share of targeted imports in total EU imports by sector

Product	Case ID	Year of Initiation	Status	Share of sector imports
Seamless pipes and tubes, of iron or steel	AD490	2005		60%
Lever arch mechanisms	AD491	2005		65%
Ethyl alcohol	AD492	2005	*	30%
Refrigerators (side-by-side)	AD493	2005		58%
Silicon carbide	AD494	2005	*	17%
Footwear with protective toecaps	AD495	2005	*	51%
Chamois leather	AD496	2005		40%
Plastic sacks and bags	AD497 + AS498	2005		61%
Footwear (with uppers of leather)	AD499	2005		56%
DVD+/-Rs + CD-Rs	AD500 + AD501	2005	*	63%
Tungsten electrodes	AD502	2005		6%
Cathode-ray colour television picture tubes	AD503	2006	*	43%
Pentaerythritol	AD504	2006	*	81%
Strawberries (frozen)	AD505	2006		38%
Ironing boards	AD506	2005		60%
Sweet corn (prepared or preserved in kernels)	AD507	2006		68%
Saddles	AD508	2006		48%
Polyester staple fibres	AD509	2006	*	35%
Camera systems	AD510	2006	*	34%
Peroxosulphates	AD511	2006		68%
Dicyandiamide	AD512	2006		87%
Silico-manganese	AD513	2006		52%
Dihydromyrcenol	AD514 + AS515	2006		7%
Ferro-silicon	AD516	2006		31%
Polyvinyl alcohol (PVA)	AD517	2006	*	37%
Coke (over 80mm)	AD518	2006		53%
Compressors	AD519	2006		18%
Manganese dioxides	AD520	2006		80%
Monosodium glutamate	AD521	2007		60%
Citric acid	AD522	2007		79%
Welded tubes and pipes of iron or non-alloy steel	AD523	2007		24%
Citrus fruits	AD524	2007		54%
Fasteners, iron or steel	AD525	2007		33%
Hot-dipped metallic-coated iron or steel flat-rolled prod.	AD526	2007	*	31%
Stainless steel cold-rolled flat products	AD527	2008	*	55%
Candles, tapers and the like	AD528	2008		71%
PSC wires and strands	AD529	2008		27%
Wire rod	AD530	2008		65%
Biodiesel	AD531 + AS532	2008		6%
Seamless pipes and tubes, of iron or steel	AD533	2008		63%
Aluminium Foil	AD534	2008		47%
Sodium metal	AD535 + AS536	2008	*	49%
Hollow sections	AD537	2008	*	58%
Cargo scanning systems	AD539	2009		7%
Molybdenum wires	AD540	2009		38%
Aluminium road wheels	AD541	2009		22%
Stainless steel fasteners and parts thereof	AD542 + AS543 + AS544	2009	*	42%
Sodium gluconate	AD544	2009		58%
Polyethylene terephthalate (PET)	AD545 + AS546	2009		30%
Polyester high tenacity filament yarn	AD547	2009		71%
Ironing boards (Since Hardware)	AD548	2009		76%
Continuous filament glass fibre products	AD549	2009		43%
Purified terephthalic acid and its salts	AD550 + AS551	2009	*	71%
Coated fine paper	AD552 + AS557	2010		14%
Zeolite A powder	AD553	2010		8%
Melamine	AD554	2010		50%
Stainless steel bars	AD555 + AS556	2010		40%
Open mesh fabrics of glass fibres	AD558	2010		43%
Ring binder mechanisms	AD559	2010		37%
Ceramic tiles	AD560	2010		48%
Wireless wide area networking modems	AD561 + AS564	2010	*	38%
Tris (2-chloro-1-methylethyl) phosphate (TCPP)	AD562	2010	*	66%
Fatty alcohols	AD563	2010		65%
Seamless pipes and tubes of stainless steel	AD565	2010		25%
Vinyl acetate	AD566	2010		86%
Graphite electrode systems	AD567	2010	*	25%

Source: Calculations by the authors based on International Trade Center data. Under status, * means terminated.

The frequency of resort to TDI by the EU can be characterised as very restrained (or alternatively as reflecting high costs of access to the system), given that the underlying conditions that allow the implementation of TDI are likely to be ubiquitous in the global economy. In particular:

- Firms that export tend to be larger and more profitable and likely to have some degree of market power and thus to use discriminatory pricing practices. Since demand conditions in the highly open EU internal market are likely to be more competitive than in most partner countries, conventional supply-demand analysis suggests exporters will often set prices lower in the EU market than in less competitive home markets.
- Given significant costs of market entry and considerable volatility in the global economy in terms of demand and real exchange rate fluctuations, exporters are likely to remain in export markets which are temporarily unprofitable ("hysteresis") and are likely to apply some degree of "local market pricing" or "pricing to market" to maintain their market share under adverse conditions. Empirical analysis suggests only about 50 to 60% of real exchange rate changes are passed through to local economies and that the "law of one price" generally does not hold in the short and medium terms. Accordingly, both price-based and cost-based dumping conditions are likely to be fulfilled with some frequency.
- Various forms of market failure are ubiquitous; by the same token, government interventions in the form of specific assistance to particular activities, firms or industries aimed at addressing these market failures are equally widely to be found.
- The industrial organisation literature demonstrates that there is constant "churn" in the composition of an industry, with firm "death" or exit being a common feature. Some firms or plants are always on the "exit ramp" with it being only a matter of time as to when exit takes place. Accordingly, facts consistent with injury might also be ubiquitous.
- Import surges are commonplace at the fine level of industry definition employed in TDI. Over the period 2001-2010, there were on average about 250 or so "surges" per year at the 6-digit level of trade, in terms of import growth of 50% or more in one year into the EU, and over 75 cases a year of import growth of 100% or greater. Limiting the counts to trade flows which reached at least EUR 1 million at any time during the period cuts these figures only by half. During the evaluation period (2005-2010), some 893 import flows into the EU at this level of aggregation in product categories that reached at least EUR 1 million during the period and that exceeded 50% growth on a year-over-year basis were recorded. Accordingly, surging import growth to which injury could be attributed is also commonplace.
- Given the prevalence of relationship-based trading, which reflects firm-level qualifications to meet terms and conditions established by individual customers, import surges that consist of exporters simply maintaining their customer base in the face of a domestic industry contraction also qualify as import "surges"; the frequency of such instances cannot be easily documented but they would be additional to those instances where nominal values of imports surge.

In short, the 78 investigations launched in the evaluation period represent a small fraction of the potential number of TD cases and the trade flows affected by implemented measures represent only a small fraction of EU imports. By these measures, the commercial significance of TDI is limited. However, as the analysis demonstrates, the potential use of TDI is much wider, which necessarily generates a hidden cost of uncertainty which impacts on both foreign firms exporting to the EU and on EU firms sourcing intermediate inputs from global sources. As firm-based trade theories show, this uncertainty acts like a fixed cost of market access that reduces trade engagement by firms, with negative welfare effects for EU consumers and negative dynamic efficiency effects on the EU economy that go beyond the small share of measured trade affected by measures.

2.3.2 The Level of Protection in EU TD practice

The extent of protection afforded by AD and CV measures depends on their level and duration. These issues are addressed in this section.[84]

2.3.2.1 Level of measures

The average level of AD and AS duties applied in the case of affirmative findings of dumping or subsidisation and injury is very high compared to average statutory tariffs applied on a Most Favoured Nation (MFN) basis. A precise measure of the level of TDI duties cannot be obtained from case documentation because, typically, different rates apply to individual firms from the various countries targeted. However, a simple, unweighted average of reported duties for cases initiated over the evaluation period confirms that the level of protection provided by TDI against targeted trade flows is high: in the World Bank's AD data base (Bown 2010b), the reported AD duties applied ranged from 5.4% to 90.6% with a simple average of about 33%. CV duties for which data were provided ranged from 4.3% to 53.1% with a simple average of 22.7% (Bown 2010b). By comparison, the EU's average applied MFN duty in 2011 was 6.4%.[85]

Although the highly particular nature of individual TD cases means there is limited comparability across cases or across economies, it is nonetheless of some interest to compare the duties applied by the EU to those of other countries. The most appropriate comparator country in this regard is the USA, given the similarity in size of economy and level of development.[86] The USA applied AD duties in 63 country-product cases, ranging from a low of 3.1% to 386%, with a simple average of 112%.[87] The USA also applied CV duties in 25 individual country/product cases, ranging from a low of 1.1% to a high of 227%, for an average of 41% during the evaluation period, or close to twice as large as the EU.

Table 23 provides a closer comparison of the EU and US AD duties applied in the evaluation period based on the Bown (2010) dataset. The simple average across all duties indicates that the

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84 The effectiveness of measures also depends on whether they actually raise the price of targeted imports and not circumvented or absorbed by various parties in the supply chain for the product concerned; however, a formal or quantitative assessment of the scope of the problem of circumvention and absorption has not been possible, given that a defining feature of these practices is to remain undetected. Generally speaking, the question of circumvention is inextricably bound up with the effectiveness of TD measures and is thus an empirical question. If measures serve to restore the competitive position of EU industry or to allow it to improve its profitability at least to a level comparable to peer sectors not benefiting protection, then any circumvention must be considered to be marginal. The empirical evaluation of the effectiveness of TD measures is developed in the next section.

85 WTO, Trade Policy Review of the European Union, Report of the Secretariat; at p. viii. WT/TPR/S/248/Rev.1, 1 August 2011.

86 The evaluation team also examined the level of duties applied by comparator countries. However, Australia and India rarely apply *ad valorem* duties while New Zealand has been an infrequent user of TDI; accordingly, including these countries in the comparison adds little value. China's duty levels are much lower, comparable to the EU's in actual fact; however, it is difficult to interpret the significance of this, given the very different cost conditions that apply in China versus in the EU. Canadian data were similar to those of the USA. Accordingly, for clarity in exposition, the evaluation team limited the comparison to duties imposed by the EU and the USA.

87 Note that the World Bank database reports either the highest duty levied in a case (often the residual duty) or individual exporter duties. Values presented here are for the highest duties; this has the effect of exaggerating the level of duties; for example, the simple average of all individual exporter duties applied in USA-AD-1153 is 154% whereas the reported figure is 386% (the "all others" rate). Whichever way the simple averages are calculated, there remains the problem that the firm-level trade weights are not available. Accordingly, any such comparison is indicative only. Importantly, the same message emerges under alternative approaches; hence the evaluation team opted to use the most readily available dataset for international comparisons and to report the comparisons on the basis adopted in that dataset.

EU applies much lower duties, whether measured for all cases or for only cases where both economies applied duties in the same HS Chapter. On average, US duties were about three times larger than those imposed by the EU in this comparison.

Table 23: AD Duties applied by the USA and the EU, by HS Chapter, 2005-2010

HS Chapter	USA	EU
20	30.6	8
28	84.8	19
29	95.2	21.9
36	66.1	
37	47.2	
38	83.4	
39	41	12.7
40	12.6	
41		58.9
44		25.2
48	72.6	
54		7.1
55	4.4	
58	124.1	
59	131.2	
63	96	
64		9.9
68	136.7	
69	136.7	
72	16	20.1
73	42.5	36.5
74	34	
76		17.9
81	129.3	29.3
82	21.6	
83		27.1
84	68.8	37.2
85	107.8	27.8
87		16.9
90		34
94	113.7	
95		5.8
96	154.7	
Total average	**77.1**	**23.1**
Same Sectors Average	**68.4**	**23.6**

Note/source: The calculation was based on Bown (2010a). Average duty per sector (at the 2-digit HS level) was calculated as the simple average of all the *ad valorem* duties[88] of the cases within the sector at the firm level. Cases involving several sectors were included in the calculation for the average duty in each of the sectors concerned.

Effect of lesser duty rule

The large difference between the US and EU duties identified above was not, for the most part, due to the EU practice of applying lesser duties. Table 24 provides, for those cases for which both the dumping and injury margins were mentioned in public documentation, the effect of the lesser duty rule on the level of definitive AD duties as compared to the dumping margin.

In the evaluation period, lesser duties were applied in 26 of the 47 or 55% of the AD cases for which information is available. The average reduction was about 9.3 percentage points or 28% lower in the evaluation period than they otherwise would have been. At the sector level, the reduction ranged from zero (where injury margins were at least as high as dumping margins) to 75% in footwear and 55% in base metals.

[88] Cases with other measures (undertakings, specific duties) were excluded.

The reductions due to the application of lesser duties were moderately greater in the evaluation period than in the 2000-2004 period; in this earlier period, the average reduction was 5.9 percentage points or 23% lower than the dumping margin; for the overall 2000-2010 period, the reduction was 8.3 percentage points or about 26% lower.

Table 24: EU dumping margins, AD duties and effect of lesser duty rule by sector, cases initiated 2000-2010

HS chapter and description		2000-2004		2005-2010		2000-2010		
		Ave. def. dumping margin	Ave. def. duty	Ave. def. dumping margin	Ave. def. duty	Ave. def. dumping margin	Ave. def. duty	Lesser duty rule effect
20	Vegetable, fruit, nut, etc food preparations			9.05	7.95	9.05	7.95	-12%
28	Inorganic chemicals, precious metal compound, isotope	27.16	26.56	35.32	22.76	30.56	24.98	-18%
29	Organic chemicals	7.64	7.58	29.49	21.89	21.08	16.38	-22%
31	Fertilisers	34.68	9.30			34.68	9.30	-73%
39	Plastics and articles thereof	31.03	27.14	12.75	12.75	18.08	16.95	-6%
41	Raw hides and skins (other than furskins) and leather			69.80	58.90	69.80	58.90	-16%
44	Wood and articles of wood, wood charcoal	14.15	14.15	25.18	25.18	20.28	20.28	0%
54	manmade filaments	11.27	6.87	7.10	7.10	8.66	7.01	-19%
55	manmade staple fibres	34.47	19.37			34.47	19.37	-44%
64	Footwear, gaiters and the like, parts thereof			39.90	9.85	39.90	9.85	-75%
72	Iron and steel	37.68	20.76	30.36	20.12	32.29	20.29	-37%
73	Articles of iron or steel	21.90	21.90	45.46	36.53	42.19	34.50	-18%
76	Aluminium and articles thereof			33.21	17.86	33.21	17.86	-46%
81	Other base metals, cermets, articles thereof			64.62	29.30	64.62	29.30	-55%
83	Miscellaneous articles of base metal			27.10	27.10	27.10	27.10	0%
84	Nuclear reactors, boilers, machinery, etc			41.84	41.84	41.84	41.84	0%
85	Electrical, electronic equipment	28.34	27.58	47.33	27.84	35.94	27.69	-23%
87	Vehicles other than railway, tramway	15.80	15.80	32.57	16.87	31.04	16.77	-46%
90	Optical, photo, technical, medical, etc apparatus			38.80	34.00	38.80	34.00	-12%
95	Toys, games, sports requisites			5.80	5.80	5.80	5.80	0%
Total average		**26.17**	**20.23**	**33.63**	**24.30**	**31.35**	**23.05**	**-26%**

Note/source: the lesser duty rule effect is the difference between the final duty and the dumping margin in percent of the dumping margin. The calculation was based on Bown (2010a). Average duty per sector (at the 2-digit HS level) was calculated as the simple average of all the *ad valorem* duties[89] of the cases within the sector at the firm level. Cases involving several sectors were included in the calculation for the average duty in each of the sectors concerned; Number of cases: 196 (60 in 2000-2005; 136 in 2005-2010).

Most Member States were of the view that the lesser duty rule provides the necessary level of protection to EU industry. Conversely, most producer associations expressed the view that the lesser duty rule was a "WTO plus" requirement that undermined the effect of AD measures and were in favour of its removal. Some suggested that the EU should consider dropping the rule in 2016 when China's NME status will phase out.

2.3.2.2 Duration of measures

Legal basis

Article 11(1) ADR specifies that an AD measure "shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury."[90]

Practice

The common practice of the EU (as well as in peer countries) is to impose measures for a standard duration of five years, and to provide a justification only when a shorter duration is chosen; this also applies to expiry reviews (see section 5.3.2 below). The provision for CV measures is the same.

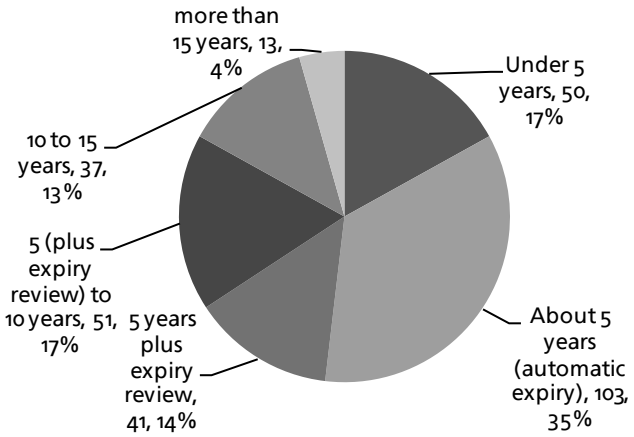
89 Cases with other measures (undertakings, specific duties) were excluded.

90 Article 17 ASR provides for the same regarding CV measures.

While in principle measures are only in place for five years, extensions are possible under expiry reviews, indefinitely. The measure which has been in place for the longest time is *Tungsten carbide and fused tungsten carbide* (AD238). It was imposed in September 1990 and currently has a foreseen date of expiry of March 2016; by then it will have been in place for more than 25 years. As of 31 December 2010, the average duration of TD measures in force was 10.0 years. The average duration of expired AD and CV measures had been 5.9 years and 3.9 years, respectively. The overall average duration of measures was thus 6.8 years.

52% of measures were revoked during the initial five-year period or expire at the end of it without an expiry review (Figure 13). An additional 14% were terminated following the expiry review. 4% of measures were in place for 15 and more years, and another 13% for between ten and 15 years.

Figure 13: Distribution of EU TD measures by duration, in years (number and % of cases)



Total no. of cases: 295

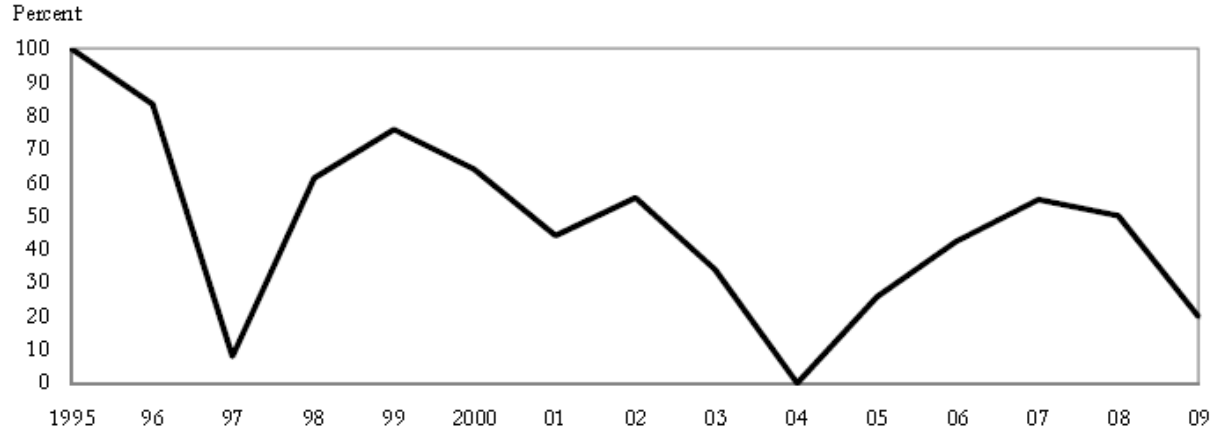
Source and calculation: Authors' calculations based on Bown (2010). The average duration of expired measures was calculated based on all cases for which dates of imposition and revocation of measure are reported in the datasets. The average duration of measures in force includes only those measures which were in force for at least five years on 31 December 2010 (the end of the evaluation period), and the duration was calculated as the time between imposition of the measure and 31 December 2010.
Note: "Under 5 years" includes all measures terminated at less than 4.8 years. "About 5 years": duration of 4.8-5.1 years[91]; "5 years plus expiry review": duration of 5.1-6.3 years. "5 (plus expiry review) to 10 years: duration of 6.3-10.1 years; "10 to 15 years": duration of 10.1-15.1 years; "more than 15 years": duration of 15.1 years and longer.

Over time, the share of measures in force longer than five years has varied substantially (Figure 14). Since 2007, there has been a declining trend, "which suggests that there has not been an increase in protection during the crisis through the channel of prolonging the duration of existing measures" (Vandenbussche and Viegelahn 2011: 10). It should also be noted that the majority of measures expire without the request for an expiry review.

Among the 13 AD measures which were (or have been) in force for more than 15 years, six were against China and four against Russia. These two countries are thus overrepresented in this group of measures: they account for 46% and 31% of long-standing measures, respectively, compared to a share of 31% (China) and 13% (Russia) in all measures in the dataset.

[91] In principle, measures must expire after exactly 5.0 years if no expiry review has been initiated. However, due to technical calculation issues (consideration of leap years), 5.1 years has been chosen as the threshold.

Figure 14: Percentage of EU AD measures imposed more than five and less than six years ago and still in force, 1995-2009



Note: Percentage of total AD measures not removed by 30 June of the year on the horizontal axis despite being imposed more than five and less than six years ago.
Source: Vandenbussche/Viegelahn (2011: Figure 4c).

Regarding the sectors which are more than proportionally affected by long-standing measures, the fertiliser and, to a lesser extent, other chemical sectors stand out. As Table 25 shows, fertilisers account for 6.9% of all AD measures in the dataset but 20.8% of measures with a duration of more than ten years and 38.5% of measures with a duration of more than 15 years. In other words, AD measures which were (or have been) in force for long periods are heavily concentrated in limited sectors.

Table 25: Sectors with over-proportional share in long-standing measures

	Number of measures with duration of ... years						Share in measures with duration of ... years		
HS Sector	<5	5	5-10	10-15	>15	Total	>10	>15	Total
25 Salt, sulphur, earth, stone, plaster, etc.		1		1	2	4	6.3%	15.4%	1.2%
29 Organic chemicals	8	7	5	3	3	26	12.5%	23.1%	7.9%
31 Fertilisers	4	7	2	5	5	23	20.8%	38.5%	6.9%
38 Miscellaneous chemical products		2	1	2		5	4.2%	0.0%	1.5%
73 Articles of iron or steel	18	23	8	9		58	18.8%	0.0%	17.5%
84 Nuclear reactors, boilers, machinery, etc	3	5		2		10	4.2%	0.0%	3.0%
85 Electrical, electronic equipment	11	15	3	8		37	16.7%	0.0%	11.2%
96 Miscellaneous manufactured articles		4	1	1	1	7	4.2%	7.7%	2.1%
Others	48	78	29	4	2	161	12.5%	15.4%	48.6%
Total	**92**	**142**	**49**	**35**	**13**	**331**	**100.0%**	**100.0%**	**100.0%**

Source: Authors' calculations based on Bown (2010). Also see the note to Figure 13 above.

Given the highly particular nature of TD cases, there is no objective basis for generalisations concerning the appropriate duration of measures. In subsidy cases, it is conceivable that measures would remain in place indefinitely if the subsidy found to be injurious remains in place and if changed circumstances in the domestic industry do not warrant revisiting the question of injury.

However, dumping normally is firm-level behaviour and the strategic behaviour of firms cannot be anticipated. Product life-cycle considerations suggest that measures should probably be in place for shorter duration for products that are subject to rapid obsolescence; conversely, the market structure for basic products may persist.

Nevertheless, cases of dumping which are facilitated, or made possible, by government policies supporting the exporter rather follow the logic of subsidies. Hence, dumping (and, in response, AD measures) in such cases could remain in place as long as the government policy enabling it remains in force. Most of the long-standing EU measures are in the chemical sector (fertilisers, organic chemicals and salts) where the presence of strategic, government-enabled dumping is

likely.[92] Accordingly, TDI protection in EU practice is usually temporary, with adequate justification for most long-standing measures.

2.3.3 Effect of TD measures on the Competitiveness of EU Industry

Since TDI affect not only imports in a product category but also exports as trade flows re-arrange to serve the various markets affected indirectly by the application of TDI in the EU, the effectiveness of TDI in improving the competitiveness of the protected sector is evaluated on the basis of the impact of TDI on EU's revealed comparative advantage in the protected product group. Five different econometric models with different dependent variables were developed:

1. **Bilateral EU Imports of the HS6 product** named in TD investigations during the evaluation period. Under this scenario, the database consists of 287 observations of EU imports flows for a specific target country/HS 6 sector pair. Here it is attempted to find out if TD measures have a statistically significant effect on bilateral trade flows, expecting that TD measures have a negative effect on bilateral import flows.
2. **Multilateral EU imports at the HS6 product level.** Under this scenario, the database consists of 155 observations of EU import flows for each HS 6 sector named in TD investigations during the evaluation period. Here, the attempt is made to find out if TD measures have a statistically significant effect on multilateral trade flows. The expectation is that TD measures have a negative effect on multilateral imports flows.
3. **Multilateral EU imports at the case level.** Under this scenario, the database consists of 66 observations of EU import flows aggregated to the case level. This test seeks to determine whether the larger flows at the case level show more stable responses that might fail to come through in the more finely disaggregated data (which tend to be more volatile). The purpose is to find out if TD measures have a statistically significant effect on multilateral trade flows. It is expected that TD measures have a negative effect on multilateral import flows.
4. **LFI at the HS6 sector level.** Under this scenario, the database consists of 155 observations of LFI time series for each HS 6 sector named in TD investigations during the evaluation period. Here it is attempted to find out if TD measures have a statistically significant effect on trends in the Lafay Index (LFI) as a measure of revealed comparative advantage. The expectation is that TD measures have a positive effect on the LFI trend.
5. **LFI at the case level.** Under this scenario, the database consists of 66 observations of LFI time series for each case. As above, the purpose is to find out if TD measures have a statistically significant effect on the LFI trend when measured at the potentially more stable case level. Again, it is expected that TD measures have a positive effect on the LFI trend.

The models seek to explain the change in the five dependent variable values described above through the following independent variables:

1. **Time trend:** each year between 2001 and 2010
2. **A TDI variable:** a time variable dummy which takes the effect of 1 for all years in which TD measures have been applied has been constructed to replicate the "TDI effect". Hence for terminated cases, the TDI time dummy takes the value of 0 for all years.
3. **EU GDP Growth**
4. **World GDP Growth**
5. **EU Exchange Rate**

[92] There are also some measures in this category where the argument of government-backing does not seem to apply, e.g. *Disposable lighters* (in force since 1991), *Bicycles* (since 1993) or *Ring Binders* (since 1997).

Table 26: Fixed effects under each scenario

Scenario	Fixed-effects
1. Bilateral EU Imports of the HS6 product	Each HS6 / Target country pair
2. Multilateral EU imports at the HS6 product level	Each HS6 sector
3. Multilateral EU imports at the case level	Each case
4. LFI at the HS6 sector level	Each HS6 sector
5. LFI at the case level	Each case

Source: Calculations by the authors.

Finally, each model is run under a number of different assumptions:

1. **A lag effect on the TDI Dummy:** each model is run assuming: (i) immediate effect of the TDI dummy, (ii) a one-year lag; and (iii) a 2-year lag
2. **Fixed effects:** each scenario is run allowing for fixed effects.

The results are reported in the tables in appendix E4. The regressions yield the following results:

1. The analysis of the time independent variable (year) confirms that the demand for TDI overwhelmingly concerns sectors with rising import volumes and declining LFIs:
    - Under the three scenarios where imports are the dependent variable, the time effect is always positive and statistically very significant at high confidence levels;
    - Under the two scenarios where LFI is the dependent variable, the time effect is always negative and statistically very significant at high confidence levels in most cases;
2. There is evidence that TD measures have a negative effect on bilateral import volumes: regardless of the lag effect applied, or whether fixed effects are allow for, the TDI effect on bilateral imports flows is always negative and statistically significant at high confidence levels.
3. However, there is limited evidence that TD measures significantly reduce global imports in the concerned sectors: while the TDI coefficients are always negative in models with multilateral import flows as the dependent variable, the results are not statistically significant. Trade diversion accordingly to third country sources is accordingly reasonably significant.
4. More importantly, there is no strong statistical evidence that TDI have an effect on improving a sector's revealed comparative advantage. In models with LFI time series as the dependent variable, the TDI effect is positive at times and negative at others. This suggests no systematic improvement in LFI due to the application of TD measures.

These results of course are qualified by the data issues – most importantly the data used in this analysis typically cover a wider range of products than are directly affected by TDI.

In summary, TDI protection tends to be provided mainly on behalf of sectors experiencing declining revealed comparative advantage, with sectors that have stronger prospects typically being more successful in obtaining temporary protection. However, there is no significant evidence that it necessarily helps the protected industries to reverse the declines in international competitiveness that may have triggered the application for protection in the first place.

2.3.4 Global Value Chains and Competitiveness of the EU Economy

The evaluation of the effectiveness of TDI necessarily must take into account the emerging production paradigm in which goods are "made in the world". In fragmented production systems, the impact on firms directly benefiting from TDI protection ripples out to other firms both upstream and downstream in the value chain within the EU. This section discusses the implications of the EU's use of TDI in the evaluation period for the competitiveness of the overall EU economy in light of these issues.

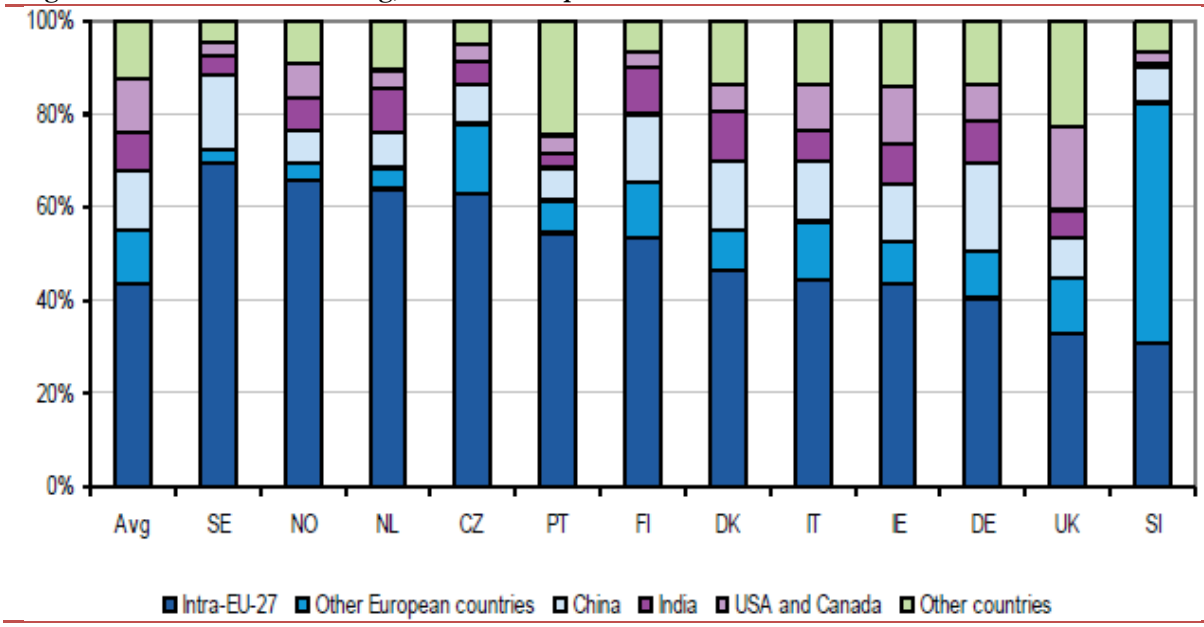
While the measurement of global value chains is in its early days, some perspectives on the use of external sourcing by EU firms can be provided from data assembled from a survey of international sourcing by firms with over 100 employees in 11 EU Member States and Norway.

According to the survey, over two-fifths of EU firms' international sourcing is on an intra-EU basis.[93] This is not surprising since large, heterogeneous economies such as the EU internal market offer considerable opportunities to gain the advantages of external sourcing.

Moreover, about four-fifths in total sourcing is directed to non-EU European countries, Canada, and the USA (see Figure 15). In international sourcing, north-north trade dominates.[94]

Further, much of the sourcing involves business services, not goods.

Figure 15: International Sourcing, Selected European Countries



Source: Pekka Alajääskö. Presentation on the Measurement of Global value Chains and International Sourcing to the OECD Working Party on Globalisation of Industry May 19, 2011.

Only a relatively small percentage of European firms tend to source internationally – only 16% of firms surveyed had moved business functions abroad in the period 2001-2006, with an additional 5% of them acknowledging plans to do so in the near future (i.e., over the period 2007-2009).[95] For manufacturing firms, the percentages were higher at about 23% and 10% respectively.[96] These results are consistent with the evidence from other countries that only a small percentage of firms sources inputs internationally (Kasahara and Lapham 2007; Bernard et al. 2007).

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93 Alajääskö (2009: 5). For some countries, intra-EU sourcing is quite high, reaching 69% in Sweden, 64% in the Netherlands, and 63% in the Czech Republic.

94 See in this regard Miroudot et al. (2009). In this OECD study, about 85% of trade in intermediate goods and services is on an intra-OECD basis, including in accession countries and enhanced engagement countries. Intra-regional trade is more important for intermediates than for final goods. This corresponds well with the general sense that value chains tend to be more regional than global in span.

95 See Figure 1 in Alajääskö (2009). The figures varied quite widely across the countries surveyed, reaching as high as 38.3% in Ireland and 34.7% in the United Kingdom. The survey methodology may however have over-estimated UK outsourcing and underestimated Swedish outsourcing; see note 2 at 2.

96 Alajääskö (2009: Figure 2). As in the overall totals, the shares for Ireland (57.1%) and UK (57.3%) were substantially higher.

Finally, firms that source internationally tend to internalise the activity: close to 70% of all enterprises surveyed that outsourced internationally did so within their enterprise group.[97] By the same token, these inter-affiliate trade flows are not contestable in the market and so changes in the volume or pricing of flows do not affect sales by domestic firms competing in these sectors and so would not tend to trigger complaints.

Accordingly, the EU's use of TDI, which predominantly affects arm's length north-south trade in goods, represents a relatively minor factor in the evolution of global value chains in which EU firms participate, notwithstanding that over half of the EU's exports and imports consist of intermediate goods and services.

The economic literature on firms involved in international trade demonstrates that firms that source internationally typically are among the largest and most productive firms in the sample (Kasahara and Lapham 2007). Further, those firms that export as well as import intermediates tend to be even larger and more profitable than firms that only import. This leads to several general conclusions:

- First, insofar as TDI actions directly affect international sourcing activities of EU firms, it is reasonable to conclude that in most cases these firms will have the resources to evaluate the implications and to defend their interests.
- Second, this conclusion holds *a fortiori* for EU exporters that source internationally.
- Moreover, such firms are likely to have some degree of market power (Kaplinsky 2005) and thus some ability to absorb costs increases from TDI duties on inputs into their own products, at least insofar as these comprise only a small share of the buying firm's total intermediate inputs.

Accordingly, there are good reasons to believe that, if TDI were likely to disrupt value chains in which EU firms participate, the TDI authorities would hear about it and would be able to address the concerns in the context of a public interest inquiry.

In point of fact, the Commission had to grapple with supply chain impacts in a number of cases, which serve to illustrate the points made above.

- In *Plastic sacks and bags* (AD497),[98] the Commission had to address the supply chain implications for retailers of duties imposed on plastic bags sourced from China. The Commission determined based on responses to its questionnaire that purchases of the product concerned amounted to less than 0.1% of the turnover of retailers It further concluded that some of this supplemental cost would be spread across various levels of the supply chain and that the overall impact of an AD duty of the level implied by the dumping findings would contribute to only a marginal increase in the cost structure of retailers.
- In *Molybdenum wires* (AD540),[99] the product served mainly as a basic but minor input to the automotive industry. As the Commission noted in the case documentation, "not a single user within the automotive industry came forward in the investigation. This appeared to support the claim of the Community industry that the share of the cost of the product concerned in the total costs of the automotive industry is extremely low." For the one EU supplier to the auto industry for which the price increase of molybdenum wire implied by the dumping margin would constitute a significant cost increase, the Commission conducted a separate impact analysis.

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97 Miroudot et al. (2009: Figure 5). Note that some firms both "insource" and "outsource" internationally; hence the shares of firms that do either add up to more than 100%.

98 OJ L 270/4, 29.09.2006.

99 OJ L 150/17, 16.06.2010.

- In *Continuous filament glass fibre products* (AD549),[100] supply chain issues arose in the sense that the case was brought in the context of a steep downturn in the downstream market, which included a wide range of industries.[101] Notably, the glass fibre filament industry comprises a large number of EU producers (including producers for captive use) and third country exporters and features a considerable degree of price dispersion (the Chinese product that was the target of the dumping complaint was structurally lower priced in the pre-initiation period). This pattern is indicative of an important degree of unobserved heterogeneity in this market.[102] For immediate downstream companies, glass fibre purchase costs ranged from 10% to more than 50%. While the Commission recognised that, for certain users, an increase in the purchase costs of Chinese glass fibres may have implied a noticeable cost impact, it nonetheless concluded that most users sourced from multiple suppliers and hence the imposition of duties would not be disruptive. In this case, the fact that EU users did not appear to be dependent on temporarily low input prices or on Chinese supply, even if they would have profited, suggests the imposition of duties would not have onerous consequences for downstream industries

In two other cases, however, the imposition of duties raised value chain issues. Both cases featured a large number of producers, exporters and users:

- In *Polyester staple fibres (PSF)* (AD509),[103] the Commission was faced with a case of a fairly basic product produced by a wide range of producers in the EU, in the target countries, and in third countries. PSF constituted an important input into the textiles industry and the targeted exporters were important suppliers. Moreover, relationships existed between suppliers and customers since the type of PSF varied by end use and users needed to test whether the types manufactured by potential alternative producers were suitable for their specific needs. Further, the fragmented nature of the producing industry and of downstream industries appears to have contributed to low cooperation rates. The Commission first imposed provisional duties but then terminated the case at the request of the complainant, in the face of supply problems that quickly surfaced for downstream EU industry.
- In *Footwear with uppers of leather* (AD499), the Commission dealt with a consumer product rather than an intermediate input. However, this too featured a highly fragmented domestic industry that was in a phase of transition, with many firms outsourcing the labour-intensive portion of their production chain to China or Vietnam to remain competitive. A study conducted by the Swedish National Board of Trade (Kammerskollegium (Swedish National Board of Trade) 2007) identified a number of companies that had outsourced their manufacturing to Asia but still contributed a significant portion, ranging from 55% to about 80%, of the overall value-added of the footwear that were targeted by duties. This is, of course, a straightforward result in any out-sourcing model where European companies provide the design and perhaps some of the inputs, but offshore the physical manufacture to Asia and re-import the product for sale in Europe. In this case, although TD measures

100 OJ L 243/40, 16.09.2010.

101 The main markets are the automotive and transport sectors (including aerospace), the electrical/electronics industry and the building industry. In the case documentation, cooperating user groups included: weavers (both of high-end specialist fabrics and of more standard fabrics, e.g. for wind energy turbines, marine, transportation, aerospace and infrastructural applications); liner producers; manufacturers of compounds, *inter alia* used in the automotive industry; producers of composite semi- finished products or end-products.

102 In the case of continuous glass filaments, for example, different chemical constituents are used for different end purposes to meet differential requirements for features such as mechanical strength, temperature resistance, resistance to corrosion, resistance to alkali in cement, and high dielectric properties. See, European Glass Fibre Association. 2003. "Continuous Filament Glass Fibre and Human Health." Because of regulatory requirements and quality control considerations, supplier-customer relations are not easily inter-changeable, a point which the Commission recognised in its decision.

103 OJ L160/30 (termination), 21.06.2007.

targeted a final consumer good, not an intermediate input, they nonetheless still affected EU intermediate goods and services (including in some cases exports of parts for assembly abroad).

To the issues illustrated by the above cases can be added those raised by the non-transparent share of EU value-added in iPods: it is likely that there are indirect effects on EU value-added in many sectors where awareness of investigations and looming impacts on business may be low or even non-existent.

2.4 Conclusions and Policy Implications of the Economic Analysis

The analysis in this chapter leads to several important conclusions with implications for the EU's stated intervention rationale, for its practice in implementing TDI and for its position in future multilateral negotiations concerning the role of TDI.

2.4.1 The Economic Welfare and Competitiveness impacts of TDI

First, and most generally, WTO TDI rules allow the application of measures to a wide range of practices, some of which can be condemned as unfair under domestic law but others not. Some pricing practices covered by anti-dumping rules are predatory and threaten competition; others, however, would be considered benign and even beneficial in a domestic market context. Similarly, subsidies are used by governments for a wide range of reasons. Insofar as these are passed-through into export prices, they distort trade and are legitimately addressed by countervailing duties. However subsidies that efficiently respond to local market failures are quite legitimate, increase welfare and are not trade-distorting. Moreover, to be efficient, subsidies that address market failure will typically be specific, whether *de jure* or *de facto*, and thus countervailable.

WTO rules do not require a motive test for dumping or a pass-through test for subsidies; accordingly, WTO-consistent TD practice does not demonstrate that the practices targeted are unfair or trade-distorting. This exposes TDI to criticism, raises the risk of retaliation, and creates uncertainty for trading firms as to when TD measures might be taken against them.

At the same time, the often-harsh criticism of TDI in the economic literature can be faulted on a number of grounds. First, economic theory establishes that price discrimination by firms with some degree of market power, of which dumping is one specific form, generally results in a misallocation of resources. This fault is only rectified under particular demand conditions which result in even larger positive output effects. In the general case, the welfare effects are indeterminate, hence the judgement that price discrimination is merely "benign", not beneficial. Moreover, the welfare gains in the country benefiting from lower prices due to price discrimination, below-cost selling, or subsidisation represent transfers which globally net out against the welfare costs to the country from which those transfers derive. Further, in those cases where injury results in reduction of capacity in the importing country, the consumer welfare impacts of TDI must be assessed not against the observed low prices during the period when dumping or subsidisation is taking place but against the higher prices that are implied in subsequent periods. These issues tend to be ignored; TDI studies generally assume that the disturbance to the market equilibrium is TDI, not the practice that TDI targets.

Second, there are important differences between rivalrous behaviour within borders versus across borders that have implications for public policy As has long been recognised in the trade literature, adjustment costs when disruptive rivalry occurs across borders are higher than within a domestic context because not all productive resources are mobile across borders. In particular, as discussed earlier, workers with acquired industry-specific skills can move from failing or contracting firms to expanding firms within the same economy but not to expanding firms in other countries. TD measures that intervene into inter-firm rivalry when injury occurs may therefore be justified on economic welfare grounds where similar rivalry in a purely domestic market context might be tolerated, because of the absence of any significant externalities in the latter context. Importantly, however, these differences are not based on differences in market regulation in an international versus domestic context; rather, they are driven by the differences in mobility of factors of production.

Third, the examination of the EU's TD practice in terms of *de facto* rationales suggests that the official intervention doctrine – to counter anti-competitive practices and to ensure a level playing field for EU industry – a can only be sustained in part. Some cases were identified where anti-competitive practices of foreign firms could be invoked as justification; in addition, the analysis of long-standing measures is not inconsistent with market distortions in certain sectors in exporting countries. The evidence for most *de facto* rationales for TDI advance in the literature was mostly lacking. The EU does appear to exercise discretion in applying TD measures given that complaining industries with stronger revealed comparative advantage are more likely to succeed in obtaining protection; however, this constitutes at most a passive and limited contribution to industrial policy. There is only weak evidence for the EU's use of TDI as a macroeconomic buffer and no systematic evidence that the EU uses TDI strategically – e.g., as retaliation – to defend market access of its own firms abroad. In only a handful of cases communitarian concerns would support TD intervention. The pattern of the EU's use of TDI, however, is generally most consistent with the insurance argument, in particular the heavy concentration of measures tempering the disruptive competitive forces stemming from the integration of major emerging markets into the global division of labour. Indeed, the availability of TDI to address excessive trade pressures has been emphasised in conjunction with major EU liberalisation initiatives. Seen as claims under implicit pre-existing insurance contracts, the large majority of EU TD interventions in the evaluation period can be seen as welfare-enhancing.

At the same time, this rationale for EU TD practice raises a critical problem: the design of trade defence laws makes them ill-suited for this role. The above argument is essentially an ex post rationalisation which is itself open to criticism on precisely those grounds and points to systemic design failures in respect of the instruments actually crafted to play this role. Moreover, it provides no practical guidance for future EU TDI policy.

As regards dynamic effects, available studies suggest that the rate of exit of firms in protected sectors is slower than in comparable non-protected sectors and thus imply that TDI temporarily slows the normal, on-going reallocation of market share from low-productivity to high-productivity firms. At the same time, the evidence for productivity-enhancing investment and restructuring in the shadow of protection points in the other direction – that firms may be using the period of protection to prepare themselves for the time when TD measures are lifted. As regards the reallocation of market share to low-productivity firms, the analysis in this evaluation report draws attention to the literature on capital investment which documents that young firms investing heavily in new technology and still gaining experience with the new technology are less profitable than mature firms that are investing less but are extracting returns from their prior investments and "experience" capital. Whether TDI is predominantly preventing an efficiency-enhancing reallocation of market shares from (statically) low productivity firms (e.g., old firms

with old technology on the exit ramp) to (statically) high productivity firms and thus generating dynamic welfare costs, or is providing a window for young firms investing intensively to gain experience and thus generating dynamic welfare benefits, is unclear on a priori grounds. By the same token, the welfare costs associated with short-run postponement of exit by (some) low productivity firms that actually are candidates for exit may be offset by the welfare gains from the renewal of the industry by the enhanced growth of (other) low productivity firms, possibly young and heavily investing firms, that use the breathing space to gear up for the future removal of protection. An independent firm-level analysis to examine this question could not be undertaken within the time and resource constraints of the present project. Accordingly, only a provisional conclusion is possible here, namely that TDI deployed to protect industries that feature many young firms and in which the pace of process innovation is rapid will likely have more positive welfare effects than otherwise.

2.4.2 Implications for EU TD Practice

Several specific factors identified in the evaluation suggest themselves as providing guidance for on-going practice in applying the public interest test.

First, the most important contextual factor identified in the literature on TDI for which this chapter provides support as a criterion for TDI use concerns factor market adjustment. If factor market adjustment is largely frictionless, there is little cost – labour and capital are redeployed to equivalent if not more profitable uses. In certain contexts, such as in vibrant industrial zones, this may be close to the reality. But in many cases, it is quite the opposite – closure of a key employer in a town can have large and long-term negative impacts on dependent individuals and communities. Job mismatch issues might constitute a major problem given that employees cannot typically shift from losing firms to winning firms when the firms are on different sides of international borders. Further, in the case of smaller and relatively isolated communities, the impacts may go beyond the private interests of the EU firms or workers directly involved and also generate significant externalities for the communities in which they are situated. Accordingly, a test based on the communitarian analysis developed in this chapter might be considered for regular application as part of the Union interest test.

Second, not all industries petitioning for TDI protection have the same longer-term prospects. EU TD practice in the evaluation period indicated a greater preparedness to provide TDI protection for sectors with better prospects, as indicated by stronger scores on a measure of revealed comparative advantage. All else being equal, this is a sound principle to apply when considering TD measures from a public interest perspective.

Third, the response of firms to protection appears to be heterogeneous. The analysis in this chapter suggests that TDI may deliver better longer-run benefits when deployed to provide temporary protection to sectors that feature a significant complement of young, heavily investing firms that may have low comparative levels of productivity but that are preparing for the removal of protection rather than planning for the extension of protection.
These three factors would enter into the Union interest test as counterweights to considerations about consumer and downstream producer interests.

Fourth, TD practice must be increasingly sensitive to the implications of the fragmentation of production if it is to deliver welfare benefits to the EU in terms of enhancing the competitiveness of EU production, no matter where in the value chain this production is located. The extent to which EU TD practice in the evaluation period contributed to, or detracted from, EU

competitiveness in terms of its impact on EU value-added production is not a question that can be answered with any rigour on the basis of the existing information base. Eurostat and other statistical agencies are still in the early phases of moving towards the value-added trade account that would enable systematic evaluation of TD practice. However, working from basic principles, it is the view of the evaluation team that the likelihood that EU TD investigations significantly compromised the participation of EU firms in global value chains during this period is very small. From a procedural perspective, the public interest test provides the mechanism to take into account the issues posed by global value chains. In this regard, the evaluation team can only recommend that the Commission follow and build on its own example in the recent (post-evaluation period) Magnesia Bricks expiry review (AD483, R511) in terms of taking into account EU firms' global operations. In this case, the question arose as to whether RHI AG, an EU-based firm with production facilities in China, was part of the Union industry. The issue turned on whether RHI had shifted its core business activities to China, a contention which RHI disputed. The Commission asked RHI to provide additional information on its business activities both in the EU and in China in order to examine whether or not it should be included in the definition of the Union industry. While in this particular instance the decision was easy (RHI imported very little of the subject goods from China because of the TDI duty), less clear-cut cases are easily imaginable. The Commission would be well-served by requesting information on the EU value-added of subject goods imported by EU firms with operations in TDI-targeted countries.[104] Such information would be particularly helpful in the case of fragmented industries where some EU firms outsource manufacturing but retain some value-added in Europe; affirmative decisions in such cases run the greatest risk of damaging the most important part of EU value-added in such products and the most progressive firms in the sector.

2.4.3 Implications for the EU Negotiating Position on TDI

The overwhelming sense from the economic literature, and the analysis in this chapter, is that TDI is used for purposes other than those for which it was designed. This points in the direction not of reforming TD practice but of reforming the instruments that have failed to serve their purpose, leaving TD practice to step into the breech. Without a doubt, the two instruments for which TDI has primarily served as substitute are the safeguards mechanism and the Article 28 renegotiation mechanism in the WTO Agreement. These instruments have the primary purpose of providing for temporary measures to handle excessive trade pressures and to adjust the terms of agreements negotiated without perfect foresight.

[104] Of course, requesting such information implies that additional resources are required from interested parties and the Commission for both the provision and analysis of the requested information on value added.

3 LEGAL REVIEW OF EU TD PRACTICE

The fifth objective of the evaluation is to provide an examination of the basic AD and AS Regulations in light of: first, the administrative practice of the EU institutions; second, the judgments of the Court of Justice of the European Union; and, third, the recommendations of the WTO DSB.

This chapter addresses the second and third part of objective 5.[105] In order to do so, the evaluation team analysed all EU Court judgments and all WTO disputes related to TDI issued from 2005 to 2010. These analyses are presented in appendix H1 (EU Court judgments) and appendix H2 (WTO disputes). In this chapter, only those cases are summarised which have implications for EU trade defence law and practice. Accordingly, section 3.1 examines judgments of the Court of First Instance (CFI) and Court of Justice of the European Union (ECJ) on AD and CV measures.

In the same way, section 3.2 analyses WTO DSB rulings on AD and CV measures. The focus of the section is on those cases in which the EU was the respondent, as these were deemed to be the ones with the highest probability of having implications for EU trade defence law and practice. An analysis of all WTO disputes related to AD and AS instruments, where a report was issued in the evaluation period, is presented in appendix H2.

Each of the two sections in this chapter is organised in the same way. First a statistical summary of cases in the evaluation period is provided, and thereafter individual cases are analysed, with conclusions being drawn on how the decisions may affect EU trade defence law and/or practice.

3.1 Judgments of the EU Courts

Over the period 2005 to 2010, EU courts issued 35 judgments on TD cases (Table 27). Of these, 30 judgments concerned AD cases, three AS cases and two both AD and AS cases. Also, the 35 judgments dealt with 27 different TD cases. Two TD cases were subject to several court challenges – *Unbleached cotton fabrics* (two court cases) and *Footwear with uppers of leather* (AD499, five court cases). Furthermore, in three TD cases the judgment of first instance was appealed during the period – in *Seamless pipes and tubes, of iron or non-alloy steel* (AD359; *Trubowest Handel v Council*), *Ironing boards* (AD506; *Foshan Shunde Yongjian v Council*) and *Recordable compact disks* (AS455; *Moser Baer v Council*) both the Court of First Instance and the Court of Justice issued judgments during the evaluation period.

A detailed review of these cases is provided chronologically in appendix H1, presenting the main legal issues in each case as well as the implications for EU law and practice. This section summarises the cases and restates the implications for EU trade defence law and practice.

[105] The first part of objective 5, the evaluation of the two basic Regulations in view of administrative practice, is addressed in chapter 5.

Table 27: Overview of European court judgments on AD and AS cases[106]

Court case	Product	Year of judgment	DG Trade Case ID	Countries	Issues
C-422/02: Europe Chemi-Con v Council	Capacitators (large electrolytic aluminium)	2005	n.a.	Japan/ Thailand, USA	Discriminatory treatment; retro-active termination; expiry review
T-192/98: Eurocoton v Council	Cotton fabrics (unbleached)	2005	n.a.	China, Egypt, India, Indonesia, Pakistan	Statement of reasons; lack of majority in Council to adopt Commission proposal
T-198/98: Ettlin v Council	Cotton fabrics (unbleached)	2005	n.a.	China, Egypt, India, Indonesia, Pakistan	Statement of reasons; lack of majority in Council to adopt Commission proposal
T-177/00: Philips v Council	Television camera systems (parts)	2005	n.a.	Japan	Statement of reasons; lack of majority in Council to adopt Commission proposal
T-364/03: Medici Grimm v Council	Handbags (leather)	2006	AD355	China	Action for damages - Review proceedings- retro-active effect
T-413/03: Shandong Reipu Biochemicals v Council	**Para-cresol**	**2006**	**AD457**	**China**	**Normal value- costs of by-products- verifications**
T-274/02: Ritek and Prodisc Technology v Council	Compact disks - recordable (CD-Rs)	2006	AD439	Taiwan	Zeroing- targeted dumping
T-138/02: Nanjing Metalink v Council	Ferro molybdenum	2006	AD436	China	Change in MET determination- events after investigation period
T-107/04: Aluminium Silicon Mill products v Council	Silicon metal (silicon)	2007	AD461	Russia	Material injury- causality- manifest error of assessment
C-351/04: Ikea Wholesale	**Bed linen**	**2007**	**AD359**	**Egypt, India, Pakistan**	**Zeroing in weighted-average to weighted-average comparison- constructed normal value- causality- effect of WTO Panel Bed Linen**
T-206/07: Foshan Shunde Yongjian v Council	Ironing boards	2008	AD506	China	Change of MET determination-rights of defence; *Also see appeal in C-141/08*
T-221/05: Huvis v Council	**Polyester staple fibres**	**2008**	**AD420**	**Korea, India**	**Review proceedings-change in methodology- duty drawback-credit cost allowance**
T-429/04: Trubowest Handel v Council	Seamless pipes and tubes, of iron or non-alloy steel	2008	AD358	Hungary, Poland, Russia, Czech Rep., Romania, Slovak Rep.	Action for damages-causal link; *Also see appeal in C-419/08*
T-348/05: JSC Kirovo-Chepetsky Khimichesky Kombinat v Council	**Ammonium nitrate**	**2008**	**AD330, AD421**	**Russia, Ukraine**	**Interim review-product scope- anti-circumvention measures**
T-45/06: Reliance Industries v Council and Commission	Polyethylene terephthalate (PET)	2008	AD425, AS.26	India, Indonesia, Malaysia, Korea, Taiwan, Thailand	Expiry review-date of initiation
T-462/04: HEG and Graphite India v Council	Graphite electrode systems	2008	AD469, AS.70	India	AD: Discriminatory treatment-other imports-equal treatment-enlargement-injury margin; AS: Calculation of subsidy amount-duty drawback scheme- excess amount
T-249/06: Interpipe Niko Tube v Council	**Seamless pipes and tubes, of iron or steel**	**2009 (appeal under joined cases C-191/09 and C-**	**AD490**	**Croatia, Romania, Russia, Ukraine**	**Normal value- non-cooperation EU industry - 25% of EU production-allowance for sales commission**

[106] Cases summarised in this chapter are listed in bold.

Court case	Product	Year of judgment	DG Trade Case ID	Countries	Issues
		200/09)			
T-299/05: Shanghai Excell v Council	Electronic weighing scales	2009	AD418, R346	China	MET determination- IAS – 3 months deadline – change in methodology- constructed normal values- allowances
T-498/04: Zhejiang Xinan Chemical Industrial Group v Council	**Glyphosate**	**2009 (appeal under case C-336/09)**	**AD349**	**China**	**MET determination-significant state interference-export price controls**
T-296/06: Dongguan Nanzha Leco Stationery v Council	Lever arch mechanisms	2009 (appeal under case C-511/09)	AD491	China	Export price-level of trade adjustment- principle of sound administration
C-141/08: Foshan Shunde Yongjian v Council	**Ironing boards**	**2009**	**AD506**	**China**	**Change of MET determination-rights of defence**
T-143/06: MTZ Polyfilms v Council	**Polyethylene terephthalate film (PET film)**	**2009**	**AD432, R355**	**India**	**Reviews- export price determination- lasting changes**
T-1/07: Apache Footwear v Council	Footwear (with uppers of leather)	2009	AD499	China	MET determination – product scope – statement of reasons
T-410/06: Foshan City Nanhai Golden Step Industrial v Council	Footwear (with uppers of leather)	2010	AD499	China	Reasonable profit margin in constructed normal values- rights of defence- injury determination period
T-409/06: Sun Sang Kong Yuen Shoes Factory v Council	Footwear (with uppers of leather)	2010	AD499	China	Rejection export prices- product scope
T-407/06: Zhejiang Aokang Shoes v Council	Footwear (with uppers of leather)	2010 (appeal under case C-247/10)	AD499	China	MET determination- sampling; *Joined case with T-408/06*
T-408/06: Wenzhou Taima Shoes v Council	Footwear (with uppers of leather)	2010	AD499	China	MET determination- sampling
T-401/06: Brosmann Footwear v Council	Footwear (with uppers of leather)	2010 (appeal under case C-249/10)	AD499	China	MET determinations-sampling- support by EU industry- product scope- causality- profit margin of EU industry
C-419/08: Trubowest Handel v Council and Commission	Seamless pipes and tubes, of iron or non-alloy steel	2010	AD358	Hungary, Poland, Russia, Czech Rep., Romania, Slovak Rep.	Action for damages-causal link
C-371/09: Isaac International	Bicycles (parts)	2010	AD287	China	Exemption of anti-dumping duties- bicycle parts- scope- operations in two Member States
T-119/06: Usha Martin v Council and Commission	Steel ropes and cables	2010 (appeal under case C-552/10)	AD384, R.348	China, India, South Africa and Ukraine	Violation undertakings- withdrawal undertakings- proportionality
T-314/06: Whirlpool Europe v Council	Refrigerators (side-by-side)	2010	AD493	Korea	Product scope-rights of defence- Advisory Committee consultations
T-369/08: EWRIA and others v Commission	Steel ropes and cables	2010	AD429	Czech Rep., Malaysia, Korea, Russia, Thailand, Turkey	Interim review- refusal to initiate
T-300/03: Moser Baer v Council	Compact disks - recordable (CD-Rs)	2006	AS455	India	Calculation subsidy amount- depreciation periods- classification of assets; *Also see appeal in C-535/06*
C-398/05: AGST	Stainless steel wire (= or > 1 mm)	2008	AS386	India, Korea	Causality- anti-competitive practices- manifest error
C-535/06: Moser Baer v Council	Compact disks - recordable (CD-Rs)	2009	AS455	India	Appeal- causality-anti-competitive practices

Source: Appendix H1.

3.1.1 Statistical Summary

As Table 28 shows, the number of court cases related to AD and AS instruments increased from year to year over the period 2005 to 2010 (with the exception of a drop in 2007). At the same time, compared to the number of court cases in the USA, which has a similar number of AD and CV measures, it is still substantially lower.[107]

The vast majority of court cases is due to claims by exporters and importers; taken together they account for 31 (89%) of the 35 cases decided over the evaluation period.

Table 28: Breakdown of EU court cases on TDI by type of applicant, 2005-2010 (year of decision)

Applicant	2005	2006	2007	2008	2009	2010	Total 2005-2010
Exporter		4	1	5	8	5	23
Importer	1	1	1	2		3	8
Union producer	3					1	4
Total	4	5	2	7	8	9	35

Source: Calculations based on appendix H1.

When looking at the main legal issues addressed in cases, typically (and increasingly so) applicants raise several in a court application. Hence, the total number of main legal issues addressed in the 35 court cases reviewed amount to 82, i.e. an average of 2.3. This has increased from 1.0 issue per court application in 2005 to 3.1 issues in 2010.

A further analysis of the legal issues addressed in AD/AS cases (Table 29) reveals no major difference with regard to the composition of complainants. Like the number of cases, the number of legal issues increased on a yearly basis; however at a faster rate (due to the tendency of addressing various legal issues in one case). 93% of all issues were raised by exporters and importers.

Table 29: Breakdown of EU court decisions on main legal issues disputed in TD cases, by type of applicant, type of legal issue, and court decision, 2005-2010 (year of decision)

	2005	2006	2007	2008	2009	2010	Total 2005-2010
By type of applicant							
Exporter		6	2	13	21	22	64
Importer	1	1	5	2		3	12
Union producer	3					3	6
By type of legal issue							
Substantive		3	5	8	11	13	40
Procedural	4	4	2	6	10	12	38
Measures				1		3	4
By court decision							
Dismissed	1	6	3	12	16	28	66
Granted	3	1	4	3	5		16
Total no. of claims	4	7	7	15	21	28	82

Source: Calculations based on appendix H1.

[107] E.g., in 2010, the USA Court of International Trade decided on 81 cases related to anti-dumping alone whereas the EU courts decided on nine anti-dumping cases (and no anti-subsidy case).

Pleas regarding the EU's implementation of AD or CV measures following a definitive decision were very rare (only four out of 82), while the remaining 78 were almost evenly split between claims regarding procedural and substantive issues in investigations.

3.1.2 Summary of Decisions having an Effect on EU Law or Practice

Court decisions could have implications for the two basic Regulations or EU TD practice in two situations: First, where claimants' arguments were accepted by the Courts, this means that either the legal basis or its implementation by the EU institutions was found to be deficient by the Courts. As described in the previous section, this would mean that Court decisions on 16 claims could require changes in the EU's trade defence law or practice. Nevertheless, among these 16 rulings against the EU institutions, some refer to the same issue, while others refer to case specificities which do not seem to be apt for drawing general conclusions.

Second, a need for change in the basic Regulations (but not EU TD practice) could also arise, under specific circumstances, where the Courts rejected the applicants' claims. This could happen where the EU institutions' practice was not in accordance with the basic Regulations but this practice is nevertheless confirmed by the Courts.[108]

The following sub-sections present EU Court decisions made during the evaluation period which should lead to a review of the ADR and/or ASR, or EU TD practice.

3.1.2.1 Case T-413/03 Judgment CFI 2006-07-13 Shandong Reipu Biochemicals v Council

The case concerned *Para-cresol* originating in China (AD457). The main claim of the applicant considered by the Court was that in the determination of the normal value for the Chinese company concerned, which had been granted market economy status, the costs of by-products had not been deducted to establish the correct costs for the product concerned.

This claim and information had been submitted by the applicant to the Commission by a fax of 18 November 2002 containing a number of corrections to the questionnaire response earlier submitted for which the deadline was 8 November 2002.

The Commission took the view, when reading this fax of 18 November 2002, that the applicant directly allocated the production costs of its by-products to those by-products according to an analytic accounting method known as the "yield method". That method consists in a direct allocation of the production costs, on the basis of yield, between the various products emerging from the production process. Use of this method results in the production costs of the product concerned not including any production cost of the by-products. That method is different from another method, known as the "market value method", based on the market value or sales price of the by-products. That method involves no direct allocation of the costs of those by-products, but involves a deduction of those costs from the production costs of the product concerned.

The reason for the Commission considering, at first analysis and on reading the fax of 18 November 2002, that the applicant used the yield method is that, in the two footnotes inserted by the applicant in that fax and in which it explained the reasons for the corrections made to its

[108] An example is the violation of the last sentence of Article 2(7)(c) ADR concerning the decision of whether a producer meets MET criteria, which effectively has been sanctioned by the Courts; see section 3.1.2.7.

answers to the AD questionnaire, the applicant expressed itself in terms of costs of production of its by-products and not in terms of market value or sales price.

During the subsequent verification visit at the Chinese producer the Commission put "a precise question" to the applicant, namely whether the applicant directly allocated related costs by reference to the yields obtained when producing para-cresol. The applicant replied in the affirmative. That reply "confirmed" the Commission in its view that there was no cause to deduct the costs of the by-products. Therefore, the Commission considered it unnecessary to enquire further into the costs of the by-products. The Commission did not clearly indicate to the company during the verification that it drew the conclusion based on this answer that by-products would not have to be deducted.

On this point, the Court of First Instance ruled that the Commission committed an obvious error of assessment and considered that:

> "94 Whilst it is true that the Commission cannot be required, in the context of an anti-dumping investigation and in particular at a verification visit, to substitute itself for the parties, which are under a duty to cooperate honestly and effectively with the Commission in supplying it with necessary and precise information, the fact remains that, in the particular circumstances of this case, the Commission could not, without failing in its duty to make a diligent investigation, omit to point out to the applicant the contradiction which it had found, or ought to have found, between, on the one hand, the figures in the fax of 18 November 2002 and, on the other hand, the fact that it understood from the applicant's reply that the latter was not requesting deduction of the costs of the by-products."

Implications for EU law and practice

Implications for EU law
In the view of the evaluation team, the judgment does not require any changes in the two basic Regulations.

Implications for EU practice
The Court of First Instance ruled that in the specific facts of the case, the Commission had made a manifest error of assessment by not confronting the exporting company during the verification with the contradictions between their statements and some of the documents provided and the conclusions drawn by the Commission on the issue of the by-products.

This suggests that the Commission investigators need to be proactive during verification visits in confronting companies with contradictions between their replies and the Commission's findings during the verification. Based on interviews with Commission staff, such a change in practice has already started, whereby in the course of the verification visits companies could be provided with a list of questions which were not answered by the company during the verification visit.[109]

3.1.2.2 Case C-351/04 Judgment ECJ 2007-09-27 Ikea Wholesale

The case concerned the AD proceeding on imports of cotton-type bed linen from Egypt, India and Pakistan (AD359). Following adoption of the WTO DSB rulings in the Bed Linen dispute[110], Ikea as an importer reiterated the key violation findings of the WTO Panel and Appellate Body, which were:

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109 Also see section 5.2.2.2.

110 DS141 European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India; Appellate Body Report of 01 March 2001, WT/DS141/AB/R.

- The practice of zeroing was inconsistent with Article 2.4.2 ADA. By zeroing the negative dumping margins, the European Communities had failed to take fully into account the entirety of the prices of some export transactions. As a result, 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 transactions involving *all* models or types of cotton-type bed linen;
- The method set out in Article 2.2.2(ii) ADA for calculating amounts for SGA costs and profits cannot be applied where there is data for only one other exporter or producer. The Appellate Body also found that, in calculating amounts for profits, sales by other exporters or producers not made in the ordinary course of trade may not be excluded.
- The Panel found that the European Communities acted inconsistently with Article 3.4 ADA by failing to consider all injury factors listed in that Article. The Panel also found that the European Communities could consider under Article 3 information related to companies outside of the sample, where such information was drawn from the EU industry, but that it could not rely on information from producers not part of the EU industry.

On the issue of zeroing in weighted-average-to-weighted average calculations, the Court considered that a manifest error of assessment was made and ruled in particular that:

> "55 In that connection, it must be observed that the wording of Article 2 of the basic regulation makes no reference to the practice of 'zeroing'. To the contrary, that regulation expressly requires the Community institutions to make a fair comparison between the export price and the normal value, in accordance with the provisions of Article 2(10) and (11).
>
> 56 Article 2(11) of the basic regulation states that the weighted average normal value is to be compared with 'a weighted average of prices of all export transactions to the Community'. In this case, in making that comparison, the use of the practice of 'zeroing' negative dumping margins was in fact made by modifying the price of the export transactions. Therefore, by using that method the Council did not calculate the overall dumping margin by basing its calculation on comparisons which fully reflect all the comparable export prices and, therefore, in calculating the margin in that way, it committed a manifest error of assessment with regard to Community law."

Concerning the issue that the amounts for SGA costs and profits used in constructed normal values were based on data from a single producer, the Court of Justice held that this was not a manifest error of assessment. The Court considered that:

> "48 First, the use in Article 2(6)(a) of the basic regulation of the plural in the expression 'other exporters or producers' does not exclude from consideration data from a single enterprise which, as one of the undertakings subject to investigation, engaged, on the domestic market of the State of origin, in representative sales of the like product during the investigation period. Second, the fact of excluding from the assessment of the profit margin the sales of other exporters or producers which were not made in the normal course of trade constitutes an appropriate method of constructing the normal value, in accordance with the principle established in Articles 1(2) and 2(1) of the basic regulation, according to which the normal value must in principle be based on data relating to sales made in the ordinary course of trade."

With regard to the determination of injury, in particular the fact that the contested regulation failed to evaluate all the relevant injury factors having a bearing on the state of the EU industry and erred in determining the injury to the EU industry by relying on evidence obtained from companies outside the EU industry, the Court of Justice found no violation and ruled that:

> "61 With regard to the question whether the Community authorities committed a manifest error of assessment by failing to evaluate all the relevant injury factors having a bearing on the state of the Community industry, as set out in Article 3(5) of the basic regulation, it must be stated that that provision gives those authorities discretion in the examination and evaluation of the various items of evidence.
>
> 62 As the Advocate General observed in points 193 and 194 of his Opinion, that provision merely requires an evaluation of the 'relevant economic factors and indices having a bearing on the state of

the [Community industry]' and it is clear from the wording of the last sentence of Article 3(5) of the basic regulation that the list of economic factors and indices 'is not exhaustive'.

63 Therefore, it must be held that, in evaluating, for the purpose of the examination of the impact of the dumped imports, only the relevant factors having a bearing on the state of the Community industry, the Community institutions did not exceed the margin of assessment which they are acknowledged to have in the evaluation of complex economic situations. Furthermore, in a fresh evaluation carried out under Regulation No 1644/2001, the errors allegedly committed in the evaluation of injury had no impact on the determination of the existence of injury to the Community industry.

64 In those circumstances, it must be held that the Community institutions did not commit a manifest error of assessment in the evaluation of the existence and extent of that injury."

Implications for EU law and practice

Implications for EU law
In the view of the evaluation team, the judgment does not require any changes in the two basic Regulations.

Implications for EU practice
In this case, the Court of Justice ruled, in line with the WTO Appellate Body, that "zeroing" is prohibited as a matter of EU law in weighted average to weighted average calculations. It confirmed that this practice needed to be abolished. It is noted that the EU institutions have indeed stopped the practice of zeroing under the weighted average to weighted average method.

At the same time, the Court of Justice did not follow the legal rulings of the WTO Appellate Body on the issue of using single producer data for SGA costs and profit in constructed normal values and the need to consider all causality factors listed in the ADR. It is noted, however, that the EU institutions follow the stricter standards established by the WTO ADA by reference to the authoritative interpretations adopted by the WTO Appellate Body.

3.1.2.3 Case T-221/05 Judgment CFI 2008-07-08 Huvis v Council

The case related to the AD proceeding on *Polyester Staple Fibres* (AD420) originating in Korea, among others, in which definitive AD measures were imposed after an interim review (R317) on 10 March 2005 by Council Regulation (EC) No 428/2005.[111]

The applicant, a Korean exporter, challenged first the methodology used for making the duty drawback adjustment. In this respect, the applicant argued that the same method as in the original investigation (referred to as the "input method") should have been used instead of the method (referred to as the "residual method") used by the Council in the interim review proceeding. The Council argued that the calculation method used by the company, similar to the one used in the original investigation, was found to not reflect the actual import level of duties borne by the like product. It was therefore not in line with the requirements of Article 2(10)(b) ADR and had to be rejected.

On this point, the Court of First Instance ruled that:

"41 It follows from Article 11(9) of the basic regulation that, as a general rule, in the context of a review, the institutions are required to use the same method, including the method for comparing the export price and the normal value pursuant to Article 2(10) of the basic regulation, as the method used in the initial investigation which led to the duty being imposed. That provision

[111] OJ L 71/1, 17.03.2005.

> provides for an exception allowing the institutions to apply a different method to that used in the initial investigation to the extent to which circumstances have changed. In that regard, any derogation from or exception to a general rule must be interpreted strictly (see Shanghai Teraoka Electronic v Council, paragraph 50 and the case-law cited). It is therefore for the institutions to demonstrate that the circumstances have changed if they intend to apply a different method to that applied in the initial investigation."

The Court of First Instance held that no explanations had been provided as regards a possible change in circumstances and considered that:

> "48 […] the Council indicated that the change of circumstances, within the meaning of Article 11(9) of the basic regulation, related to the fact that the institutions '[had become] aware that what was appropriate during the initial investigation was no longer appropriate.' Such an assertion is not sufficient to justify the use of a different method, since a change of opinion is not equivalent to a change in circumstances. The possibility that the method used in the initial investigation 'did not reflect the real level of import duties borne by the like product' does not constitute a change in circumstances but concerns whether that method complies with Article 2 of the basic regulation.
>
> 49 It must therefore be stated that the institutions concerned have not demonstrated the existence of a change in circumstances within the meaning of Article 11(9) of the basic regulation. That being so, it is still necessary to examine whether the requirement of compliance with Article 2 of the basic regulation precluded application of the 'input' method and justified application of the residual method."

In this respect, the Court ruled that neither the Council nor the Commission had demonstrated that the use of the input method had actually led to overcompensation and had not been consistent with Article 2(10)(b) ADR and therefore annulled the contested regulation on this point.

Implications for EU law and practice

Implications for EU law

The Court of First Instance ruled that the Commission is required to demonstrate a change in circumstances in order to use a different method in review proceedings than in the original proceedings and that a mere change of opinion on the appropriate method is no justification for changing such method. Accordingly, one option to respond to the judgment could be to delete Article 11(9) ADR, which requires that:

> "In all review or refund investigations carried out pursuant to this Article, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Article 2, and in particular paragraphs 11 and 12 thereof, and of Article 17."

Deleting the requirement that the same methodology should be applied in review proceedings as in the original investigations could address issues of consistency when the policy on certain methodologies has changed. It would avoid that old superseded methodologies continue to be used in review proceedings when such methods are no longer used in current new investigations, possibly concerning the same product but new countries and accordingly creating discriminatory treatment between companies in different countries exporting the same product.

An alternative option could be to amend Article 11(9) in such a way that it would allow for a different methodology to be used when the circumstances have changed (or when the previous methodology was illegal), and/or when policy has changed. However, the latter is not recommended as allowing changes in policy as a justification for changing the methodology which would effectively make the rule of methodological consistency over time meaningless.

Implications for EU practice

An alternative response to the judgment would be, rather than a change in the ADR, a change in TD practice, whereby stricter disciplines will be required in review investigations to follow the same methods as in the original investigation, unless a change in circumstances can be duly demonstrated (or the previous methodology was not consistent with the basic regulation)

The choice between whether to opt for vertical consistency (using the same method in reviews as in original investigations and thus ensuring consistency and comparability of results in the same proceedings over time), which would require the stricter discipline of practice with Article 11(9), and horizontal consistency or coherence (using the same method in all investigations carried out at the same time to ensure that all companies get the same treatment at the same time), which would seem to be feasible only if Article 11(9) was deleted, is a choice of the lesser evil as both options imply the acceptance of some inconsistency (be it vertical or horizontal).

3.1.2.4 Case T-348/05 Judgment CFI 2008-09-10 JSC Kirovo-Chepetsky Khimichesky Kombinat v Council

The case concerned the partial interim review (R344) of the AD measures applicable to imports of *ammonium nitrate* originating in Russia (AD330) and the Ukraine (AD421) which had resulted in Council Regulation (EC) No 945/2005 of 21 June 2005.[112] The partial interim review had examined the product scope of the measures after introduction of new product types on the market.

The applicant essentially argued that the contested regulation breached Article 11(3) ADR in that the Council, by way of an amendment allegedly intended to clarify the definition of the product concerned contained in the original regulations, had extended the existing measures to products other than the product concerned. In particular, the applicant argued that the new definition of the product concerned covers not only ammonium nitrate containing a limited quantity of non-fertilising substances (referred to in the original regulation) but also ammonium nitrate containing other fertilising substances, which the Community institutions themselves recognised were not the product concerned. Thus, the contested regulation amends the original regulation in order that an AD duty could be imposed on imports of solid fertilisers with an ammonium nitrate content exceeding 80% by weight. According to the applicant, the category of solid fertilisers with an ammonium nitrate content exceeding 80% by weight is broader than that of ammonium nitrate and, hence, constitutes a different product.

The Council stated that its conclusions did not provide for the extension of the existing measures as such to new product types, but only their proportional application to the product concerned incorporated in the new product types.

On this issue the Court of First Instance ruled that:

> "61 In the light of these preliminary observations, it is a therefore necessary to determine whether the Council has the power, following a review procedure undertaken pursuant to Article 11(3) of the basic regulation, to apply anti-dumping measures initially imposed on a product concerned to that product when it is incorporated in another product type.
>
> 62 That question must be answered in the negative. A component of a finished product may, of course, be the subject of anti-dumping measures but, in that event, it must be regarded as being a product concerned as such. When that component is not considered in itself, but as an element of another product, it is that other product, with all its components, which constitutes the product concerned, and the anti-dumping investigation must accordingly relate to that product

[112] OJ L 160/1, 23.06.2005.

> independently of those components. Only products which have been the subject of an anti-dumping investigation may be subject to anti-dumping measures, once it has been found that the products in question are exported to the Community at a price lower than the price of 'like products' within the meaning of Article 1 of the basic regulation. Consequently, since it is established that the new product types referred to in the contested regulation differ from the product concerned within the meaning of the original regulations, it is impossible to impose an anti-dumping duty on them without, first, carrying out an investigation in order to ascertain whether those products are also being dumped on the Community market."

The Court of First Instance further added that:

> "69 Article 13(1) and (3) of the basic regulation provides that, when circumvention of the measures in force is taking place by way of the import from third countries of like products, whether slightly modified or not, and of slightly modified like products from the country subject to measures or parts thereof, an investigation may be initiated with a view to examining the need to extend the measures in force to such like products.
>
> 70 Accordingly, the Council cannot circumvent the requirement for an investigation under Article 13 of the basic regulation by amending the definition of the product concerned in the course of applying Article 11(3) of that regulation."

Implications for EU law and practice

Implications for EU law

In the view of the evaluation team, the judgment does not require any changes in the two basic Regulations.

Implications for EU practice

The Court referred to the anti-circumvention procedure in Article 13 ADR as the appropriate procedure for such cases. An alternative option could be to open a new investigation against the changed product.

Given the absence of a clear detailed agreement on anti-circumvention rules at the WTO level, the safer option for the EU – when possible in the circumstances of the case – would be to start a new investigation concerning the changed not-like product, as this would reduce the risk of being involved in a WTO dispute.

3.1.2.5 Case T-249/06 Judgment CFI 2009-03-10 Interpipe Niko Tube v Council

The case concerned the Council Regulation (EC) No 954/2006 of 27 June 2006[113] imposing a definitive AD duty on imports of *certain seamless pipes and tubes, of iron or steel* originating in Croatia, Romania, Russia and the Ukraine (AD490). The applicant was an exporter from the Ukraine with two sales companies, SPIG Interpipe, established in the Ukraine, and Sepco SA, established in Switzerland.

Among other claims, the applicant argued that no deduction should have been made from the export price of an allowance for sales commission related to sales by the company Sepco SA established in Switzerland. In this respect, the Court of First Instance first recalled that:

> "178 It should be noted that, where it is found that a producer entrusts tasks normally falling within the responsibilities of an internal sales department to a company for the distribution of its products which it controls economically and with which it forms a single economic entity, the fact that the institutions base their reasoning on the prices paid by the first independent buyer from the affiliated distributor is justified. Taking the prices of the affiliated distributor into account avoids costs which are clearly included in the sale price of a product when that sale is carried out by an integrated sales

[113] OJ L 175/4, 29.06.2006.

department in the producer's organisation no longer being included where the same sales activity is carried out by a company which is legally distinct, even though economically controlled by the producer (see, to that effect, and by analogy, Case C-171/87 Canon v Council [1992] ECR I-1237, paragraphs 9 to 13).

179 The case-law also shows that a single economic entity exists where a producer entrusts tasks normally falling within the responsibilities of an internal sales department to a company for distributing its products which it controls economically (see, to that effect, Canon v Council, cited in paragraph 178 above, at paragraph 9). Moreover, the capital structure is a relevant indicator of the existence of a single economic entity (see, to that effect, Opinion of Advocate General Lenz in Case C-75/92 Gao Yao v Council [1994] ECR I-3141, I-3142, point 33). It has also been held that a single economic entity may exist where the producer assumes part of the sales functions complementary to those of the distribution company for its products (Matsushita Electric Industrial, cited in paragraph 177 above, paragraph 14)."

The Court of First Instance further held that the arguments provided by the Council for such an adjustment for sales commissions were not convincing and held, among others, that:

"187 Thirdly, concerning the alleged insufficiency of Sepco's connections with the applicants, such connections not supporting the conclusion that Sepco was under the applicants' control or that there was a common control, the evidence on file shows that Sepco and NTRP are linked by a common parent company, Allied Steel Holding, which held 100% of Sepco's capital and 24% of NTRP's capital during the investigation period. That is a fact which, if corroborated by other relevant factors, might contribute to establishing that there was a control common to Sepco and NTRP and which, in any event, does not demonstrate the insufficiency of the links between Sepco and NTRP. That conclusion is not called into question by the Council's assertion that the applicants failed to provide sufficient information as to the identity of the actual beneficiaries of the shares of Niko Tube, SPIG Interpipe and 76% of the capital of NTRP. Similarly, the fact that the relationship between Sepco and NTRP is one of buyer and seller is of no relevance in demonstrating that those latter do not constitute a single economic entity or that Sepco carries out functions comparable to those of an agent working on a commission basis."

Therefore, the Court of First Instance held that there was a manifest error of assessment in applying Article 2(10)(i) ADR in so far as the Council made an adjustment on the export price charged by Sepco, in the context of transactions concerning pipes manufactured by NTRP.

Implications for EU law and practice

The case is currently under appeal. Hence, the following conclusions made on implications for EU law and practice have to be understood as preliminary.

Implications for EU law

In the view of the evaluation team, the judgment does not require any changes in the two basic Regulations.

Implications for EU practice

In this case, the Court of First Instance took the view that where a legal entity in a third country is involved in the export chain which forms a single economic entity with the exporter, no allowance deductions for sales commission can be made to the export price. This ruling would require a change in practice in certain cases. However, as the case is currently under appeal, a recommendation on this issue would appear to be premature.

3.1.2.6 Case T-498/04 Judgment CFI 2009-06-17 Zhejiang Xinan Chemical Industrial Group v Council

The case concerned the AD proceeding with regard to *glyphosate* originating in China (AD349) which after an expiry/interim review (R298, R298a) had resulted in the contested Council

Regulation (EC) No 1683/2004 of 24 September 2004 imposing definitive duties.[114] The applicant was a Chinese exporter listed on the Shanghai Stock Exchange and had been denied MET in the proceeding. On this point the contested regulation stated:

> "(13) Although the majority of the shares of the company were owned by private persons, due to the wide dispersion of the non-State-owned shares, together with [the] fact that the State owned by far the biggest block of shares, the company was found to be under State control. Moreover, the board of directors was in fact appointed by the State shareholders and the majority of the directors of the board were either State officials or officials of State-owned enterprises. Therefore, it was determined that the company was under a significant State control and influence.
>
> (14) Moreover, it was established that the Government of the PRC had entrusted the China Chamber of Commerce Metals, Minerals & Chemicals Importers and Exporters (CCCMC) with the right of contract stamping and verifying export prices for customs clearance. This system included the setting of a minimum price for glyphosate exports and it allowed the CCCMC to veto exports that did not respect these prices.
>
> (15) Consequently, after consulting the Advisory Committee, it was decided not to grant [MES] to [the applicant] on the basis that the company did not meet all the criteria set in Article 2(7)(c) of the basic regulation."[115]

Before the Court of First Instance, the applicant appealed the denial of MET. First, the applicant contested the determination that there was significant State control as a reason for rejecting MET in this case. On this point the Court of First instance took the view that:

> "82 In that regard, State 'control' or 'influence' is not a criterion expressly laid down in the first indent of Article 2(7)(c) of the basic regulation. It must therefore be determined whether, as the Council contends, State control, as found in this case, necessarily entails 'significant State interference', within the meaning of that provision.
>
> 83 The first indent of Article 2(7)(c) of the basic regulation requires that, to qualify for MES, the exporting producer concerned must, in particular, submit sufficient evidence that 'decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard'.
>
> 84 It is clear from the wording of that provision that the question of whether or not there is significant State interference must be assessed in the light of the way that 'decisions of firms regarding prices, costs and inputs' are made. It requires the exporting producer concerned to show that its decisions are made both 'in response to market signals' and 'without significant State interference'. In addition, the use of the words 'in this regard' further accentuates the connection between the relevant decisions and the State interference. Consequently, conduct by the State which is not such as to influence those decisions cannot constitute 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation.
>
> 85 Furthermore, in view of the wording, purpose and context of that provision, the concept of 'significant State interference' cannot be assimilated to just any influence on the activities of an undertaking or to just any involvement in its decision-making process, but must be understood as meaning action by the State which is such as to render the undertaking's decisions incompatible with market economy conditions.
>
> 86 The very use of the expression 'significant … interference' is evidence of the Community legislature's intention to allow a certain degree of State influence over an undertaking's activities or of State involvement in its decision-making process if it has no effect on the manner in which its decisions concerning prices, costs and inputs are made.
>
> […]
>
> 88 It must therefore be held that the condition in question is intended to determine whether the

[114] OJ L 303/18, 30.09.2004.
[115] OJ L303/18, 30.09.2004.

relevant decisions of the exporting producers concerned are based on purely commercial considerations, appropriate for an undertaking operating under market economy conditions, or whether they are distorted by other considerations, appropriate to State-run economies."

With regard to the specific findings in the contested regulation, the Court of First Instance took the view that:

"94 First, as regards the appointment of the board of directors, it is clear from the Court file that neither the State nor State bodies have the right to appoint, directly, one or more directors. As the applicant showed in the request for MES, under its articles of association the members of the board of directors are appointed by the general meeting. In addition, as is not disputed by the institutions and as, on the contrary, is clear from the contents of the Court file and the Council's arguments, the assertion made in recital 13 in the preamble to the contested regulation concerns precisely the fact that, because of the wide dispersion of the private shareholdings, which allows the State shareholders to control general meetings, it is they who decide, in practice, on the composition of the board of directors. That fact alone does not lead to the conclusion that the State shareholders are in a position different, or act differently, to a private minority shareholder which, because of the dispersion of the majority shareholding, in fact controls the shareholders' meetings. Therefore, it cannot constitute a ground for refusing the applicant MES.

95 Second, as regards the composition of the board of directors, in the light of the contents of the Court file and the Council's arguments, the assertions concerning the existence of connections between the majority of the board of directors and the State are based also on the mere fact that the applicant is State-controlled. Whereas the institutions have raised no objection as regards two of the nine directors, they have complained of three other directors being in an employment relationship (as regards the 'General Manager' and 'Vice General Manager') or connected by a contract for the supply of services (as regards the Chairman of the board of directors) with the applicant, while the latter was State-controlled. That fact alone cannot be regarded as being incompatible with market economy conditions and cannot found an argument, in the absence of other information about their connections with the State, that the decisions of those directors at board meetings are influenced by considerations peculiar to the State. In those circumstances, without it being necessary to examine the applicant's arguments as regards the other directors, the ground that the majority of the board of directors had connections with the State which were incompatible with market economy conditions must be rejected.

96 It must therefore be held that the findings set forth in recital 13 in the preamble to the contested regulation contain no matter justifying the refusal of MES in this case. In particular, the Council's conclusion that the applicant is subject to 'a significant State control and influence', amounts only, in the light of the contents of the Court file, to an assertion that the applicant is State-controlled."

The Court of First Instance further added to this point that:

"103 Those findings are not put in question by the Council's argument that, according to the case-law, the Community institutions have a wide discretion in a case like the present.

104 The foregoing findings are not based on an evaluation of the factual, legal or political situations which encompass a wide discretion of the institutions in that field but are based on the determination of the scope of the relevant rules of law established by the Council. In its scrutiny of legality, the Community judicature conducts a full review as to whether the institutions properly applied the relevant rules of law (see, to that effect, Case T-374/04 Germany v Commission [2007] ECR II-4431, paragraph 81).

105 It is appropriate to point out, indeed, that, by Article 2(7)(b) and (c) of the basic regulation and, in particular, by laying down precise criteria for the grant of MES, the Council limited its own discretion, with the aim, moreover, of taking account of the 'changed economic conditions' in China (fifth recital in the preamble to Regulation No 905/98). Thus, its assessment in respect of that requirement must be carried out within the limits of those rules of law and the exercise of the wide discretion in that domain cannot lead to the imposition of criteria for the grant of MES which go beyond those set out in Article 2(7)(c) of the basic regulation."

Implications for EU law and practice

The case is currently under appeal. Hence, the following conclusions made on implications for EU law and practice have to be understood as preliminary.

Implications for EU law

In the view of the evaluation team, the judgment does not require any changes in the two basic Regulations.

Implications for EU practice

This judgment of the Court of First Instance draws an important distinction between "state control" and "significant State interference". It suggests that State controlled companies should not automatically be denied MET and requires a change in practice in certain cases. It must be demonstrated that the commercial decisions of the producers – even if state controlled – have been distorted by significant state interference. Furthermore, the Court of First Instance denied the institutions any wide discretion in MET determinations.[116]

The absence of wide discretion would imply that the examination of the Courts will not be limited, but the Courts could more closely scrutinise the assessments made by the EU institutions in MET determinations.

3.1.2.7 Case C-141/08 Judgment ECJ 2009-10-01 Foshan Shunde Yongjian v Council

The case concerned an appeal of the judgment of the Court of First Instance in Case T-206/07 relating to the AD proceeding concerning *ironing boards* originating in China (AD506). The applicant had been first denied MET because its accounting records and the audit report were not in line with International Accounting Standards. This determination was confirmed in the Commission Regulation (EC) No 1620/2006 imposing provisional duties.[117] Following submissions made by the applicant and a hearing after the provisional measures were imposed, the Commission sent the applicant a final general disclosure document in which it stated its intention to grant the applicant MET. Following a further submission of the complainants in the AD proceeding and a consultation with the Advisory Committee in which a number of Member States protested against the granting of MET to the applicant, the Commission again revised its

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116 This absence of a wide discretion in MET determinations is a change in case law. For example, in Shanghai Teraoka Electronics v Council, Case T-35/01, judgment of 28 October 2004, the Court of First Instance had stated:

> "48 First of all, it should be observed that, in the sphere of measures to protect trade, the Community institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine (Case T-162/94 *NMB France and Others v Commission* [1996] ECR II-427, paragraph 72; Case T-97/95 *Sinochem v Council* [1998] ECR II-85, paragraph 51; *Thai Bicycle*, cited in paragraph 46 above, paragraph 32; and Case T-340/99 *Arne Mathisen v Council* [2002] ECR II-2905, paragraph 53).
>
> 49 It follows that review by the Community judicature of assessments made by the institutions must be limited to establishing whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of power (Case 240/84 *Toyo v Council* [1987] ECR 1809, paragraph 19; *Thai Bicycle*, cited in paragraph 46 above, paragraph 33; and *Arne Mathisen*, cited in paragraph 48 above, paragraph 54). The same applies to factual situations of a legal and political nature in the country concerned which the Community institutions must assess in order to determine whether an exporter operates in market conditions without significant State interference and can, accordingly, be granted market economy status (see, to that effect, Case T-155/94 *Climax Paper v Council* [1996] ECR II-873, paragraph 98)."

117 OJ L 300/13, 31.10.2006.

determination and considered, *inter alia*, that the applicant's practice of offsetting and grouping sales transactions together in its accounts on a summary basis, contrary to the accrual basis, constituted an infringement of the IAS, which was incompatible with the requirements laid down in Article 2(7)(c) ADR. On 23 April 2007, the Council adopted definitive measures in the case.[118]

In this case, the Court of Justice overruled the Nangjing Metalink judgment which precluded a change in MET determination based on a reassessment of old facts. The Court of Justice basically ruled that the requirement in Article 2(7) ADR that the MET determination "*shall remain in force throughout the investigation"* should not be observed.[119]

A second argument by the applicant was directed at the finding by the Court of First Instance that the infringement by the Commission of Article 20(5) ADR did not affect the content of the contested regulation and hence the applicant's rights of defence. On this point, the Court of Justice first confirmed that:

> "73 As a preliminary point, it should be noted that, contrary to the submissions of the Council and the Commission in particular, the Court of First Instance did not err in law in finding, at paragraph 70 of the judgment under appeal, that the Commission infringed Article 20(5) of the basic regulation by sending its proposal for definitive measures to the Council only six days after communicating to the appellant the revised final disclosure documents of 23 March 2007 and thus before the expiry of the 10-day period laid down in that provision.
>
> 74 The Court of First Instance was correct in stating that the Commission was required in the circumstances to inform the appellant of its new position, as set out in the revised final disclosure documents of 23 March 2007, and that in sending those documents it was required to comply with the period prescribed in Article 20(5) of the basic regulation.
>
> 81 […] it should be noted at the outset that the Court of First Instance was correct in finding at paragraph 71 of the judgment under appeal that failure to comply with the 10-day period prescribed in Article 20(5) of the basic regulation can result in annulment of the contested regulation only where there is a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome and thus in fact adversely affected the applicant's rights of defence (see, to that effect, Case 30/78 Distillers Company v Commission [1980] ECR 2229, paragraph 26;

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118 OJ L 109/12, 26.04.2007.

119 In Case T-299/05 Shanghai Excell v. Council the Court of First Instance had taken the view that the ADR does not contain any sanction for exceeding the three-month deadline and considered that:

> "127 In that regard, the three-month period imposed under the second subparagraph of Article 2(7)(c) of the basic regulation is intended, in particular, to ensure that the question whether the producer meets the criteria set out in that article is not decided on the basis of its effect on the calculation of the dumping margin. Thus, the last sentence of Article 2(7)(c) of the basic regulation prohibits the institutions, after they have adopted an MES decision, from then re-evaluating the information which was available to them in that regard (see to that effect, Case T-138/02 Nanjing Metalink International v Council [2006] ECR II-4347, paragraph 44).
> 128 Consequently, the practical effect of that time-limit is not called in question if, in the period between the expiry of the three-month period and the MES decision and having regard to the circumstances of the case, it had to be concluded that the undertakings claiming MES had made it impossible for the Commission to know what effect its MES decision might have on the calculation of the dumping margin."

The Court of First Instance concluded on this issue as follows:

> "138 Lastly, it must, in any event, be concluded that, in the absence of a provision setting out either expressly or implicitly the consequences of failure to comply with a procedural time-limit such as that in the present case, the failure can entail the annulment in whole or in part of the act to be adopted within the period in question only if it is shown that, in the absence of such alleged irregularity, that act might have been substantively different (see, to that effect, Joined Cases 209/78 to 215/78 and 218/78 van Landewyck and Others v Commission [1980] ECR 3125, paragraph 47, and Case 150/84 Bernardi v Parliament [1986] ECR 1375, paragraph 28).
> 139 The applicants have not proved that, if the Commission had not exceeded the three-month period, the Council might have adopted a different regulation more favourable to their interests than the contested regulation."

Case C-142/87 Belgium v Commission, 'Tubemeuse' [1990] ECR I-959, paragraph 48; and Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 31)."

With regard to the specific facts of the case the Court of Justice then concluded that:

"92 In particular, in light of the conduct of that procedure and the fact that the Commission had already altered its position twice as a result of the observations submitted to it by the interested parties, it cannot be ruled out that the Commission might have altered its position once again because of the arguments put forward by the appellant in its letter of 2 April 2007, which related, according to the findings set out at paragraph 74 of the judgment under appeal, to the significance to be attached to the accounting shortcomings discovered and the inferences to be drawn from the information on the price of steel imports.

93 Respect for the rights of the defence is of crucial importance in procedures such as that followed in the present case (see, to that effect, Case C-49/88 Al-Jubail Fertilizer v Commission [1991] ECR I-3187, paragraphs 15 to 17, and by analogy, Case C-113/04 P Technische Unie v Commission [2006] ECR I-8831, paragraph 55).

94 Moreover, according to the case-law of the Court of Justice, the appellant cannot be required to show that the Commission's decision would have been different in content but simply that such a possibility cannot be totally ruled out, since it would have been better able to defend itself had there been no procedural error (see Thyssen Stahl v Commission, paragraph 31 and the case-law cited).

[…]

102 […] the fact that the Commission submitted a proposal for definitive measures to the Council before receiving the appellant's letter of 2 April 2007 is likely to influence the conclusion which it could still have drawn from the observations in that letter. Had the Commission been aware of those observations before submitting its proposal for definitive measures, it would have had greater room for manoeuvre in its assessment of those measures and might have reached other conclusions, including as to whether it was permissible for it to alter its original decision not to grant the appellant market economy treatment."

The Court of Justice considered that the Court of First Instance was not entitled to rule out the possibility that the infringement by the Commission of Article 20(5) ADR was likely to affect the content of the contested regulation and therefore, the appellant's right of defence.

The Court of Justice set aside the judgment and concluded that:

"110 The last two sentences of Article 2(7)(c) of the basic regulation provide that a determination whether the producer meets the substantive criteria laid down in that provision is to be made within three months of the initiation of the investigation and that the determination is to remain in force throughout the investigation.

111 In the light of the principles of compliance with the law and sound administration, that provision cannot be interpreted in such a manner as to oblige the Commission to propose to the Council definitive measures which would perpetuate an error made in the original assessment of those substantive criteria to the detriment of the undertaking concerned.

112 Accordingly, if the Commission realises in the course of the investigation that, contrary to its original assessment, an undertaking meets the criteria laid down in the first subparagraph of Article 2(7)(c) of the basic regulation, it must take appropriate action, while at the same time ensuring that the procedural safeguards provided for in the basic regulation are observed.

113 It follows that the Commission could still have altered its position following receipt of the appellant's letter of 2 April 2007.

114 Since it cannot therefore be ruled out that the Commission would have proposed to the Council definitive measures more advantageous to the appellant if it had been aware of the content of that letter and that, in that case, the Council would have accepted such a proposal, it is clear that the appellant's rights of defence were in fact adversely affected by the failure to comply with the 10-day period prescribed in Article 20(5) of the basic regulation, which led to the Commission not taking

account of the content of that letter at the appropriate time.

115 The contested regulation must therefore be annulled in so far as it imposes an anti-dumping duty on imports of ironing boards manufactured by the appellant."

Implications for EU law and practice

Implications for EU law

With regard to the three-month deadline for determining MET, the last paragraph of Article 2(7)(c) ADR provides that:

> "A determination whether the producer meets the above- mentioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation."

However, the courts took the view that there is no sanction if the mandatory three-month deadline is exceeded.[120] Also, by holding that the mandatory rule that the determination cannot be changed should not be observed, the above case law has rendered these provisions in the final paragraph of Article 2(7)(c) ADR basically meaningless. Further, the rationale behind these rules – in the view of the Court of First Instance being "in particular, to ensure that the question whether the producer meets the criteria set out in that article is not decided on the basis of its effect on the calculation of the dumping margin" – is contradicted and invalidated by the view of the courts that this determination should nevertheless be changeable at a later stage in the proceedings when the effects on the calculation of the dumping margin could be known.

Therefore, it seems recommendable to simply abolish the final paragraph in Article 2(7)(c) ADR and make the determination on MET part of the normal provisional and definitive determinations without any separate special procedure or rules.

With regard to respecting rights of defence in line with the time-limits established in Article 20(5), it appears that there are three options to address the ECJ's findings on disclosure:

- Re-disclose while respecting the 10-day time limit;
- Re-disclose with a reduced deadline for providing comments;
- Not to re-disclose amendments to findings made following the initial final disclosure, leaving potential complaints in the hands of judicial review.

If the second or third options are pursued, the two basic Regulations should be amended accordingly.

Implications for EU practice

If the first of the three options regarding time-limits for commenting on final disclosure is chosen, the Commission would have to allow parties at least ten days to comment on final disclosure, including re-disclosure of certain aspects.

The evaluation team's considerations on this issue are further discussed, and recommendations provided, in section 5.2.3.2.

[120] Such breach of the mandatory deadline can in the view of the Court of First Instance only lead to annulment of the Regulation if the applicant can show that the Council might have adopted a different regulation, which in practice is a burden of proof in the realm of pure speculation.

3.1.2.8 Case T-143/06 Judgment CFI 2009-11-17 MTZ Polyfilms v Council

The case concerned an interim review (R355) of the AD measures on *PET film* originating, *inter alia*, in India (AD432), which resulted in Council Regulation (EC) No 366/2006 of 27 February 2006 imposing a definitive AD duty.[121]

The interim review presented the special issue that the exporters had been subject to Minimum Import Price (MIP) undertakings. Therefore, the Council stated that particular consideration was given to whether the existence of such undertakings influenced the past export prices, so that the future behaviour of exporters could not reliably be extrapolated from them.

The reliability of the prices of sales made to the Community by the Indian exporters concerned, including the applicant, was assessed by comparing those prices with the MIPs which were the subject of the accepted undertakings. An analysis was made of whether the weighted average of prices charged by each of those exporters was or was not substantially above the MIPs. Where the export prices were substantially above the MIPs, it was considered that they had been set independently of the MIPs and that they were, therefore, reliable. On the other hand, where the export prices were not sufficiently above the MIPs, it was considered that they were influenced by the undertakings and were not reliable enough to be used for the dumping calculation, in accordance with Article 2(8) ADR.

It was found that the prices of exports by three Indian exporters, including the applicant, to the Community, were very close to the MIPs, whereas their export prices to third countries were considerably below those charged in the Community, which, according to the Council, made it likely that, in the absence of undertakings, the export prices to the Community would be aligned with the export prices charged for the same types of products to third countries. Consequently, the export prices of those exporters to the Community could not, in the opinion of the Council, be used to establish reliable export prices, within the meaning of Article 2(8) ADR. According to recital 31 of the contested regulation, it was decided, for that reason, to establish the export prices of those exporters on the basis of the prices charged for their sales to third countries.

The applicant challenged this methodology before the Court of First Instance based on the fact that the institutions did not base their assessment of the reliability of the applicant's export prices to the Community on the criteria laid down in Article 2(8) and (9) ADR. The Council argued in essence that the reason for the departure from the methodology laid down in Article 2(8) and (9) ADR was the need to determine, in accordance with Article 11(3) ADR, whether any change was lasting and thus would lead to the termination or possible amendment of the existing measures as part of an interim review.

On this issue the Court of First Instance took the view that:

> "41 […] it is not provided in Article 11(3) of that regulation that the Council has the power in an initial review to use, as it has done in the present case, a methodology for the determination of the export price which is incompatible with the requirements laid down in Article 2(8) and (9) of the Basic Regulation, by referring to the need to make a prospective assessment of the prices charged by the exporters concerned.
>
> 42 It is clear from Article 11(9) of the Basic Regulation that, as a general rule, in a review, the institutions are required to apply the same methodology, including the method of determining the export price under Article 2(8) and (9) of the Basic Regulation, as that used in the initial investigation which led to the imposition of the anti-dumping duty. The same provision contains an exception whereby the institutions may apply a methodology other than that used in the initial investigation only where the circumstances have changed, an exception which must however be

[121] OJ L 68/6, 08.03.2006.

> interpreted strictly. Furthermore, it is clear from Article 11(9) of the Basic Regulation that the methodology applied must take account of the provisions of Articles 2 and 17 of the Basic Regulation.
>
> 43 Accordingly, in an interim review, just as in an initial investigation, the institutions are, as a general rule, required to determine the export price in accordance with the criteria established by Article 2 of the Basic Regulation.
> […]
> 48 It must be observed, in that regard, that the practical effect of Article 11(3) of the Basic Regulation is broadly ensured by the fact that when assessing the need to continue existing measures the institutions have a wide discretion, which includes the option of carrying out a prospective assessment of the pricing policy of the exporters concerned.
>
> 49 However, once the institutions have assessed that need and decided to amend the existing measures, they are bound, when determining the fresh measures, by the provision in Article 11(9) of the Basic Regulation which confers on them the express power and obligation to apply the methodology prescribed by Article 2 of that regulation."

The Court of First Instance concluded for these reasons to annul the contested regulation as far as the applicant was concerned.

Implications for EU law and practice

Implications for EU law
In the view of the evaluation team, the judgment does not require any changes in the two basic Regulations.

Implications for EU practice
In this case, the Court of First Instance ruled against the use of alternative third country export prices in case the EU export prices may have been affected by the existence of minimum price undertakings in review proceedings. While the Court permits prospective analysis in review proceedings, the methods to establish the dumping when it is decided to change the measures need to comply with Article 2 ADR. The Court also ruled that the institutions have a wide discretion in deciding whether to update the measures in an interim review and a prospective analysis of the pricing behaviour of the exporter may be carried out in determining whether there is a real need for change in the measures.[122]

The evaluation team recommends, following the court's ruling, that the Commission use prospective analysis in determining whether there is a real need for continuation or change in the measures, while not changing the methodology.

3.2 WTO Rulings on Anti-Dumping and Countervailing Cases

Over the period 2005 to 2010, WTO DSB Panels and the Appellate Body issued reports in 19 different AD and CV cases (Table 30). Of these, 12 were AD cases, four CV cases and three addressed both AD and CV measures. In 12 cases, at least one of the parties appealed the Panel's report and an Appellate Body report was also issued. The EU was a respondent in three disputes (listed in bold in the table), of which one was a CV case (*DRAMs from Korea*) and two were AD cases (*Farmed Salmon from Norway* and *Fasteners from China*).

[122] This prospective analysis may not only be carried out in interim reviews but also in determining the likely continuation of recurrence of dumping in Article 11(2) expiry reviews.

Table 30: Overview of WTO DSB rulings on AD and CV cases (Panel and Appellate Body reports issued 2005-2010)

No	Case no.	Case name	Date complaint	Date Panel Report	Date AB Report	ADA	ASCM
1	DS282	USA – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico	18/02/2003	20/06/2005	02/11/2005	x	
2	DS294	USA – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (EC)	12/06/2003	31/10/2005	18/04/2006	x	
3	DS295	Mexico – Definitive Anti-Dumping Measures on Beef and Rice (USA)	16/06/2003	06/06/2005	09/11/2005	x	x
4	DS296	USA – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea	30/06/2003	21/02/2005	27/06/2005		x
5	**DS299**	**EC – Countervailing Measures on Dynamic Random Access Memory Chips from Korea**	**25/07/2003**	**17/06/2005**			**x**
6	DS312	Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia	04/06/2004	28/10/2005		x	
7	DS322	USA – Measures Relating to Zeroing and Sunset Reviews (Japan)	24/11/2004	20/09/2006	09/01/2007	x	
8	DS331	Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala	17/06/2005	08/06/2007		x	
9	DS335	USA – Anti-Dumping Measure on Shrimp from Ecuador	17/11/2005	30/01/2007		x	
10	DS336	Japan – Countervailing Duties on Dynamic Random Access Memories from Korea	14/03/2006	13/07/2007	08/11/2007		x
11	**DS337**	**EC – Anti-Dumping Measure on Farmed Salmon from Norway**	**17/03/2006**	**16/11/2007**		**x**	
12	DS341	Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities	31/03/2006	04/09/2008			x
13	DS343	USA – Measures Relating to Shrimp from Thailand	24/04/2006	29/02/2008	16/07/2008	x	
14	DS344	USA – Final Anti-dumping Measures on Stainless Steel from Mexico	26/05/2006	20/12/2007	30/04/2008	x	
15	DS345	USA – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties	06/06/2006	29/02/2008	16/07/2008	x	x
16	DS350	USA – Continued Existence and Application of Zeroing Methodology	02/10/2006	01/10/2008	04/02/2009	x	
17	DS379	USA – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China	19/09/2008	22/10/2010	11/03/2011	x	x
18	DS383	USA – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand	26/11/2008	22/01/2010		x	
19	**DS397**	**EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China**	**31/07/2009**	**03/12/2010**	**15/07/2011**	**x**	

Source: Appendix H2.

A detailed review of these cases is presented in appendix H2, presenting the main legal issues in each case as well as the potential implications for EU law and practice. This section provides an analysis of those cases, printed in bold in the above table, in which the EU was the respondent and those which, in the view of the evaluation team have an impact on EU TD practice or legislation. It also provides conclusions and recommendations in respect of the disputes' implications for EU law and practice. Reference to WTO disputes not involving the EU as the respondent is made in chapter 5 of this report, where required.

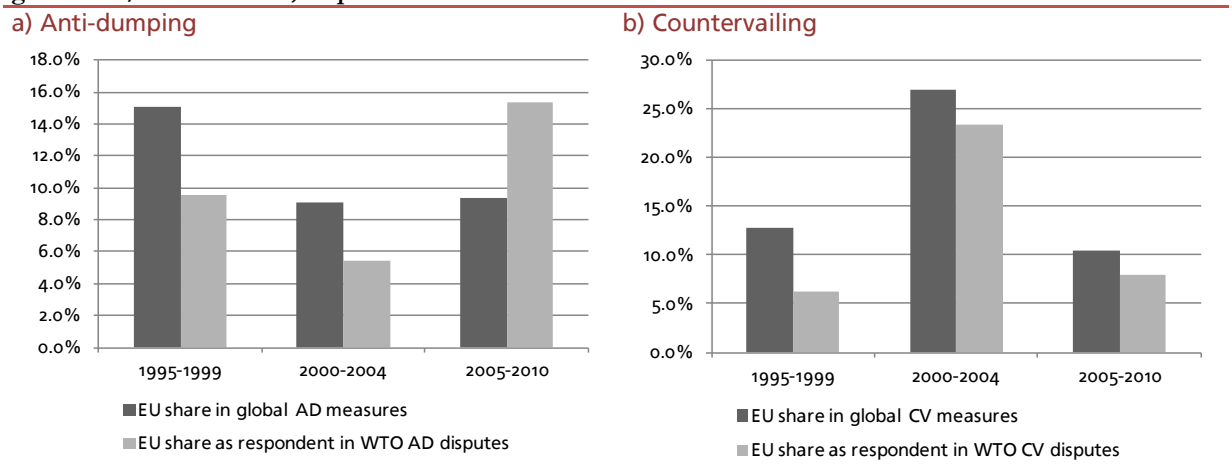
3.2.1 Statistical Summary

The share of the EC/EU as a respondent in WTO AD disputes over the period 1995 to 2010 is lower than its share in AD measures (9.5% v 10.9%), which indicates a better-than-average compliance with WTO AD rules. The same applies to CV measures, where the share of the EC/EU as a respondent in disputes is 12.6% compared to an EC/EU share in CV measures of

17.7%); two CV disputes were initiated against the EU during the evaluation period. Nevertheless, as Figure 16 shows, this long-term performance has been reversed in the evaluation period (2005-2010) for the AD instrument, when four disputes against the EU were initiated out of a total of 26. Nevertheless, the absolute number of trade defence disputes initiated with the EU as a respondent was low in the evaluation period.

As Table 31 shows, from 2005 to 2010 DSB reports were issued in three cases against the EC/EU[123], brought forward by China, South Korea and Norway.

Figure 16: Share of EC/EU as a respondent in worldwide WTO AD/CV disputes v share of EC/EU in global AD/CV measures, disputes initiated 1995-2010



Source: Authors' calculations based on WTO data.

Table 31: WTO AD and CV cases by complainant and respondent, reports issued 2005-2010

Respondent \ Complainant	EC	Korea	China	Mexico	Thailand	Ecuador	Guatemala	India	Indonesia	Japan	Norway	USA	Total
USA	2	1	1	2	2	1		1		1			11
Mexico	1						1					1	3
EC		1	1								1		3
Japan		1											1
Korea									1				1
Total	3	3	2	2	2	1	1	1	1	1	1	1	19

Source: Appendix H2.

3.2.2 Summary of Disputes involving the EC/EU as Respondent

3.2.2.1 DS299 Countervailing Measures on Dynamic Random Access Memory Chips from Korea, Korea v European Communities

This dispute concerned the AS investigation concerning imports of *DRAMs* from Korea. It was initiated in July 2002. In August 2003, the investigation was concluded with the imposition of CV duties on imports from Hynix (34.8%). Immediately, Korea requested consultations under the

[123] In 2008, India requested consultations regarding the EU's *Expiry Reviews of Anti-dumping and Countervailing Duties Imposed on Imports of PET from India* (DS385); no panel has been appointed until 31 December 2011. Also, in 2010 one additional complaint against the EU was registered, i.e. China's complaint related to *Anti-Dumping Measures on Certain Footwear* (DS405). The Panel report has been issued on 28 October 2011.

provisions of the WTO ASCM and the DSU. The Panel was called to examine aspects relating to the subsidy, injury and causation as well as some procedural matters. Overall, the panel addressed 14 different claims, of which five were granted and nine rejected. This section analyses the main issues in the case.

Determination of subsidy

The first group of substantive claims concerned the subsidy determination. The first claim concerned an alleged violation of Article 1.1(a)1(iv) of the ASCM when determining the existence of a financial contribution. In particular, the issue related to the Commission's determination of "entrustment or direction" in a number of cases. The Panel first reminded that in light of Article 1.1, there was

> "no need for a finding of entrustment or direction in cases where it has been established that the party providing the financial contribution was itself a public body."[124]

It then examined the meaning of "entrust" or "direct". It found that both terms entail

> "the notion of the imposition of a *requirement* or an *obligation* on the person that is entrusted with a task or that is directed to carry out a task. The private body that is directed to provide a financial contribution or is entrusted to do so, is thus acting on behalf of the government, and its actions can therefore be ascribed to the government."[125]

The Panel then examined Korea's argument that for there to be a financial contribution there was "a requirement to demonstrate an explicit and affirmative act by government to a particular entity to perform a particular task."[126] The Panel did not agree to follow that finding by stating that it read Article 1.1 as not requiring

> "that the government's entrustment or direction be conveyed to the private bodies in a particular way. Rather, it encompasses entrustment or direction irrespective of the precise form it takes [...] such delegation or command should invariably take the form of an affirmative act. But it does not necessarily need to be 'explicit'. It could be explicit or implicit, informal or formal. The key is being able to identify such entrustment or direction in each factual circumstance. This will obviously need to be determined, on a case-by-case basis, whether an investigating authority could reasonably have concluded on the basis of all of the relevant and probative evidence before it that such entrustment or direction existed."[127]

The Panel differentiated between the legal standard, as set forth in the excerpt just quoted, and the evidence that is relied upon to prove government entrustment or direction. In particular, the Panel accepted that non-commercial behaviour could be evidence of government entrustment or direction.

The Panel then moved to discuss the relevance of non-cooperation in a government entrustment or direction analysis. In this regard, it found that "uncooperative behaviour" may be taken into account by an investigating authority when weighing the evidence and facts before it. It also stated that, albeit the ASCM did not contain text similar to Annex II to the WTO ADA "a similar significant degree of cooperation is to be expected of interested parties in a CV duty investigation."[128] It further stated that

> "the possibility of drawing certain inferences from the failure to cooperate play[s] a crucial role in inducing interested parties to provide the necessary information to the authority. If we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile."[129]

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124 Panel report, *EC – Countervailing Measures on DRAM Chips*, para. 7.49.
125 *Id.*, para. 7.52.
126 *Id.*, para. 7.54.
127 *Id.*, para. 7.57 [footnote omitted].
128 *Id.*, para. 7.61.
129 *Ibid,* [footnote omitted].

Based on the above understanding, it examined the financial contribution determinations with respect to each programme investigated. In the case of the May 2001 programme, the Panel found that there was insufficient information to support the conclusion that several private banks were entrusted or directed to participate in it. Hence it concluded that the EU had made the financial contribution determination inconsistently with Article 1.1(a)1(iv). Concerning the October 2001 programme, the Panel reviewed the "entrustment or direction" determination of five banks that the Commission considered not to be public bodies. For four of the banks, even where the Government of Korea had less than 50% shareholding, the Panel agreed with the Commission's conclusions of existence of a financial contribution. In so doing, the Panel agreed to take into account various factors which jointly provided sufficient backing for the conclusion of entrustment or direction. Concerning the fifth bank, Citibank, the Panel found that the Government of Korea did not have any shareholding. However the Panel agreed that considerable weight had to be attributed to Citibank's lack of cooperation in the investigation, as well as other facts of record. In sum, the Panel confirmed that the financial contribution determinations for the October 2001 programme (as well as for the remaining three programmes investigated) were consistent with Article 1.1(a)1(iv) of the ASCM.

Determination and calculation of benefit

The second claim concerned the existence, and calculation, of benefit. Korea argued that it was inconsistent with Article 1.1(b) and 14 of the ASCM. The Panel set out its understanding of benefit, referring back to the Appellate Body determination in *Canada – Aircraft*. It then proceeded with the examination of the claim related to the determination of the existence of benefit for each of the five investigated programmes. Here, the purchase of Hynix bonds, the implementation of a restructuring programme at the company in a situation where no reasonable market investor would have invested and the provision of new loans at lower interest rates than earlier in 2001 were deemed to be benefits. The Panel sided with the EU in that against this background, "one would reasonably expect a commercial bank to have increased the interest rate to reflect the increased risk of losing the money invested."[130] In sum, with the exception of the benefit determination for the first programme, the Panel agreed that the determination of the existence of benefit was done in conformity with Article 1.1(b) of the ASCM.

The next step was to consider whether the calculation of the benefit was in accordance with Article 14 of the ASCM. The Commission had treated all financing granted to Hynix as grants after it found that no reasonable investor would have provided funds to Hynix. The Panel flatly disagreed:

> "there is a basic problem with the EC's grant methodology, and that is, simply put that a loan, a loan guarantee, a debt-to-equity swap that requires the recipient to repay the money or to surrender an ownership share in the company is not the same as a grant and can not reasonably be considered to have conferred the same benefit as the provision of funds without any such obligation. [...] We note that, in a benefit analysis, it is the perspective of the recipient that is important, not that of the provider of the financial contribution. In that sense, we find erroneous the starting point of the EC's calculation of the amount of benefit, which focuses on the expectation of the provider of the funds to see his money back. The question of benefit is not about the cost to the provider of the financial contribution, it is about the benefit to the recipient."[131]

While acknowledging that finding market benchmarks in accordance with the guidelines of Article 14 might have been difficult in that particular investigation, in the Panel's view

> "[a]ny methodology used must [...] reflect the fact that the situation of Hynix is less favourable in case it has to repay the money provided, or dilute the ownership of existing shareholders, compared to the situation that it could keep the money provided in the form of a grant."[132]

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130 *Id.*, para. 7.208.

131 *Id.*, para. 7.212.

132 *Id.*, para. 7.213.

As a result, the Panel stated that the EU's calculation of the benefit conferred through the programmes was inconsistent with Articles 1.1(b) and 14 of the ASCM.

Determination of injury and causation

Concerning the EU's causation and non-attribution determinations, Korea put forward several arguments in support of its allegation of violation of Article 15.5 of the ASCM. Korea first argued that the EU had improperly determined the existence of causation. The Panel stated that Korea had failed to establish that there was an absence of coincidence between absolute import volume and the injury to the domestic industry. Regarding non-attribution, the Panel first recalled that according to the Appellate Body an investigating authority must separate and distinguish the injury caused from other known factors. The Panel stated that Article 15.5 does not impose any particular methodology but that it did

> "not suffice for an investigating authority merely to 'check the box'. An investigating authority must do more than simply list other known factors, and then dismiss their role with bare qualitative assertions, such as 'the factor did not contribute in any significant way to the injury', or 'the factor did not break the causal link between subsidized imports and material injury.' In our view, an investigating authority must make a better effort to quantify the impact of other known factors, relative to subsidized imports, preferably using elementary economic constructs or models. At the very least, the non-attribution language of Article 15.5 requires from an investigating authority a satisfactory explanation of the nature *and extent* of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports."[133]

Based on this understanding of Article 15.5, the Panel reviewed the Commission's analysis and conclusions with respect to various factors. In several occasions, the Panel found that while the Commission had found that a given factor had caused injury to the domestic industry, e.g. the economic downturn or non-subsidised imports from Samsung, there was no satisfactory explanation of the nature and extent of the injurious effects of those factors, as distinguished from the injurious effects of subsidised imports. In several occasions, the Panel noted that the record was "devoid of even elementary quantitative analysis of the importance of the economic downturn, or a thorough qualitative analysis of the nature and extent of this factor."[134] In light of the above, the Panel found that the non-attribution analysis did not conform to the requirements of Article 15.5 of the ASCM.

The Panel report was not appealed by the parties.

Implications for EU law and practice

Implications for EU law

In the view of the evaluation team, the Panel's findings do not require any changes in the two basic Regulations.

Implications for EU practice

Certain changes in standard EU TD practice should be the consequence of some of the matters raised in this dispute.

Concerning the determination of the existence of entrustment or direction, the Panel accorded a considerable degree of discretion to investigating authorities and at the same time provided useful guidelines to guide such an analysis and determination. Precisely, it clarified that informal or implicit means of direction can be valid. Regarding the criteria to determine the existence of direction or entrustment, the role of a private actor's non-cooperation in a proceeding as an

133 *Id.*, para. 7.405.

134 *Id.*, paras. 7.413, 7.420, 7.427 and 7.434.

indication for being entrusted by the government with the operation of a subsidy scheme is particularly noteworthy. For future cases, it is recommended that the Commission compile a list of factors, based on past cases (not only of the EU but also other countries using CV measures) which could be considered as indicators for entrustment or direction. Factors to be included would be non-commercial behaviour or non-cooperation. The purpose of such list would be to provide guidance to case handlers in determining entrustment.

Concerning the calculation of the subsidy, the Panel expressed disagreement with the Commission's treatment of all financing – regardless of the form which took – as grants.[135] It is noted that the *DRAMs* dispute concerned an extreme case, where the Commission had considered that a government loan was provided in a situation where no market lender or investor would have provided funds, and had therefore taken the view that the total amount of funding had to be considered as a grant. The evaluation team considers that such interpretation is within the Commission's discretionary power. At the same time, such an interpretation would have to be explained in detail in the regulations.

With regard to the analysis of the state of the domestic industry, the Panel stated that all factors listed under Article 15.4 ASCM must be analysed. This is now the Commission's policy.

Concerning the non-attribution analysis, in several occasions the Panel stated that a satisfactory explanation of the nature and extent of the injurious effects of other known factors, as distinguished from the injurious effects of subsidised imports, was not provided. The Panel stated that a thorough qualitative analysis was required but also expressed the usefulness of using elementary quantitative analysis to support non-attribution analysis and determinations. Methodological issues of the non-attribution analysis are further discussed, and recommendation provided, in section 5.1.5 below.

3.2.2.2 DS337 Anti-Dumping Measures on Farmed Salmon from Norway, Norway v European Communities

This dispute concerned an AD determination made by the EU against *farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen* from Norway. The AD investigation was initiated on 23 October 2004, upon a complaint lodged by the EU Salmon Producers' Group. Provisional measures were imposed by the Commission following preliminary determinations of dumping, injury and casual link. Definitive measures were imposed on 17 July 2006 through Council Regulation 85/2006 (the definitive regulation) and took the form of a system of minimum import prices and fixed duties for six presentations of farmed salmon.

Norway's claims concerned both substantive as well as procedural matters. The substantive claims included: (i) the identification of the product under consideration; (ii) the definition of the domestic industry; (iii) the calculation of the margin of dumping; (iv) the findings of injury and causation; and (v) the remedies imposed on dumped products (i.e., the MIPs and the fixed duties). The procedural claims relate to the WTO ADA requirements of disclosure of non-confidential information and of explanation of the determinations. In total, 37 claims were addressed by the Panel, of which 22 were granted and 15 rejected.

[135] This point of view was subsequently confirmed by the Appellate Body in *Japan – DRAMs from Korea*. See Appellate Body report, paras. 177-178.

Disclosure of non-confidential information

The first procedural claim concerned the violation of Article 6.4 of the WTO ADA relating to disclosure of non-confidential information. Norway claimed that the EU violated Article 6.2 and 6.4 of the WTO ADA because it failed to disclose non-confidential information contained in the record of the investigation. In particular, according to Norway, the non-confidential record of the proceeding that was available at the Commission's premises failed to include a number of documents that were filed by interested parties. In addition, Norway claimed that, in the context of the panel proceedings, the EU presented certain exhibits that contained information that was not before the investigating authority. Norway claimed that such exhibits should either be excluded from the panel proceedings or, in the alternative, that the EU should be found to be in violation of Article 6.4 for failing to disclose the information.

The Panel examined Article 6.4 of the WTO ADA. In interpreting the wording of the provision, the Panel concluded that

> "information which relates to issues which the investigating authority is required to consider under the ADA, or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation presumptively falls within the scope of Article 6.4".[136]

The Panel also stated that

> "unless information submitted to the investigating authority is rejected, that information must remain in the investigating authorities' files, and if it is relevant, not confidential, and used by the investigating authority […], interested parties must be given timely opportunities to see it".[137]

Assessing the EU's defence that, in relation to certain documents that were not included in the investigation file, no non-confidential summaries were provided by the interested parties, the Panel concluded that the EU "did not violate Article 6.4 by failing to provide timely opportunities for interested parties to see such confidential information".[138] However, the Panel also concluded that, to the extent that the information is not confidential, the EU violated Article 6.4 by failing to provide timely opportunities for interested parties to see such information. This finding related in particular to documents providing information on the question of "Community interest" and a letter submitted by a consultant regarding the domestic industry.

Disclosure of essential facts

The second procedural claim concerned the alleged violation of Articles 6.9 and 6.2 of the WTO ADA on disclosure of essential facts. In particular, Norway alleged that the EU failed to disclose the essential facts that formed the basis for the decision to impose duties as required by Article 6.9 of the WTO ADA, depriving Norway of the opportunity to defend its interests, as required by Article 6.2. Norway's claim related in particular to four instances: dumping, the definition of domestic industry, causation and non-attribution of injury to other factors and the remedies imposed.

The Panel examined the wording of Article 6.9 of the WTO ADA, and considered the obligations therein to be "straightforward". Addressing Norway's claims concerning disclosure of essential facts affecting the dumping margin (which changed for three Norwegian exporters between the disclosure and the definitive regulation) and the MIP, the Panel found that Article 6.9 does not require more than one disclosure prior to the imposition of definitive measures. On this basis, the Panel rejected Norway's arguments and concluded that the EU's disclosure of essential facts regarding dumping by three exporters and the MIP was not inconsistent with Article 6.9 of the WTO ADA. The Panel also rejected Norway's claim under Article 6.2 of the

136 Panel report, *EC – Salmon (Norway)*, para. 7.768.
137 *Id.*, para. 7.771.
138 *Id.*, para. 7.773.

WTO ADA. The Panel found that there was no violation of Articles 6.9 and 6.2 also in relation to disclosure of essential facts affecting the definition of domestic industry, causation and non-attribution of injury to other factors. In making these findings, the Panel, examining the definition of the word "fact" and the concept of "essential facts", disagreed with Norway's view that the investigating authority must disclose the evidence on which it has relied in reaching the factual conclusions. The Panel concluded that not every element of factual evidence must be disclosed and found that the EU did not act inconsistently with the WTO ADA.

Norway's substantive claims related to: (i) the determination of the product under consideration; (ii) the definition of domestic industry; (iii) sampling; (iv) the calculation of the dumping margin; (v) the determination of injury; (vi) causation; and (vii) the imposition of minimum import prices.

Determination of the product under consideration

Norway claimed that the EU's determination of the "product under consideration" was inconsistent with Articles 2.1 and 2.6 of the WTO ADA. As a consequence, Norway argued, the EU initiated the investigation, and determined the existence of dumping and injury, on the basis of a flawed determination of the product under consideration, resulting in consequent violations of Articles 2.1, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 5.1 and 5.4 of the WTO ADA. In particular, Norway argued that, according to Article VI:1 of the GATT 1994, dumping occurs when the export price of a product is lower than the normal value of the "very same product".[139] Likewise, Article 2.1 of the WTO ADA defines dumping in terms of a comparison between the prices of the export product (i.e., the "product under consideration") and the "like product". In addition, Norway recalled that Article 2.6 defines the "like product" as a product that is "identical" or has "characteristics closely resembling" those of the "product under consideration". Accordingly, Norway claimed that the pricing comparison necessary to establish the existence of dumping must be made between "identical" products or products that have "closely resembling" characteristics. Norway argued that this obligation implies that, where an authority wishes to group multiple products together in a single investigation, any given product forming part of "like product" must be "like" each and every product forming part of the product under consideration. In this regard, Norway argued that the assessment of the conditions of whether likeness exists between the product under consideration and the allegedly "like product" must be made for each product "as a whole", and not just for individual sub-product categories.

In examining Norway's claim, the Panel first noted that there is no specific provision in the WTO ADA that concerns the selection, description, or determination of a product under consideration. The Panel then analysed Articles 2.1 and 2.6 of the WTO ADA. In relation to the first one, which defines when a product is to be considered as dumped, the Panel stated that, while this provision refers to a product as being dumped, nothing in the text of Article 2.1 provides any guidance as to what the parameters of that product should be. Instead, the Panel observed that certain contextual provisions in the ADA, such as Article 6.10, suggested that "whatever the parameters of a product in Article 2.1 may be, the concept was not so limited as contended by Norway". The Panel also observed that the Appellate Body had recognised that an investigating authority may divide a product into groups or categories of comparable goods for purposes of comparison of normal value and export price (the practice of "multiple averaging"). The Panel stated that neither of these would be necessary if Norway's view of the meaning of "a product" in Article 2.1 were the only permissible interpretation. On the basis of these considerations, the Panel concluded that

[139] *Id.*, para. 7.49.

> "while Article 2.1 establishes that a dumping determination is to be made for a single product under consideration, there is no guidance for determining the parameters of that product, and certainly no requirement of internal homogeneity of that product, in that Article".[140]

The Panel then considered Article 2.6, which defines the term "like product". In relevant part, the Panel stated that

> "even assuming Article 2.6 requires an assessment of likeness with respect to the product under consideration 'as a whole' in determining like product, [...] this would not mean that an assessment of 'likeness' between categories of goods comprising the product under consideration is required to delineate the scope of the product under consideration".[141]

According to the Panel, to say that the product under consideration must be treated "as a whole" in addressing the question of like product "does not entail the conclusion that the product under consideration must itself be an internally homogenous product."[142] In making the finding, the Panel further noted that Article 2.6 of the WTO ADA cannot be stretched to require that an investigating authority assess whether each category or group of goods within the product under consideration is "like" each other category or group of goods. Therefore, the Panel rejected Norway's arguments and concluded that Articles 2.1 and 2.6 of the WTO ADA do not require investigating authorities to ensure that, where the product under consideration is made up of categories of products, all such categories of products must individually be "like" each other, thereby constituting a single "product". The Panel also considered that past panel reports supported these conclusions.

Definition of domestic industry

Norway furthermore alleged that the EU's determination of the domestic industry was inconsistent with a number of provisions of the WTO ADA. In particular, Norway contended that the EU's determination of domestic industry excluded several categories of domestic producers (*inter alia*, processors) that it was required to include and, therefore, that the EU failed to define the domestic industry to include "domestic producers of the like product whose collective output of the product constitutes a major proportion of the total domestic production of those products", as required by Article 4.1 of the WTO ADA. In sum, the Panel concluded that the exclusion of entire categories of producers (in particular EU producers of fillets who did not also farm fish and producers of organic salmon) is not compatible with the definition of domestic industry under Article 4.1 of the WTO ADA. According to the Panel, the EU's approach to defining the domestic industry in this case "resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1".[143] The Panel also concluded that the EU's "determination of support for the application under Article 5.4 was based on information relating to a wrongly-defined industry, and is, therefore, not consistent with the requirements of that Article".[144]

Sampling

In relation to the sampling of foreign producers, Norway argued that, by excluding all non-producing exporters from its examination of dumping, and limiting its examination to ten Norwegian exporting producers, the EU acted inconsistently with the provisions of Article 6.10 of the WTO ADA. Norway contended, *inter alia*, that the EU was obliged under Article 6.10 to investigate the ten interested parties with the largest possible volume of exports, irrespective of whether these parties were producers, exporting producers or non-producing exporters.

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140 *Ibid.*
141 *Id.*, para. 7.53.
142 *Ibid.*
143 *Id.*, para. 7.118.
144 *Id.*, para. 7.124.

The Panel did not find that the EU acted inconsistently with Article 6.10 in relation to the exclusion of non-producing exporters of farmed salmon from the investigation. The Panel reviewed Article 6.10 of the WTO ADA, and, on the basis of a textual interpretation of Article 6.10, it concluded that

> "the ordinary meaning of the first sentence of Article 6.10 suggests that the 'known exporter[s] or producer[s]' that serve as the starting point for the selection of the interested parties investigated under either of the two limited investigation techniques described in the second sentence of Article 6.10, do not always have to be all known exporters and all known producers".[145]

The Panel did not consider the EU's interpretation of Article 6.10 to be "impermissible"[146] and it rejected Norway's claim that "the investigating authority's selection of the ten interested parties investigated was inconsistent with Article 6.10 because the investigating authority excluded, *ab initio*, all non-producing exporters from even being considered for selection".[147] In relation to Norway's claim that the producers and producer-exporters selected did not account for the largest volume of exports that could be reasonably investigated because two producers, which exported more than several of the investigated companies, were left out of the sample, the Panel upheld Norway's claim only in relation to the exclusion of one company from the sample. The Panel's reasoning was based on an interpretation of Article 6.10.1 of the WTO ADA. In relation to the company in respect of which a violation was found, the EU argued that such company was excluded by the investigation because, at the time of the selection of companies, there was no specific information before the investigating authority in respect of that company's volume of exports to the EU. The Panel noted that because the investigating authority knew that such company was among the largest producers in Norway, and that the characteristics of the Norwegian salmon industry were such that it was likely that a large proportion of the company's production would be exported to the EU, "it was incumbent on the EU investigating authority to try to remove any doubts" about that company's exports.[148]

Determination of dumping margins

Norway made several claims in relation to the determination of the dumping margins. These related, inter alia, to certain aspects (the application of the 5% representative sales test and the less than 10% profitable sales test) of the determination of the SGA and profit margin for the purpose of determining the constructed normal value. In Norway's view, the EU had incurred in a violation of Article 2.2.2 of the WTO ADA. The first question examined by the Panel was whether an investigating authority may calculate the amounts of SGA cost and profit to use in the construction of normal value by disregarding data pertaining to domestic sales made in "low volumes", in particular, sales found not to be made in "sufficient quantities" within the meaning of footnote 2 to Article 2.2. After examining the text of Article 2.2.2, the Panel concluded that

> "the text of Article 2.2.2, when read in the context of Article 2.2, suggests in clear terms that Members are not entitled to disregard data pertaining to low-volume sales (within the meaning of Article 2.2) from the identification of appropriate amounts of SG&A cost and profit to use in the construction of normal value."[149]

The Appellate Body report in *EC – Tube or Pipe Fittings* supported the Panel's determination. In light of this finding, the Panel concluded that "that the investigating authority acted inconsistently with the EC's obligations under Article 2.2.2 of the AD Agreement when it disregarded the actual SG&A and domestic profit margin data pertaining to some or all sales of these companies because of the low volume of those sales."[150] The second question before the

145 *Id.*, para. 7.128.
146 *Id.*, para. 7.181.
147 *Ibid.*
148 *Id.*, para. 7.203.
149 *Id.*, para. 7.298.
150 *Id.*, para. 7.309.

Panel was whether profitable sales may be treated as not being made in the ordinary course of trade for the sole reason that they are made in low volumes. The Panel did not find that the less than 10% profitable sales test was not provided for in Article 2.2.1 of the WTO ADA. In light of this, the Panel stated that "the drafters did not envisage that a low volume of above-cost sales could be determinative of whether such sales were made in the ordinary course of trade"[151] and that this test was "an impermissible means of determining whether domestic sales are in the ordinary course of trade."[152] Based on the findings concerning these two questions, the Panel found that in applying both tests the EU had acted in violation of Article 2.2.2. Both of these tests had been the EU's consistent practice.

Determination of injury

An important claim regarding injury determination concerned an alleged violation of (*inter alia*) Articles 3.1 and 3.2 of the WTO ADA. Norway claimed that the EU failed to determine correctly the volume of dumped imports to be considered in its injury analysis. In particular, Norway's claims focused on two issues: (1) the EU's treatment of imports from Nordlaks, for which a *de minimis* margin of dumping was calculated, as dumped imports in making its injury determination and (2) the treatment of imports attributable to producers/exporters that were not individually examined in making the dumping determination as "dumped imports" for purposes of the injury determination. The Panel found violations based on both claims and concluded that the EU erred in treating imports attributable to a company for which a *de minimis* margin was calculated as dumped and in treating all imports from unexamined producers and exporters as dumped, in the context of its injury determination. The Panel thus concluded that the EU acted inconsistently with Articles 3.1 and 3.2 of the WTO ADA in considering the volume of dumped imports. With particular reference to the first argument, the Panel found that "imports attributable to a producer or exporter for which a *de minimis* margin of dumping is calculated may not be treated as 'dumped' for purposes of the injury analysis in that investigation".[153] The Panel pointed to Article 5.8 of the WTO ADA in support of its finding. This article provides that where authorities determine that a margin of dumping is *de minimis*, there shall be "immediate termination". The Panel argued that, given that a finding of *de minimis* is effectively a finding that there is no legally relevant dumping by the producer or exporter in question, imports attributable to such producer or exporter may not be treated as "dumped" imports for any aspect of that investigation. The Panel also recalled that earlier panels had made statements suggesting a similar conclusion.

Determination of causal link

In relation to causation, Norway argued that the EU violated Article 3.1 and 3.5 of the WTO ADA in its causation determination by failing to ensure that injury caused by the following two other known factors was not improperly attributed to dumped imports: (1) the EU producers' increased costs of production, and (2) the surge of imports from Canada and the USA. The EU contended, *inter alia*, that Norway had failed to make a *prima facie* case on these arguments.

The Panel examined Article 3.5 of the WTO ADA and noted that WTO case law clarifies that "while an investigating authority is required to consider the effects of other factors known to the investigating authority which may be causing injury to the domestic industry, there is no required method of analysis in undertaking that examination".[154] Assessing the arguments and the facts of the case, the Panel found that the EU's analysis failed to address Norway's argument that an increase in the EU industry's costs was a cause of losses incurred by the industry. The Panel also

151 *Id.*, para. 7.315.
152 *Id.*, para. 7.318.
153 *Id.*, para. 7.625.
154 *Id.*, para. 7.656.

concluded that Norway had successfully demonstrated that the EU acted inconsistently with Article 3.5 of the WTO ADA. Lastly, the Panel found that the provisional and definitive regulations failed to specify on which information the conclusion, as regards to the imports from the USA and Canada, was based. The Panel noted that the information at stake (which the EU claimed to have gathered in the context of a separate safeguard procedure) was not reflected anywhere in the published determinations and had not been brought before the Panel "in a way that it was available to and considered by the investigating authority in establishing the facts". The Panel concluded that the EU "failed to properly examine known factors other than the dumped imports which at the same time were causing injury to the domestic industry, and failed to ensure that the injuries caused by these other factors were not attributed to dumped imports, in violation of the requirements of Article 3.5 of the AD Agreement".[155]

Choice of measure

Norway made a number of claims of inconsistency in relation to the EU's imposition of AD measures in the form of fixed duties and MIPs. These related in relevant part to the calculation of the MIP. In particular, Norway alleged that (i) the MIPs imposed on investigated parties were greater than their respective normal values; (ii) the MIPs imposed on non-investigated parties were greater than the weighted average of the normal values calculated for the investigated parties; and (iii) the MIPs imposed on investigated parties were greater than their respective margins of dumping. Accordingly, Norway contended that the EU violated a number of provisions of Article 9 of the WTO ADA. Concerning the first matter, the Panel agreed with Norway in that the Commission had wrongly computed the non-dumped MIPs for all exporters (inappropriate adjustment to the CIF Community border level and unjustified use of a three year exchange rate). In addition, for one exporter, the Panel determined that the Commission incorrectly calculated the "non-dumped" MIPs for all six presentations of salmon because it erred in the calculation of this company's cost of production. Following these findings, the Panel stated that

> "To the extent that we have found that the 'non-dumped' MIPs calculated by the investigating authority were greater than the relevant normal values, greater than what they should have been or derived through the application of a flawed methodology, the investigating authority's finding that the 'non-injurious' MIPs were less than the 'non-dumped' MIPs rested on a flawed factual basis."[156]

Hence, in imposing the MIPs on the investigated parties at the level of the "non-injurious" MIPs, the EU acted inconsistently with Article 9.2 of the WTO ADA. The Panel also found that the MIPs imposed by the EU on the non-investigated parties were inconsistent with Article 9.4(ii). The Panel rejected Norway's claim related to the inconsistency of the fixed duties with Article 9 of the WTO ADA.

The panel's report was not appealed by any of the parties.

Implications for EU law and practice

Following the publication of the Panel's determination, which was not appealed by the EU, the contested AD proceeding was terminated and the measures repealed in July 2008. This decision was however based on the results of a partial interim review requested by some EU Member States rather than by the implementation of the Panel's finding and recommendations.

155 *Id.*, para. 7.669.
156 *Id.*, para. 7.727.

Implications for EU law
The Panel's determination covers a wide range of issues. In the view of the evaluation team, however, none of these require changes in the two basic Regulations.

Implications for EU practice
Some of the most important matters raised for the EU's future TD practice are as follows:

Regarding the definition of the domestic industry, the Panel determination interpreted Article 4.1 of the WTO ADA, giving useful indications for future investigations whether covering salmon or any other products. One of the key findings is that "th[e] wholesale exclusion of an entire category of producers from the domestic industry is not compatible with the definition of domestic industry as set out in Article 4.1." This means that any kind of producer whose output is the like good – regardless of whether it is a processor or assembler, etc. – must, in principle, be included in the domestic industry definition.

Concerning the determination of the volume of dumped imports for the injury analysis, the Panel clarified that imports which have a *de minimis* margin of dumping, as well as imports from all unexamined producers and exporters, must not be treated as dumped imports in the injury analysis. The Commission has already amended the practice accordingly (see section 5.1.4.4).

Regarding the 5% representativity test and the 10% rule, both of these were found to be in violation of WTO rules and required a change in practice. In response, the two rules have been abandoned in practice since 2009.

With respect to the analysis of factors affecting the domestic industry other than dumped imports, the Panel found also in this case deficiencies in the EU's non-attribution analysis. The recommendations made in the context of *EC – Countervailing Measures on DRAM Chips (Korea)* at the end of the previous section as well as in section 5.1.5.2 below therefore apply also in this case.

Finally, concerning rights of defence, parties should be granted timely opportunities to see any information which is relevant, non-confidential and which is used by the Commission. In particular, this right should cover information for which no confidential treatment has been requested by the party submitting it.

3.2.2.3 DS397 Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, China v European Communities

This dispute, triggered by the EU's measures taken in *Fasteners (of iron or steel*, AD 525), has been of major importance for EU TDI and therefore is treated in some degree of detail in this section. The dispute had two dimensions: First, China claimed that the EU ADR[157], in particular Article 9(5) thereof, violated "as such" Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the WTO ADA, Article I:1 of the GATT, as well as Article XVI:4 of the WTO Agreement (the "as such" claims). Second, China claimed that the imposition by the EU of definitive AD duties on certain iron or steel fasteners from China through Council Regulation (EC) No. 91/2009 violated a number of WTO rules (the "as applied" claims) with regard to both substantive and procedural matters. The substantive claims include: (i) standing and the definition of the domestic industry; (ii) the

[157] At the time the dispute was initiated the EU Basic Anti-dumping Regulation was contained in Council Regulation (EC) No. 384/96. This regulation was repealed after the establishment of the Panel and replaced by Council Regulation No. 1225/2009, the ADR.

"product under consideration" and "like product"; (iii) dumping; (iv) injury; and (v) causation. The procedural claims relate to, *inter alia*, disclosure and confidentiality requirements.

In total, the Panel addressed 19 different claims, of which it granted eight and rejected 11.

The analysis first addresses the Panel's and Appellate Body's treatment of China's "as such" claims, continuing then with the findings on the most important "as applied" claims (both in relation to substantive claims and procedural claims).

"As such" claims

Individual treatment
China's "as such" claims related to the treatment granted by the ADR to NMEs, particularly Article 9(5) that provides that an AD duty will normally be determined for each supplier except, *inter alia*, where the provisions for NMEs apply, in which case a single "country-wide" duty will apply to all imports from the country. As an exception to this latter rule, Article 9(5) of the EU ADR allows an individual duty to be specified for exporters from certain NMEs that demonstrate to meet certain requirements (the individual treatment test).

China argued that Article 9(5) ADR is inconsistent with Articles 6.10, 9.2, 9.3 and 9.4 of the WTO ADA and Article I:1 of the GATT. In relation to the claim under Article 6.10, China argued that Article 6.10 requires investigating authorities, as a rule, to calculate an individual margin of dumping for each exporter/foreign producer of the allegedly dumped imports. The sole exception to this principle, according to China, is the use of sampling. Therefore, China alleged that, by providing that exporters from NMEs are subject to a country-wide dumping margin unless they are able to demonstrate that they meet the five criteria of Article 9(5), this provision violates Article 6.10 of the WTO ADA.

The Panel first analysed the scope and operation of Article 9(5) ADR and concluded that this provision concerned not only the imposition of AD duties (as the EU was alleging), but also the calculation of the dumping margins (as argued by China) and that the result of the individual treatment test in Article 9(5) ADR "determined the nature of the margin calculation the EU authorities will undertake, either individual or country-wide".[158]

In relation to the specific claim brought by China under Article 6.10 of the WTO ADA, the Panel noted that the question was then whether the use of the sampling technique constituted the only exception to the general obligation to calculate individual margins for each known producer or exporter set out in the first sentence of Article 6.10 of the WTO ADA. The Panel analysed Article 6.10 of the WTO ADA, as well as past case law on which the EU relied and, rejecting the EU's view, it concluded that Article 9(5) is not consistent with Article 6.10 of the WTO ADA "in that it conditions the calculation of individual margins for producers from NMEs on the fulfilment of the IT (individual treatment) test".[159]

In this respect, the EU asked the Appellate Body to reverse the Panel's finding of inconsistency with Article 6.10, arguing that it was premised on an incorrect understanding of the scope of Article 9(5) ADR. According to the EU, Article 6.10 of the WTO ADA addresses the determination of margins of dumping, while Article 9(5) is directed at the imposition of AD duties. The Appellate Body disagreed, after examining Article 9(5) alone and in context. Thus the

158 Panel report, *EC – Fasteners (China)*, para. 7.77.
159 *Id.*, para. 7.98.

Appellate Body confirmed the Panel's finding that that provision not only concerned the imposition of AD duties but also the calculation of dumping margins.

China's claim in relation to the alleged violation of Article 9.2 of the WTO ADA was based on similar considerations. In particular, China argued that, just as Article 6.10 required the calculation of individual dumping margins, Article 9.2 of the WTO ADA required the authorities to name individual "suppliers" in the imposition of the duties. Thus, China argued that, by subjecting the assignment of individual duty rates to the fulfilment of certain conditions, Article 9(5) ADR violated Article 9.2 of the WTO ADA.

After having concluded that the term "supplier" under Article 9.2 of the WTO ADA was equivalent to "exporter" or "producer" under Article 6.10 of the WTO ADA, the Panel concluded that

> "Article 9.2 of the AD Agreement require[d] the investigating authorities to name the individual suppliers, that is, the producers or exporters, on whom anti-dumping duties are imposed, except that where the number of producers or exporters is so large that it would be impracticable to do so, the authorities may name the supplying country"[160]

and that these provisions must be read

> "in parallel with the requirements of Article 6.10 of the AD Agreement relating to the determination of dumping margins".[161]

The Panel thus concluded that Article 9.2 of the WTO ADA did not allow the imposition of a single country-wide AD duty in an investigation involving a NME. Recalling that Article 9(5) ADR required that a country-wide duty be imposed with respect to producers or exporters from NMEs unless such producers or exporters show, on the basis of the criteria set out in that provision, that they were independent from their State, the Panel concluded that Article 9(5) ADR violated Article 9.2 of the WTO ADA.

Upon appeal by the EU of findings relating to the violation of Article 9.2 of the WTO ADA, the Appellate Body examined the Panel's finding that this provision did not allow the imposition of a single country-wide AD duty in an investigation involving an NME country. After carefully examining the text of Article 9.2, the Appellate Body rejected the EU's contention that that provision does not contain a mandatory rule regarding the imposition of individual AD duties. The Appellate Body thus found that the requirement under Article 9.2 that AD duties be collected in appropriate amounts in each case and from all sources *relates to* the individual exporters or producers under investigation. Regarding the interpretation of the term "appropriate amounts", the Appellate Body found that "unless sampling is used, the *appropriate* amount of an anti-dumping duty in each case is one that is specified by supplier".[162] The Appellate Body also held that Article 9.2, second sentence, required the specification of AD duties by individual suppliers. The Appellate Body then moved to interpret the term "impracticable" in the third sentence. Under it, a Member is allowed to name "the supplying countries involved" instead of the "suppliers". The EU argued that Article 9(5) ADR was covered by this provision. The Appellate Body examined Article 9.2, third sentence, together with Article 6.10, finding that the exceptions under both provisions "refer to a situation where an authority determines dumping margins based on sampling."[163] This was not the case under Article 9(5) ADR, where the justification for not naming individual exporters was rather the fact that they had not been granted individual treatment. In any event, the Appellate Body did not reject the EU's argument on the above basis, but rather on the fact that the EU argued before the Appellate Body that

160 *Id.*, para. 7.112.
161 *Id.*
162 Appellate Body report, *EC – Fasteners (China)*, para. 339.
163 *Id.*, para. 344.

imposing individual AD duties on suppliers that are all related to the State would not be effective (instead of "impracticable", as set forth in Article 9.2, third sentence). The Appellate Body stated that the notion of "ineffective" is not included in the notion of "impracticable"; hence concluding that Article 9.2, third sentence, of the WTO ADA did not cover Article 9(5) ADR.

The Appellate Body then considered EU's appeal of the Panel's finding that the IT test neither served the purpose of establishing whether the State and the exporters or producers are in fact a single entity, nor it identified the source of price discrimination. The EU stated that its view was supported by findings of the panel *Korea – Certain paper*. First, the Appellate Body examined how Article 9(5) ADR operated and compared it to the obligations under Article 6.10 and 9.2 of the WTO ADA. The Appellate Body found that Article 9(5) established a presumption that producers or exporters that operate in NME countries are not entitled to IT, unless they prove that they satisfy certain criteria. By contrast under Articles 6.10 and 9.2

> "it is the investigating authority that is called upon to make an objective affirmative determination, on the basis of the evidence that has been submitted or that it has gathered in the investigation, as to who is the known exporter or producer of the product concerned. It is, therefore, the investigating authority that will determine whether one or more exporters have a relationship with the State such that they can be considered as a single entity and receive a single dumping margin and a single anti-dumping duty."[164]

As a result, the Appellate Body stated that

> "[e]ven accepting in principle that there may be circumstances where exporters and producers from NMEs may be considered as a single entity for purposes of Articles 6.10 and 9.2, such singularity cannot be presumed; it has to be determined by the investigating authorities on the basis of facts and evidence submitted or gathered in the investigation."[165]

The Appellate Body did not find support for such a presumption in any other legal provision of the WTO ADA or Protocol of Accession of China. Nor did the economic structure of China justify the general presumption under Article 9(5) ADR.

The Appellate Body then moved to examine the issue of whether in NME countries, the State and exporters can be considered as a single entity for the purposes of Articles 6.10 and 9.2 of the WTO ADA. Here, the Appellate Body noted a Panel finding in the sense that the IT test in Article 9(5) ADR did not concern the structural and commercial relationship between distinct legal entities – test developed by the panel in *Korea – Certain paper* – but with the role of the State in the way business is conducted in a Member country. Moreover, the Panel found that the IT was not concerned with ascertaining whether the State was the "source of price discrimination". The Appellate Body sided with this view. Interestingly, the Appellate Body presented a non-exhaustive list of situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity":[166]

> "(i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output."[167]

As a matter of example, since the WTO ADA addresses the pricing behaviour of exporters, the Appellate Body stated that

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164 *Id.*, para. 363.
165 *Id.*, para. 364.
166 *Id.*, para. 376.
167 *Ibid.*

> "if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the *Anti-Dumping Agreement* and a single margin and duty could be assigned to that single exporter."[168]

By contrast, the Appellate Body found that the IT test had "a different function" and that it could not "be used to determine whether distinct exporters are sufficiently integrated with each other or with the State to constitute a single exporter."[169] Out of the five criteria in the IT test, the Appellate Body found that only one "directly relates to the structural relationship of the company with the State: the requirement that the majority of the shares belong to private persons and that the State officials holding management positions be in the minority."[170] The Appellate Body also stated that "[a]nother criterion relates to the State interference with prices and output."[171] All other criteria, instead, related to State interference with exporters or State intervention in the economy *in general* and were

> "likely to lead to the denial of individual treatment with respect to exporters that have little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State."[172]

Importantly, the Appellate Body noted that the test in *Korea – Certain paper* could not capture all situations in which the State effectively controls or materially influences and coordinates several exporters such that they can be considered a single entity. When assessing whether the State and certain exporters constitute a single entity, in addition to the circumstances examined by the panel in *Korea – Certain paper* an investigating authority

> "might have to take into account factors and positive evidence other than those establishing a corporate or commercial relationship in assessing whether the State and a number of exporters are a single entity and that, therefore, the State is the source of price discrimination. These, for instance, may include evidence of State control or instruction of, or material influence on, the behaviour of certain exporters in respect of pricing and output. These criteria could show that, even in the absence of formal structural links between the State and specific exporters, the State in fact determines and materially influences prices and output."[173]

The Appellate Body finally noted that even if it had correctly been determined that particular exporters that are related constitute a single supplier, Articles 6.10 and 9.2 of the WTO ADA would require the determination of an individual margin of dumping for the single entity, based on a comparison of the normal value in the surrogate country with "the average export prices of each individual exporter, and the imposition of a corresponding single anti-dumping duty."[174] This the EU does not do; a country-wide margin and duty is calculated.

For all of the above reasons, the appealed Panel findings were upheld.

"As applied" claims

Besides attacking the legislation itself, China put forward a number of claims in relation to the EU definitive AD duties on certain iron or steel fasteners from China, embedded in Council Regulation (EC) No. 91/2009. In particular, these related to (i) standing and the definition of the domestic industry; (ii) the "product under consideration" and "like product"; (iii) dumping; (iv) injury; (v) causation; and (vi) disclosure and confidentiality.

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168 *Ibid.*
169 *Id.*, para. 377.
170 *Id.*, para. 378.
171 *Ibid.*
172 *Ibid.*
173 *Id.*, para. 381.
174 *Id.*, para. 383.

Domestic industry standing

In relation to the standing claim, China claimed that the Commission determination on standing was inconsistent with Article 5.4 of the WTO ADA on three main arguments: (i) the Commission failed to examine whether the figure for total EU production was reliable and correct; (ii) the Commission failed to examine, prior to the initiation of the investigation, whether the application had been made by or on behalf of the domestic industry; and (iii) the Commission's decision on standing was wrong since the EU producers supporting the application accounted for less than 25% of total production. The Panel rejected China's arguments and the claim that the Commission's standing determination was inconsistent with Article 5.4 of the WTO ADA. The Panel also rejected China's claims that the Commission's approach in the definition of domestic industry violated Articles 4.1 and 3.1 of the WTO ADA.

However, upon China's appeal the Appellate Body reversed the Panel determination, finding on appeal that the EU had breached Articles 4.1 and 3.1 in defining a domestic industry comprising producers accounting for 27% of the total estimated EU production of fasteners. In particular, the Appellate Body rejected the linkage between Articles 4.1 and 5.4. The Appellate Body also affirmed that investigating authorities must ensure that the process of defining the domestic industry must not give rise to a "material risk of distortion". The "active exclusion of certain domestic producers" is likely to lead to a finding of violation of Article 4.1. The Appellate Body found that by

> "defining the domestic industry on the basis of the willingness to be included in the sample, the Commission's approach imposed a self-selection process [...] that introduced a material risk of distortion [..., and that] the unwillingness to be part of the sample should not affect whether a producer should be part of the domestic industry"[175].

Product definition

China also claimed that, in the investigation which led to the definitive AD measure at issue, there was great uncertainty concerning the precise scope of the "product under consideration" and whether fasteners produced by the EU industry were comparable to fasteners produced by the producer in the analogue country (i.e., India), and to those produced in China and exported to the EU market. According to China, the EU acted inconsistently with Articles 2.1 and 2.6 of the WTO ADA by including in the scope of the product under consideration both standard and special fasteners as "like" products, despite apparent differences in characteristics and uses. According to China, by concluding that fasteners produced and sold by the EU industry, fasteners produced and sold on the domestic market in India and fasteners produced in China and sold to the EU were "alike", the EU acted inconsistently with Articles 2.1 and 2.6 of the WTO ADA. China based this claim on the argument that Article 2.1 of the WTO ADA, in combination with Article 2.6,

> "sets forth an obligation concerning the definition of the product concerned, such that the product concerned can only include products that are 'like', in order to ensure that the dumping determination is based on a comparison between products which are 'like'".[176]

In its analysis, the Panel considered separately the issues of "product under consideration" and "like product" under the WTO ADA and rejected China's view that Articles 2.1 and 2.6

> "must be interpreted to require the European Union to have defined the product under consideration to include only products that are 'like'".[177]

Thus, the Panel rejected China's claim that the product under consideration identified by the EU was inconsistent with Articles 2.1 and 2.6 of the WTO ADA.

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175 Appellate Body report *EC – Fasteners (China)*, paras. 427 and 429, respectively.

176 Panel report, *EC – Fasteners (China)*, para. 7.246.

177 *Id.*, para. 7.278.

Dumping determination

China claimed that the Commission violated Article 2.4 of the WTO ADA for two reasons: first, because it did not make the comparison between the normal value and the export price on the basis of product categories based on "Product Control Numbers" ("PCNs"), which the Commission itself had defined in requesting information; and second, because it failed to make adjustments for quality differences and for certain differences in physical characteristics, which were included in the PCNs, but not reflected in the factors on which product categories for the comparison were ultimately based and which affected price comparability.

The Panel considered the two arguments and rejected China's claims. In relation to the first argument, the Panel, *inter alia*, disagreed with China's argument that

> "if the Commission asked the interested parties to submit information on the basis of PCNs it must be because the Commission considered each and every element of PCNs to represent a difference in physical characteristics which would necessary affect price comparability".[178]

The Panel, instead, noted that

> "the fact that the Commission sought information on the basis of PCNs certainly suggests that the EU authorities considered, at least in the early stages of the investigative process, that these elements might affect price comparability, and that they therefore envisioned comparisons based on the PCNs in order to avoid possible problems of non-comparability".[179]

The Panel noted, however, that since the Indian producer (India was chosen as the "third analogue country" for the determination of normal value) did not submit its information on the basis of PCNs, "the Commission was unable to make the comparison between the normal value and the export price on the basis of PCNs, and decided on an alternative basis for grouping the product into comparable categories".[180] The Panel used, *inter alia*, these conclusions to reject China's second argument in relation to the violation of Article 2.4 of the WTO ADA. In particular, the Panel found that

> "[h]aving concluded that the European Union was not required to carry out its comparison on the basis of the PCNs, partly because the PCN elements do not necessarily reflect differences affecting price comparability and there is no evidence to demonstrate that they do in this case, we consider that the argument that the Commission should have considered whether the elements excluded from the comparison nonetheless required adjustments does not amount to a prima facie case of violation of Article 2.4".[181]

In relation to the same claim, China also argued that the EU had violated Article 2.4 of the WTO ADA by not making an adjustment for quality differences between the Chinese fasteners and those sold by the Indian producer. The Panel, however, rejected China's claims (which were based, *inter alia*, on an interpretation of a recital of Council Regulation (EC) No. 91/2009) that the EU acted inconsistently with Article 2.4 of the WTO ADA by not making the necessary adjustments in its dumping determination.

The Panel's findings regarding aspects of the dumping determination were appealed by both parties. The Appellate Body examined the EU's appeal of the findings under Articles 6.4 and 6.2. The EU's substantive argument was that the information on the grouping of products was not "information" within the meaning of Article 6.4. By contrast, the Appellate Body found that products types constitute a necessary step in an AD investigation (fair comparison). In light of the facts, the product types were "a critical piece of information" for the purpose of ensuring fair comparison. Without knowing what constituted product types, "it would be difficult if not

178 *Id.*, para. 7.300.
179 *Id.*, para. 7.301.
180 *Ibid.*
181 *Id.*, para. 7.306.

impossible, for foreign producers to request adjustments that they consider necessary to ensure a fair comparison."[182] In sum, because information on product types was used in the dumping determination and was indispensable to the exporters' presentations of their cases, it constituted information within the meaning of Article 6.4, and by not providing timely opportunities to see it, the EU incurred in a violation of that provision. The Appellate Body then went on to confirm the violation of Article 6.2, after rejecting the EU's argument that the Panel's reading of this provision "would effectively render redundant *all* of the other provisions under Article 6."

The Appellate Body then examined China's appeal of the Panel's finding that the EU did not fail to conduct a fair comparison under Article 2.4. The Appellate Body disagreed with the Panel. The Appellate Body found that

> "because the Commission did not clearly indicate the product types used for purposes of price comparisons until very late in the proceedings, the European Union acted inconsistently with its obligations under Article 2.4 by depriving the Chinese producers of the ability to request adjustments for differences that could have affected price comparability."[183]

While reversing the Panel's finding, the Appellate Body disagreed with other arguments submitted by China, including that investigating authorities must evaluate any identified differences, regardless of whether a request for adjustment had been made. In the view of the Appellate Body, because the differences between the products used for computing normal value and those for determining the export price may be numerous, accepting the Chinese argument could place an undue burden on investigating authorities to assess each difference in order to determine whether adjustments would be required in every case, even where no interested party requested any adjustment.

Injury determination

China claims with respect to the Commission's injury determination relate, in particular, to the Commission's determination of price undercutting; to the treatment of the volume of dumped imports; and to the examination of the impact of the dumped imports. The Panel rejected China's claim that the EU had acted inconsistently with Articles 3.1 and 3.2 of the WTO ADA in relation to price undercutting determination. However, the Panel partially upheld China's claims in relation to the treatment of the volume of imports. In particular, China claimed that the EU had violated Articles 3.1, 3.2. 3.4 and 3.5 of the WTO ADA by treating all imports, including, notably, imports from two Chinese producers subject to individual examination that were not found to be dumped, as being dumped. In relation to the same claim, China also argued that

> "taking into consideration the fact that these two individually-examined Chinese producers were found not to be dumping, the Commission could not legitimately treat all imports from Chinese producers for which an individual dumping margin was not calculated (because of the use of sampling) as dumped".[184]

Noting the parties' arguments, the relevant provisions of the WTO ADA and previous case law, the Panel concluded that the EU "erred in treating imports attributable to two companies which it found not to be dumping as dumped in the context of its injury determination"[185] and, on this basis, it concluded that the EU acted inconsistently with Articles 3.1 and 3.2 of the WTO ADA in considering the volume of imports.

However, the Panel did not find that the EU had violated Articles 3.1 and 3.2 of the WTO ADA in treating all imports from non-sampled/unexamined producers and exporters as dumped in the

[182] Appellate Body report, *EC – Fasteners (China)*, para. 499.
[183] *Id.*, para. 513.
[184] Panel report, *EC – Fasteners (China)*, para. 7.338.
[185] *Id.*, para. 7.360.

context of its injury determination. Lastly, the Panel rejected China's claim that the EU had failed to objectively examine the impact of dumped imports on the domestic industry in violation of Articles 3.1 and 3.4 of the WTO ADA.

Determination of causation

China contended that the EU violated Articles 3.1 and 3.5 of the WTO ADA in concluding that dumped imports from China caused material injury to the EU industry. China's claim was based on two assertions: first, that the Commission failed to demonstrate that the dumped imports, through the effects of dumping, were causing injury; and second, that the Commission failed to ensure that injury caused by factors other than dumped imports was not attributed to dumped imports. In relation to the first aspect, China, in particular, argued that

> "in order to make a determination of causation consistent with Article 3.5, the EU authorities were required to demonstrate with supporting evidence that the loss of production volumes and the loss in market share were caused, *i.e.,* produced, by the dumped imports".[186]

China argued that,

> "by basing the conclusion on a mere coincidence, the Commission failed to do so, and ignored that the factors considered to show injury, and in particular the loss of market share, may well be explained by the domestic industry's increased production of special fasteners".[187]

In relation to this aspect of China's claim, the Panel concluded that China did not demonstrate a failure of reasoning or explanation in the Commission's determination. In the Panel's view, the Commission's determination, that dumped imports caused the injury that the Commission's investigation revealed, was "a reasonable conclusion, based on the evidence and arguments before it".[188]

In relation to the second aspect of this claim, China argued that the Commission did not separate and distinguish the effects of other factors, specifically the costs due to the increase of raw material prices and the export performance of the EU industry, which might have contributed to the injury suffered by the domestic industry from the effects of dumped imports, as required by Article 3.5 of the WTO ADA. Whereas the Panel concluded in its analysis that China did not demonstrate that the Commission's determination in relation to the impact of increased prices of raw materials on causation was not a reasonable conclusion, it found that the Commission's conclusion on the impact of the EU industry's export performance was inconsistent with Articles 3.1 and 3.5 of the WTO ADA.

Disclosure and confidentiality

The first procedural claim concerned the Commission's failure to disclose the identity of domestic producers. China claimed this was in violation of Articles 6.2, 6.4 and 6.5 of the WTO ADA. After finding that "the rights of interested parties set forth in [Articles 6.2 and 6.4] do not apply to confidential information", the Panel stated that "to find a violation of Articles 6.4 and 6.2, we necessarily have to find a violation of Article 6.5".Turning to Article 6.5 the Panel stated that this provision

> "does not, however, explain what 'good cause' means. In our view, this is something that has to be assessed by the investigating authorities in light of the circumstances of each investigation and each request for confidential treatment. We also consider that what constitutes 'good cause' will depend on the nature of the information at issue for which confidential treatment is sought. The 'good cause' alleged to exist, in turn, will determine the kind of supporting evidence that may be needed in order to demonstrate the existence of such 'good cause'."[189] [footnote omitted]

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186 *Id.*, para. 7.423.
187 *Ibid.*
188 *Id.*, para. 7.427.
189 *Id.*, para. 7.451.

The Panel also stated that "Article 6.4 [and 6.2] does not obligate the investigating authorities to actively disclose information to interested parties."[190] The Panel then examined whether "potential commercial retaliation" constituted a "good cause" for the purpose of Article 6.5. Based on the facts before it, the Panel concluded that the EU had not acted inconsistently with Article 6.5. As a result of this it also rejected the claims of violation of Articles 6.2 and 6.4.

The Panel's findings under Articles 6.5, 6.5.1, 6.2 and 6.4 of the ADA were appealed by both parties. First the Appellate Body addressed the issues under Articles 6.5 and 6.5.1. The Appellate Body examined the text of both provisions. It found that while the question of whether information is "by nature" confidential depends on the content of the information, in case of information "provided on confidential basis" is not necessarily confidential by reason of its content but rather confidentiality arises from the circumstances in which that information is submitted to the authorities. The Appellate Body also confirmed that the "good cause" requirement applies to both types of information. According to the Appellate Body, the good cause alleged must

> "constitute a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation, who would otherwise have a right to view this information".[191]

The Appellate Body went on finding that "'Good cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party."[192] In Article 6.5 the Appellate Body found two examples of "good causes", namely that the disclosure might bestow an advantage to a competitor, or the experience of an adverse effect on the submitting party of the party from which the information is acquired. The Appellate Body continued finding that the "type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular 'good cause' alleged."[193]

The Appellate Body then noted that Article 6.5 referred to "parties to an investigation", as opposed to "interested parties". This led the Appellate Body to find that that provision did not limit the protection afforded to sensitive information submitted by "interested parties" listed in Article 6.11 but that it covers "any person who takes part or is implicated in the investigation."[194]

The Appellate Body further found that Article 6.5.1 obliges investigating authorities to require that non-confidential summaries be furnished, and to ensure that the summaries contain "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence."

Finally, the Appellate Body examined the terms "exceptional circumstances". In the view of the Appellate Body:

> "[s]ummarization of information will not be possible where no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence."[195]

Faced with a request that "exceptional circumstances" exist, investigating authorities

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190 *Id.*, para. 7.480.
191 Appellate Body report, *EC – Fasteners (China)*, para. 537.
192 *Ibid.*
193 *Id.*, para. 539.
194 *Id.*, para. 540.
195 *Id.*, para. 543.

> "must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible."[196]

Having set forth its interpretation of the obligations in the relevant provisions of the ADA, the Appellate Body proceeded to examine each of the grounds for appeal. First, it examined the appeal of the Panel's finding that the EU had acted inconsistently with Article 6.5.1 by failing to ensure that two domestic producers provided appropriate statements of why summarisation of their responses was not possible. In particular, the EU disagreed with the Panel's findings that "investigating authorities must ensure that parties provide 'appropriate' non-confidential summaries or 'appropriate' statements of the reasons why summarization is not possible."[197] The Appellate Body disagreed, recalling that Article 6.5.1 imposed an obligation on investigating authorities to ensure that parties to an investigation provided non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. It does not suffice for investigating authorities to "make best efforts to ensure that non-confidential summaries are provided [...] Members [shall] comply with the requirements of Article 6.5.1."[198] The Appellate Body then examined the arguments presented by two domestic producers for not disclosing certain injury information. In both cases, the Appellate Body found that the producers had neither presented an "exceptional circumstance" to justify the lack of summaries, nor did they provide reasons why summarisation was not possible. On top of it, the Appellate Body noted that the Panel record did not indicate that the Commission had "examined the statements to evaluate their consistency with Article 6.5.1."[199]

Second, the Appellate Body examined the EU's appeal of the Panel's finding that the EU had acted inconsistently with Article 6.5 of the WTO ADA with respect to the treatment of the information submitted by producer in the surrogate country. The Appellate Body first examined various procedural arguments from the EU and found that China had failed to substantiate its claim that the treatment of confidential information submitted by the producer in the surrogate country was improper. On this ground, the Appellate Body reversed the finding of the Panel.

Third, the Appellate Body examined China's appeal of the Panel's finding that the EU had not erred by treating the identity of the complainants and supporters of the complaint as confidential. For China a "potential commercial retaliation" did not satisfy the "good cause" requirement of Article 6.5 as it was a "merely hypothetical" threat. The Appellate Body started its examination by recalling that the standard for "good cause" requires a balance to be struck between the conflicting interests of the parties in an investigation. The Appellate Body also recalled that "it is for the investigating authority to strike that balance and to make an objective determination of whether 'good cause' has been shown."[200] The Appellate Body went on rejecting China's argument that the Commission should have demonstrated that potential commercial retaliation "would", as opposed to "could", have happened if the information had been disclosed. The Appellate Body rejected this argument, stating that "'good cause' can be shown when the party requesting confidential treatment demonstrates the risk of a potential adverse consequence."[201] The Appellate Body rejected all other arguments from China, thus confirming the Panel's finding.

China furthermore claimed that the Commission failed to allow the Chinese producers access to information pertaining to different aspects of the Commission's dumping determinations,

196 *Id.*, para. 544, footnote omitted.
197 *Id.*, para. 547.
198 *Id.*, para. 548.
199 *Id.*, para. 555.
200 *Id.*, para. 585.
201 *Id.*, para. 587.

thereby violating Articles 6.2, 6.4, 6.5 and 6.9 of the WTO ADA. The Panel first examined Articles 6.2 and 6.4. Concerning the first of the two provisions, the Panel referred to previous panel determinations examining this provision and found that

> "a violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information used by the authorities, which was relevant to the presentation of that interested party's case and which was not confidential."[202]

Similarly the Panel referred to a previous Appellate Body determination regarding Article 6.2. The Panel then moved to examine the particular facts of the case in light of its interpretation of the requirements contained in the WTO ADA. Concerning the information on product types, the Panel found that

> "the Chinese exporters could not defend their interests in this investigation because the Commission only provided information concerning the product types used in the determination of the normal value at a very late stage of the proceedings, when it was no longer feasible for them to request that adjustments be made in order to ensure a fair comparison, which until that time they reasonably considered were not necessary".[203]

Concerning other types of information, the Panel dismissed China's arguments. The Panel did not decide on the claim of violation of Article 6.9 because it was not within its terms of reference.

Another claim concerned the non-confidential summaries of two EU producers and one Indian exporter. China claimed that the EU had acted in violation of Article 6.5 of the WTO ADA by failing to make sure that the non-confidential summaries of confidential information in the responses of the two EU producers were sufficiently detailed so as to allow a reasonable understanding of the substance of the confidential information. The Panel found that under that provision of the ADA "the investigating authorities must ensure that where an interested party asserts that a particular piece of confidential information is not susceptible of summary, the reasons for that assertion are appropriately explained."[204] The Panel found that both producers had not supplied information on a number of injury factors, giving a general reason for it, and stated that "the investigating authorities must ensure that the reasons given in this regard are appropriate."[205]

A third claim concerned the alleged violation of Articles 6.2, 6.4 and 6.5 by failing to disclose certain Eurostat data on EU production of fasteners. As it turned out to be the case, certain information submitted in confidence by the applicants to prove EU production was in fact available from the Eurostat website:

> "[i]t seems apparent to us that information that is publicly available is not confidential within the meaning of Article 6.5 of the AD Agreement. However, the Commission treated this information as confidential information, despite that good cause had not been shown. [...] The fact that this information was available in the public domain is not, in our view, an excuse for disregarding the requirements of Article 6.5. This undoubtedly constitutes a fault on the part of the Commission with respect to Article 6.5, even if this violation did not materially affect the ability of Chinese producers to defend themselves in the investigation at issue."[206]

By contrast, the Panel rejected the claims of violation under Article 6.2 and 6.4.

Through the last procedural claim, China argued that the EU had violated Article 6.1.1 of the WTO ADA by failing to provide sufficient time (at least 30 days) to respond to requests for

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202 Appellate Body report, *EC – Fasteners (China)*, para. 7.480.
203 *Id.*, para. 7.495.
204 *Id.*, para. 7.515.
205 *Id.*, para. 7.516.
206 *Id.*, para. 7.534.

information (i.e., the MET/IT claim form). The Panel first examined the text of the provision, and then a previous panel report. Based on that the Panel concluded that "the term 'questionnaires' in Article 6.1.1 refers to one kind of document in an investigation.",[207] and that

> "it refers to the initial comprehensive questionnaire issued in an anti-dumping investigation to each of the interested parties by an investigating authority at or following the initiation of an investigation, which questionnaire seeks information as to all relevant issues pertaining to the main questions that will need to be decided (dumping, injury and causation)."[208]

For this reason, the Panel rejected that the MET/IT questionnaire is the questionnaire to which Article 6.1.1 applies. Hence this claim was rejected.

This finding was appealed by China. In China's view, "questionnaires" covers all "information requests [...] which are so substantial that they deserve verifications being carried out and [which] do not prevent the investigating authorities from complying with the timeframes set out in the [ADA]."[209] In examining this matter, the Appellate Body noted that Article 6.1.1 is aimed at protecting the interests of exporters and foreign producers by requiring investigating authorities to provide them with at least 30 days to reply to questionnaires, and by allowing in certain circumstances, extensions. At the same time, the Appellate Body recalled that a proper interpretation must take into consideration the interests of investigating authorities in controlling the investigative process and bringing investigations to a close within normally 12 months. The Appellate Body then continued its analysis stating that

> "the 'questionnaires' referred to in Article 6.1.1 are a particular type of document containing substantial requests for information, distributed early in an investigation, and through which the investigating authority solicits a substantial amount of information relating to the key aspects of the investigation that is to be conducted by the authority (that is, dumping, injury, and causation)."[210]

The Appellate Body then tested against the above definition whether the request for information – the MET/IT claim form – constituted a "questionnaire" for the purposes of Article 6.1.1. The Appellate Body examined the content as well as the purpose of that request for information and compared it to the "typical anti-dumping questionnaire used by the Commission for exporters". The Appellate Body found that the MET/IT claim form has a definite purpose: "to select those exporters or producers that operate under market economy conditions or that are sufficiently independent from the State to justify different treatment from non-qualifying NME exporters or producers."[211] By contrast, the Appellate Body found that "a typical anti-dumping questionnaire solicits different information and for a different purpose than the MET/IT Claim Form".[212] The Appellate Body therefore concluded that

> "the MET/IT Claim Form is not an information request soliciting from the Chinese exporters and producers a substantial amount of information upon which the Commission would base its determinations regarding the key aspects of an anti-dumping investigation".[213]

Interestingly, in an *obiter dictum* the Appellate Body stated that

> "under the requirements of Article 6.1, a deadline of 15 days from the date of publication of the Notice of Initiation was too short and did not provide parties with 'ample opportunity' to submit all evidence in support of their requests for MET or IT treatment."[214]

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207 *Id.*, para. 7.574.
208 *Ibid.*
209 Appellate Body report, *EC – Fasteners (China)*, para. 602.
210 *Id.*, para. 613.
211 *Id.*, para. 618.
212 *Id.*, para. 619.
213 *Id.*, para. 623.
214 *Id.*, para. 615.

However, since China had not raised a claim of violation under Article 6.1, this statement did not constitute a formal finding.

Implications for EU law and practice

Implications for EU law
This case directly affects the EU's legislative environment and practice. Based on the Panel and Appellate Body reports regarding "as such" issues, Article 9(5) ADR will have to be amended to remove the inconsistency found with respect to IT. Furthermore, the ADR will also have to be amended regarding the major proportion issue. As WTO rulings have no immediate effect on EU law and cannot be directly enforced, amendments of those parts of the two basic Regulations found incompatible with WTO rules should be made as soon as possible. Furthermore the EU institutions will have to devise mechanisms on how to address the WTO rulings in past and ongoing cases.

The Panel and Appellate Body reversed the burden of proof regarding IT as provided for in Article 9(5) ADR. Thus, rather than according IT to certain *exporters* which could show that they *are not* to be considered as a single entity with the State, following the DSB findings the *Commission* would have to show that exporters *are* to be considered as a single entity and accordingly be subjected to a country-wide residual duty. The Appellate Body also presented, as discussed above, a list of criteria which, if fulfilled, could allow the investigation authority to apply common residual duty:

> "(i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management;
> (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and
> (iii) control or material influence by the State in respect of pricing and output."[215]

These three criteria could be used for a "single entity treatment" test (although it would have to be determined if fulfilment of one of the criteria was sufficient for a positive "single entity" finding).

Another option could be to abolish the IT test altogether. When balancing the costs (more complex investigations) and benefits (accruing to exporters) of such a test, this latter option seems recommendable.

As long as the current rules on IT are in place, it appears that the Commission has no choice but to apply the IT test, as Article 9(5) ADR does not grant power of discretion to the Commission in this regard. This calls for a rapid change of the ADR in order to implement the WTO ruling and avoid further disputes over IT.

Second, as also discussed in section 5.1.1.2, the "major proportion" definition must be determined in such a way so as to ensure that the domestic industry defined on that basis is capable of providing ample data that ensures an accurate analysis without a major risk of distortion. 25% of the total production may or may not be sufficient for this purpose. It is therefore recommended to delete the reference to Article 5(4) in Article 4(1) ADR. Likewise, it is recommended to remove the reference to Article 10(6) in Article 9(1) ASR.

215 *Id.*, para. 376.

Implications for EU TD practice

Besides the required changed to the two basic Regulations, the Panel and Appellate Body also made findings on a number of issues that affect EU TD practice. In the view of the evaluation team, some of the most important matters raised in this dispute which are recommended to lead to a change in future EU TD practice are the following ones:

- In the assessment of the volume of dumped (subsidised) imports for the purpose of injury determination, non-dumped imports (of non-sampled companies for which nonetheless an individual margin of dumping is calculated) need to be excluded. It should be noted that, with different factual backgrounds, the EU has been found to have acted in violation of Article 3.2 of the WTO ADA in two occasions already, namely *EC – Bed linen (Article 21.5- India)* and *EC – Salmon (Norway)*.[216] The Commission has amended its practice in this respect;
- Concerning the causality determination, in particular when distinguishing and separating the effects of dumped (subsidised) imports from other factors which at the same time are affecting the domestic industry, this is the last of several disputes where the DSB has found EU determinations in this area to be inconsistent with the obligations contained in Articles 3.5 ADA and 15.5 ASCM (see e.g. *EC – Salmon (Norway)* and *EC – Countervailing Measures on DRAM Chips*). A further discussion of this issue is provided in section 5.1.5.2 below, along with recommendations;
- Concerning the right of defence of interested parties, the EU may wish to review its practice regarding implementation of obligations under Articles 6.2 and/or 6.4 of the WTO ADA and parallel provisions under the ASCM in light of the negative panel determinations in several WTO disputes (see e.g. *EC – Salmon (Norway)* and *EC – Tube or Pipe Fittings*) with the purpose of making sure that interested parties have at their disposal all the information needed for the defence of their position;
- Concerning the implementation of the provision in the ADR akin to the last sentence of Article 2.4 of the WTO ADA, in circumstances similar to those described by the Appellate Body, the Commission may wish to ensure that parties are placed in the situation of being able to have timely access to information which is relevant to assessing whether those parties should request adjustments for differences that could affect price comparability;[217]
- The DSB's criticism of the quality of content of non-confidential summaries submitted by interested parties suggests that the Commission should review its procedures for checking the non-confidential summaries provided by interested parties;
- Finally, the Appellate Body's suggestion that a period of 15 days for the submission of an MET/IT claim was too short would lead to the recommendation that this period should be extended. The Commission has recently extended the period allowed for submission to 21 days.

As important as the above findings, the Panel and the Appellate Body validated – in abstract – many approaches and methodologies applied regularly by the Commission (e.g. sampling in case of domestic industry, examination of injury data of domestic producers where sampling has been used, and general approach to considering adjustments under Article 2.4 of the WTO ADA).

[216] See section 3.2.2.2 above.

[217] Appellate Body report, paras. 513 and 515.

3.3 Conclusions of the Court Case and Dispute Analysis

3.3.1 Conclusions and Implications from EU Court Cases

The analyses of EU Court cases focused on those cases which would result, in the view of the evaluation team, in amendments to the two basic Regulations or/and changes in EU TD practice. In the majority of cases, it was found that changes in practice were appropriate. In addition, the evaluation team notes that in most of the cases the Commission already adjusted its practice in line with the Court judgment.

EU court judgments leading to changes in EU TD practice

The cases requiring changes in EU TD practice are:

- *Case T-413/03 Shandong Reipu Biochemicals v Council:* The judgment suggests that the Commission investigators need to be proactive during verification visits in confronting companies with contradictions between their replies and the Commission's findings during the verification. Based on interviews with Commission staff, such a change in practice has already started, whereby in the course of the verification visits companies could be provided with a list of questions which were not answered by the company during the verification visit.

- *Case C-351/04 Ikea Wholesale:* The Court ruled, in line with the WTO Appellate Body, that "zeroing" is prohibited as a matter of EU law in weighted average to weighted average calculations. It confirmed that this practice needed to be abolished. It is noted that the EU institutions have indeed stopped the practice of zeroing under the weighted average to weighted average method.
  At the same time, the Court did not follow the legal rulings of the WTO Appellate Body on the issue of using single producer data for SGA costs and profit in constructed normal values and the need to consider all causality factors listed in the ADR. It is noted, however, that the EU institutions follow the stricter standards established by the WTO ADA by reference to the authoritative interpretations adopted by the WTO Appellate Body.

- *Case T-348/05 JSC Kirovo-Chepetsky Khimichesky Kombinat v Council:* The Court referred to the anti-circumvention procedure in Article 13 ADR as the appropriate procedure for cases of modified products, rather than interim reviews. An alternative option could be to open a new investigation against the changed product. The evaluation team recommends the latter option given the absence of a clear detailed agreement on anti-circumvention rules at the WTO level, as this would reduce the risk of being involved in a WTO dispute.

- *Case C-141/08 Foshan Shunde Yongjian v Council:* With regard to respecting rights of defence in line with the time-limits established in Article 20(5), the Court ruled that this was likely to affect the content of the contested regulation and therefore, the appellant's right of defence. Unless the two basic Regulations are amended, the evaluation team therefore recommends that the Commission allow parties at least ten days to comment on final disclosure, including re-disclosure of certain aspects.

- *Case T-143/06 MTZ Polyfilms v Council:* The Court ruled against the use of alternative third country export prices in cases where the EU export prices may have been affected by the existence of minimum price undertakings in review proceedings. Also, the Court permitted prospective analysis in review proceedings, provided that the methods to establish the dumping comply with Article 2 ADR. The evaluation team recommends, following the court's ruling, that the Commission use prospective analysis in determining whether there is a real need for continuation or change in the measures, while not changing the methodology.

EU court judgments leading to amendments of the two basic Regulations

The cases which, in the view of the evaluation team, should result in changes to the two basic Regulations, are:

- *Case T-221/05 Huvis v Council:* The Court ruled that the Commission is required to demonstrate a change in circumstances in order to use a different method in review proceedings than in the original proceedings and that a mere change of opinion on the appropriate method is no justification for changing such method. Accordingly, one option to respond to the judgment could be to delete Article 11(9) ADR. An alternative option could be to amend Article 11(9) in such a way that it would allow for a different methodology to be used only when the circumstances have changed (or when the previous methodology was illegal), and/or when policy has changed. However, the latter is not recommended as allowing changes in policy as a justification for changing the methodology which would effectively make the rule of methodological consistency over time meaningless.
  An alternative response to the judgment would be, rather than a change in the ADR, a change in TD practice, whereby stricter disciplines will be required in review investigations to follow the same methods as in the original investigation, unless a change in circumstances can be duly demonstrated (or the previous methodology was not consistent with the basic regulation)
  The choice between whether to opt for vertical consistency (using the same method in reviews as in original investigations and thus ensuring consistency and comparability of results in the same proceedings over time), which would require the stricter discipline of practice with Article 11(9), and horizontal consistency or coherence (using the same method in all investigations carried out at the same time to ensure that all companies get the same treatment at the same time), which would seem to be feasible only if Article 11(9) was deleted, is a choice of the lesser evil as both options imply the acceptance of some inconsistency (be it vertical or horizontal).

- *Case C-141/08 Foshan Shunde Yongjian v Council:* With regard to the three-month deadline for determining MET, the evaluation team recommends to simply abolish the final paragraph in Article 2(7)(c) ADR and make the determination on MET part of the normal provisional and definitive determinations without any separate special procedure or rules.

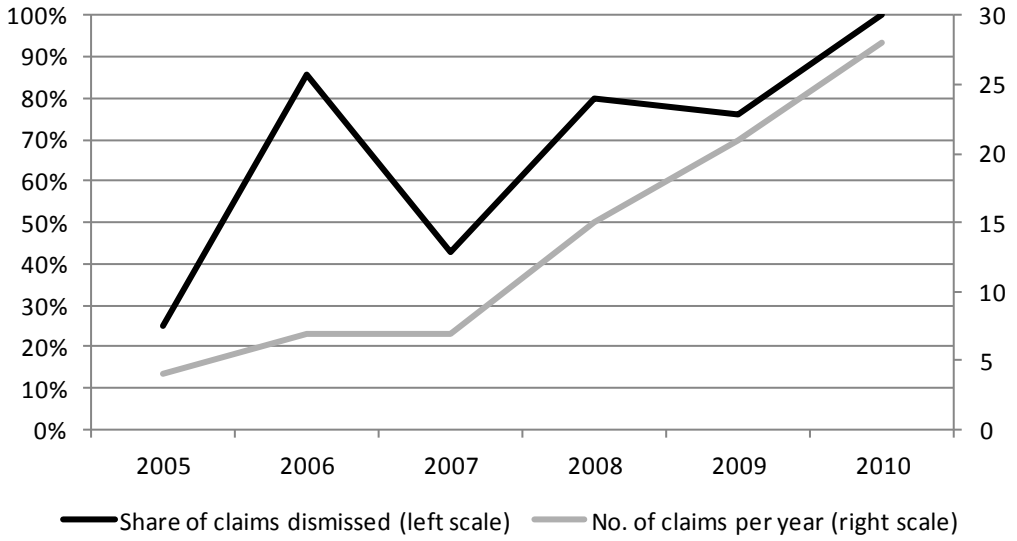
In addition, two of the analysed cases (*Case T-249/06 Interpipe Niko Tube v Council* and *Case T-498/04 Zhejiang Xinan Chemical Industrial Group v Council*) were under appeal at the time of finalising the present evaluation report, and although the General Court's judgment would indicate changes in EU practice, these may still be overruled and hence are not summarised here.

EU success rate in court cases

Looking at the overall picture, the "success rate" of EU institutions in EU court cases, i.e. the share of claims dismissed by the EU Courts, stands at 80.5% over the six-year evaluation period (66 out of 82 claims).[218] Put differently, the Courts accepted 16 of the 82 claims made by applicants. Furthermore, the EU's success rate increased over time during the evaluation period. In 2010 Court decisions, all claims were dismissed (Figure 17). This figure shows that, in the view of the Courts, compliance of the EU institutions with the two basic Regulations is very high.

[218] It should be noted that the analytical value of these success rates is limited, as claims are not weighed.

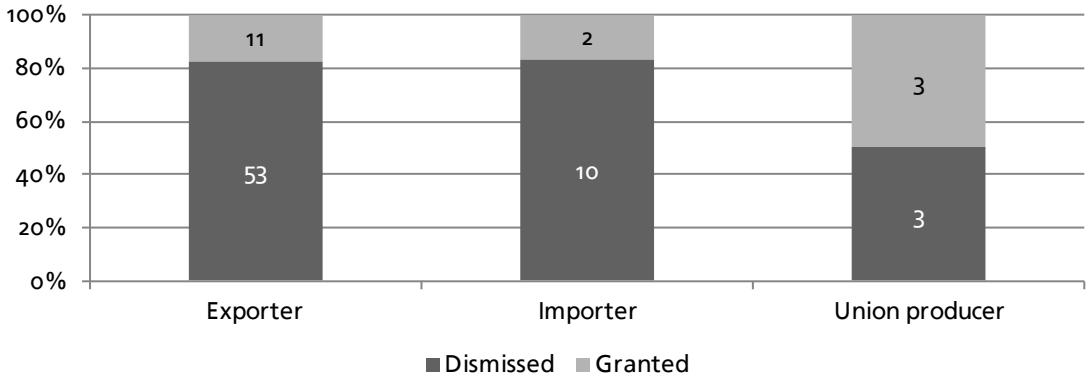
Figure 17: "Success rate" of EU institutions in EU court cases on TDI, 2005-2010 (year of decision)



Source: Calculations based on appendix H1.

Figure 18 and Figure 19 further analyse the outcomes of Court decisions. Figure 18 shows that the success rate of Union producers (50%) is higher than that of exporters and importers, which see more than 80% of their claims rejected. However, the higher success rate of Union producers is more apparent than real, as the three claims accepted by the Courts concerned the lack of statement of reasons by the Council for not adopting the Commission proposal. These rulings had no practical consequences.

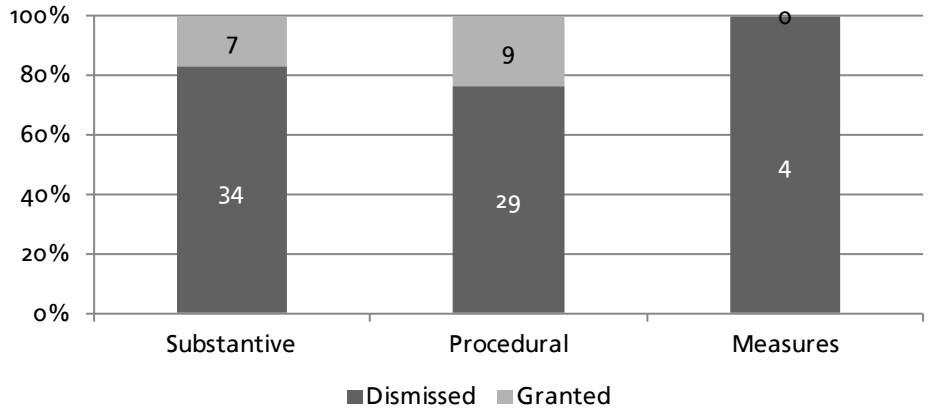
Figure 18: "Success rate" of claimants in EU court cases on TDI, by type of claimant, 2005-2010 (year of decision)



Source: Calculations based on appendix H1.

Figure 19 addresses the question of whether certain types of legal issues addressed in a claim are likely to have a higher success rate. In this respect, it is striking that none of the arguments made about the implementation of measures was accepted. Furthermore, there are no qualitative differences between claims regarding procedural and substantive issues, with the former showing a slightly higher success rate of about 24%.

Figure 19: "Success rate" of claimants in EU court cases on TDI, by type of legal issue, 2005-2010 (year of decision)



Source: Calculations based on appendix H1.

The findings presented above may explain to a certain extent the relatively low number of cases in the EU system. If the likelihood of success in cases is low, the expected benefit from going to court will be relatively low. Such considerations were confirmed by a number of stakeholders who asserted that, even if they disagreed with the findings of the Commission, it was "not worthwhile" to pursue the matter in court. Thus, the low probability of submitting a successful application appears to partially explain the low number of cases. This should not detract, however, from the finding stated below that, in the view of the Courts, compliance of the EU institutions with the two basic Regulations is very high.

3.3.2 Conclusions and Implications from WTO Disputes

EU TD measures were rarely challenged before the WTO DSB, with reports issued in only three disputes during the evaluation period. In response to these, certain practices of EU trade defence were changed, or should be addressed in the view of the evaluation team. The main issues are:

WTO rulings leading to changes in EU TD practice or to amendments of the two basic Regulations

- *DS299 Countervailing Measures on Dynamic Random Access Memory Chips from Korea, Korea v European Communities:*
  With regard to the analysis of the state of the domestic industry in the injury analysis, the Panel stated that all factors listed under Article 15.4 ASCM must be analysed. This is now the Commission's policy.
  Concerning the non-attribution analysis, the Panel stated that either a thorough qualitative analysis or an elementary quantitative analysis was required to support non-attribution analysis and determinations.[219] Methodological issues of the non-attribution analysis are further discussed, and recommendation provided, in section 5.1.5.2 below.

- *DS337 Anti-Dumping Measures on Farmed Salmon from Norway, Norway v European Communities:*
  Regarding the definition of the domestic industry, the Panel determined that the exclusion of an entire category of producers from the domestic industry is not compatible with WTO rules. This means that any kind of producer whose output is the like good – regardless of whether it is a processor or assembler, etc. – must, in principle, be included in the domestic industry definition.

[219] This issue was also addressed in *DS337 Farmed Salmon from Norway* and *DS397 Steel Fasteners from China.*

Concerning the determination of the volume of dumped imports for the injury analysis, the Panel clarified that imports which have a *de minimis* margin of dumping, as well as imports from all unexamined producers and exporters, must not be treated as dumped imports in the injury analysis.[220] The Commission has already amended the practice accordingly (see section 5.1.4.4).
Regarding the 5% representativity test and the 10% rule, both of these were found to be in violation of WTO rules and required a change in practice. In response, the two rules have been abandoned in practice since 2009.

- *DS397 Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, China v European Communities:*
  This case directly affects the EU's legislative environment and practice. Article 9(5) ADR will have to be amended to remove the inconsistency found with respect to IT. The Panel and Appellate Body reversed the burden of proof regarding IT. Thus, rather than according IT to certain *exporters* which could show that they *are not* to be considered as a single entity with the State, following the DSB findings the *Commission* would have to show that exporters *are* to be considered as a single entity and accordingly be subjected to a country-wide residual duty. Another option could be to abolish the IT test altogether. When balancing the costs (more complex investigations) and benefits (accruing to exporters) of such a test, this latter option seems recommendable.
  Second, as also discussed in section 5.1.1.2, the "major proportion" definition must be determined in such a way so as to ensure that the domestic industry defined on that basis is capable of providing ample data that ensures an accurate analysis without a major risk of distortion. 25% of the total production may or may not be sufficient for this purpose. It is therefore recommended to delete the reference to Article 5(4) in Article 4(1) ADR. Likewise, it is recommended to remove the reference to Article 10(6) in Article 9(1) ASR.
  Besides the required changed to the two basic Regulations, the dispute also has implications for EU TD practice. Thus, in addition to issues also raised in earlier disputes as mentioned above, the DSB's criticism of the quality of content of non-confidential summaries submitted by interested parties suggests that the Commission should review its procedures for checking the non-confidential summaries provided by interested parties. Finally, the Appellate Body's suggested that a period of 15 days for the submission of an MET/IT claim was too short. The Commission's most recent practice is to allow 21 days for the submission of claims forms.

EU success rate in WTO disputes

Despite the fact that the absolute number of TDI related disputes brought against the EU was low during the evaluation period, the involvement of the EU in WTO disputes on AD measures (15.4%) was higher than the EU's share in global AD measures imposed (9.3%). This could merely reflect an increasingly adversarial international environment to the EU's trade policies. It might, however, also reflect an EU trend towards less compliance with WTO rules on AD measures. Third, given the low absolute number of disputes, it might also be a statistical artefact. In order to get some further insight on this question, the evaluation team analysed the issues addressed in those WTO AD/CV disputes since 2005 in which the EC/EU was a respondent.

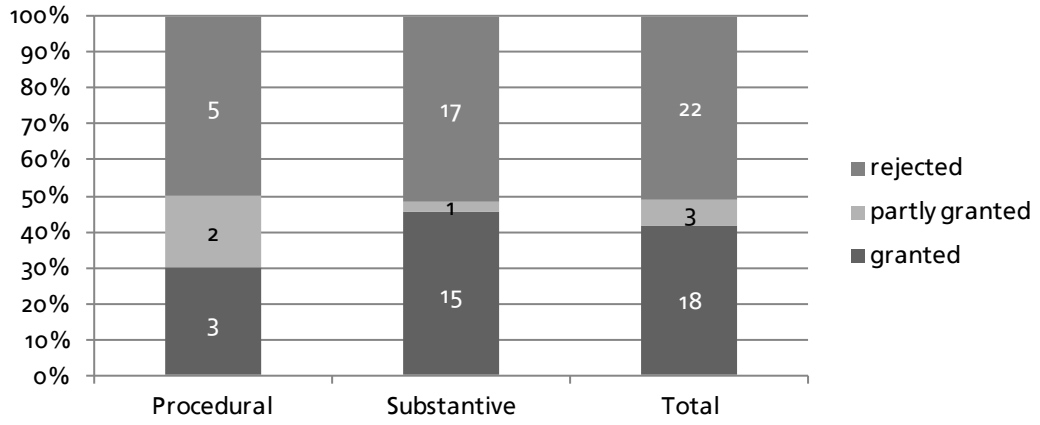
Based on the evaluation team's summary of the main legal issues addressed in these disputes as presented in appendix H2, the EU's success rate, as measured by the share of complaints being rejected by the WTO DSB[221], is just over 50% (Figure 20). If the count of claims made by the WTO DSB Panel is taken as the basis for the success rate calculation, the success rate is exactly

220 This issue was also addressed in *DS397 Steel Fasteners from China.*

221 As mentioned above in the context of analysing EU Court judgments (see footnote 218), the success rate constitutes only a very rough indicator, as claims are not weighed.

50%.[222] Furthermore, if the recent Panel report in *EU – Footwear (China,* WT/DS405/R, 28 October 2011, not analysed in detail for this evaluation) is also considered, the EU's success rate increases to approximately 60%.[223] This finding clearly speaks against the second possible interpretation mentioned above – no trend towards less compliance of EU TDI with WTO rules can be deduced. The same finding results from a comparison of the EU's share as a respondent in WTO disputes on TDI and the EU's share as a respondent in all WTO disputes. The former was lower than the latter in every single year during the evaluation period (in fact in every year since the WTO was established), thus showing that EU TD measures are less prone to be challenged by other WTO members than EU trade policy overall.

Figure 20: "Success rate" of claimants in legal issues raised in WTO disputes against the EC/EU 2005-2010



Source: Authors' calculations based on appendix H2.

In sum, therefore it is concluded that, despite certain important recent instances of violation of WTO rules by EU TDI – such as individual treatment – compliance of EU TDI law and practice with WTO rules is satisfactory, as is evidenced by a low number of disputes brought against the EU and a success rate of above 50%.

[222] Based on a count in the conclusion section of Panel reports in the three cases 35 claims were granted and 35 rejected (WT/DS299/R, 17 June 2005; WT/DS337/R, 16 November 2007; and WT/DS397/R, 03 December 2010).

[223] WT/DS405/R, 28 October 2011, not analysed in detail for this evaluation. The total count of the four disputes then changes to 63 claims rejected out of a total of 105 claims, i.e. a success rate of 60%.

4 COMPARATIVE EVALUATION OF THE EFFECTIVENESS OF THE EUROPEAN UNION'S POLICY DECISIONS ON TDI

The fourth evaluation objective focuses on a comparative analysis of the EU's use of TDI with the purpose of determining how peer countries have used the policy space which WTO rules leave for members' application of AD and AS instruments, and to determine the extent to which EU practice can be considered best practice.

For this purpose, seven peer countries have been chosen: Australia, Canada, China, India, New Zealand, South Africa and the USA. These seven countries combined initiated 507 AD investigations during the evaluation period, which represents 44% of all AD investigations initiated by WTO members. These countries also imposed 370 AD measures (47% of all measures). As regards CV measures, the peer countries initiated 56 AS investigations and imposed 37 CV measures, which account for 72% and 77%, respectively, of all AS initiations and CV measures imposed by WTO members during the evaluation period.[224]

Although the WTO agreements have detailed mandatory provisions on many issues related to AD and AS which members must follow, on other issues they leave considerable policy space to members. Accordingly, TD systems across the world vary substantially with regard to the issues where policy space exists.

Internationally, two major "families" of TD systems exist, of which the EU and the US systems are prominent examples. In designing or reforming their TD systems, third countries often look at the TD practice the EU or the USA for inspiration. For example, in its recent reform of TDI, Australia has considered whether to "import" into its system the public interest test (an EU example) or the administrative protective order system (a US practice) but decided against them. Another example would be the MET criteria applied by India which closely mirror the ones applied by the EU.

The policy issues addressed in this chapter have been selected based on a review of the WTO ADA and ASCM, topics addressed in the Doha rules negotiations and the comparison of peer country TDI rules. The main criterion was to identify those issues which are important for the effectiveness of TDI in the current global economic framework. On this basis, the following policy issues are discussed:

- the institutional structure of TDI, including the decision making rules for imposing definitive measures (section 4.1, which also briefly introduces the TD legislation and administrative bodies for each country);
- policy choices regarding the initiation of proceedings (section 4.2);
- the existence of rules to ensure the cooperation of interested parties in investigations (section 4.3);
- the transparency of investigations, in particular the extent to which interested parties have access to non-confidential and confidential information (section 4.4);
- the treatment of non-market economy countries, including the determination of market economy status, market economy treatment and the choice of analogue countries (section 4.5);

[224] Of course some of the measures imposed by third countries are against EU exporters. The Commission provides information for and assistance to EU exporters in this regard. This aspect of DG Trade's work is not the subject of this evaluation; further information is available from DG Trade's website at http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/actions-against-eu-exporters/.

- the application of the lesser duty rule and potential conditions for its application (section 4.6);
- the role of public interest on the imposition of measures (section 4.7);
- the duration of investigations and time needed to impose measures (section 4.8);
- the choice of duty collection systems and of the form of duty, and the use of refunds (section 4.9);
- the use of undertakings (section 4.10);
- policies for the review of measures (section 4.10); and
- the rules in force to combat the circumvention of AD or CV measures (section 4.12).

Each section in this chapter first addresses the background and importance of the policy issue before describing the relevant legal basis and practice in each of the peer countries. Finally, a comparative section assesses the EU's policy choice against peer countries, [225] draws conclusions, and provides options and recommendations for the EU.

The individual country reports presented in appendix I provide more details about each of the seven peer countries' TD systems.

4.1 Institutional Structure of TDI and Decision-Making

4.1.1 Background, importance and policy options available

The WTO agreements do not provide for any specific institutional set-up of members' TD systems, nor do they prescribe any specific terms for decision-making about the imposition of measures. For example, the WTO ADA does not require the authorities for dumping and injury determination to be distinct or separate, nor does the ASCM in respect of subsidies and injury. Accordingly, the same authority may deal with both, just as a country may have separate authorities to deal separately with the issues. National practices in this respect may and do vary.

Some important policy options which any jurisdiction has when designing or reforming a TD system are:

- Should the investigating authority be an independent body or not? This decision matters because it has an impact on how investigations are carried out, and how decisions are taken. Specifically, it may have an impact on the degree of politicisation of a TD system. An independent institution would typically be less subject to political pressure, thereby strengthening the technical character of TD investigations. The decision of principle to be made is whether TDI should be technical or policy instruments.
- Should the different analyses which are part of an investigation, i.e. subsidy/dumping analysis; injury/causation analysis; and, where it exists, the public interest test, be undertaken by the same authority (the unitary system) or separate authorities (the bifurcated system)?
- Is the imposition of duties automatic or subject to discretion? If it is subject to discretion, to what extent is the decision-makers' discretionary latitude limited by the findings in the investigation?

The following sub-sections assess how the peer countries have answered these questions.

[225] The description of EU legal basis and practice in this chapter is represents a summary of the more detailed analysis in chapter 5.

4.1.2 Policy Choices of Peer Countries

4.1.2.1 Australia

The Customs Act 1901 is Australia's primary legislative instrument governing applications for import relief through the imposition of anti-dumping or countervailing measures. This Act is augmented by the Customs Tariff (Anti-Dumping) Act 1975 (also known as the Dumping Duty Act) and the Customs Regulations 1926.[226]

Australia used a bifurcated system for a number of years until 1998, but in the sense that a separate authority was created that automatically reviewed all decisions of the first authority. Thus, while preliminary investigations were conducted by the Australian Customs Service (now Australian Customs and Border Protection Service; ACS), final investigations were conducted by the Anti-Dumping Authority. The ACS was responsible for all aspects of an investigation, i.e. dumping or subsidies, material injury and causal link, as was the Anti-Dumping Authority. This could therefore not have been described as a truly bifurcated system. The system of automatic review was also only applied for a relatively short period of time, before it reverted to a fully unitary system.

Australia in 2011 embarked on a process of streamlining its AD and AS systems so as to decrease the time taken to complete investigations, including reducing the time within which provisional measures are imposed. To ensure that no bottlenecks occur during this process, the ACS has undertaken to increase staff by 45%, from 31 to 45 staff, by July 2012 (Australian Customs and Border Protection Service 2011: 4).

Under Australian trade defence law, measures are imposed by the Minister responsible for Customs and Border Protection. Once the ACS has completed its investigation, it will make recommendation to the Minister who then takes the decision. Regarding decision-making, the ACS has recommended a number of changes from 2011 onwards, including bringing in independent experts to supplement existing staff knowledge in complex cases and to provide advice on key issues such as determinations of like goods, production processes and costs, accounting arrangements, statistical analysis, economic modelling and economic impact studies (Australian Customs and Border Protection Service 2011: 14), while it would still be open for interested parties to procure expert opinions in support of their case at their own expense.

4.1.2.2 Canada

Canada's TD practice is conducted under the Special Import Measures Act (SIMA).[227] The Canada Border Services Agency (CBSA, formerly Revenue Canada) and the Canadian International Trade Tribunal (CITT, the "Tribunal"), an independent tribunal constituted under the Canadian International Trade Tribunal Act,[228] are jointly responsible for administering SIMA. The CBSA conducts the dumping and subsidy investigations, the CITT determines injury, and the CBSA enforces AD and CV measures at the border and collects the duties. The CBSA reports to the Minister of Public Safety while the Tribunal reports to the Minister of Finance, although as an independent tribunal, it does not take directions on its determinations from the Minister. The Minister of Finance is responsible for the tariff and thus for the imposition of

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226 Australia's TD laws are available at http://www.customs.gov.au/site/page5719.asp.

227 *Special Import Measures Act*, R.S.C., 1985, c. S-15. Consolidated Acts, Published by the Minister of Justice at the following address: http://laws-lois.justice.gc.ca. Current to May 29, 2011.

228 *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Su). Consolidated Acts, Published by the Minister of Justice at the following address: http://laws-lois.justice.gc.ca. Current to May 29, 2011.

duties as well as overall policy formulation, including in the WTO (Finance Canada 2002). Canada's engagement in international TDI negotiations is coordinated by Foreign Affairs and International Trade Canada.

Under SIMA, if the CBSA finds dumping or subsidisation and the President of the CBSA "considers that the imposition of provisional duty is necessary to prevent injury, retardation or threat of injury," the provisional duty applies automatically. If the CITT makes an affirmative injury finding, the Act also applies definitive duties automatically, unless public interest plays a role. If the CITT is of the opinion that there are reasonable grounds to consider that the imposition of an AD or CV duty, or the imposition of such a duty in the full amount, would not or might not be in the public interest, it is required on its own initiative or on the request of an interested person to initiate a public interest inquiry. Based on its determination, the Tribunal makes a recommendation to the Minister of Finance who decides whether the duty should actually be reduced or eliminated.

4.1.2.3 China

TDI legislation in China dates back to the early 1990s. Following China's accession to the WTO, the State Council abolished the old Regulation on Anti-dumping and Countervailing (i.e. the State Council Order [1997] No. 214) and issued separate Regulations on Anti-dumping and on Countervailing Measures on 26 November 2001, coming into effect on 1 January 2002. They were revised in 2004.[229]

China is a centralised nation and the roles and responsibilities on AD and AS investigations are exclusively taken by the central government, i.e. the Ministry of Commerce (MOFCOM). China has a bifurcated system, which has changed in form over the past few years. Different authorities were responsible for the dumping or subsidisation and material injury parts of an investigation until March 2003, but it was then centralised in MOFCOM, which is responsible for all aspects of investigations. However, there are two separate units under MOFCOM, being the Bureau of Foreign Trade (BOFT), which is responsible for all investigations into dumping and subsidies, and the Investigation Bureau of Industry Injury (IBII), which is responsible for all aspects of investigations relating to material injury. BOFT and the IBII are jointly responsible for determining causality.

Once MOFCOM has made a final affirmative finding on dumping, injury and causality, it makes a recommendation to the Tariff Commission of the State Council,[230] which is the final decision-making body that decides whether AD or CV duties should be imposed (Xiaochen Wu 2009: 202).

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229 *Regulations of the People's Republic of China on Anti-Dumping* (Promulgated by Decree No. 328 of the State Council of the People's Republic of China on 26 November 2001, and revised in accordance with the Decision of the State Council on Amending the Regulations of the People's Republic of China on Anti-Dumping promulgated on 31 March 2004), as notified to the WTO, G/ADP/N/1/CHN/2/Suppl.3, 20 October 2004.
Regulations of the People's Republic of China on Countervailing Measures (Promulgated by Decree No. 329 of the State Council of the People's Republic of China on 26 November 2001, and revised in accordance with the Decision of the State Council on Amending the Regulations of the People's Republic of China on Countervailing Measures promulgated on 31 March 2004), as notified to the WTO, G/SCM/N/1/CHN/1/Suppl.3, 20 October 2004.

230 Article 38 of the Regulations on Anti-Dumping.

4.1.2.4 India

The main legal basis of India's TD legislation is constituted by Sections 9, 9A, 9B and 9C of the Customs Tariff Act 1975 as well as the Anti-Dumping Rules and the Countervailing Duty Rules.[231]

In India a single authority, the Directorate General of Anti Dumping and Allied Duties (DGAD) under the auspices of the Ministry of Commerce, is responsible for all aspects of AD and AS investigations.[232] The Designated Authority is a quasi-judicial authority which was set up under the Customs Act, 1962, in April 1998.[233] DGAD is designated to initiate the necessary action for investigations and subsequent imposition of AD/CV duties. The Central Government may, by notification in the Official Gazette, appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as that Government may think fit as the Designated Authority. A senior level joint secretary and Director, four investigating officers and four costing officers assist DGAD.[234] There is also a section under DGAD headed by a Section Officer to deal with the monitoring and coordination of the functioning of DGAD. Once DGAD has reached a final determination it makes a recommendation to the Ministry of Commerce. The responsibility for the imposition and collection of duties as recommended by DGAD and agreed to by the Ministry lies with the Ministry of Finance, Government of India (Aggarwal 2002: 64).

In India, investigations are carried out by the designated authority internally. Aggarwal (2002: 64) notes the argument that having recourse to independent outside experts during the investigation process might be useful for developing countries and observes that the Indian authorities may request assistance for more technical aspects of the investigations. The authorities do not, however, apparently take any recourse to independent experts.

4.1.2.5 New Zealand

The main legal basis for New Zealand's TDI is the Dumping and Countervailing Duties Act 1988 (the Act)[235] which was amended in 1994 to take account of the entry into force of the WTO ADA and ASCM. Subsequent amendments have been made to reflect changes arising from bilateral or regional free trade agreements and for other administrative purposes.

New Zealand operates a unitary approach to AD and AS investigations. In New Zealand, TDI administration was for many years the responsibility of the New Zealand Customs Service, which held in particular the knowledge and skills required to undertake investigations relating to imports. In 1988, the opportunity was taken to place this function in the newly-established Ministry of Commerce (now the Ministry of Economic Development), where TDI administration would be placed with other activities concerned with domestic regulatory policy and industry support. Currently, investigations are undertaken by the Trade Rules, Remedies and

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231 Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995; and Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and the Determination of Injury) Rules, 1995; available at http://commerce.nic.in/traderemedies/ad_compendium.asp?id=11.

232 Aggarwal (2002: 64); Ganguli (2006: 4); Chugh (2007: 22).

233 DGAD Annual Report 2004/5, p7.

234 Aggarwal (2002: 64). Note that interviews with DGAD have indicated that its staff complement has now increased to around 20 people.

235 Available at http://www.legislation.govt.nz/act/public/1988/0158/latest/DLM137948.html.

Tariffs Group of the Ministry of Economic Development, with a staff of a Chief Advisor, a Senior Analyst, and four Analysts, headed by the Manager of the Group.[236]

The question of whether trade remedies investigations should be carried out through a public inquiry approach, rather than an administrative one, was raised in a 1998 Discussion Paper.[237] In that paper it was suggested that while a public inquiry was likely to be more transparent and freely accessible, an administrative process was likely to be faster and less costly. The outcome of the consideration of the discussion paper was that no change was proposed and the administrative system was maintained.

While the Trade Rules, Remedies and Tariffs Group of the Ministry of Economic Development is responsible for all aspects relating to investigations, the Minister still has responsibility for matters relating to final determinations, the imposition of provisional and final duties, and the acceptance of undertakings.

4.1.2.6 South Africa

South Africa's TDI are regulated by the 2002 International Trade Administration Act (ITA Act),[238] which also established the International Trade Administration Commission (ITAC).

ITAC is an independent institution and is responsible for conducting trade defence investigations. It is responsible for the merit, preliminary and final investigation stages, but has to request the Commissioner for the South African Revenue Services (SARS) to impose the provisional measures, while its final finding is in the form of a recommendation to the Minister of Trade and Industry. If the latter agrees that a definitive duty must be imposed, he requests the Minister of Finance to impose such duty in the amount and for the duration specified by the Minister of Trade and Industry.

ITAC has three technical divisions, as well as a fourth division that is responsible for support services. One of the technical divisions is responsible for trade remedies and consists of two directorates (Trade Remedies I and Trade Remedies II). Each directorate has a senior manager and its own investigating officers. Investigations and reviews are allocated purely on the basis of available capacity within the directorates and each directorate is responsible for all aspects of an investigation or review, i.e. for dumping/subsidisation, injury and causality. Although it has been considered whether to split responsibilities as under a bifurcated system, it was decided that this would not be expedient and that it would suit South Africa's needs better if a single unit was responsible for all investigative aspects pertaining to an investigation.

Although in terms of the International Trade Administration Act any final determination on AD or CV measures has to be taken by the Southern African Customs Union (SACU) Council of

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236 Conversely, safeguard action is subject to an inquiry process through a Temporary Safeguard Authority under the Temporary Safeguard Authorities Act 1987. An Authority can be appointed to undertake such an inquiry if requested by the Minister, and is serviced by the Ministry of Economic Development. There is a Trade (Safeguards) Bill before Parliament that would revoke the Temporary Safeguard Authorities Act, and provide for safeguard investigations to be undertaken by the chief executive of the government department responsible for the administration of the legislation (currently the Ministry of Economic Development). The procedures and requirements set out in the Bill reflect the provisions of the WTO Safeguards Agreement. This reflects a move to have all trade remedies subject to the inquisitorial approach.

237 Ministry of Commerce, *Trade Remedies in New Zealand: A Discussion Paper*, 1998

238 *International Trade Administration Act, 71 of 2002* (although accepted in Parliament in 2002 it was only promulgated in 2003), available at http://www.itac.org.za/docs/international_trade_administration_act.pdf.

Ministers, they have delegated decision-making to the Commission. It follows that the Commission takes decisions on behalf of the whole of SACU.

4.1.2.7 USA

US TDI are governed by the US anti-dumping and countervailing (anti-subsidy) duty statutes, which are found in Title VII (sections 701-783), of the Tariff Act of 1930, as amended, which is codified in the US Code at 19 USC. §§ 1671 *et seq*.[239] These laws were most recently substantively amended in 1995 to implement the USA's obligations under the relevant WTO agreements following completion of the Uruguay Round.

Three institutions play a role in administration and enforcement of US TDI: the International Trade Administration (ITA) of the US Department of Commerce (Commerce), the International Trade Commission (ITC) and the Bureau of Customs and Border Protection (Customs).

The USA follows a completely bifurcated system. Commerce, a cabinet level agency of the executive branch, has primary responsibility for administration and enforcement of the US TDI. The ITA, a division of the Department of Commerce, conducts the initial investigations of dumping and subsidies and administrative reviews to determine definitive duty assessments, makes rulings on whether a product falls within the scope of a specific AD or CV duty order, and conducts circumvention inquiries. The Secretary of Commerce has delegated decision-making authority in all of these areas to the Assistant Secretary for Import Administration.

The ITC, which is an independent agency comprised of six commissioners (three Democrats and three Republicans) appointed by the President for nine-year terms, is responsible for making the injury determinations in initial AD and AS investigations and expiry (or "sunset") reviews.

Customs generally plays a ministerial rather than decision-making role in the administration of the laws. In the area of enforcement, however, Customs has broad authority to address fraudulent schemes to evade duties.

4.1.3 The EU's policy choice

The EU has no independent investigating authority. Rather, it is the Trade Defence Directorate within the European Commission's DG Trade which conducts the investigations, while definitive decisions are taken by a political body (the Council) following consultations with Member States. In future, the European Commission will also impose definitive measures, although still only after consultations with Member States.

With regard to the choice between a unitary and bifurcated system, the EU uses a semi-bifurcated system, in which dumping/subsidisation and injury are determined by separate teams of case handlers. However, there is no specialisation, i.e. the same case handler can work on injury in one case and on dumping in another case. Likewise, there is no sectoral specialisation. In the past, the Commission used to have two separate directorates for the determination of dumping/ subsidisation and injury; however, this is no longer the case. A reason for the decision against such specialisation was the greater flexibility to assign staff.

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[239] In addition, there are regulations that address certain issues in more detail, which are found in Title 19 of the Code of Federal Regulations ("C.F.R."), Parts 207 and 351.

4.1.4 Conclusions and recommendations

Comparative summary

Table 32 presents a comparative overview of peer countries' institutional choices.

Regarding the independence of investigation bodies, South Africa, Canada and the USA – the latter two in respect of injury determinations only – are the only peer countries that have established independent investigating authorities (ITAC, CITT and the ITC, respectively). However, only in Canada and the USA do the independent institutions take the decision that results in application of duties. These two countries thus have taken clear decisions that the question of whether or not to apply TD duties should be outside of the scope of political discretion. Moreover, by ceding decision-making on the key judgemental areas (injury and attribution of injury to dumping or subsidisation) to quasi-judicial institutions, these countries have insulated the TD decision-making from immediate political influence.[240] Although a part of the investigations (i.e. the assessment of dumping or subsidisation) remains within the customs authority (Canada) respectively the Department of Commerce (USA), this is the rather technical part which leaves little room for discretionary power and hence political influence.

Other countries, such as Australia and New Zealand, do not have independent investigating authorities but rely on the institutionalised neutrality of their public service to ensure that investigations are carried out impartially. However, in these countries, like in South Africa, the final decision-making power rests with ministers, i.e. political bodies. An even stronger influence of political considerations may exist in countries where the final decision is made not only by one minister in charge but by several ministers, or an inter-ministerial body; this is the case in China and South Africa.

Table 32: Comparison of institutional structure and decision-making in peer countries

Country	Independent investigating authority	Unitary or bifurcated system	Decision-making (definitive duties)	Automatic or discretionary imposition of measures
Australia	No (ACS)	"Sequenced" bifurcated	Minister for Home Affairs	Discretionary
Canada	Dumping: no (CBSA); Injury: yes (CITT)	Bifurcated	CBSA and CITT	Automatic
China	No (MOFCOM)	Semi-bifurcated	Tariff Commission of the State Council	Discretionary
EU	No (DG Trade)	Semi-bifurcated	Council (in future: Commission after consultation of Member States)	Discretionary
India	No (DGAD, Ministry of Commerce)	Unitary	Ministries of Commerce and Finance	Discretionary
New Zealand	No (Ministry of Economic Development)	Unitary	Minister of Commerce	Discretionary
South Africa	Yes (ITAC)	Unitary	Minister of Trade and Industry, Minister of Finance	Discretionary
USA	Dumping: no (ITA); Injury: yes (ITC)	Bifurcated	ITA and ITC	Automatic

Source: Summary by the evaluation team.

The aim of greater objectivity is also one of the justifications to have a bifurcated system. Among the peer countries, Canada and the USA have bifurcated systems, separating the dumping/subsidisation and injury investigations, while Australia has a system of substantive

[240] Note, however, that in Canada the focus on the technical, de-politicised nature of TDI is combined with the application of a public interest test, although the thresholds for applying the public interest are high and the decision to apply lesser duties pursuant to such a test rests with the political authorities; see section 4.7 below.

appeals where the appeal body can not only expeditiously review Customs' decisions, but replace its findings. China has a "semi-bifurcated" system whereby dumping/subsidisation and injury analyses are undertaken by separate units within the same institution.

Conclusions/ recommendations

While bifurcated systems may, at least theoretically, lead to greater objectivity of investigations – through a more independent inquiry and deeper analysis of both dumping or subsidies and injury – and allow for greater specialisation, they also increase the costs of conducting investigations (and of cooperating in investigations). Furthermore, they may also result in disparate interpretations of key elements, such as like products, in investigations,[241] as well as cause delays in finalising investigations as a result of the coordination required between the different agencies. The evaluation team therefore considers that a bifurcated system is not inherently superior to a unitary one.

In view of the fact that the EU does not have an independent investigation authority and that its decisions are taken by the Council (coupled with issues like the Union interest test and the lesser duty rule, which reduce the predictability of investigation outcomes) the EU system is sometimes described as a politicised system. However, apart from anecdotes in the context of particularly contentious cases, the evaluation team could find no systematic evidence for this interpretation. The EU TD system does not appear to be more politicised than that of most peer countries.

In addition, in future, under the new comitology rules, it will be the Commission that imposes definitive measures. Although final decisions will be taken only after consultations with Member States it constitutes a formal step towards de-politicisation. The evaluation team does not consider that further measures are required at present.

4.2 Policy Choices regarding the Initiation of Proceedings

4.2.1 Background, importance and policy options available

The WTO ADA and ASCM provide that investigations should only be initiated on the basis of applications lodged by or on behalf of the domestic industry. For example, Article 5 of the WTO ADA provides that:[242]

> "5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry. […]
>
> 5.4 […] The application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry. […]
>
> 5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without

[241] E.g. in the USA Commerce and the ITC do not necessarily give the same meaning to the determination of product under consideration and the like product, respectively (although in practice this rarely happens). As a result of this different interpretation of the precise scope of the dumping and injury investigations, injury might not be determined in respect of the exact product for which dumping was determined, which may give rise to questions of causality, i.e. whether a product for which dumping was determined could cause injury to a product which is not necessarily a like product. The separation of the investigation across two separate authorities thus raises issues regarding the causality analysis.

[242] The corresponding paragraphs in Article 11 ASCM provides for the same, *mutatis mutandis*.

> having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation."

Global economic developments in recent years have raised doubts, however, about the effectiveness of the current rules for the initiation of proceedings. In particular, the emergence of global production patterns calls into question the established understanding of what constitutes the "domestic industry".[243] Among domestic producers, differences in interests have emerged, depending on the business strategy chosen.

A similar divergence of interests regarding the response to dumped or subsidised imports may occur in the relationship between EU producers and their employees. The effects of globalisation and other trends have contributed to this:

- Globalised production implies that the management of EU producers with facilities abroad will not necessarily give a larger weight to the production in EU, resulting in neutrality or opposition to cases that might affect production subsidiaries in the exporting country. Conversely, for EU workers the protection of jobs in the EU will be paramount;
- Increasing inward FDI in the EU means that an increasing number of EU producers come under foreign ownership, resulting in a divergence of owners' (global profit maximisation) and workers' interests (at least maintenance of employment in the EU);
- Finally, in view of an (even if only perceived) increasing threat of retaliation against EU TDI, management of EU producers may feel obliged to consider the global standing/profits of the company while workers primarily focus on the company's production in the EU.

As a result, EU workers or their representatives might have an interest in filing complaints where management might not. This is in line with WTO rules as, as the ADA or ASCM specifically provide that:

> "Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1."[244]

This leads to the question of whether providing for complaints by labour unions would improve the effectiveness of the EU system. If the general answer to this question were positive, a number of further issues would have to be addressed:

- Given the fact that labour unions do not have the same information as company management, the question arises of what should be the appropriate requirements regarding supporting evidence – should it be lower than for complaints submitted by (or at least with the support of) EU producers' managements?
- Also, if labour unions were to file complaints, cooperation of EU producers would not be guaranteed. Therefore, the question arises as to how cooperation of EU producers could be ensured in the event that cases were not supported by management. This issue is addressed in section 4.3 below.
- Finally, how should the investigating authority treat a situation in which management and workers have opposing views?

Another response to the above sketched developments could be for the Commission to investigate more investigations *ex officio*.

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243 Also see the discussion on global value chains in section 2.1.3.4 above.

244 Footnote 14 to Article 5 ADA/Footnote 39 to Article 11 ASCM.

The following sections describe if and how peer countries have granted the right to complaint to trade unions and/or use *ex officio* investigations.

4.2.2 Policy Choices of Peer Countries

4.2.2.1 Australia

In terms of current Australian legislation any party may lodge and AD or AS application.[245] This is subject to the applicant meeting certain threshold requirements, including that an application is supported by a sufficient part of the Australian industry. An application can be considered to have sufficient support if (1) it is supported by those domestic producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application; and (2) they account for 25% or more of the total production or manufacture of like goods in Australia.

Labour unions' right to complaint

Australia recognises trade unions whose members are employed by the relevant domestic industry as interested parties to an investigation.[246] In practice, however, trade unions seldom, if ever, lodge applications.[247]

Ex officio initiations

With regard to the *ex officio* initiation of investigations, Section 269TAG of the Trade Act provides that the Minister may, on his or her own initiative, initiate an investigation to determine whether dumped or subsidised exports are causing material injury to a domestic industry in Australia. *Ex officio* initiation may only be used if there are "special circumstances", and only where there is *prima facie* evidence of dumping causing material injury to the domestic industry as a whole (Australian Customs and Border Protection Service 2011). No instance of an investigation initiated *ex officio* could be identified by the evaluation team in the evaluation period.

4.2.2.2 Canada

Labour unions' right to complaint

All applications in Canada are lodged by or on behalf of the domestic industry, without labour unions playing any role. Unions can, however, play a role in public interest enquiries. For example, in the public interest inquiry in *Beer*, the Mayor of Creston and two local labour unions for brewery workers argued in favour of keeping the AD duties at full level to protect local jobs.[248]

Ex officio initiations

In the normal course, investigations are initiated pursuant to complaints.[249] However, SIMA does provide for the CBSA to start an investigation on its own initiative, if it is of the opinion that there is evidence that the goods have been dumped or subsidised and there is a reasonable indication that the dumping or subsidisation has caused injury or retardation or is threatening to cause injury. The Act also provides for the Governor in Council (Cabinet) to initiate a subsidy investigation.

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245 See http://www.aph.gov.au/senate/committee/economics_ctte/customs_amendment_2011/report/c07.htm (accessed 25 November 2011) par 7.19.

246 Ss 269T(1) and 269ZX of the Act.

247 Customs, *Submission 15 at 1*, as referred to in http://www.aph.gov.au/senate/committee/economics_ctte/customs_amendment_2011/report/c07.htm (accessed 25 November 2011) par 7.21 footnote 15.

248 *Beer from the United States* – CITT, Public Interest Opinion No.: PI-91-001, November 25, 1991, at 3.

249 CBSA (2004a).

In practice, however, these provisions are not used and all initiations are based on applications lodged by or on behalf of the domestic industry.

4.2.2.3 China

Labour unions' right to complaint

In China, applications must be lodged by or on behalf of the domestic industry. According to China's Anti-Dumping Regulations applicants can be either the domestic producers of the like product or any natural or legal person, including any organisation acting on behalf of the domestic industry.[250] To date, all but two AD and AS applications have been lodged by producers, while the other two applications, both related to AD, were lodged by industrial associations.

Labour is not recognised as an interested party to an AD or AS investigation. Accordingly, labour unions do not have standing to lodge applications.

Ex officio initiations

With respect to *ex officio* investigations, China's Anti-Dumping Regulation provides that where, under special circumstances, MOFCOM does not receive a written application for an AD investigation, but has sufficient evidence of dumping, injury and a causal link, it may initiate an investigation on its own initiative. [251]

In practice, however, all AD and AS cases in China to date have been initiated upon the applicants' application.

4.2.2.4 India

Labour unions' right to complaint

In the Indian Rules, the domestic industry is defined as

> The domestic producers as a whole engaged in the manufacture of 'like article' and any activity connected therewith or those whose collective output of the said article constitutes a major proportion[252] of the domestic production of the article except when such producers are related to the exporters or importers of the alleged dumped goods or are themselves importers[253] thereof in which case such producers shall be deemed not to form part of domestic industry.[254]

The definition of interested parties also limits interested parties to the domestic industry, exporters, foreign producers, importers, business associations and the government of the exporting country. Unions are not recognised as interested parties and therefore have no standing to bring AD or CV applications before DGAD.

Ex officio initiations

Rule 5 of the Indian Rules deals with the initiation of an investigation. In general, investigations may only be initiated on the basis of a written application by or on behalf of the domestic industry. However, Rule 5(4) provides for *ex officio* initiation of AD proceedings by DGAD on the basis of information received from the Collector of Customs appointed under the Customs Act, 1962, or from any other source. In such circumstances, DGAD initiates the AD investigation on its own without any complaint/petition filed in this regard, provided DGAD is

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250 Article 13 of the Regulations on Anti-dumping,

251 Article 18 of the Regulations on Anti-dumping,

252 In *M/s AIIGMA v DA* the Tribunal held that 33% of the domestic industry was sufficient to establish industry standing; see Raju (2008: 320).

253 In *M/s Sterlite Industries Ltd* the Tribunal found that this is only relevant where the industry imported from the country under investigation and not where it imports from other countries; see Raju (2008: 320).

254 Rule 2(b). See also Raju (2008: 223).

satisfied that sufficient evidence exists as to the existence of dumping, injury and causal link between the dumped imports and the alleged injury.

In practice, however, all investigations and reviews are based on written applications.

4.2.2.5 New Zealand

Labour unions' right to complaint

Although the WTO ADA and ASCM note that in the territory of certain members, employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation, New Zealand is not one of those members. The Act defines "industry" in terms of "producers of like goods" and while it might be possible for unions to represent an industry, with the agreement of the business owners, it is difficult to see how this might be feasible or practicable. It would certainly be impossible without the cooperation of the business owners given the nature of the information that would be required to support an application and that would be required throughout an investigation.

As a result, in New Zealand practice applicants have been individual companies, or on some occasions groups of companies, but have not normally been associations or other bodies, such as labour unions.

Ex officio initiations

New Zealand legislation does not permit the initiation of an investigation on the Secretary's own initiative. This has been a consistent position since the passage of the Customs Amendment Act in 1987. The Secretary may, however, initiate a *review* on his or her own initiative, but only if the Secretary has information available pointing to the need for a review.

4.2.2.6 South Africa

Labour unions' right to complaint

Although labour unions are recognised as interested parties in South African legislation, "industry" is strictly defined in terms of "producers of like goods". While it might be possible for unions to represent an industry, with the agreement of the business owners, it is difficult to see how this might be feasible or practicable as unions are unlikely to have access to the business proprietary information required in investigations. This is particularly true considering the practice in South Africa whereby industry must submit *all* injury information and such information is verified prior to initiation.

Given this context, applicants have been individual companies, groups of companies or producer associations, but labour unions have never been an applicant.[255]

Ex officio initiations

South Africa's legislation provides for ITAC to self-initiate investigations and reviews. However, other than the self-initiation of the first round of sunset reviews in 1999, this provision has never been used. This follows both from ITAC's reluctance to be regarded as protectionist and from its policy that *all* injury information must be submitted prior to initiation, with ITAC not being in a position to have access to all injury information at this stage without significant industry cooperation.

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[255] Note that the special safeguard on textiles and clothing against China was, to a large extend, lodged by the Congress of South African Trade Unions (COSATU) as industry could not put an application together. Government, in the form of the Department of Trade and Industry, rather than ITAC, used the "application" as basis for consultations with the Chinese government before proceeding to impose a China-specific safeguard measure, although the measure was imposed outside the provisions of China's Protocol of Accession to the WTO.

4.2.2.7 USA

Labour unions' right to complaint

Only a "domestic interested party" has standing to file a petition for the imposition of an AD or CV measure in the USA.[256] Domestic interested parties include: (1) US domestic manufacturers, producers or wholesalers of a domestic like product; (2) a union or recognised group of workers that is "representative of" the domestic industry; (3) a trade or business association a majority of whose members are US domestic manufacturers, producers or wholesalers of a domestic like product; (4) an association, the majority of whose members are composed of interested parties falling within groups 1 through 3.[257]

Typically, petitions are filed by domestic manufacturers or producers, and they may be joined by a labour union. Petitions filed solely by a labour union are far less common. Petitions are most frequently filed by one or more US producers, sometimes with a labour union as a co-petitioner. It is also common for the petitioner to be an *ad hoc* group of US producers and labour.

The requisite industry support for lodging an application exists if: (1) domestic producers or workers supporting the petition account for at least 25% of total production of the domestic like product, and (2) those supporting domestic producers and workers account for at least 50% of the production of the domestic like product by that portion of the industry expressing support for or opposition to the petition.

In the US system, the fact that labour unions and other recognised labour groups have standing to file a petition may help SMEs obtain the requisite support for a petition. A union may represent workers in many companies, both large and small, and the union's support counts as support by each company in which it has members. Thus, even a small producer, with union support, could successfully file a petition. Note, however, that labour and management have an equal voice. As a result, when determining industry support for a petition, if workers (through the union) and management at a particular company express opposing views they cancel each other out and the company is counted as neutral.[258]

Conflicts between labour and management have little if any impact on Commerce's investigation into dumping or subsidies because the focus there is on foreign producers and governments. Conflicts are more likely to play out in the ITC's injury proceedings because of its focus on the domestic industry. Companies that did not support a petition are still interested parties and can participate at the ITC and present facts and arguments contrary to the position of a petitioning union. Overt splits are relatively unusual, however. It is more common for companies to remain neutral. For example, a company with operations in the target country may be reluctant to actively support a case if doing so could potentially have a negative impact on those foreign operations. Broader labour relations issues can also impact a company's decision to actively participate in opposition to a union.

Ex officio initiations

Other than sunset reviews, which are always so initiated, *ex officio* investigations are rare in the US system. Generally, all proceedings are initiated in response to a request by an interested party. Commerce has rarely self-initiated an original investigation and only under special circumstances, as required under the WTO rules. Although the WTO rules restrict self-initiation of investigations, they are generally equally rare with respect to other types of inquiries, such as

256 19 USC. §§ 1671a(b)(1) and 1673a(b)(1).
257 19 USC. § 1677(9)(C), (D), (E), and (F).
258 19 C.F.R. § 351.203(e)((3).

changed circumstances reviews and anti-circumvention inquiries.[259] This is consistent with the remedial nature of the statute, but also reflects the practicalities. It is typically the domestic or foreign parties who have a specific interest in an inquiry and unlike the agencies, which have hundreds of measures to administer, interested parties are focused on one, or perhaps a few, cases. The domestic industry is closer to the specific market and usually monitors the market when a measure is in place. Typically, therefore, private parties are most aware when circumstances may warrant some type of inquiry. The agencies have, however, shown a willingness to self-initiate proceedings to protect the integrity of the process against fraud, and the court has upheld their authority to do so.[260]

4.2.3 The EU's policy choice[261]

Labour unions' right to complaint

In the EU, as in most of the peer countries, workers or trade unions cannot lodge a complaint. Since workers or trade unions cannot legally represent the domestic industry or producers but only themselves, they are precluded from filing a complaint within the meaning of Article 5(1) ADR/Article 10(1) ASR.

Ex officio initiations

Furthermore, as in all peer countries except New Zealand, according to the two basic Regulations, in special circumstances the Commission can initiate an investigation on its own initiative if it has sufficient evidence of dumping, injury and a causal link. While the Commission did not make use of this provision during the evaluation period except for circumvention investigations and reviews, it has indicated that it is willing to consider *ex officio* cases against Chinese subsidies.[262] Thus, there are indications that the Commission's policy in this respect might be changing.

4.2.4 Conclusions and recommendations

Comparative summary

As can be seen from Table 33, with the exception of New Zealand, investigations can be initiated without a complaint in the EU as well as in all of the peer countries. However, in none of them has an investigating authority self-initiated cases except in truly exceptional circumstances.

Furthermore, except for the USA and, to a limited extent New Zealand and South Africa, none of the peer countries grant the right to complaint to workers or their representatives. In New Zealand and South Africa, trade unions could side with producers, but such joint complaints would hardly address any of the problems sketched in the introduction to this section (4.2.1). The US rules would allow labour to file complaint in some of the cases mentioned in section 4.2.1, i.e. those where management of domestic producers is afraid of retaliation and would therefore be passive.

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259 For example, annual administrative reviews are conducted upon request. 19 USC. § 1675(a). Similarly, although the USA automatically institutes an expiry review (19 USC. § 1675(c)(2)), if the domestic industry does not participate, the measure is revoked (19 USC. § 1675(c)(3)(A)). In effect, therefore, the domestic industry must affirmatively seek continuation of the measure through participation in the review.

260 See *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352 (Fed. Cir. 2008) (upholding Commerce's authority to initiate changed circumstances review upon learning that respondent provided false information to the agency).

261 For more details, see section 5.2.1.1 and 5.2.1.2.

262 See e.g. Commissioner De Gucht's speech "Going global: EU trade relations with major trading partners" at BusinessEurope on 08 Ocober 2011; available at http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148266.pdf.

Table 33: Comparison of policy choices made by peer countries regarding the initiation of proceedings

Country	Right for trade unions to lodge complaints	*Ex officio* initiations
Australia	Yes but rarely is used in practice	Possible but not used in practice
Canada	No	Possible but not used in practice
China	No	Possible but not used in practice
EU	No	Possible but not used in practice
India	No	Possible but not used in practice
New Zealand	Only in cooperation with domestic industry, never used in practice	Not possible
South Africa	Only in cooperation with domestic industry, never used in practice	Possible but not used in practice
USA	Yes	Possible but rarely used in practice

Source: Summary by the evaluation team.

Conclusions/ recommendations

To summarise, none of the peer countries appears to have made any policy response to the developments outlined above regarding initiations, or to consider that a policy response is necessary. However, the views expressed by stakeholders do show a certain discomfort with the current situation regarding initiations while at the same time no alternative is currently clearly in view.

Various considerations bear on a more active use of *ex officio* initiations. First, the antagonising potential of such initiations on countries concerned may be substantial. Second, there could be a high probability of such cases being brought before the WTO DSB. Third, it is typically the interested parties who have a specific interest in an investigation or review and are thus most likely to be aware when circumstances may warrant an investigations or review. Fourth, the evaluation team notes that the Commission already has a tested practice for dealing with situations of threat of retaliation, i.e., treating the identity of complainants as confidential.[263]

It is therefore recommended that the EU continue to use *ex officio* initiations of new investigations only in special circumstances where the business interests of some EU firms in the country of export might militate against their joining a specific complaint and thus compromise the ability of the industry to gain standing for a complaint. To the knowledge of the evaluation team, what constitutes "special circumstances" has not been clarified through practice or litigation. Certainly, the effect of globalisation on the composition of the domestic industry and the ensuing implications for filing complaints are general and pervasive developments that would hardly pass a "special circumstance" test. Examples of special circumstances include:

- There is a history of firms requesting anonymity in respect of TDI actions in respect of the country concerned.
- There is *prima facie* evidence of tit-for-tat retaliatory behaviour by the country concerned.
- The producer has significant investments in the country concerned or exports a significant portion of its production to that country.
- The identity of the producer could not be kept confidential because it could be readily inferred from the industry structure.

Another option to address most of the issues described in the introduction to this section, i.e. to grant the right to complaint to workers or their representatives, seems to avoid most of the disadvantages of *ex officio* initiations. It also has the advantage of already being in place in one of the peer countries, the USA. Therefore, although it is not a panacea for all of the situations mentioned where domestic producers might refrain from submitting or supporting a complaint, it is recommended that, in addition, the right to submit complaints, i.e., to have standing, be

263 This was done in the EU *Fasteners (China)* investigation. It was challenged by China, but the WTO DSB ruled in the EU's favour.

extended to labour representatives. Regarding conflicts between employees and management of domestic producers, guidance could be taken from US rules.

In legal terms, an amendment to the two basic Regulations with an explicit mentioning of workers or trade unions in Article 5(1) ADR/10(1) ASR would not contradict the WTO ADA or ASCM, as stated in section 4.2.1, and should therefore not pose a problem.

4.3 Obligation to Cooperate

4.3.1 Background, importance and policy options available

The policy relevance of a potential obligation to cooperate in TDI proceedings stems from the fact, discussed in section 4.2 above, that under certain conditions a domestic industry might be reluctant to file a complaint and cooperate in an investigation. Hence, if a decision is taken to grant workers and their representatives the right to file a complaint, such right would have little practical implication if not accompanied by corresponding measures to ensure cooperation of the domestic industry in the investigation.

Although the WTO ADA and ASCM address the issue of non-cooperation,[264] the provisions primarily affect exporters (and importers) but not the domestic industry. Further means to ensure cooperation of interested parties are not covered by the two WTO agreements.

Nevertheless, some WTO members have systems in place to ensure the cooperation of interested parties (at least domestic interested parties) in the proceedings. These systems are discussed in the following section.

4.3.2 Policy Choices of Peer Countries

4.3.2.1 Australia

The only power of coercion the ACS has is with regard to releasing goods into the customs territory of Australia. There is no enabling provision in terms of which the ACS can oblige a domestic producer, importer or exporter to comply with a request for information. There are numerous references in the Customs Handbook to what the ACS does in the event of a lack of cooperation, and this inevitably involves the ACS deciding on the basis of information otherwise available to it.

4.3.2.2 Canada

The Canadian system provides the Tribunal the power to issue subpoenas – that is, the Tribunal can require that a particular party participate in the proceedings by testifying as required by the Tribunal (subject of course to the rules governing Tribunal proceedings). Parties to the proceedings also have the ability to call witnesses through subpoenas. These issues are addressed

[264] Article 6.8 ADA/Article 12.7 ASCM provide that "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." Annex II to the ADA furthermore makes it clear that, "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

in the Tribunal's Rules. This power has been rarely exercised in TD cases historically but the sense of practitioners is that the Tribunal has become more prepared to use subpoenas.

4.3.2.3 China

No information could be obtained by the evaluation team regarding the obligation of interested parties to cooperate in Chinese TDI proceedings.

4.3.2.4 India

In India, there is no obligation on parties to cooperate in an investigation or to submit any evidence and there are no provisions in Indian law providing DGAD with power to force any party to cooperate in an investigation (Raju 2008: 284f).

4.3.2.5 New Zealand

The Dumping and Countervailing Duties Act 1988 does not provide any mechanisms for compelling cooperation from parties to an investigation, apart from permission for the investigating authorities to rely on the information available. There is no ability to subpoena witnesses or to apply for search warrants, or to require responses to questions, all of which are powers that have been available under competition or customs law.

The Ministry will not necessarily make an adverse inference from a failure to supply some or all of the information requested, nor does it maintain strict rules regarding the structure, format or medium for the provision of information. Often, information is sought from a range of sources, not necessarily limited to parties to the investigation. This reflects the inquisitorial approach to investigations.

4.3.2.6 South Africa

A *prima facie* reading of South Africa's ITA Act seems to indicate that ITAC has significant subpoena powers. However, the Act deals not only with trade remedies, but also with import and export control and these powers are limited to use outside the scope of trade remedies. Accordingly, ITAC requires that *all* injury information be submitted prior to initiation as it has no powers to force any party to cooperate. Its primary means of conducting its investigations is through the issuance of questionnaires and verification of the responses. ITAC does not have subpoena power in trade defence investigations, which is understandable given that its investigation is directed at foreign entities. However, this does result in significant recourse to facts available in investigations.

It should be noted that the Competition Commission, which conducts similar investigations in the competition law field, does have subpoena powers.

4.3.2.7 USA

Commerce's primary means of conducting its investigations is through the issuance of questionnaires and verification of the responses. Commerce does not have subpoena power, which is understandable given that its investigation is directed at foreign entities. Therefore, participation in Commerce's proceedings is voluntary. Nevertheless, if a party fails to cooperate

in or significantly impedes Commerce's investigation, the agency will draw an adverse inference based on the information available (e.g., the rate alleged in the petition).[265] The use of adverse facts available is therefore Commerce's primary means of inducing parties to participate.

The ITC, on the other hand, does have subpoena power. Although most information is submitted to the ITC voluntarily, the agency has on occasion used its subpoena power in trade defence cases. This may explain, at least in part, the ITC's reluctance to resort to the use of adverse facts available.

4.3.3 The EU's policy choice

In the EU TDI regime, the Commission does not have any coercive power to ensure cooperation by interested parties, apart from the rules regarding non-cooperation in Article 18(1) ADR/Article 28(1) ASR., which provide that in such case the Commission may arrive at its findings on the basis of facts available, which may include independent sources of information (such as official statistics, published price lists), or information provided by other interested parties, including the information provided in the complaint.

The situation is different in the area of competition policy, where the Commission's DG Competition may levy fines, as part of its investigation powers, in case of companies supplying incorrect or misleading information, or not providing information.[266]

4.3.4 Conclusions and recommendations

Comparative summary

In summary, the majority of peer countries – Australia, India, New Zealand and South Africa – as well as the EU have no means to compel domestic interest groups to provide information to the Commission in AD or AS investigations. Only in Canada and the USA do the agencies responsible for the injury assessment have subpoena power. In this context it is noteworthy that the USA is also the only country where Unions have the right to file complaints.

None of the peer countries has any instrument in place that would compel foreign interested parties to cooperate, over and above the provisions on non-cooperation derived from the WTO ADA and ASCM.

Conclusions/ recommendations

The evaluation team considers that cases not initiated by the Union industry (such as cases initiated upon request by employees or by the Commission on its own initiative), as discussed in section 4.2.4 above, entail a higher-than-average probability for a low degree of cooperation by the EU producers (and possible other EU stakeholders) which would call into question the investigation findings.

Therefore, a logical consequence of recommending that labour have standing to submit complaints is that options for compelling interested parties to cooperate need to be considered. Furthermore, obligatory cooperation in investigations would also remove some of the pressure on EU companies which may be exerted by allegedly dumping exporters or subsidising governments. The evaluation team recommends that instruments be introduced which ensure

265 19 USC. § 1677e.

266 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003.

cooperation of interested parties in TD investigations. These instruments should be comparable to those which DG Competition has as part of its investigating powers.

4.4 Transparency and confidentiality

4.4.1 Background, importance and policy options available

In order to ensure that interested parties' rights of defence are protected, AD and AS investigations must be carried out transparently. This requires that interested parties can have access to information used in and considerations made during the case which have a bearing on the outcome of investigations.

At the same time, investigations typically involve the analysis of confidential business information which must not be divulged, especially not to competitors. Thus, there is a conflict between the need for transparency in order to ensure rights of defence, and the need for confidentiality in order to protect proprietary information.

With regard to access to information in AD proceedings, the WTO ADA provides that:

> "The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential [...], and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information."[267]

The WTO ADA and ASCM furthermore provide that parties may submit information to the investigating authority in confidence. However, every claim for confidentiality must be supported with reasons and with either a non-confidential version of the information submitted in confidence or with reasons indicating why it is not possible to provide a non-confidential summary. All non-confidential summaries must be in sufficient detail to provide other interested parties a reasonable understanding of the information submitted in confidence.

The WTO agreements also allow members to have systems in which to provide for access to confidential information. Finally, the agreements do not regulate if, to what extent, and how parties other than interested parties can access information related to AD/AS cases.

WTO members therefore have certain policy space in designing TDI procedures which ensure the highest degree of transparency while respecting confidentiality requirements of interested parties who provide information in the course of proceedings. In this context, questions which have to be answered include the following ones:

- Should access be provided to confidential information, and if so, to whom and under which conditions and rules?
- How should access to non-confidential information be provided to interested parties?
- Who is to be considered as an interested party?
- Should access be provided to non-confidential information to parties other than interested parties, and if so, which extent of information, to whom and under which conditions and rules?

The following sections describe how peer countries have answered these questions.

[267] Article 6.4 ADA. Article 12.3 ASCM establishes the equivalent rule for AS proceedings.

4.4.2 Policy Choices of Peer Countries

4.4.2.1 Australia

Australia's rules regarding transparency and confidentiality issues in investigations are set out in detail in the ACS' Practice Statement on Administration of Australia's Anti-Dumping and Countervailing System.[268]

Non-confidential information

Australia distinguishes between a public and a confidential record. The public record contains non-confidential versions of all submissions from interested parties (including letters and emails); the statement of essential facts; and a copy of all relevant correspondence between the ACS and other persons in relation to the case. The public file may be examined by any person at the ACS Trade Measures Branch office. Interested parties can also access to the public record through the internet, from the Electronic Public Record.

Since June 2011, key documents pertaining to any investigation – initiation reports, statements of essential facts, preliminary, definitive and termination reports – can be accessed on the ACS website.[269]

Confidential information

On the other hand, Australia does not provide access to the confidential record. As noted by the Australian Productivity Commission:

> "While allowing for greater contesting of facts and thereby somewhat improving the information available to decision makers, these benefits would come at a cost of a more adversarial, longer and potentially more expensive process – especially if access to confidential information under these orders were limited to lawyers. And decisions could still rely heavily on the judgement of Customs, the TMRO and the Minister, given that the APO approach would not necessarily resolve competing claims" (Australian Productivity Commission 2009: 152).

The Commission's view was that for the time being non-confidential summary arrangements should be applied more rigorously with better public reporting on the outcome of investigations.

4.4.2.2 Canada

Non-confidential information

In Canada, participants in a proceeding are divided into two broad categories: "parties to the proceeding" and "interested persons". Both groups are allowed to file any information that they feel is pertinent and may file case arguments and reply submissions. The main difference between the two groups is that counsel for "interested persons" (i.e. persons other than "parties to the proceeding") may not be given access to confidential or protected information, while counsel for "parties to the proceeding" may be given access provided all the relevant conditions of SIMA are met. SIMA provides for the disclosure both of confidential and non-confidential information to participants in cases in order that all parties can understand the reasons and bases of fact on which decisions are made (CBSA 2004a); and the results of investigations are posted online. Non-confidential information relating to proceedings may be disclosed to any person on request and payment of a fee.

Confidential information

The issue of confidentiality of information provided to administrative agencies was dealt with in considerable depth in Canada's policy review in the mid-1990s and the subsequent policy reforms. At the time of the review, the Tribunal already had established procedures for dealing with confidential information but the CBSA's predecessor, the CCRA, had not. The

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268 Australian Customs and Border Protection Service Practice Statement No: PS2009/25, 27 July 2009. The legal basis for the keeping of records is Division 7 of Part XVB of the Customs Act 1901.

269 See http://www.customs.gov.au/site/page4412.asp.

Parliamentary subcommittees conducting the review argued that greater disclosure would allow interested parties to make rebuttal submissions, which would improve the quality and reliability of evidence, and promote greater procedural fairness as well as greater consistency with US policies applied to Canadian producers exporting to the USA.[270] In response to the recommendations, the CCRA did indeed establish guidelines for the disclosure of confidential information. Under these guidelines, counsel must sign a disclosure undertaking, and the party being represented by counsel must sign a letter of authorisation. Breach of the undertaking could incur a penalty of up to CAD 1 million and up to 5 years in prison.[271] Meanwhile, the Tribunal published a detailed Guideline for the treatment of confidential information in 2003.[272]

Until the Auditor General's review of the system in 2002, no known significant breaches of confidentiality had been experienced, nor enforcement actions been necessitated. A case of breach of confidentiality was subsequently uncovered; this involved the use of a software programme which made redacted information in PDF files visible again. This event forced the Tribunal to rely on more cumbersome filing procedures (e.g., use of faxes to transmit scanned PDF files).[273]

The Parliamentary subcommittees also recommended that SIMA be amended to permit access by expert witnesses to confidential information in Tribunal proceedings. The CITT Act and Rules were amended to respond to this recommendation.

The review of the system by the Auditor General of Canada concluded that users were generally satisfied that business confidential information such as marketing plans and price/cost information provided to Canadian counsel by the administrative bodies would remain protected but were much more concerned about the provision of such information to foreign counsel. Indeed, two thirds of the complainants surveyed by the Auditor General were not convinced that confidential information provided to foreign counsel would remain protected and expressed doubts about the enforceability of penalties outside Canada. In practice, the Tribunal has imposed additional conditions when granting access to foreign counsel on a case-by-case basis, including requiring that foreign counsel be under the control and direction of a domestic counsel, with domestic counsel held responsible for the way foreign counsel used and treated the confidential information; and imposing restrictions on the offices and locations where the foreign counsel could see confidential information. The Guideline reads, in relevant part, as follows:

> "In cases where counsel requesting access to confidential information are not residents of Canada and the Tribunal is persuaded that it is warranted, the Tribunal may grant such access on condition that it take place under the direction and control of Canadian counsel and that the information remain in Canada at all times" (CITT 2003).

The Auditor General's survey also found concern expressed over access to confidential information by expert witnesses at Tribunal hearings, on grounds that such individuals are not necessarily affiliated with a professional body capable of holding them accountable for maintaining the confidentiality of the information.

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270 Auditor General of Canada (2002: 10).

271 See advice from McMillan LLP. Available at http://mcmillan.ca/anti-dumping-and-anti-subsidy-remedies#How%20is%20confidential%20information%20protected.

272 CITT (2003): "Guideline: Designation, Protection, Use and Transmission of Confidential Information," last modified 29 November 2007, available at: ftp://ftp.citt-tcce.gc.ca/doc/english/publicat/ConfInfo_e.pdf.

273 CITT 2005. Minutes, Bench and Bar Committee, 28 September, 2005.

4.4.2.3 China

China has separate regulations regarding access to other parties' non-confidential information in injury and dumping investigations. There are no regulations governing the disclosure of information and access to non-confidential information in AS investigations.

Access to information on injury

As regards injury investigations, interested parties may only obtain access to other parties' non-confidential information. The IBII's definition of interested parties comprises

> "(1) Foreign (regional) producers, exporters and domestic importers of the product under investigation, or associations or other organizations of such producers, exporters and importers;
> (2) The government of the exporting country (region) of the product under investigation;
> (3) The producers of domestic like product, or associations or other organization of such producers;
> (4) Others"[274]

Non-confidential information may be accessed by prior appointment in the public reading room for trade remedies at the IBII's offices. The information may be searched, read or copied, but the files may not be removed from the reading room. No access can be obtained to confidential information submitted by any other party.

The IBII discloses the basic facts for the determination of injury within a reasonable period of time before a final determination is made. Disclosure only takes place to interested parties having registered to participate in the injury investigation, while interested parties which have not registered with the IBII may obtain access to relevant disclosure materials at the Public Reading Room of the IBII within a reasonable period of time before the definitive determination is made.

The essential facts that should be disclosed include the factors or data used to identify domestic like products, the factors or data on which identification of the domestic industry is based; the factors or data for cumulative assessment; the volume (in absolute or relative terms) and price of dumped or subsidised imported products; relevant economic factors or data to identify whether the domestic industry is injured or not; the factors or data supporting a finding that imports from the investigated country will further negatively impact the domestic industry; and other relevant information.

Access to information on dumping

In dumping investigations, i.e. those investigations conducted by BOFT, disclosure of the essential data, information, evidence and reasons adopted for establishment of the existence of dumping and the dumping margin for that particular interested party is made to those interested parties in an AD investigation who have provided information during the course of investigation. Disclosure takes place at three separate stages of the investigation: after the preliminary determination is issued; the result of on-the-spot verification; and before the final determination is made.

Information contained in the disclosures after the preliminary determination is issued includes:

- on normal value: the establishment of normal value, transaction data submitted and data having been adjusted adopted for calculation of normal value, data rejected for calculation of normal value and reasons for the rejection of any information;
- on export prices: the establishment of export prices, transaction data submitted and data having been adjusted adopted for calculation of export prices, data rejected for calculation of export prices and reasons for any rejection of information;

[274] Decree of the Ministry of Commerce concerning "Publication of Rules on Information Access and Information Disclosure in Industry Injury Investigations", No. 19 2006, as notified to the WTO, G/ADP/N/1/CHN/2/Suppl.6, 19 October 2007.

- on costs: the data for the establishment of cost of production, allocation method for various expenses and data adopted, estimate of profits, and the establishment of abnormal or non-recurring items;
- any information to the use of facts available and reasons, provided that confidential information of other interested parties is not disclosed;
- the methodology used to determine the dumping margin; and
- any other information BOFT considers necessary to disclose.

Disclosure to the relevant interested parties is made within 20 days from the date of issuance of the public notice of the preliminary determination and parties have ten days in which to submit written comments.

The essential facts disclosure prior to the final determination covers the same information as the disclosure after the preliminary determination is issued and parties again receive ten days to comment in writing.

Interested parties may also have access to the relevant public information of the case for up to six months after finalisation of the case.[275]

4.4.2.4 India

In India, any interested party may inspect the public file containing non-confidential version of the evidence submitted by other interested parties. This includes the non-confidential application, non-confidential versions of exporters' and importers' responses and all subsequent documentation. No access can be obtained under an administrative protective order.

Raju has indicated that

> "The due process clause in the [Customs Tariff] Rules must be followed strictly. The whole Indian procedure is not transparent. In most of the cases, the parties accuse each other for not providing a proper non-confidential summary of the information submitted by the other party. The DA [Designated Authority, i.e. DGAD] also does not insist that the domestic industry submit a non-confidential summary. In the case of *Reliance Industries Ltd v DA*, the Tribunal held that the DA's procedures require more transparency. Rule 16 mandates the DA to inform all interested parties about the essential facts forming the basis of its decision. In *Optical fibre from Korea* case, the SC held that 'confidentiality is not something, which must be automatically assumed [...] confidentiality changes from case to case. It is for the DA to decide whether a particular material is required to be kept confidential.' Indian rules have to be amended to include detailed guidelines for the preparation of non-confidential summaries of information, and the Rule should be applicable to all interested parties. The due process clause contained in Article 6.9 should be adopted completely and incorporated into Rule 16 of the [Customs Tariff] Act" (2008: 320f.).

This confirms Kumaran's statement that there is insufficient transparency in Indian investigations. He specifically indicated that "Indian cases suffer from an obsession about confidentiality leading to a non-transparent system" (2005: 118), that DGAD fails to insist that the domestic industry provide a proper non-confidential version of its costing information and that exporters are "not given any numbers even in indexed form" (2005: 118). He also argued that while written submissions filed pursuant to a public hearing are made available to all interested parties, rejoinders to the written submission are not so made available.

Not only did Kumaran indicate a lack of transparency as one of the ten major problems in Indian AD, but he listed the inadequate disclosure of information to interested parties as another of the

[275] *Ibid.*, Article 15.

ten major problems (2005: 118). Disclosure falls short of the requirements of the WTO ADA in this regard, even though the wording of the ADA has been duplicated in Rule 16. No indication is given in the essential facts as to what the facts are that DGAD will take into consideration and it is a mere recital of the arguments raised by various parties. Even where parties point out clear errors, DGAD does not issue a revised disclosure statement (2005: 119).

4.4.2.5 New Zealand

Non-confidential information

New Zealand legislation requires the Secretary to ensure that all interested parties are given reasonable opportunity to present in writing all evidence relevant to the investigation, and, upon justification being shown, to present such evidence orally. It also grants all parties access to all non-confidential information relevant to the presentation of their case and that is used by the Secretary in the investigation.

The Act provides the basis for making information confidential between the Ministry and the party submitting the information and permits the Secretary to request non-confidential summaries of information which is claimed to be confidential or to provide a statement of the reasons if such a summary is not possible, and the Secretary may disregard any information for which a satisfactory summary is not provided or a satisfactory reason given why such a summary cannot be provided.

In practice, interested parties to the investigation are allowed access to any non-confidential information used in the investigation that is relevant to the presentation of their case. The Ministry operates a Public File for each investigation that is publicly available for viewing and copying (although not yet available online as of October 2011). Copies of documents on the Public File are available at the Ministry's premises in Wellington, or can be sent to anyone who requests the information as hard copy, fax, or email attachment.

Copies of non-confidential versions of initiation reports, final reports, review reports, and reassessment reports are generally made available online through the Ministry's website.[276] Also available on the site are the instructions given in each case to the New Zealand Customs Service regarding the collection of AD or CV duties.

Confidential information

New Zealand does not operate an APO system by which confidential information is made available under strict conditions to the legal representatives of interested parties. The small number of cases in New Zealand means that there is no significant body of legal experience or expertise on AD, and most cases are undertaken with the support of a limited range of trade and economic consultants.

4.4.2.6 South Africa

Non-confidential information

Access to information held by Government in trade remedy investigations is subject to the provisions of the Constitution, the Promotion of Access to Information Act (PAIA), the International Trade Administration Act (ITA Act) and the Regulations. In general, the Constitution and PAIA provide that any person has the right of access to all information in Government's possession, except under certain conditions, which includes information submitted on a confidential basis and that, if released, could provide parties with an unfair advantage or could have a negative effect on the party submitting the information.

[276] www.med.govt.nz.

The ITA Act provides for the right of parties to claim confidentiality, provided a proper non-confidential version is submitted that sets out the essence of the information submitted in confidence.[277] In practice, ITAC treats all information submitted on a confidential basis as confidential, even if it disagrees that such information should be granted confidential status (in which cases the ITAC should return the information to the provider thereof if it is not declared non-confidential). However, while this is enforced in respect of the domestic industry, the same stringent requirements are not enforced in respect of exporters' submissions.

The AD Regulations provide for a "public file" to be kept with all non-confidential information submitted by interested parties. Although explicit reference is made to a "public file", it is virtually impossible for anybody other than interested parties to gain access to this information (although access would have to be granted in terms of the *Information Act*), while consultants in most instances have to show a letter of appointment before they will be granted access to the public file. In addition, the public file is not kept in a separate room where direct (albeit controlled) access may be gained, but is kept by each investigating officer. This requires that the investigating officer be contacted and a meeting be set up to gain access to the public file. Such an appointment normally has to be made approximately two to three working days before access is granted, although there are no specific rules in this regard. Free copies may be made of any material on the public file, but the files may not be removed from the board room. No or limited access is available to the public file by parties other than interested parties and no submissions are made available via the internet. However, all preliminary and final reports are published on the ITAC website.[278]

Confidential information

Although the ITA Act provides that the disclosure of confidential information is an offence (and provides for severe penalties in this regard),[279] it also provides that information may be disclosed "for the purpose of the administration of justice"[280] or through an order of court.[281] Thus, access to other parties' confidential information may only be obtained by a party's legal counsel in High Court reviews and then only either if the opposing party agrees to release the information or if the High Court rules that such access should be given (which has been done in every case such access was requested to date).

Despite a requirement in the Anti-Dumping Regulations that all issues of law and fact considered in ITAC's determinations must be contained in the public reports, few of the public reports contain the parties' arguments and it is often difficult to determine whether information submitted by a party has been taken into consideration. Accordingly, most users and consultants feel that South Africa's trade remedy system lacks transparency.

4.4.2.7 USA

Non-confidential information

The US system distinguishes between access to non-confidential and confidential information. Anybody, including parties other than interested parties, may obtain full access to all non-confidential information submitted both to Commerce and the ITC and may make copies of any non-confidential documents at their own expense. The ITC also has an electronic docket that allows all registered users online access to all public documents.

277 S 3 of the *ITA Act*, read with ADR 2.
278 www.itac.org.za.
279 S 50(1) of the *ITA Act*.
280 S 50(2)(b) of the *ITA Act*.
281 S 50(2)(d) of the *ITA Act*.

Confidential information

Access to confidential information is administered under the APO system under which counsel to the parties are afforded access to all confidential business proprietary information (BPI) submitted to Commerce and the ITC.[282] APO access is granted only to counsel[283] and their consultants (e.g., economists) and they are prohibited from disclosing the information to their clients or any other unauthorised party. Persons granted APO access are under strict obligation to handle BPI in a specific manner[284] and to protect the information from unauthorised disclosure. APO violations are subject to sanctions, including barring the violator from representing parties before the agency.[285]

For the operation of the system, Commerce and the ITC maintain two "service lists."[286] All parties that participate in a proceeding are placed on a "public" service list. Whenever a party makes a submission, the party must provide each person on the public service list with a copy of the public version of the submission. In the public version all business proprietary information is redacted.

The other service list is comprised of legal counsel who have applied for and been granted access to business proprietary information under what is known as an Administrative Protective Order (APO). The submitting party must provide copies of the business proprietary version of all submissions to each individual on the APO service list.

Only in very limited circumstances does Commerce or the ITC decline to release information under APO (e.g., to protect certain confidential sources). Thus, normally the representatives have access to the full administrative record on which Commerce and the ITC will base their determinations.

The APO system is generally viewed as very effective and the greater access to information unquestionably affords parties a greater opportunity to defend their interests. Coupled with judicial enforcement of the agency's obligation to adequately explain its decisions,[287] the APO process provides a high level of transparency. However, it has also resulted in increased participation by counsel, with a corresponding increase in the costs to lodge or defend a case.

Both Commerce and the ITC issue their preliminary and final determinations in writing, although only *after* decisions have been taken: Normally within five days of issuing a preliminary or final determination, Commerce discloses its calculations, including computer printouts, under APO and will, if requested, conduct a disclosure conference.[288] The scope of disclosure is normally limited to a factual presentation by Commerce of the calculations. Although Commerce will answer specific factual questions, legal or methodological arguments and comments are not normally addressed during disclosure.

Within five days of disclosure, a party may submit comments on what it believes to be "ministerial" errors in the calculation. A ministerial error is defined as an error in an arithmetic function, a clerical error result from (e.g.) inaccurate copying, and similar types of unintentional, ministerial errors. Commerce will amend a final determination to correct any ministerial error.[289]

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282 19. C.F.R. § 351.305.
283 Thus, for example, a party appearing *pro se* will not be granted APO access.
284 See http://ia.ita.doc.gov/apo/apo-handbook-20110805.pdf.
285 19 C.F.R. Part 354.
286 See 19 C.F.R. § 207.3 (ITC) and 351.303(f) (Commerce)
287 *See* Greater Boston Television Corp. v. FCC, *444 F.2d 841,851 (D.C. Cir. 1970), cert. denied, 403 US 923 (1971)* (Court must be assured "that the agency has given reasoned consideration to all the material facts and issues").
288 19 C.F.R. § 351.224.
289 19 C.F.R. § 351.224(e).

However, Commerce will only correct a "significant" ministerial error in a preliminary determination.[290] A significant error is defined as one that makes a difference of at least 5 percentage points, but not less than 25% of the weighted average margin.[291] For example, if correction of a ministerial error would reduce the preliminary margin from 10% to 5%, the difference is 5 percentage points and more than 25% of the original margin. Commerce would therefore issue a corrected preliminary determination. In contrast, if correction of the error would change the margin from 30% to 25%, Commerce will not issue a corrected preliminary determination because, while the difference is 5 percentage points, it is less than 25% of the original margin.

4.4.3 The EU's policy choice[292]

Non-confidential information

In the EU, access to information related to TD cases, other than the information contained in the publications, is restricted to interested parties. Interested parties do not have access to the complete files, which include confidential information, but only to a non-confidential version. This is provided electronically, with online access under preparation. The EU practice is thus comparable to that in New Zealand.

Confidential information

The EU does not provide access to the confidential record. However, it is envisaged that the Hearing Officer can check, upon request by interested parties, that confidential information has been taken into account correctly by the Commission in the investigations.

4.4.4 Conclusions and recommendations

Comparative summary

Among the peer countries, only Canada and the USA provide access to confidential information on a systematic basis (Table 34). In South Africa, access is possible provided that the High Court has ordered so (which happens infrequently). All other peers do not provide access to the confidential file. On the other hand, all countries reviewed provide access to the non-confidential files to interested parties, which is an obligation under WTO rules. Some of the countries (Australia, Canada and the USA) also provide access to the non-confidential file to the general public, upon certain conditions. Indeed, some countries refer to the non-confidential file as the "public file", but in practice there is no clear distinction between a "public" and a "non-confidential" file, other than the means of how the information is provided – persons other than interested parties will usually have to go to the investigating authority's offices and inspect the non-confidential file there, while interested parties can access the files electronically, or receive them automatically. Finally, all peer countries except China provide access to official case reports on their websites, accessible for anyone.

As the provision of access to the confidential file raises obvious confidentiality issues, Canada and the USA have subjected such access to a number of restrictions and sanctions. In Canada:

- counsel must sign a disclosure undertaking, and the party being represented by counsel must sign a letter of authorisation;
- breach of the disclosure undertaking could incur a penalty of up to CAD 1 million and up to 5 years in prison;

290 *Ibid.*
291 19 C.F.R. § 351.224(g).
292 See section 5.2.3 for more details.

- granting access to foreign counsel is decided on a case-by-case basis, including requiring that foreign counsel be under the control and direction of a domestic counsel, with domestic counsel held responsible for the way foreign counsel used and treated the confidential information; and imposing restrictions on the offices and locations where the foreign counsel could see confidential information.

In the USA, access to confidential information under the APO system is conditioned upon the following:

- counsel must be registered on the respective service list;
- counsel are under strict obligation to handle BPI in a specific manner and to protect the information from unauthorised disclosure.
- violations are subject to sanctions, including barring the violator from representing parties before the agencies.

Table 34: Comparison of peer country practice regarding access to information

Country	Non-confidential file	Confidential file
Australia	▪ Any person at IA office ▪ Interested parties at IA office or online	▪ No access
Canada	▪ Any person upon request and fee payment, at IA office	▪ Counsel for "parties to the proceeding" and expert witnesses in Tribunal proceedings
China	▪ Interested parties at IA office Public Reading Room	▪ No access
EU	▪ Interested parties at IA office and on DVD (online access planned)	▪ No access
India	▪ Interested parties at IA office	▪ No access
New Zealand	▪ Interested parties at IA office (online access planned)	▪ No access
South Africa	▪ Interested parties at IA office ▪ (theoretically: any person)	▪ For the purpose of the administration of justice, or through an order of court
USA	▪ Interested parties are "served" all documents ▪ Any person at IA office	▪ Counsel and their consultants (e.g., economists) on service list (other experts on case-by-case basis)

Source: Summary by the evaluation team.

Access to confidential information - arguments

The key policy decision in the context of the transparency of trade defence proceedings is whether or not to provide access to the confidential files. The following arguments have been mentioned in favour of and against such a move:

Advantages of APO systems:

- The increase in transparency will remove any doubts about proceedings and how findings (on all substantive issues covered in an investigation) have been arrived at;
- Interested parties can have access to all information they might require to defend their interests;
- Provision of access to the confidential files reduces the importance of disclosure. In the EU, as well as in other countries without access to the confidential file, rights of defence demand that "essential facts under consideration"[293] be provided to interested parties and these be given the opportunity to react – i.e., disclosure must take place *before* the issuance of the decision. In the EU system, this has led to problems in cases where changes in findings (as a response to input from interested parties) have required an additional disclosure (see section 5.2.3.2); this problem might become more important under the new comitology rules if it leads to cycles of comments and re-disclosures. In the USA and Canada, disclosure of all

[293] Article 6.9 ADA/Article 12.8 ASCM. Note that the WTO agreements refer to "essential facts *under* consideration" whereas the two basic EU Regulations refer to "essential facts *and* considerations."

facts is covered by the access to the full file under APO. An active disclosure (which in the US Commerce does after the dumping finding) is thus strictly speaking not required; the same would apply to re-disclosures in the EU if access were provided to confidential information.

Disadvantages of APO systems:

- An APO system may lead to more litigation since trade lawyers have access to full file and based thereon can identify potential issues for litigation.[294] On the other hand, complete access to information implies greater transparency and thus may also lead to less litigation as parties have the opportunity to point out possible errors *before* a final finding is made. Which effect prevails is an empirical matter – although based on the number of litigations in the USA the former effect seems to be stronger.
- Breach of confidentiality is a potentially serious disadvantage and requires that access to confidential information be subjected to both restrictions and sanctions. In the peer countries' practice, while concerns have been expressed about leakage of confidential information (and indeed one documented breach of confidentiality through hacking of electronic files occurred in Canada), this has not been an issue in the USA.
- The APO system increases costs of interested parties to lodge or defend a case. In order to benefit from access to the confidential file, interested parties would be obliged to appoint a person with the right to access the file (which would typically be a lawyer). Without such an appointment, parties would be at a distinct disadvantage

EU stakeholder views

Among the EU stakeholders consulted, an APO system was seen as worth considering by some Member States; other Member States deemed that such a system was not necessary and stated that the cost of such a system would constitute a problem for small users, as it would make the hiring of lawyers mandatory. Divergent views on the APO system were also expressed by trade lawyers. While some were against such a system in the EU, stating as arguments the likely pressure on lawyers from their clients and the potential problems of leakage of confidential information, other were in favour, arguing that total transparency would reduce politicisation of TDI and help eliminate "weak" cases.

Conclusions/ recommendations

A priori, it is difficult to assess if the advantages or disadvantages of providing access to confidential files weigh more heavily, as they will depend on the specific conditions under which such access is provided. In this context, one concern that has been mentioned in the EU discussion is that, in the EU, sanctioning of lawyers through Bars is not possible. However, both Canada and the USA also have other sanctioning mechanisms, including disbarment, fines and prison sentences. The Canadian system of allowing access for foreign counsel only under guidance from a Canadian lawyer is also interesting to note. With regard to the cost effects, provision of access to confidential files need not necessarily be restricted to lawyers but could also include other experts, which would likely limit the cost increase of the system.

Furthermore, the evaluation team notes that an APO system is not the only instrument to provide access to confidential files. Another option could be to provide access to confidential information to the courts.[295] Finally, the Hearing Officer could check, upon request by interested parties, that confidential information has been taken into account correctly by the Commission in the investigations. This last option has in fact already been selected by the Commission.

[294] They may also have a commercial self-interest in finding issues for litigation.

[295] The evaluation team understands that access to confidential information is already provided if the Court requests but that this plays only a limited role in practice.

In view of this, it is recommended that the Commission actively promote the role of the Hearing Officer within the stakeholder community. The introduction of a system to provide access to confidential information (such as the APO system) is not recommended at this stage. However, it is recommended that a review be undertaken once some experience has been gained with the Hearing Officer's role of verifying that confidential information has been duly considered in an investigation.

Regarding access to non-confidential information, in view of the practice of some of the peer countries to grant persons other than interested parties access to the non-confidential files, it is recommended that this practice also be adopted by the EU. By definition, a non-confidential file is not confidential and there should thus be no reason to withhold such information, especially as there is no way to keep the information under control once it has been handed over to interested parties. This recommendation does not imply major resources as access to the non-confidential files could be restricted to visits at the Commission's premises; furthermore, based on peer country experience it is unlikely that demand for access to non-confidential files would be unduly high. A potential negative consequence of such a change could be that the quality of non-confidential files might suffer as interested parties might be less willing to provide meaningful information knowing that this might be read e.g. by their competitors in third countries. However, this does not seem to have been the case in peer countries; it could also be countered if the Commission had coercive powers to ensure cooperation of interested parties, as recommended in section 4.3.4 above.

4.5 Treatment of non-market economies

4.5.1 Background, importance and policy options available

The second note to Article VI.1 of GATT provides that a strict comparison between the export price and domestic prices in a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State may not always be appropriate, i.e. non-market economies (NMEs). Article 2 of the WTO ADA provides that the export price need not be compared to the domestic selling prices in the exporting country where a "particular market situation" exists, although this does not specifically relate to NMEs.

There is currently no definition of a NME country in either of the two WTO agreements, but China's and Vietnam's Protocols of Accession do provide for specific different rules related to the determination of the normal value in cases of imports from China/Vietnam, with concessions ending in 2016 and 2018 for China and Vietnam, respectively.

WTO members therefore have considerable policy space regarding the treatment of NMEs in AD cases. This includes decisions on issues such as the following:

- the criteria for considering countries as NMEs and, accordingly, the number and identity of countries considered as NMEs;
- the criteria and modalities for removing the status of NME for countries (i.e., granting market economy status or MES), for sectors or firms (i.e., granting market economy treatment or MET);
- the consequences and implications of NME treatment for AD proceedings, such as the methodology to be applied for determining dumping; and
- under the analogue (or surrogate) country methodology, the criteria to apply for choosing the analogue country.

4.5.2 Policy Choices of Peer Countries

4.5.2.1 Australia

Where the government of the country of export has a monopoly, or substantial monopoly, of the trade of the country, and determines or substantially influences the domestic prices of goods in that country, the ACS may determine the normal value on the basis of the normal value determined in a surrogate country, which could include prices in Australia. The determination of whether a country is to be treated as an NME (or economy in transition to use the terminology preferred in Australia) is made by the ACS in consultation with the Department of Foreign Affairs and Trade.

Countries considered as market economies/ MES

Rather than having a list of NME countries, Schedule 1B of the Australian Customs Regulations 1926[296] contains a list of 149 countries to which subsection 269TAC (5D) of the Act (i.e. the provisions on determining normal value in an economy in transition) does not apply – i.e. a list of market economies. This list includes a number of countries which the EU considers as NMEs, including Albania, Armenia, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, PR of China, and Vietnam.

Australia granted China MES in 2005[297] in what appears to have been a preliminary gesture of good will prior to initiating negotiations towards a free trade agreement, of which the 16th round of negotiations was held in July 2011.[298] This notwithstanding, the ACS examines the effects of the wide-spread presence of state-owned enterprises on prices and other market factors in the Chinese domestic market. Notwithstanding having granted China MES, and in line with the essential facts quoted above, the ACS has decided to strengthen its rules on the "particular market situation" provided for under the WTO ADA. This includes considering the relevance and impact of government influence and assistance in respect of key inputs to the product; circumstances where the proportion of state-owned enterprises might contribute to a particular market situation determination; and other circumstances where government intervention could result in distortion of domestic selling prices (Australian Customs and Border Protection Service 2011: 15).

The following quotation shows the treatment of China after MES having been granted:

> "In determining whether the provision of goods conferred a benefit, Customs and Border Protection has had regard to the guidelines set out in ss. 269TACC(4) and (5). In establishing a benchmark price for primary aluminum reflecting adequate remuneration, Customs and Border Protection considered whether prices from private enterprises were an appropriate basis. Information provided in the GOC questionnaire response showed that state-owned enterprises represented a significant percentage of the total number of aluminium producers in China. Importantly, in terms of production volumes, state-owned enterprises producing primary aluminium accounted for almost half of the total aluminum production in 2008. It is Customs and Border Protection's view that prices of primary aluminium supplied by state-owned enterprises are likely to have influenced domestic primary aluminium prices generally.
>
> Customs and Border Protection has also taken into account the following factors which indicate the Government's involvement in the domestic aluminium market and the distorting effects on domestic prices:
> - export taxes on primary aluminium; and
> - purchase of primary aluminium by the GOC.

296 Available at http://www.austlii.edu.au/au/legis/cth/consol_reg/cr1926233/sch1b.html.

297 http://www.asiantribune.com/news/2005/04/20/australia-grants-full-market-economy-status-china (accessed 25 November 2011).

298 http://www.dfat.gov.au/fta/acfta/ (accessed 25 November 2011).

> For these reasons, Customs and Border Protection considers privately owned supplier prices of primary aluminium to be distorted and unsuitable for use as a benchmark in determining whether a benefit is conferred by the program.
>
> In ascertaining an appropriate benchmark, Customs and Border Protection is mindful of the need to determine a price that reflects prevailing market conditions for like goods in China. This requirement is reflected in s. 269TACC(5). Customs and Border Protection was able to confirm that an important factor in the purchasing decisions of Chinese exporters was the comparison of domestic prices reflected on the Shanghai Futures Exchange (SHFE) and equivalent prices for imported primary aluminium quoted on the London Metal Exchange (LME). This was clearly evidenced in the switch to imported aluminium at about the same time that SHFE prices rose above LME prices.
>
> Therefore, Customs and Border Protection considers that LME prices for primary aluminum are indicative of import prices into the Chinese market and as such, are a suitable benchmark for determining whether primary aluminium was provided at less than adequate remuneration and conferred a benefit in relation to the goods exported."[299]

Criteria for considering countries as NMEs

Where an applicant seeking the imposition of dumping duties alleges that exports originate in an NME country (which is not included in the list of market economies in Schedule 1B of the Customs Regulations) the ACS will assess, on a case-by-case basis, the influence a government has over domestic selling prices. The applicant must provide adequate *prima facie* evidence that market conditions do not prevail.

The ACS' decision on whether a country is considered as an NME is based on exporters' responses to a "Supplementary Section – Questions for Exporter/Manufacturers in Transitional Economies" in the exporter questionnaire. The criteria this assessment relies upon include the following (Australian Customs and Border Protection Service 2009: 41f):

- whether the entity makes decisions about prices, costs, inputs, sales and investments in response to market signals and without significant interference by a government of the country of export;
- whether the entity keeps accounting records in accordance with generally accepted accounting standards in the country of export and whether these accounting standards are in line with international accounting standards developed by the International Accounting Standards Board;
- whether said accounting records are independently audited;
- whether the entity's production costs or financial situation are significantly affected by the influence that a government of the country of export had on the domestic price of goods in the country before the country's economy was an economy in transition;
- whether the country of export has laws relating to bankruptcy and property and whether the entity is subject to these laws;
- whether the entity is part of a market or sector in which the presence of an enterprise owned by a government of the country of export prevents market conditions from prevailing in that market or sector;
- whether utilities are supplied to the entity under contracts that reflect commercial terms and prices that are generally available throughout the economy of the country of export;
- if the land on which the entity's facilities are built is owned by a government of the country of export – whether the conditions of rent are comparable to those in a market economy; and
- whether the entity has the right to hire and dismiss employees and to fix their salaries.

[299] See ACS Statement of Essential Facts no. 148 in *Certain Aluminium Extrusions Exported to Australia from the People's Republic of China* (1 March 2010) 79-80.

In addition, in determining the involvement of the government of the country of export in management decisions (particularly in how management makes decision on prices, costs, inputs, sales and investments) of a given exporter, the ACS has regard to the following (Australian Customs and Border Protection Service 2009: 42):

- whether a genuinely private company or party holds the majority shareholding in the entity;
- if officials of a government of the country of export hold positions on the board of the entity – whether these officials are a minority of the members of the board;
- if officials of a government of the country of export hold significant management positions within the entity – whether these officials are a minority of the persons holding significant management positions;
- whether the entity's ability to carry on business activities in the country of export is affected by a restriction on selling in the domestic market, if the potential for the right to do business being withdrawn other than under the contractual terms, or if the entity is a joint-venture in which one of the parties is a foreign person, or is carried on in the form of such a joint-venture – the ability of the foreign person to export profits and repatriate capital invested
- Whether the entity's significant production inputs (including raw materials, labour, energy and technology) are supplied by enterprises that are owned or controlled by the government, and at prices that do not substantially reflect conditions found in a market economy.

Methodology for NME dumping calculation

When determining normal value for exports from an NME, Australian legislation sets out four options:

- The price of like goods manufactured and sold for domestic consumption in a country determined by the Minister (a surrogate country);
- The price of like goods manufactured in a surrogate country and sold to an appropriate third country;
- The constructed price of like goods manufactured and sold in the surrogate country;
- The price payable for like goods manufactured and sold in Australia.

There is no hierarchy binding or guiding the ACS in its choice of the appropriate method for determining normal value for exports from NMEs, although in practical terms Australian domestic prices would be a last resort to be used only when the normal value could not be established on any other basis. The ACS will make its choice depending on what it deems appropriate and reasonable in the circumstances of the case.

Criteria for choosing the analogue country

When selecting an appropriate analogue country, the ACS will request the applicant to nominate a comparable market economy where a petition for import relief alleges dumping/subsidisation of goods exported to Australia from an NME. Although there are no established criteria that apply, when selecting a comparable analogue country, the ACS may consider the following non-exhaustive list of indicators:[300]

- Administrative expediency: It is not unusual that the ACS will assess the suitability of any other market economy countries also named as sources of unfairly traded imports in an investigation that involves a non-market economy. Only where there are no other nominated countries or those nominated are unsuitable to serve as surrogates will the ACS turn to a country from outside the investigation;
- Similarity of products: When choosing a surrogate country the ACS will seek countries in which producers manufacture a product that is a "like product" to that manufactured in the exporting non-market economy. When comparing different products, the ACS may consider quality a relevant factor. Minor differences between the products compared may result in adjustments being made by the ACS for fair comparison;

[300] See Australian Customs and Border Protection Service (2009: 49f).

- Manufacturing processes: The similarity of the manufacturing processes, including the use of technical standards and the level of technological advancement/sophistication;
- Market conditions: The ACS will seek to assure itself that prices are formed under sufficiently competitive domestic market conditions, and that price levels are in a reasonable ratio to production costs, and are free of distorting influences such as price controls or import restrictions like high tariff walls, inter-company relationships, or monopolistic/oligopolistic practices.
- Volumes: The ACS will look to identify an analogue country where the domestic market is relatively representative of that in the NME under investigation. One indicator commonly relied upon is whether the surrogate country's sales constitute at least 5% of the volume of sales from the non-market economy to Australia. Even where the 5% threshold is not met, this will not preclude them from being considered.
- Access to raw materials: Where significant differences exist between the potential surrogate country and the non-market economy under investigation in terms of each country's access to raw materials, this will likely preclude its choice as a surrogate. Although factor endowments are the most obvious differentiating feature here, the ACS will also examine whether the potential surrogate country has transport and port infrastructure that is vastly different or import barriers that are considerably higher than the NME under investigation.
- Macroeconomic indicators: Levels of development, GDP, population sizes, division of labour and levels of technological advancement are all relevant macroeconomic factors. However, the ACS may also compare on an industry-to-industry or sector-to-sector basis, and review the macroeconomic indicators specific to the relevant industrial sectors in the two countries, rather than conducting an economy-wide analysis.

4.5.2.2 Canada

Countries considered as NME

Under the Canadian system, the default position is to treat each country, sector or product under investigation as subject to market economy conditions unless there is evidence to the contrary. Accordingly, it is NME status that is applied on a discretionary basis. The non-market economy determination is made in respect of the sector producing the subject goods, not on the country as a whole. Each determination is made on its own merits and all countries are deemed to be operating under market conditions until proven otherwise. The fact that a finding of non-market status is made in respect of a particular sector in a country is of no relevance in the normal course for determinations being made in respect of other sectors in that same country. It follows that there is no established list of countries considered as NMEs.

A determination that an industry is operating under non-market conditions may only be made if

- the government has a monopoly or substantial monopoly of its export trade; and
- domestic prices are substantially determined by the government of that country and there is sufficient reason to believe that they are not substantially the same as they would be if they were determined in a competitive market.

It follows that, for most countries, it is difficult to render a finding that a particular industry is operating under non-market conditions. However, for particular countries that are named in regulations (at the present, the only countries named are China and Vietnam) to be found to be operating under non-market conditions, there is no requirement to show that the government has a monopoly or a substantial monopoly of its export trade.

"Government" is defined broadly and includes not only the national government but provincial/state, regional or municipal authorities, as well as any of their agents (i.e., any person,

agency or institution acting for, or on behalf of, or under the authority of, or under the authority of any law passed by any level of, government).

Methodology for NME dumping calculation and criteria for choosing the analogue country

In cases where a positive non-market economy determination is made, normal value is calculated on the basis of a surrogate or analogue country investigation. The statutory provisions stipulate only that the analogue country not be Canada and that like goods be sold by producers for use in that country. As regards the producers, these are designated by the President of the CBSA. If producers in the chosen analogue countries do not respond, the normal value is set by Ministerial Specification. In *Aluminium Extrusions*, where this situation arose, the CBSA chose India as the analogue for China and constructed a normal value based on publicly available information.

4.5.2.3 China

China does not have any special provisions for dealing with imports from non-market economies and treats all countries as market economies.

4.5.2.4 India

Countries considered as NME

India defines NME countries as those which are "not operating on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[301] In 2001, India established a list of 17 countries regarded as NMEs for the purpose of AD proceedings. These countries are: Albania, Armenia, Azerbaijan, Belarus, China, Georgia, Kazakhstan, North Korea, Kyrgyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, the Ukraine, Uzbekistan and Vietnam[302].

Furthermore:

> "There shall be a presumption that any country that has been determined to be, or has been treated as, a non-market economy country for purposes of an anti-dumping investigation by the designated authority or by the competent authority of any WTO member country during the three year period preceding the investigation is a nonmarket economy country."[303]

Criteria for granting MES or MET

However, countries considered as or presumed to be NMEs can request being granted MES, and exporting countries MET. The granting of both MES and MET is based on the following criteria:

> "(a) the decisions of the concerned firms in such country regarding prices, costs and inputs, including raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand and without significant State interference in this regard, and whether costs of major inputs substantially reflect market values;
> (b) the production costs and financial situation of such firms are subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts;
> (c) such firms are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of the firms, and
> (d) the exchange rate conversions are carried out at the market rate."[304]

If a company succeeds in establishing that it is operating under market conditions, normal values for the company will be calculated on the basis of the principles set out for market economies.

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301 Rules 8(1).
302 Notification No. 28/2001-NT-Customs, 31 May 2001, as notified to the WTO, G/ADP/N/1/IND/2/Suppl.3, 21 August 2001.
303 Rules 8(2).
304 Rules 8(3).

There is no specific NME questionnaire that is issued to exporters in NME countries, although DGAD includes a list of 15 questions in the questionnaire to determine whether individual exporters or foreign producers operate under market conditions (Kumaran 2005: 119). DGAD on several instances has failed to properly evaluate responses by individual exporters and market economy status has been rejected on general grounds.[305]

The courts in India have also failed to provide proper guidance. Thus, in *Universal Chemicals and Indus Ltd v DA* the Tribunal held that it is up to the applicant to prove that China is a non-market economy, whereas in *Shenyang Matsushita S Battery Co Ltd v Exide Industries Ltd* the SC held that "it is the duty of the party claiming market economy status from China to prove that such individual units were operating according to market principles" (Raju 2008: 290).

Methodology for NME dumping calculation and criteria for choosing the analogue country

Where a country is regarded as operating under non-market conditions, a surrogate country is normally used for the determination of the normal value. In terms of the latest provisions in the CT Act, an "appropriate market economy third country shall be selected by the DA in a reasonable manner keeping in view the level of development of the country concerned and the product in question" (Raju 2008: 290). The "third country" could be India.

4.5.2.5 New Zealand

New Zealand does not treat any country as a non-market economy and has agreements with China and Vietnam that they will each be treated as a market economy. No dumping or subsidy case has so far arisen with any other country that has been regarded as a non-market economy by other jurisdictions.

4.5.2.6 South Africa

Countries considered as NME

South Africa does not maintain a list of NME countries. Traditionally, China, Russia and the Ukraine have been regarded as non-market economies. No investigations have been conducted against other countries traditionally regarded by other authorities as operating under non-market conditions, and hence it is impossible to state if these would be considered to be NME countries by South African authorities.

Countries having been granted MES

However, since 2003, South Africa has officially granted MES to China, Russia and Vietnam. In addition, in the only sunset review conducted against the Ukraine after Russia had been granted MES, South Africa regarded both Russia and the Ukraine as market economies and no presentations to the contrary were made by any party.

MET and criteria for analogue country selection

In terms of a Memorandum of Understanding and a Record of Understanding signed between South Africa and China in 2006, the South African industry can still lodge an AD application against China on the basis of the NME status of the Chinese industry, using surrogate country normal values for initiation purposes, but Chinese producers are then granted the opportunity to prove that they are operating under market conditions.

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[305] Kumaran (2005: 119). Note, however, that Raju (2008: 291) holds an entirely different view (in one section) when he states that "India is liberal in considering the NME status in its investigations. If the country investigated submits a response from the questionnaire, the DA will consider it properly and give it market economy status after evaluation. Out of the nine cases investigated between 2000 and 2004, in seven cases, India granted the market economy status to different countries." However, he contradicts himself later by stating that "India has initiated a majority of cases against China. But only in a few cases has India granted market economy treatment to individual exporters from China" (see Raju 2008: 322).

There are no guidelines in either the legislation or the Memorandum on how the surrogate country should be selected, but the application questionnaire requires that the "third country should have an industry at a similar level of development as that in the exporting country. If more than one country is subject to the current application the information of that country may be used as the third or surrogate country." In practice, however, Chinese exporters are automatically granted MET as soon as they cooperate in an investigation, regardless of the amount of government intervention. Conversely, they are treated as operating under non-market conditions if they do not cooperate and the investigation was initiated on the basis of their NME status. The Supreme Court of Appeal in 2011 held that ITAC does not even have to consider information submitted by interested parties showing that a company or industry in China is operating under non-market conditions, thereby nullifying provisions of the ITA Act in this regard.[306]

4.5.2.7 USA

NME – criteria and countries

The USA has certain special procedures for calculating dumping margins in cases involving NMEs.[307] It defines an NME country as one that Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[308] The factors Commerce considers in determining NME status are:

(1) the convertibility of the currency;
(2) extent to which wage rates are the result of free bargaining between management and labour;
(3) the extent to which joint ventures and other investments by foreign firms are permitted;
(4) the extent of government ownership and control of the means of production;
(5) the extent of government control over the allocation of resources; and
(6) other factors Commerce deems appropriate.[309]

The USA treats several countries, e.g., China and Vietnam, as NMEs.[310] This is a political decision that cannot be reviewed in a court of law,[311] and exporters do not have the opportunity to prove that they are operating under market conditions in the context of an investigation. The USA has "graduated" Russia and many of the former Soviet republics to MES. However, approximately 60% of all US cases involve imports from China. Most other NME cases are those involving imports from Vietnam.

Methodology for NME dumping calculation and criteria for choosing the analogue country

In AD cases involving an NME, Commerce ignores prices and costs in the NME and calculates normal value using what is known as the "factors of production" method.[312] Under that method, Commerce gathers data on the type and level of inputs the NME producer uses, including raw materials, labour, packaging, etc., and then values those factors in a surrogate country. The surrogate country must be at a comparable level of development and a significant producer of the

306 See *ITAC v SATMC* [2011] ZASCA 137. Note, however, that this decision, although now binding is incorrect and unconstitutional as it renders certain portions of the ITA Act and the Regulations irrelevant and as the decision was based on errors of fact and law. See Brink (2011b).
307 19 USC. § 1677b(c).
308 19 USC. § 1677(18)(A).
309 19 USC. § 1677(18)(B).
310 Other ITA-designated NME countries are Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova, Tajikistan, and Uzbekistan; see Martin (2011); footnote 39 at page 11.
311 19 USC. § 1677(18)(D).
312 19 USC. § 1677b(c).

subject merchandise.[313] Commerce also uses surrogate financial ratios for selling, general and administrative costs and for profit and surrogate values for internal transportation costs.

MET

Commerce does have discretion under the statute to use domestic prices and costs in an NME. However, the test it has established for exercising that discretion set a high bar – so high that no respondent has yet met the requirements. As a matter of practice, Commerce developed a three-pronged test for establishing a "market-oriented industry" within an NME:

(1) for the subject merchandise there must be virtually no government involvement in setting prices or production levels;
(2) the industry producing the subject merchandise should be characterised by private or collective ownership; and
(3) producers must pay market-determined prices for all significant inputs, whether material inputs or non-material inputs (e.g., labour and overheads).

What makes the test particularly onerous is that Commerce will only apply it on an industry-wide basis, not a producer-specific basis.[314]

4.5.3 The EU's policy choice[315]

Countries considered as NME

The EU distinguishes between two groups of NMEs, the composition of which at the end of 2010 was as follows:

- Group 1: Azerbaijan, Belarus, North Korea, Tajikistan, Turkmenistan and Uzbekistan;[316]
- Group 2: Albania, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, PR China, Vietnam.[317]

For countries in group 2, individual exporters in these countries can apply for MET. If this is granted by the Commission, the standard (market economy) procedure for determining normal value will be applied to these companies only.

Criteria for granting MES or MET

For MET to be granted, an exporter must fulfil all of the following five conditions:[318]

- it must make entrepreneurial decisions (e.g. regarding prices, costs and inputs, output, sales and investment), in response to market signals and without significant State interference, and costs of major inputs must substantially reflect market values;
- it must have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;
- its production costs and financial situation must not be subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts;
- it must be subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms; and
- it must carry out exchange rate conversions at the market rate.

313 *Ibid.*
314 It should be noted that this is in line with China's Protocol of Accession to the WTO.
315 See section 5.1.2.7 for a more detailed analysis.
316 None of these countries is a member of the WTO.
317 All of these countries except Kazakhstan are members of the WTO.
318 See Article 2(7)(c) ADR.

During the evaluation period only a minority of exporters' MET applications were successful: only 29 exporting producers (21%) out of 141 which had submitted applications (and subsequently cooperated) were granted MET.

In order to be granted MES, a country must fulfil five conditions which are derived from the list in Article 2(7) ADR:[319]

- low degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly (e.g. public bodies);
- absence of state-induced distortions in the operation of enterprises linked to privatisation and the use of non-market trading or compensation system;
- existence and implementation of a transparent and non-discriminatory company law which ensures adequate corporate governance (application of international accounting standards, protection of shareholders, public availability of accurate company information);
- existence and implementation of a coherent, effective and transparent set of laws which ensure the respect of property rights and the operation of a functioning bankruptcy regime;
- existence of a genuine financial sector which operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision.

Given the often far-reaching and deep reforms required by individual economies to meet market economy criteria, typically a considerable time elapses between the application for such status and the granting of it. China applied in 2003, Kazakhstan, Mongolia and Vietnam applied in 2004, Armenia in 2005, and Belarus in 2009. So far, only two countries, Russia in 2002 and the Ukraine in December 2005, were granted MES.

Methodology for NME dumping calculation

Normal value for NME country exporters is determined in line with the standard rules except that, instead of the exporter country, a market economy third country, the so-called "analogue country", is taken as the basis. If no domestic or export price in the analogue country can be determined, and if the construction of normal value is not possible (e.g. because no analogue country producer cooperates in the investigation), normal value can then be determined "on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin"[320].

Criteria for choosing the analogue country

The ADR provides little guidance regarding the criteria to be applied for choosing the analogue country, other than that the selection shall be in a "not unreasonable manner", and shall take into account the amount of reliable information made available at the time of selection. If an investigation is carried out simultaneously against NMEs and market economies, a market economy that is subject of the same investigation shall be used when appropriate. Last but not least, interested parties are given the opportunity to comment on the choice of analogue country.

4.5.4 Conclusions and recommendations

Comparative summary

Table 35 summarises the criteria for determining NME, MES and MET, and the lists of NMEs, and countries having been granted MES. As can be seen, there is indeed a great variance in WTO

[319] It should be noted that the regulation itself does not address the issue of how to determine the country-wide MES. However, detailed information on criteria and procedure is provided in the Commission Staff Working Document on Progress by the People's Republic of China towards Graduation to Market Economy Status, SEC(2008)2503 final, 19.09.2008, available at: http://register.consilium.europa.eu/pdf/en/08/st13/st13409.en08.pdf.

[320] Article 2(7)(a) ADR.

members' treatment of NMEs, ranging from the absence of the concept of NME (in China), a case-by-case assessment (most peer countries), to established lists of NMEs (EU, India, USA). Likewise, the modalities for being granted MES or MET vary considerably: Thus, the USA does not grant MET; at the other end of the spectrum (of those countries that apply the NME concept) is Canada, which presumes a market economy unless the domestic industry claims otherwise. In the EU, MET can be requested only in some NME countries.

Table 35: Comparison of peer countries' definition and lists of NMEs, MES and MET

Country	NMEs – Criteria and countries	MES/MET – Criteria and countries/sectors/firms	Rules for analogue country selection
Australia	▪ Criteria: see WTO ADA ▪ Countries: case-by-case	▪ list of market economies includes Albania, Armenia, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, PR of China, and Vietnam ▪ for China "particular market situation" applies	▪ Australia can be used as analogue country as last resort ▪ No established criteria but non-exhaustive list of indicators including administrative expediency, similarity of products, manufacturing processes, market conditions, sales volumes, access to raw materials, and macroeconomic indicators
Canada	▪ Criteria: see WTO ADA ▪ Countries: lesser criteria apply to China and Vietnam to be considered as NMEs	▪ Presumption of market economy; NME status determined case-by-case, sector-by-sector	▪ Analogue country must not be Canada ▪ Criteria: like goods must be sold by producers for use in analogue country
China	▪ Not applicable	▪ Not applicable	▪ Not applicable
EU	▪ Criteria: see WTO ADA ▪ Countries: Albania, Armenia, Azerbaijan, Belarus, North Korea, Tajikistan, Turkmenistan, Uzbekistan, Georgia, Kyrgyzstan, Moldova, Mongolia, PR of China, Vietnam, Kazakhstan	▪ Detailed rules for MES (5 criteria) ▪ Selected NMEs only: Detailed rules for MET and IT (IT non-compliant with WTO rules) ▪ MES granted: Russia, Ukraine	▪ EU can be used as analogue country as last resort ▪ No list of criteria; market economy in same investigations to be used where possible; choice in a not unreasonable manner
India	▪ Criteria: presumption of NME if the country was treated as NME by any WTO Members in the three years prior to the investigation ▪ Countries: Albania, Armenia, Azerbaijan, Belarus, China, Georgia, Kazakhstan, North Korea, Kyrgyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam	▪ Both government and individual exporters can request MES/MET (4 criteria)	▪ India can be used as analogue country ▪ Criteria: similar level of development of the country concerned
New Zealand	▪ Countries: none	▪ Not applicable	▪ Not applicable
South Africa	▪ Case-by-case ▪ Countries: none at present. Non-cooperating exporters in countries having been granted MES are treated as operating under non-market conditions	▪ China, Russia and Vietnam (Ukraine implicitly)	▪ No full-fledged methodology ▪ Criteria: similar level of development of the country concerned
USA	▪ Criteria: does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise. Six factors to determine NME; ▪ Countries: Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Uzbekistan and Vietnam.	▪ MET applied on industry-wide basis ▪ Criteria for MET exist but have not yet been met by any industry from an NME	▪ Analogue country must be at a comparable level of development and a significant producer of the subject merchandise

Source: Summary by the evaluation team.

Regarding the methodology to be applied for determining dumping in NMEs, there is less variance. Although the WTO ADA does not provide any guidance for the methodology to be used, all peer countries currently apply the analogue country approach or a variant of it (the factors of production method in the USA, which bases factor remuneration on cost levels in an analogue country).[321] An important distinction is between countries that allow including themselves among the analogue country (Australia, India, the EU) and others that don't (Canada).

Criteria for selecting the analogue country vary widely. While some countries (India, South Africa, USA) include a similar level of development among the list, most others do not. Canada is the only country which requires that the like product must be sold on the domestic market. Australia has the most extensive list of indicators to be considered when choosing the analogue country, but no ranking between these indicators seems to exist. In effect, therefore, the investigating authority has a similar degree of discretion as if no selection indicators were established. Finally, the EU has no legally established criteria for selecting the analogue country.

Conclusions/ Recommendations

In the EU, NME countries are listed in the ADR. By contrast, in some peer countries, the determination of whether non-market conditions exist is determined by the administrative authorities on the basis of the factual context of the industry and country concerned. The establishment of MES by the EU tends inherently to be a long process and so far has been completed only by two countries. Regarding the treatment of NMEs at the country level, the EU system provides less flexibility than others that are presently in use. On the other hand, requests for MET, which is treated on an enterprise level (rather than on a sector/industry level as in Canada or the USA), are frequent.

The evaluation team considers that the differences in treatment of NMEs across WTO members' AD systems introduce inconsistencies in the international trading system which should be avoided. A harmonisation of NME concepts at the multilateral level would therefore be desirable.

Furthermore, the evaluation team notes that flexible systems that do not rely on lists of countries established by regulation have not apparently impaired the application of NME status to countries/sectors where such is warranted. Also, the status of China and Vietnam, the two major economies with significant NME characteristics, will be changing before the end of the decade. With both of these economies changing rapidly, flexibility is called for both on substantive fairness grounds and from the perspective of facilitating administration of cases and avoiding future WTO challenges. These considerations suggest that a flexible system of NME treatment such as practiced in some peer countries could be more appropriate than the current system applied by the EU, in particular with regard to the lists of NMEs and the granting of country-wide MES. The practices of Australia, which has granted China MES and utilises the "particular market situation" provisions to address cases where domestic Chinese prices may be distorted, and Canada, which applies market treatment as the default but has used the latitude in its system to successfully apply non-market treatment where warranted, are worth examining as the EU considers its next steps.

A more detailed assessment of the EU's treatment of NMEs, which addresses the implementation details, is provided in section 5.1.2.7.

[321] However, it should be noted that the factors of production method and the standard analogue country method can yield substantially different results. For example, the analogue country approach, unlike the factors of production approach, also neutralises currency undervaluation.

4.6 Application of Lesser Duty Rule

4.6.1 Background, importance and policy options available

The application of the lesser duty rule is not compulsory according to WTO rules but is recommended. Article 9.1 of the WTO ADA states that:

> "the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury."[322]

Hence, WTO members are free to decide if they want to apply the lesser duty rule, and if so, under which conditions and how to determine which level of the measure would be adequate to remove the injury. This, in turn, requires measuring the level of the injury. Key policy decisions arising in the context of the lesser duty rule application thus are:

- Should the lesser duty rule be applied at all?
- If it is applied, should it be mandatorily applied in all cases, or based upon further considerations or conditions?
- If the lesser duty rule is not applied in all cases, how should its application be determined? Should this be rules-based or discretionary?
- Which criteria should determine whether or not to apply the lesser duty rule? This could be public interest considerations, the condition of cooperation of interested parties, or the condition of reciprocity, i.e. whether the exporting country concerned also applies the lesser duty rule.
- Which methodology should be applied to measure the level of injury which is to be offset by the measure?

The following sub-sections assess how the peer countries have addressed these questions and what the effect has been on the level of duties.

4.6.2 Policy Choices of Peer Countries

4.6.2.1 Australia

Legal basis

Australia applies the lesser duty rule under the so-called "non-injurious price" (or NIP) doctrine, as provided under Section 269TACA of the Act and Sections 8, 9, 10 and 11 of the Dumping Duty Act, implementing Article 9.1 ADA and Article 19.2 ASCM, respectively. Under this doctrine, the non-injurious price of the subject imports is identified as the minimum price necessary to remove the injury caused by the dumping and/or subsidisation (Australian Customs and Border Protection Service 2009: 103).

As a matter of policy, the ACS generally derives a given NIP on the basis of an unsuppressed selling price (USP), which is defined as a selling price that the Australian industry could reasonably achieve in the market in the absence of dumped or subsidised imports (Australian Customs and Border Protection Service 2009: 103). The calculation of the USP will generally be based on the Australian industry's selling prices at a period of time in which it was unaffected by dumped imports. Where this approach is unwarranted on good grounds, the ACS may construct a price on the basis of the domestic industry's production and a margin for profit. If neither of

[322] Also see Article 19.2 ASCM.

these methods is deemed appropriate, the ACS will use the selling price of non-dumped imports of the like product on the Australian market.

The NIP is normally calculated on the basis of proprietary information of the Australian industry and other interested parties. Since it may be possible for this information to be mathematically derived if the NIP were to be made public, the ACS keeps NIP calculations confidential. Practice

Application of the lesser duty rule in Australia is not mandatory but subject to the discretion of the Minister who decides based on a recommendation prepared by the ACS. Also, the authorities do not reveal if the lesser duty rule has been applied – only dumping margins and the level of measures are provided (Australian Productivity Commission 2009: 156), and as Australia does not normally apply *ad valorem* duties one cannot infer from the level of measures if the lesser duty rule has been applied. Nevertheless, according to the Australian Productivity Commission, the lesser duty rule had been applied in 12 of the 27 measures in place at the end of 2009, leading to an average decrease in the duty of 15%, although in some case the decrease was as much as 45% (2009: 31).

As part of the recent reform of TDI in Australia, concerns have been raised that

> "the Australian approach to determining the non-injurious price, upon which the lesser duty is based, should be improved to ensure injury to Australian industry is adequately addressed" (Australian Customs and Border Protection Service 2011: 21)

Part of the problem is that injury does not only affect prices – which currently are the only aspect considered in the determination of the NIP – but can "have effects on volume, price, profits or a range of other economic factors" (Australian Customs and Border Protection Service 2011: 21).

In response, the Australian authorities are currently in the process of developing a revised methodology for calculating the non-injurious price.

4.6.2.2 Canada

Canada applies the full duty rule in the normal course, setting the duties equal to the dumping/subsidy margins. The Canadian framework does however provide for implementation of a lesser duty pursuant to a public interest test, i.e., if the Tribunal is of the opinion that the imposition of an AD or CV duty in the full amount would not or might not be in the public interest (see section 4.7.2.2 below). Legal basis

In *Beer*, the Tribunal clearly affirmed the lesser duty principle in rather categorical terms:

> "Anti-dumping duties at levels higher than necessary to remove material injury are excessive. Duties that are excessive penalize certain products and exporters by raising prices unnecessarily high and, perhaps by excluding them from the market altogether. In our view, this is not in the public interest."[323]

By inference, in cases where the Tribunal eschews to undertake a public interest investigation, it may be concluded that the Tribunal does not see the duties implied by its injury findings to be excessive, if imposed.

In practice, however, the public interest test and, hence, the lesser duty rule is applied very seldom, and in no case during the evaluation period (see section 4.7.2.2 below). An established Practice

[323] *Beer* – CITT, Public Interest Inquiry, No. PI-91-001, 25 November 1991, at 4 .

methodology for calculating the non-injurious price has not been adopted. In practice, where the lesser duty rule has been applied it was done so based on case specific approaches.

4.6.2.3 China

China does not apply the lesser duty rule. According to China's Antidumping Regulation, AD/CV duties may not be levied in excess of the margin of dumping/subsidisation established in a final determination.[324] On the other hand, there is no provision that foresees a level of measures below the margin of dumping/subsidisation. Thus, in practice, the duty rate is always equal to the dumping/subsidy margin.

4.6.2.4 India

Legal basis

The Indian trade defence legal framework mandatorily foresees the use of lesser duty rule since 1999. The Government is obliged to restrict an AD duty to the lower of the dumping margin and the injury margin.[325] This is done to reduce the negative effect of a measure on those industries (not consumers) which use the imported product as input for their production.[326]

With regard to CV measures, as a matter of principle the amount of a CV duty is an amount not exceeding the amount of subsidy as determined by DGAD. However, in cases of imports from specified countries[327] the amount of duty shall not exceed the amount which has been found adequate to remove the injury to the domestic industry.[328]

The injury margin is calculated as the difference between the fair selling price due to the domestic industry and the landed cost of the product under consideration.[329] Landed cost for this purpose is taken as the assessable value under the Customs Act and the basic customs duties. DGAD determines a single weighted average import price for the product under consideration, regardless of the number of models and price differences between the models, and compares this to the weighted average price of the Indian domestic product to determine the margin of price undercutting and price disadvantage. The lesser duty rule will then be determined on the basis of this average price, rather than on a properly weighted basis taking into consideration the price disadvantage on a model-by-model basis (Kumaran 2005: 121f.).

However, in October 2011 India notified to the WTO[330] that it had just adopted new principles[331] for the determination of the non-injurious price. According to the new legislation:

> "It shall be the duty of the designated authority, in accordance with these rules [...] (d) to recommend to the Central Government (i) the amount of anti-dumping duty equal to the margin of

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324 Article 42 of the Regulations on Antidumping; Article 43 of the Regulations on Countervailing Measures.

325 Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, as amended, Section 4(d) and 17(1)(b).

326 See e.g. *Acetone from Japan and Thailand*, para 94.

327 "Specified country" means a country or territory which is a member of the WTO and includes countries or territories with which the Government of India has an agreement for granting it the MFN treatment. Section 2(f) of Customs Tariff (Amendment) Ordinance 1994.

328 Article 20 of Customs Tariff (Amendment) Ordinance 1994.

329 Directorate General of Anti-Dumping & Allied Duties Ministry of Commerce, Government of India: Anti-dumping – a guide, p. 9.

330 WTO *Notification of Laws and Regulations under Article 18.5 of the Agreement: India* G/ADP/N/1/IND/3 (19 October 2011).

331 Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of injury) Amendment Rules, 2011.

dumping or less, which levied, would remove the injury to the domestic industry, after considering the principles laid down in the Annexure III to these rules".[332]

Annexure III provides the following rules for the calculation of the non-injurious price:

"(3) The non-injurious price is required to be determined by considering the information or data relating to cost of production for the period of investigation in respect of the producers constituting domestic industry. Detailed analysis or examination and reconciliation of the financial and cost records maintained by the constituents of the domestic industry are to be carried out for this purpose.

(4) The following elements of cost of production are required to be examined for working out the non-injurious price, namely:-

(i) The best utilization of raw materials by the constituents of domestic industry, over the past three years period and the period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of raw materials.

(ii) The best utilization of utilities by the constituents of domestic industry, over the past three years period and period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of utilities.

(iii) The best utilization of production capacities, over the past ·three years period and period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of production capacities.

(iv) The Propriety of all expenses, grouped and charged to the cost of production may be examined and any extra-ordinary or non-recurring expenses shall not be charged to the cost of production and salary and wages paid per employee and per month may also be reviewed and reconciled with the financial and cost records of the company.

(v) To ensure the reasonableness of amount of depreciation charged to cost of production, it may be examined that no charge has been made for facilities not deployed on the production of the subject goods, particularly in respect of multi-product companies and the depreciation of re-valued assets, if any, may be identified and excluded while arriving at reasonable cost of production.

(vi) The expenses to the extent identified to the product are to be directly allocated and common expenses or overheads classified under factory, administrative and selling overheads may be apportioned on reasonable and scientific basis such as machine hours, vessel occupancy hours, direct labour hours, production quantity, sales value, etc., as applied consistently by domestic producers and the reasonableness and justification of various expenses claimed for the period of investigation may be examined and scrutinized by comparing with the corresponding amounts in the immediate preceding year.

(vii) The expenses, which shall not to be considered while assessing non-injurious price include,-

a) research and development Provisions (unless claimed and substantiated as related to the product specific research);

b) since non-injurious price is determined at ex-factory level, the post manufacturing expenses such as commission, discount, freight-outward etc. at ex-factory level;

c) excise duty, sales tax and other tax levies on sales;

d) expenses on job work done for other units;

e) royalty, unless it is related to technical know-how for the product;

f) trading activity of product under consideration; or

g) other non-cost items like bad debts, donations, loss on sale of assets, loss due to fire, flood, etc.

(viii) A reasonable return (pre-tax) on average capital employed for the product may be allowed for recovery of interest, corporate tax and profit. The average capital employed is the sum of "net fixed assets and net working capital" which shall be taken on the basis of average of the same as on the beginning and at the end of period of investigation. For assessment of reasonable level of working capital requirement, all the elements of net working capital shall be scrutinized in detail. The impact of revaluation of fixed assets shall not be considered in the calculation of capital employed. Interest is allowed as an item of cost of sales and after deducting the interest, the balance amount of return is to be allowed as pre-tax profit to arrive at the non-injurious price.

(ix) Reasonableness of interest cost may be examined to ensure that no abnormal expenditure on account of interest has been incurred. Details of term loans, cash credit limits, short term

[332] S 4 of the new Rules 2011.

loans, deposits and other borrowings taken by the company and interest paid thereon may be examined in detail along with the details of assets deployed.

(x) In case there is more than one domestic producer, the weighted averages of non-injurious price of individual domestic producers are to be considered. The respective share of domestic production of the subject goods may be taken as basis for computation of weighted average non-injurious price for the domestic industry as a whole."

Since the new principles were only adopted in 2011 it remains to be seen how this would affect the determination of the lesser duty rule in AD investigations.

Practice

The effect of the lesser duty rule on the level of measures could not be assessed by the evaluation team due to the fact that duties are hardly ever established in *ad valorem* terms, and hence a comparison of injury and dumping/subsidy margins was not possible.

4.6.2.5 New Zealand

Legal basis

Section 14(5) of the Dumping and Countervailing Duties Act 1988 requires that the Minister of Commerce have regard to the desirability of ensuring the amount of duty is not greater than is necessary to prevent material injury to the New Zealand industry. To this end the Ministry's usual practice is to use either one of two methods to determine whether a lesser duty should apply.

The first involves the calculation of non-injurious FOB (NIFOB) and Normal Value (Value for Duty Equivalent; NV(VFDE)) amounts.[333] If the NIFOB is less than the NV(VFDE) this normally indicates that a lesser duty should apply. If the NIFOB is more than the NV(VFDE) this normally indicates that duty should apply at the full margin of dumping. NIFOBs are calculated by deducting from the industry's non-injurious price (NIP) the costs arising after FOB up to the level of trade at which the imported product first competes with the New Zealand industry's product. NV(VFDE) amounts are calculated by adding to normal values the costs incurred between the ex-factory and FOB levels in the country of origin.

The second method is adding back the margin of dumping to the export price and comparing this price to the industry's NIP. If there is still price undercutting then this normally indicates that an AD duty should be imposed at the full margin of dumping, and if there is no price undercutting this normally indicates that a lesser duty should apply.

The NIFOB/NV(VFDE) approach requires the establishment of reference prices and therefore this method cannot be used to determine whether a lesser duty in the form of a percentage *ad valorem* duty should apply, meaning the other method must be used. The Ministry notes that the determination of whether a lesser duty should apply is not affected by which method that is used, as either approach will result in the same outcome.

For both methods the Ministry must first establish a NIP or NIPs for the New Zealand industry. The NIP refers to the price the New Zealand industry could achieve in the absence of dumped product in the New Zealand market. The methods that can normally be applied are:

- Using pre-injury prices scaled up by a relevant index.
- Determining the lowest priced undumped product in the market such as the price of goods originating from Australia.
- The current cost of production plus industry profits taken at a time when the industry was unaffected by dumped imports.

333 In New Zealand the value for duty is usually based on the FOB value of the goods.

New Zealand has applied the lesser duty rule in a high proportion of the actions it has taken: It has been applied in 43% of cases initiated since 1995 and in 23% of current duties. The Government considers that the application of such a rule meets the need to ensure that AD and CV duties are applied only to the extent necessary to remove the injurious impact of dumping or subsidisation. Practice

4.6.2.6 South Africa

South Africa's Anti-Dumping Regulations require that ITAC "shall consider applying the lesser duty rule if both the corresponding importer and exporter have cooperated fully."[334] No further details are provided. The lesser duty rule is not applied unless both the exporter and the importer have cooperated, on the basis that it then not possible to accurately determine the injury margin, called price disadvantage in South Africa, experienced by the domestic industry. "Price disadvantage" is defined as "the extent to which the price of the imported product is lower than the unsuppressed selling price of the like product produced by the SACU industry, as measured at the appropriate point of comparison."[335] Legal basis

Unsuppressed selling price is defined as

> "the price at which the SACU industry would have been able to sell the like products in question in the absence of dumping, and can be determined with reference to –
> (a) the expected or required return of the SACU industry for the like or similar products; or
> (b) the profit margins of the industry for the like products before the entry of the dumped imports; or
> (c) the prices obtained for the like products by the industry directly before the entry of the dumped imports; or
> (d) any other reasonable basis."[336]

In most instances the unsuppressed price is determined as the current total cost (production plus selling, general and administrative costs) plus the same profit margin realised before the onset of the dumping.[337] Practice

Although ITAC has indicated that both the margin of dumping and the margin of injury are expressed as a percentage of the FOB export price for comparative purposes, analysis of reports (where there is sufficient information to allow such comparison) indicates that this is not always the case and that the injury margin is sometimes expressed as a percentage of the domestic industry's ex-factory selling price.

It is also not clear how the lesser duty would be determined in instances where there were several models under investigation, each with its own dumping and injury margins. In at least one instance, the *Wire, rope and cables (China, Germany, India, Korea, Spain, UK)* investigation, the lesser duty rule was not applied despite importers and exporters cooperating.[338] Although no reasons were given in the public report the rationale provided verbally to interested parties was that the Commission was not able to determine the lesser duty rule when faced with a large number of models.

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334 Anti-Dumping Regulations 17.
335 Anti-Dumping Regulations 1.
336 Anti-Dumping Regulations 1.
337 This is not necessarily evident from the various reports – see e.g. *Tall oil fatty acid (Sweden)(Commission Report 298)*, where the margin of price disadvantage is indicated, but no details are provided as to how this was determined. See also Brink (2004) 861 in this regard.
338 *Wire, rope and cables (China, Germany, India, Korea, Spain, UK)(Board Report 4173).*

4.6.2.7 USA

If both Commerce and the ITC make affirmative determinations of dumping/subsidisation and injury, the statute requires Commerce to order the collection of duties in the full amount of the dumping or subsidisation found to exist.[339] Thus, in US law, there is no lesser duty provision, and generally stakeholders have not raised this as a significant concern.

4.6.3 The EU's policy choice[340]

Legal basis

In the EU, the Commission applies the lesser duty rule in each AD or AS case. The ADR specifies that the

> "amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry"[341]

Practice

As per the lesser duty rule, the duty is calculated as the lesser of the dumping/subsidy margin and the injury margin. For the calculation of the injury margin, the Commission compares, at the same level of trade, the weighted average import price of the dumped products with a "non-injurious price." The difference between these two is then expressed as a percentage of the CIF import value of the dumped product.

While this general approach is always applied, differences in methodology can be observed regarding the calculation of the non-injurious price, which is sometimes interpreted to be the actual sales price (in which case the injury margin is identical to the undercutting margin) but in most cases calculated based on Union producers' costs plus a reasonable profit margin (price underselling).

The application of the lesser duty rule in the EU has led to an average reduction in duties of 28% in 55% of all cases (see section 2.3.2.1 above).

4.6.4 Conclusions and recommendations

Comparative summary

The EU, Australia, Canada, India, New Zealand and South Africa apply the lesser duty rule, whereas China and the USA do not (Table 36). Among those countries that do apply the rule, the EU, India and New Zealand do so in all cases; the others apply it on a contingent basis:

- In Australia, at the discretion of the Minister in charge;
- In Canada, only in the context of the public interest test, which is invoked only in a small minority of cases (see section 4.7.2.2 below);
- In South Africa, only in cases where exporters and importers cooperate in the investigations.

With regard to the methodology applied for the calculation of the injury margin, practices vary. Canada has not adopted a standard methodology. All other countries that apply the rule determine injury margin in terms of price effects only, by comparing the import price (defined in slightly different terms) with a non-injurious price (again defined in slightly different terms). Australia, New Zealand and South Africa apply the lesser duty rule to individual exporters, while

339 19 USC. §§ 1671e(a)(1) and 1673e(a)(1).

340 For more details, see section 5.1.7.1 below.

341 Article 9(4) ADR. Article 7(2) ADR establishes the same rule for provisional duties. Also see Article 15(1) and 12(1) ASR for the corresponding rules regarding CV duties.

India takes the average import price at CIF and makes no adjustments to bring prices to the same level of trade (although under new rules notified to the WTO in October 2011 this may change).

Table 36: Application of lesser duty rule by the EU and peer countries

	Application of lesser duty rule, conditions	Methodology for calculation of lesser duty
Australia	Yes, discretionary by Minister upon recommendation by Customs	Non-injurious selling price on the basis of an unsuppressed selling price (price that the Australian industry could reasonably achieve in the absence of dumped or subsidised imports)
Canada	Yes, discretionary by Tribunal as part of public interest test	Case specific
China	No	Not applicable
EU	Yes, automatic in all cases	Lesser of the dumping/subsidy margin and the injury margin. Calculation of the injury margin: the Commission compares, at the same level of trade, the weighted average import price of the dumped products with a "non-injurious price" (usually the price that could be achieved in the absence of dumping/subsidisation)
India	Yes, automatic in all cases	Lesser of the dumping/subsidy margin and the injury margin. Calculation of the injury margin: difference between the fair selling price due to the domestic industry and the landed cost of the product under consideration. Detailed rules for calculations recently adopted
New Zealand	Yes, automatic in all cases	Two alternative methods, based on non-injurious price
South Africa	Yes, automatic if both exporters and importers cooperate	Based on "price disadvantage," i.e. "the extent to which the price of the imported product is lower than the unsuppressed selling price of the like product produced by the SACU industry, as measured at the appropriate point of comparison"
USA	No	Not applicable

Source: Summary by the evaluation team.

The assessment of the lesser duty rule's impact on the level of measures has been possible, apart from the EU, only for Australia and, in a limited way, for New Zealand and Canada. In the EU, lesser duties were applied in 55% of all cases resulting in an average reduction in duties of 28%. In Australia the rule was applied in 44% of current measures with an average reduction of duties of 15%, little more than half the 28% reduction in the EU. In New Zealand, the lesser duty has been applied in 43% of cases initiated since 1995 and in 23% of currently in-force measures. In Canada, the recommendations for duty reduction were implemented in three of the four cases; the only one for which the percentage duty reduction is available involved a reduction from 181% to 35% (moreover, while the recommendation was for a reduction in respect of US product only, the reduction was implemented for other named countries as well). In all other peer countries, with the possible exception of India, the incidence of application of the lesser duty rule will also certainly be lower than in the EU.

Reciprocity

It has been argued in the context of the WTO Doha negotiations that the divergence of methodologies for (and including the non-application of) the lesser duty rule across WTO members introduces distortions into the global trading system in several ways: countries that apply the lesser duty rule create an advantage for exporters of the country concerned – if the injury margin is found to be lower than the dumping or subsidy margin, they are subject to a lower duty than without the application of the lesser duty rule. Conversely, the rule puts non-dumping or non-subsidised third country exporters at a relative disadvantage compared to the exporters of the subject country, as they would still have to compete with exports priced at less than fair value. Furthermore, high-dumping (or subsidised) exporters are rewarded by the lesser duty rule, as the duty they have to pay is capped at the injury margin level.

Against this background, the idea of reciprocity in the application of the lesser duty rule has been raised in the Doha negotiations. In line with this idea, countries would apply the lesser duty rule only to those countries which in turn apply the lesser duty rule in their TDI.

The rationale for this approach appears to be weak however. Even if it were granted that a reciprocal reduction of the level of distortion caused by the current application of the rule would be felt in the bilateral flow, third country exporters would now be disadvantaged in both countries: it would be a version of the standard trade diversion effect of a bilateral FTA, whereby countries reciprocally applying the lesser duty rule would apply lower AD or CV duties than would apply to other exporters. Moreover, as the discussion of retaliation in section 2.2.5 shows, the number of measures that the EU has taken against various partners and the number of measures that it has faced are highly imbalanced. For example, four countries (Australia, Canada, Argentina and Israel) alone mounted a total of 268 cases against the EU with the EU only mounting five in response over the timeframe covered by the World Bank dataset. Accordingly, there is unlikely to be any neat balancing of lesser duty rule benefits in practice.

From a legal perspective, it is not clear if the reciprocal application of the lesser duty rule would be consistent with WTO rules. In terms of Article I of GATT, once a concession, such as the application of the lesser duty rule, is made, it has to apply to all other WTO Members. It is therefore not clear whether a country could apply the lesser duty rule on a selective basis without violating its obligations under Article I. Furthermore, the reciprocal application of the lesser duty rule might violate the prohibition of discriminatory application of AD/CV duties as laid down in the WTO ADA and ASCM.[342]

Finally, from a technical perspective, the application of reciprocity would require that a certain level of harmonisation (or at least mutual recognition) of methodologies for the lesser duty rule be put into effect. As noted above, there appears to be no accepted, theoretically grounded basis for the various rules that are applied internationally. For example, the economic analysis in chapter 2 concluded that, even with the lesser duty rule, EU TDI are moderately over-protecting. Against this background, a limitation to the lesser duty rule in the form of reciprocal application would introduce still greater self-inflicted distortions into the EU economy. This is not recommended.

Conclusions/ Recommendations

The concept of lesser duty based on an "injury margin" that is different from the margin of dumping or subsidisation is not rigorously grounded in economic theory in the EU or in the other countries which purport to identify such a margin. In Canadian practice, it is a compromise solution that does not purport to identify a new economic concept. Accordingly, practice abroad does not provide an approach that is clearly preferable to that currently practiced by the EU.

In chapter 2, the conclusion was reached that, even with the lesser duty rule, EU TD measures afforded a moderately greater degree of protection than consistent simply with offsetting dumping or subsidisation. Accordingly, it was inferred that TDI in full force was excessive, and an even more conservative approach to applying the lesser duty rule could be contemplated. This conclusion remains the view of the evaluation team in light of the survey of international practice.

[342] The WTO ADA establishes in Article 9.2 that
"When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury."
The WTO ASCM provides for the same in Article 19.3. The two basic EU Regulations mirror these provisions in Article 9(5) ADR/ Article 15(2) ASR.

4.7 Treatment of Public Interest

4.7.1 Background, importance and policy options available

Unlike the Agreement on Safeguards, the WTO ADA and ASCM do not explicitly prescribe a public interest[343] test that requires members to consider the public interest when determining AD or CV measures. At the same time, the WTO ADA and ASCM provide that members:

> "shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality."[344]

Also, the ADA encourages members to make the imposition of duties voluntary, rather than mandatory, once dumping and consequent injury are shown to exist: Article 9.1 ADA states that "is desirable that the imposition be permissive", but does not provide any detailed provisions for a public interest test. The ASCM goes one step further, stating that "procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty"[345] and further clarifying that "'domestic interested parties' shall include consumers and industrial users of the imported product subject to investigation".[346]

In view of these rules, WTO members have significant policy space with regard to the imposition of measures, their level, and reasons for applying lower level measures or not applying measures at all. By the same token, a wide range of different outcomes is possible as regards application of public interest tests. One extreme option for a country is to ignore the recommendations in the ADA and ASCM and disregard the interests of those interested parties whose interests might be negatively affected. In this case, measures will be imposed if dumping/subsidisation, injury and causality are found: there is no public interest test. On the other extreme, an understanding of the public interest as an unweighted balancing between domestic producer and consumer welfare based on standard economic models would almost invariably lead to the conclusion that measures are against the public interest, because the immediate effect of dumping or subsidised imports on national economic welfare is likely to be positive.[347] Intermediate policy options will assign different weights to the interests of the domestic industry and other interested parties.

For any jurisdiction which applies a form of public interest test, the issues that arise are:

- How is the public interest defined? Which criteria are to be considered for determining it?
- Which methodology or methodologies are applied to evaluate the public interest?
- Whose interests are to be considered in the determination of the public interest?

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343 Some jurisdictions rather refer to "national interest." In this report, the term "public interest" is used for all countries and, of course, "Union interest" for the EU.

344 Article 6.12 ADA. Article 12.10 ASCM provides for the same, *mutatis mutandis*.

345 Article 12.10 ASCM.

346 Footnote 50 to Article 12.10 ASCM.

347 As discussed in chapter 2, the immediate welfare impacts of TD measures are indistinguishable from the effects of tariffs and thus are likely to be negative. In a more complex, multi-period model in which dumping or subsidisation results in a reduction in production capacity in the importing country and a consequential eventual rise in the price of the product in question, the evaluation of the welfare effects of TDI would be between the eventually higher price in the absence of TDI (coupled and lower domestic production capacity) and the higher price with TDI (coupled with a sustained level of domestic production capacity). The welfare impact of TDI in the latter scenario would likely be positive. However, for this scenario to be plausible, the dumping or subsidisation must have a significant predatory character.

- What are the implications of the public interest test on the predictability of the system and its findings?
- Which procedures should apply in administering the test?

The following sub-sections attempt to provide (comparative) answers to these questions for the peer countries, and draw lessons and recommendations for the EU.

4.7.2 Policy Choices of Peer Countries

4.7.2.1 Australia

In Australia, a public interest test is neither provided for in law nor applied in practice. When conducting its investigation, and in deciding on whether to recommend to the Minister to impose AD duties or CV measures or not, the administrative authority, Customs, focuses solely on whether dumping or subsidisation has occurred and, if so, whether it has caused or threatens to cause material injury to the local industry concerned. At the same time, the Minister has an unfettered discretion not to impose measures and could use this if she/he considers them not to be in the public interest.

Various reviews of Australia's TD system have considered whether a public interest test should be incorporated but have concluded that this should not be the case. For example, a 1986 review concluded that "introducing national interest provisions into every case from the outset would compound the difficulties of administration and legislation substantially"[348], largely because of the subjective nature of what constituted the "national interest."

Nevertheless, the most recent review of Australia's AD and AS regime, conducted by the Australian Productivity Commission in 2009, found as one of the deficiencies of the Australian TD system that:

> "there is no consideration of the wider impacts and the broader public interest in the advice provided to the Minister. Yet the costs of particular anti-dumping measures for downstream industries, other stakeholders and the community, can be significant relative to the benefits for recipient industries. And while the Minister can ostensibly take into account other factors – including the public interest – when deciding whether to impose measures, as far as the Commission is aware, no Minister has done so" (Australian Productivity Commission 2009: 53).

In response to this deficiency, and citing the EU and Canadian public interest tests as an example, the Productivity Commission proposed to introduce a so-called "bounded" public interest test:

> "The imposition and continuation of anti-dumping and countervailing measures should be subject to a 'bounded' public interest test, embodying a presumption that measures will be imposed if there has been dumping or subsidisation that has caused, or threatens to cause, material injury, unless one (or more) of the following circumstances apply:
>
> - the imposition of measures would preclude effective choice and competition in the Australian market for the like goods, and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule
> - the price of the imported goods concerned after the imposition of measures would still be significantly below competing local suppliers' costs to make and sell
> - un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidised imported goods
> - prior to the commencement of injurious dumping or subsidisation, the local industry's share of the domestic market for the goods concerned was low, with that share likely to remain low even if measures were imposed

[348] Gruen review (Gruen 1986), as cited in Australian Productivity Commission (2009: 64).

- the large majority of the overseas supplier's output of the goods concerned is exported, with the goods imported into Australia being exported at a price which covers the supplier's fully distributed costs and a reasonable profit margin (plus the value of any identifiable input subsidies).

The explanatory memoranda to the enabling legislation should elaborate on the intent and application of this list of circumstances, having regard to the commentary in the body of this report.

Where, based on the advice from the Australian Customs and Border Protection Service (ACBPS), the Minister is satisfied that one (or more) of these circumstances apply, measures would not be imposed. And where none of these circumstances apply and the Minister has determined that measures should be imposed, then the magnitude of those measures should be set having regard to the existing lesser duty rule arrangements.

Assessments against the public interest test by the ACBPS should generally be completed within 30 days, and draw if necessary on advice from external parties such as the Australian Competition and Consumer Commission. Provisional measures should be imposed in all cases where a finding by the ACBPS that there has been injurious dumping or subsidisation provides the basis for moving to apply the test.

In giving effect to these requirements, the ACBPS should also:

- clearly indicate the nature and breadth of the public interest test in its initial invitations to interested parties to comment on applications for measures
- give interested parties the opportunity to comment on its assessments against the test through detailing those assessments in the Statement of Essential Facts
- include a synthesis of that commentary from interested parties in its final report to the Minister" (Australian Productivity Commission 2009: 89f).

Nevertheless, in response to stakeholder views expressed regarding the Productivity Commission's report the Australian government opted not to implement this recommendation, arguing that such a test was:

> "a costly and disproportionate response to the possible consequences that might arise from the small number of anti-dumping and countervailing cases brought in Australia each year.
>
> The purpose of the ADS [anti-dumping system] is to provide redress for manufacturers and producers injured by dumping or subsidisation. A public interest test could unfairly remove the remedy available to those manufacturers and producers.
>
> The Government did consider a number of other options for taking account of the wider impact of measures. However, any such approach would undermine the purpose of the ADS for Australian manufacturers and producers. It would increase the cost and complexity of the ADS, and the Government believes it would increase business uncertainty, affecting investment decisions" (Australian Customs and Border Protection Service 2011: 26).

Instead of implementing a public interest test, the Government chose to implement some changes regarding the Minister's discretionary power not to impose measures:

> "the Minister has an unfettered discretion not to impose measures. In reporting its findings to the Minister, the Branch will now include an assessment of the expected effect that any measures might have on the Australian market for the goods subject to those measures, and like goods manufactured in Australia, and in particular any potential for significant impacts on this market.
>
> Potential market impacts and relevant factors are likely to differ in each case. However, the additional assessment that Customs and Border Protection will provide the Minister may include matters such as an assessment of the expected effect of any measures on market concentration and domestic prices. Customs and Border Protection will also report on any claims regarding impacts on downstream industries.
>
> This is not expected to affect current investigation processes or timeframes, or the information requirements on business" (Australian Customs and Border Protection Service 2011: 26)

In practice, no cases are known in which measures were not imposed, or amended, based on public interest considerations. Whether the new rules will change this remains to be seen – while they provide some guidance regarding the more general factors to be considered when imposing measures (effect of potential measures on market concentration, domestic prices and downstream industries), they fall short of requiring consideration of the more specific factors proposed by the Productivity Commission.

4.7.2.2 Canada

Legal basis

The Canadian TDI legislation provides for a public inquiry if imposition of a duty may not be in the public interest. In line with this legislation, the Tribunal can recommend that the level of the AD duty be reduced, or that no duty be imposed.

Under SIMA, if the Tribunal makes an order or finding that results in imposition of a duty, the Tribunal shall, on its own initiative or on the request of an interested person, initiate a public interest inquiry, if the Tribunal is of the opinion that there are reasonable grounds to consider that the imposition of an AD or CV duty, or the imposition of such a duty in the full amount provided for under the Act, would not or might not be in the public interest (SIMA 45(1)). Based on its determination, the Tribunal makes a recommendation to the Minister of Finance who determines whether the duty should actually be reduced or eliminated. A decision by the Minister of Finance to accept a CITT recommendation can result in an order under section 115 of the Customs Tariff to remit AD/CV duties paid or payable under SIMA (Saroli and Tereposky 2000: footnote 33).

Practice

Note that the public interest test is applied on a post hoc basis following imposition of AD or CV duties. Furthermore, it is not addressed *ex officio* in each and every case but requires a special petition for a public interest inquiry. Herman (2001) observes that this differs technically from provisions in the WTO Agreements that recommend consideration of broader interests than those of the directly affected parties when considering imposing duties, but is consistent with the spirit of these recommendations.

Procedures

Interested persons have 45 days from the date of the order or finding that results in imposition of a duty to file a request for a public inquiry (SIMR 40(1)). The request must explain in detail why the duty might not be in the public interest, including, where applicable,

- whether like goods are available from countries or exporters not subject to the duty;
- the effect of the duty on competition in the domestic market;
- the effect of the duty on producers in Canada that use the goods as production inputs;
- the effect of the duty on domestic producers of inputs, including primary commodities, used in the production of like goods;
- the effect of the duty on competition by limiting access to production inputs or to technology;
- the effect of the duty on the choice or availability of goods at competitive prices for consumers; and
- any other information that is relevant in the circumstances.

If a properly documented request is received, the Tribunal notifies all those concerned and requests responsive briefs that address the issues raised in the request.

The information requirements do not include social, environmental or political issues, nor do they specifically exclude them. However, by detailing six specific economic effects and making no

mention of non-economic effects, there is the distinct possibility that the statute might be interpreted to exclude non-economic effects.

Beyond the direct participation of the industry and the parties that are the subject of investigations, SIMA provides for broad participation by other stakeholders, including by written submissions and in oral hearings. Procedurally, SIMA 45(6) provides that, if a person interested in a public interest inquiry makes a request to the Tribunal within the period and in the manner prescribed under the regulations for an opportunity to make representations, the Tribunal is obliged to give that person an opportunity to make representations to the Tribunal orally or in writing, or both, as the Tribunal directs in the case of that inquiry. SIMA section 34 provides for notice of initiation of an investigation to be given to various interested parties, including the exporters, the importers, the government of the country of export, the complainant (if any), and "any other prescribed persons"; however, regulations have not been promulgated specifying who those "prescribed persons" might be. As a practical matter the requirement for publication of the initiation of an investigation in the *Canada Gazette* (SIMA, 34(1)(a)(ii)), provides for the necessary transparency by providing the opportunity for interested parties to step forward.

Oral hearings are an important part of the process, particularly at the injury determination stage upon the completion of investigations by the Canada Border Services Agency (CBSA) that result in affirmative findings of dumping or subsidisation, and in the event that a public interest inquiry is launched. The possibility of hearings at the preliminary injury determination stage is not precluded but neither is it prescribed (SIMA 34(2) states that the preliminary injury inquiry by the Tribunal need not include an oral hearing). SIMA explicitly excludes the possibility of public hearings in the event that the CBSA decides not to initiate an investigation solely on grounds that the CBSA is of the view that there is no injury, retardation or threat of injury. In this case, the issue is referred to the Tribunal for its opinion. This makes sense as it is in effect the Tribunal providing its independent view on the same fact base as before the CBSA on injury, its area of expertise. A re-hearing is provided for in the event a case is remanded back to the Tribunal by the Federal Court of Appeals (SIMA 44(2)(b)); and hearings are provided for if any party feels aggrieved in a redetermination; (SIMA 61(2)).

One of the main purposes served by hearings at the injury determination stage is to address the various issues surrounding product exclusions. The Tribunal in fact refers to "the product exclusion process" that forms part of the preparation of a public hearing for injury determination.[349] As well, the Tribunal obtains a considerable amount of detailed information through the hearing process, supplementing the information it obtains from questionnaires, as evidenced by the frequent citations in its reports of transcripts of the public hearings. From a substantive point, there is no clear dividing line between the purposes served by public hearings at the injury determination stage and in a public interest inquiry, if one is launched, since requests for product exclusions often are based on the interests of others than the exporters and competing producers, usually downstream producer interests (see, for example, the lengthy list of companies requesting product exclusions in *Aluminum extrusions*[350]).

Participation tends to be dominated by industry associations and legal counsel for interested corporations. Small and medium-sized enterprises and consumer advocates rarely participate directly. The interests of small and medium-sized enterprises are most often represented by associations or regional or local governments, both as producers benefiting from protection and

[349] *Greenhouse bell peppers from the Netherlands* – CITT, Finding and Reasons: Inquiry No. NQ-2010-001, October 19 and November 3, 2010, at 2, para. 15.

[350] *Aluminum Extrusions from China* – CITT, Findings and Reasons, Inquiry No. NQ-2008-003, March 17 and April 1, 2009.

those facing negative consequences from higher production input prices. *Refined sugar*, for example, featured the participation of associations that represent mostly small businesses such as the Bakery Council of Canada, the Canadian Honey Council (which represents beekeepers), and the National Dairy Council of Canada, as well as the Consumers' Association of Canada. Consumer interests are most often represented by retailers or importers of goods subject to AD or CV duties.

The administrative authorities for the Canadian Competition Act have frequently participated in the injury determination and public interest processes. This has led to some notable conflicts of views between Canada's administrative agencies.

Substance

The Tribunal in *Grain Corn* commented on the meaning of the term "public interest" at some length. Of particular interest is the discussion of how it sees its role in dealing with the conflicting interests which are at the heart of public interest inquiries and, in particular, the fact that the price increases entailed by duty applications are an expected cost and thus not a sufficient basis, *per se*, for a public interest test:

> "The term 'public interest' itself provides little guidance to the Tribunal, nor does Canadian jurisprudence offer a definition that is applicable in the context of SIMA, that is to say, within an international trading environment. Review of case law in the United States and the European Economic Community (EEC) was similarly of little assistance in providing any precise and operational meaning to this term. *The Tribunal was not persuaded that price increases caused by the imposition of anti-dumping or countervailing duty would, in and by themselves, be a sufficient basis for it to initiate hearings and to submit a report to the Minister of Finance as contemplated by section 45. Such increases in price are an inevitable consequence and cost of having such a system, and one which the Tribunal must believe Parliament was aware of at the time the statute was enacted.* Nor is the Tribunal of the view that consideration of the public interest necessarily requires the Tribunal to choose between the private interests of parties with opposing concerns, as for example the users or consumers on the one hand and the producers on the other; certainly, private interests may ultimately be affected and the private parties can be expected to defend these interests before the Tribunal and elsewhere. However, the Tribunal does not view the section 45 process as a contest between the parties. Rather, the Tribunal concluded that the responsibility imposed on it by section 45 requires it to analyze and evaluate the consequences flowing from the application of the countervailing duty, for all parties affected, and by weighting the relative merits of each, to form an opinion as to whether, and how, on balance, the public interest would best be served."[351]

While the Tribunal's discussion above sheds some light on its views as to what a public interest test *is not*, it is less helpful in identifying what it *is*. Struggling to emerge from this discussion is some meaning to the "public interest" that is not simply the summation of a set of private interests. Consumer surplus, for example, is simply the sum of private interests, just as producer surplus is the sum of producers' interest. SIMA protects the latter in certain circumstances, and the Tribunal's reasoning emphatically points to a conclusion that "public interest" does not involve simply weighing (with some implicitly unequal weights[352]) consumer surplus against producer surplus. Rather, SIMA points in the direction of externalities: impacts on third parties not involved directly.

Based on a review of the case record since 1989, the Tribunal sees the purpose of duties as being to restore competition, albeit on a qualified, "fair" basis, not to eliminate it. When duties have

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[351] *Grain Corn from the United States* – Canadian Import Tribunal, Report on Public Interest, October 1987, as cited in the Dissenting Opinion of Tribunal Member Michèle Blouin in *Beer from the United States* – CITT, Public Interest Opinion No.: PI-91-001, November 25, 1991, at 6-7; emphasis added.

[352] With equal weights, under typical market conditions, the decision would almost always favour consumer surplus, thus defeating the very purpose of SIMA – although this consideration would not cover use of excessive force that eliminates competition rather than restoring it to a "fair basis".

prohibitive effects on imports, the Tribunal tends to be sympathetic towards redress. Accordingly, in terms of its statutory criteria, limited availability of the subject goods for downstream users is clearly the principal consideration for the Tribunal. In this regard, the Tribunal considers the availability of domestic and alternative sources of import supply and, as well, whether there is continued supply of the subject goods, in particular from suppliers facing low margins of dumping or subsidisation. If these conditions are met, it is unlikely that the other factors listed in the regulations – e.g., impacts on competition in the market or the competitive position of downstream users – will be judged to be significantly impaired by the imposition of duties.

The Tribunal does not rely on formal methodologies which would allow the integration and joint evaluation of the different interests of stakeholders. Legally, it is privileged to hand down opinions, based on its own expertise. This expertise is not open to second-guessing in the courts, as the courts must grant the Tribunal considerable deference in its judgements.

The issue of using formal economic modelling did, however, come up in one case, the injury determination in *Refined Sugar*.[353] In this case, in addition to the standard methods of economic analysis used by Tribunal staff, preliminary quantitative economic estimates of the effects of dumped and subsidised imports were prepared using the "Commercial Policy Analysis System" (COMPAS) partial equilibrium models[354] developed for the USA International Trade Commission. Tribunal staff developed a set of model-based estimates of the economic impacts of measures using the data in its usual economic report, along with the dumping margins and subsidy amounts identified in the preliminary determination by the CBSA. A revised set of estimates was made using the final dumping margins and subsidy amounts.

However, the further use of these estimates became caught up in a legal dispute as one of the parties, United Sugars Corporation, made a motion for an order directing the Tribunal staff and members to make no further use of COMPAS. Although some parties supported the use of this modelling approach (e.g., trade economist James Brander, hired as an expert witness by the Canadian Sugar Institute, suggested that COMPAS could assist the Tribunal by helping to summarise information regarding the effects of dumping and subsidising),[355] counsel for the Bureau of Competition Policy suggested that the Tribunal give little, if any, weight to the COMPAS results, on grounds that the failure to take into account the oligopolistic market structure resulted in an overestimate of the injury.[356] Opposing counsel made a number of counter arguments, including that the model's market structure assumptions did not reflect the reality of the Canadian refined sugar market.[357]

In the end, the Tribunal indicated that "it did not feel bound, legally or otherwise,"[358] to adopt the Tribunal's staff's model-based estimates, and ultimately was "persuaded that there is some merit to the arguments against relying on COMPAS estimates of the effects of dumping and subsidising in this case. Accordingly, the Tribunal has decided not to give any weight to those estimates."[359] Since then, there is no indication that any analysis of economic and welfare effects using formal economic models is undertaken.

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353 *Refined Sugar from the United States, Denmark, Germany, the Netherlands and the United Kingdom* – CITT. Findings and Reasons, Inquiry No.: NQ-95-002, November 6 and 21, 1995.

354 Francois, Joseph and Keith Hall. 1997. "COMPAS: Commercial Policy Analysis System", spreadsheets.

355 *Refined Sugar from the United States, Denmark, Germany, the Netherlands and the United Kingdom* – CITT. Findings and Reasons, Inquiry No.: NQ-95-002, November 6 and 21, 1995, at 2.

356 Ibid., at 11.

357 Ibid., at 21.

358 Ibid., at 21.

359 Ibid., at 22.

Canadian authorities have interpreted the application of the public interest provisions to be limited to exceptional circumstances. For example, in *Grain Corn*, the first public interest inquiry conducted under SIMA, the Canadian Import Tribunal stated:

> "In deciding what meaning is to be attached to the public interest provision, the Tribunal accepts that SIMA itself, as with all legislation, was enacted by Parliament in the interest of the public good. It would follow that section 45, being a specific provision within the statute, is to be applied on an exceptional basis, as for instance when the relief provided producers causes substantial and possibly unnecessary burden to users (downstream producers) and consumers of the product."[360]

Consistent with the Tribunal's interpretation of the exceptional circumstances required for the application of the public interest test, the case record over the period since the creation of the Canadian International Trade Tribunal in 1989 shows that only in 23 instances was the process for a public interest inquiry started and only in four cases did the Tribunal proceed to a full public inquiry; in each case that proceeded to the full inquiry, however, a reduction in the TDI duty was recommended. This pattern of decision-making suggests that the actual public interest inquiry is the Tribunal's internal evaluation of the merits of the case; in most cases the Tribunal decides the requests for reduction or elimination of duties lack merit and thus recommends no initiation of a formal public inquiry. In those cases where the process continues to a formal inquiry, the likelihood of some reduction being proposed is high and one may infer that the main purpose of the process from that point onward is to establish the magnitude of the reduction, rather than its merit.

A public interest inquiry was started in six of the 16 cases (involving 29 exporting countries) initiated during the evaluation period.[361] In none of these cases did the CITT proceed to full public interest inquiry; accordingly, there were no recommendations that the level of the AD duty be reduced, or that no duty be imposed, in the evaluation period.[362]

In sum, Canada has a well developed, but seldom invoked, public interest test. While this is fundamentally different from the EU's Union interest test, the criteria and methods applied are similar. In terms of impact, as indicated above, Canada does not generally apply the lesser duty rule; however, in each of the very few instances where public interest affected a decision, this resulted in a recommendation that a lower duty than the full margin of dumping be imposed. Overall, the impact of the public interest test in Canada thus appears to be much more limited than in the EU.

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360 *Grain Corn from the United States* – Canadian Import Tribunal, Report on Public Interest, October 1987, at 2.

361 *Laminate flooring* (PB-2005-001); *Copper pipe fittings* (PB-2006-001); *Carbon steel welded pipe* (PB-2008-001); *Thermoelectric Containers* (PB-2008-002); *Aluminum extrusions* (PB-2008-003); *Oil Country Tubular Goods* (PB-2010-001 & 002).

362 In total, the public interest was invoked on four occasions since 1988, when the CITT was created. The reasons for recommendations of reduced duties were:

- *Beer* (1991): consumer benefits and increased competition in the like goods industry;
- *Prepared baby food* (1998): income distribution and children's health tempered by communitarian concerns about the impact of elimination of tariffs on the Canadian producer's community;
- *Iodinated contrast media* (2000): health care externalities for patients and cost implications for hospitals; and
- *Stainless steel wire* (2004): downstream industry competitiveness.

Beer was clearly the case with the least clear-cut rationale for a public-interest based reduction of tariffs since it emphasized consumer benefits, an issue that the Tribunal has explicitly noted is implicitly taken into account in the framing of SIMA. In the other three cases, the lack of alternative supply in a situation where the duties were prohibitive was the common element in the decisions in which the explicit rationales were drawn from a wide range of policy concerns.

4.7.2.3 China

Legal basis

The 2004 Regulations of the People's Republic of China on Anti-Dumping and Countervailing Measures provide the legal basis for the treatment of public interest in Chinese AD and CVD proceedings. Article 37 of the Regulation on Anti-Dumping states:

> "If a final determination establishes the existence of dumping and injury caused by dumping to a domestic industry, an anti-dumping duty may be imposed. Imposition and collection of anti-dumping duties shall be in the public interest."[363]

This provision was specified, for a brief time, in some further detail in the State Economic and Trade Commission (SETC) Rules on Investigations and Determinations of Industry Injury for Anti-Dumping of early 2003,[364] Article 18 of which stated that:

> "In carrying out investigations of injury to industry and making determinations thereof, SETC shall take into account of public interest, and may investigate the potential impacts of the imposition of anti-dumping measures on public interest.
> SETC shall provide opportunities for the users and consumers of the dumped imports to present their comments and to submit relevant evidence."

However, following SETC's absorption into the Ministry of Commerce (MOFCOM), new *Provisions on the Antidumping Investigation of Industry Injury* were issued by MOFCOM in September 2003.[365] In these, the first paragraph of the SETC rules was deleted, and the new Article 17 stated that:

> "In the investigation of industry injury, the MOFCOM shall give users or consumers of the dumped imports an opportunity to present their views and evidences."

Finally, Article 33 of the Regulation on Anti-Dumping (as well as Article 34 of the Regulations on Countervailing Measures) states that undertakings can be accepted if they are in the public interest:

> "If considering that a price undertaking made by an exporter is acceptable and in the public interest, the Ministry of Commerce may decide to suspend or terminate the anti-dumping investigation without applying provisional anti-dumping measures or imposing anti-dumping duties. The decision to suspend or terminate the anti-dumping investigation shall be published by the Ministry of Commerce."

Practice

In practice, to date no case has been terminated on the basis of public interest considerations. In the AD case on Methanol from Indonesia, Malaysia, New Zealand and Saudi Arabia,[366] no preliminary or definitive AD duties were imposed on the products concerned imported from Saudi Arabia, but the Announcements for both the preliminary and final determination did not mention the reason for this clearly and did not mention "public interest" at all.

4.7.2.4 India

Legal basis

The Indian authorities recognise that taking AD or CV measures could go against the interest of consumers and producers who use the imports as input for further processing and production. However, the legal structure does not have a detailed and structured public interest test provision

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363 Article 38 of the Regulations on Countervailing Measures provides for the same, *mutatis mutandis*.

364 As notified to the WTO on 11 April 2003, see G/ADP/N/1/CHN/1/Suppl.2, 14 April 2003. Also see the Rules on Investigations and Determinations of Industry Injury for Countervailing Measures (as notified to the WTO on 11 April 2003, see G/SCM/N/1/CHN/1/Suppl.2, 14 April 2003.

365 Order of the Ministry of Commerce [2003] No. 5. Apparently not notified to the WTO.

366 Preliminary Determination on the antidumping case on Methanol from Indonesia, Malaysia, New Zealand and Saudi Arab, MOFCOM Announcement [2010] No. 71; Final Determination on the antidumping case on Methanol from Indonesia, Malaysia, New Zealand and Saudi Arab, MOFCOM Announcement [2010] No. 91

to weigh the cost-benefit analysis of the intended measure. The Indian AD law only grants the right to be heard to consumers and users[367], but does not specify how the DGAD should take them into account.

In practice, DGAD has addressed public interest considerations in a number of cases.[368] For example, in *2 MNI from China* (2002) DGAD mentioned that: Practice

> It is recognised that the imposition of anti-dumping duties might affect the price levels of the products manufactured using the subject goods and consequently might have some influence on relative competitiveness of these products. However, fair competition on the Indian market will not be reduced by the anti-dumping measures, particularly if the levy of the anti dumping duty is restricted to an amount necessary to redress the injury to the domestic industry. On the contrary, imposition of anti dumping measures would remove the unfair advantages gained by dumping practices, would prevent the decline of the domestic industry and help maintain availability of wider choice to the consumers of subject goods. Imposition of anti dumping measures would not restrict imports from the subject countries in any way, and therefore, would not affect the availability of the product to the consumers.[369]

Furthermore, in a recent case, *Acetone from Japan and Thailand* (2011), DGAD stated:

> "94. The Authority notes that the purpose of anti-dumping duties, in general, is to eliminate 'injury' caused to the Domestic Industry by the unfair trade practices of dumping so as to re-establish a situation of open and fair competition in the Indian market, which is in the general interest of the Country. Imposition of anti-dumping measures would not restrict imports from the subject country in any way, and therefore, would not affect the availability of the subject goods to the consumers.
>
> 95. It is recognized that the imposition of anti-dumping duties might affect the price levels of the products manufactured using the subject goods and consequently might have some influence on relative competitiveness of these products. However, fair competition in the Indian market will not be reduced by the anti-dumping measures, particularly if the levy of the anti-dumping duty is restricted to an amount necessary to redress the injury to the domestic industry. On the contrary, imposition of anti-dumping measures would remove the unfair advantages gained by dumping practices, would prevent the decline of the domestic industry and help maintain availability of wider choice to the consumers of the subject goods. With a view to minimize the impact on the downstream industry, the Authority has considered it appropriate to recommend anti-dumping duty based on the lower of the dumping and injury margins. The Authority notes that the imposition of anti-dumping measures would not restrict imports from the subject country in any way, and therefore, would not affect the availability of the product to the consumers.

As can be seen, the formulation of user and consumer interests is rather formalistic, and a detailed public interest test is not carried out. The general view of the Indian authorities is that as long as the AD or CV measure is restricted to the amount necessary to redress the injury to the domestic industry, i.e. by applying the lesser duty rule, the imposition of measures will not be against the public interest.

Given the foregoing, it is impossible to assess whether public interest considerations have resulted in the reduction of measures of termination of investigations without measures. Impact

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367 Article 6(5) Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, states that the authority:

> "shall also provide opportunity to the industrial users of the article under investigation, and to representative consumer organizations in cases where the article is commonly sold at the retail level, to furnish information which is relevant to the investigation regarding dumping, injury where applicable, and causality."

368 Due to lack of data the number and share of cases in which public interest considerations have been invoked could not be determined.

369 *2 MNI (2-Methyl (5) Nitro Imidazole) from China (*2002) para. 16(b). The same is repeated in *1-Phenyl-3-Methyl-5-Pyrazolone from China* (2005).

4.7.2.5 New Zealand

New Zealand does not apply a public interest test before imposing AD or CV duties. When the Dumping and Countervailing Duties Act was amended in 1994 to take account of the WTO agreements it was noted that the issue had been raised during the negotiations on a revised ADA, and that the EU required that the overall interests of the EU should be taken into account before a definitive AD duty was assessed. At that time it was decided that the issue need not be addressed in implementing the Uruguay Round outcome, but would require further discussion in the context of a broader review of AD issues (New Zealand Ministry of Commerce 1994: 34f).

In 1998 a review of trade remedy policy did propose that such a test should be applied, and a discussion paper was released to canvass views on the basis for such an approach. The discussion paper noted that

> "New Zealand's economic policy is focused on increasing national welfare. This is achieved only through the promotion of economic efficiency. Anti-dumping duties may be applied only if the dumping is causing material injury to domestic producers of like goods. This focus on producers may not be a good proxy for net national benefit since the adverse impact of dumping on producers might be outweighed by benefits to consumers and downstream producers. New Zealand's competition law has as its primary objective the promotion of economic efficiency, which tends to lead to appropriate prices at a level of output desired by society, provides incentives on management to innovate or otherwise produce output at lowest possible cost, and minimises the unproductive use of resources to secure or defend market power" (New Zealand Ministry of Commerce 1998: 2)

The paper went on to outline the issues put forward for discussion, which included how the application of trade remedies could take account of the interests of consumers or other producer considerations (net national benefit); and the extent to which competition policy considerations should be incorporated into trade remedy analysis. The review concluded that while a full net national interest test was not considered to be justified, the legislation should incorporate a public interest test that took account of the impact on competition when considering AD action. Some form of public interest test was supported by farmers, retailers and the New Zealand Business Roundtable, but was strongly opposed by manufacturers and unions. In the end the government decided not to change the approach to AD, and no public interest test was introduced.

Section 14 of the Act provides that at any time after the Minister makes a final determination, the Minister may give notice of the rate or amount of AD or CV duty to be imposed. It also provides that no CV duty shall be imposed if to do so would be inconsistent with New Zealand's obligations as a party to the WTO Agreement. This suggests that there are situations where the decision to impose duties could be discretionary, and it could be argued that nothing in section 14 requires the Minister to impose an AD or CV duty. However, a decision not to impose a duty would have to be consistent with the overall purpose of the Act. This purpose includes enabling fair competition between New Zealand industry and imported goods, as well as giving effect to New Zealand's international obligations. The whole of the investigation process provided for in the Act is to address the extent to which dumping or subsidisation of imported goods is causing injury to domestic producers, and the nature and extent of any measure that might be required to remedy that injury.[370]

In sum, the New Zealand legislation has no provisions requiring any special consideration be given to the public interest or to labour union interest. As the New Zealand legislation is currently framed, the basis for taking AD or CV duty action is fairly narrowly defined within the terms set out in the WTO ADA and ASCM. To the extent that trade unions or other groups in

[370] A detailed discussion of the legal arguments on this matter can be found in *Oral Liquid Paracetamol from the Republic of Ireland: Non-Confidential Anti-Dumping Duties Report*, July 2006.

the community can provide information or views that are relevant to the consideration of the matters covered within that framework then the Ministry could give consideration to the interests of such groups. However, other parties, through the judicial review process of High Court action, could challenge any decisions resulting from the consideration of matters outside the framework.

4.7.2.6 South Africa

Legal basis

In South Africa, the Anti-Dumping Regulations and Countervailing Regulations do not address public interest, and hence public interest considerations do not form part of AD or AS investigations. For safeguards, the situation is different, as the Safeguard Regulations require that national interest has to be taken into consideration in the decision whether or not to impose a safeguard measure. [371]

Practice

In practice, despite the fact that the laws do not foresee the application of the public interest test, the Commission did apply public interest in its preliminary determination in the *Paper and paperboard* (Korea) investigation by refusing to impose provisional payments as such payments would allegedly have been detrimental to the downstream industry. This followed despite no representations being made by the downstream industry and without providing any interested parties with an opportunity to submit information. Following the general opposition to its unilateral action, the Commission then did not consider public interest in its final determination and imposed definitive duties.

Following the *Paper and paperboard* investigation the Commission proposed draft amendments to the Anti-Dumping Regulations and Countervailing Regulations to *inter alia* incorporate public interest as a factor to be taken into consideration in AD and AS investigations. Industry, however, expressed serious reservations and to date the amendments have not been promulgated. [372]

South Africa has also made a submission to the WTO Anti-Dumping Practices Committee indicating that it is "desirable" that the public interest be considered in AD investigations.[373]

4.7.2.7 USA

The US system does not have a mechanism for taking public interest into account in determining whether to impose an AD or CV measure. Consumers and industrial users have an opportunity to provide to Commerce and the ITC information that is relevant to a case.[374] If the agencies find dumping or subsidisation and resulting injury, however, the statute mandates that Commerce issue an AD or CV duty order.[375] As a result, consumers and industrial users rarely file comments.

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371 Safeguard Regulation 20.2.

372 It is submitted that the draft proposals regarding the consideration of national interest in anti-dumping investigations are highly impractical and would lead to the termination of several investigations on the basis of the Commission's failure to conclude investigations within a period of 18 months. See Brink (2006); Brink (2009a).

373 See *Proposals on Issues Related to the Anti-Dumping Agreement: Paper from South Africa* TN/RL/GEN/137 par D. See also Brink (2009a: 316-359).

374 19 USC. § 1677f(h).

375 19 USC. §§ 1671d(c)(2) and 1673d(c)(2) (if there are affirmative determinations of dumping and injury Commerce "shall issue and antidumping duty order"). Nevertheless, the US practice sometimes includes certain elements which could be interpreted as expressions of public interest considerations. Thus, the definition of the like product in certain cases has excluded certain models not produced in the USA, or particularly important for user industries. Likewise, the US Congress can exempt certain products from the application of measures. Here, at least an informal weighting between the effects of the measure on US producer and user industry can take

4.7.3 The EU's policy choice

Legal basis

In the EU[376], the consideration of the public interest is compulsory for the imposition of measures. According to the two basic Regulations (Article 21 ADR/Article 31 ASR), AD or CV measures may not be applied where the authorities can "clearly conclude" that it is not in the Union interest to apply such measures.

In addition to decisions about the imposition of provisional or definitive measures, the two basic Regulations also state that the Union interest must be considered in a number of other decisions to be made during trade defence investigations, i.e. when deciding whether or not to terminate an investigation following the withdrawal of a complaint, or to suspend measures.

It is also the consistent practice of the Commission, although not explicitly mentioned in the two basic Regulations, to assess the Union interest in expiry reviews and full interim reviews.

Although the two basic Regulations fail to provide a clear definition of the Union interest, i.e. by specifying which effects of measures are to be considered in the Union interest test, the Union institutions have provided explanations on their practice in some of the regulations. Thus, non-economic considerations are not normally addressed in the Union interest test. While they have been considered in a very limited number of cases when raised by interested parties, the Commission has invariably rejected such arguments. Hence, the Union interest refers to economic interests.

The conventional approach to assessing the public interest in standard economic terms would be to assess the welfare implications of potential measures. The approach taken in the two basic Regulations does not preclude this but does not go so far as to specify this practice. The Regulations only stipulate the following general requirement:

> "A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers."[377]

The two basic Regulations thus establish an open list of stakeholders whose interests will be considered in the Union interest test. While it is clear that the interests of the Union industry, users and consumers must be considered, in practice the following stakeholders' interests are considered in the Union interest test:

- the Union industry, including not only complainants but also non-supporting EU producers;
- importers and traders;
- users or retailers;
- consumers; and
- suppliers to the Union industry.

Furthermore, some issues which may affect various stakeholders' interests are routinely considered, i.e. the potential effect of measures on competition in the EU and on security of supply of the product concerned.

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place which could be interpreted as a kind of public interest test; at the same time it should be acknowledged that the main objective of such behaviour is to design measures in such a way as to maximise their acceptance by interested parties.

376 EU rules and practice regarding Union interest are analysed in detail in section 5.1.6 and are therefore only summarised here for the purpose of comparison with peer countries.

377 Article 21(1) ADR and, *mutatis mutandis*, Article 31(1) ASR.

Practice

In practice, interests of the different stakeholders are determined, first and foremost, based on the stakeholders' own contributions. However, often these expressed interests are analysed further by the Commission with regard to their substance, and the "real interest" of stakeholders is then inferred from the likely effect of measures on these stakeholders. In this regard, the methodology of the Commission consists of qualitative economic reasoning and micro-economic considerations. For assessing the Union industry interest, usually a simple extrapolation of the summarised injury determination findings is presented. The assessment of effects of measures on other economic operators and consumers usually follows the same standard arguments, which where possible are substantiated with figures calculated based on data provided by interested parties.

The various (typically conflicting) interests are then compared and weighted against each other in order to determine the Union interest. In this regard, the two basic Regulations specify that:

> "the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration."[378]

Furthermore, the EU will refrain from taking measures only if the authorities "can *clearly* conclude" [379] that these measures are not in the interest of the Union. This means that the interests of the Union industry are given more weight than the interests of other stakeholders. However, while it is established that the negative effects of measures on stakeholders must be disproportionate in relation to the positive effects on the Union industry, discretion remains concerning what is considered as "disproportionate."

Case law has not resulted in a standard practice, as in all cases in the evaluation period which have been terminated based on Union interest considerations[380] it was found that the Union industry would be unlikely to obtain any significant benefits *and* the imposition of measures would have substantial negative effects on other interested parties.

The impact of the Union interest on TD practice in the EU has been the subject of some debate. Some stakeholders have argued that the low number of cases terminated based on Union interest considerations shows the lack of relevance of the Union interest test for TD practice. However, based on the statistics, the number of cases terminated based on Union interest considerations is actually not so small: in the evaluation period this happened in six country-cases (*CD-Rs* [AD500] – China, Hong Kong and Malaysia, and *Recordable DVDs* [AD501] – China, Hong Kong and Taiwan), although admittedly they concerned two investigations with similar products. Furthermore, in two other country-cases (*Polyester Staple Fibres* [AD509] – Malaysia and Taiwan) the Union interest played an important role in the termination of investigations.

In addition, the Union interest test has also influenced the design of measures. Thus, both the type and the duration of measures as well as the acceptance of undertakings have been shaped by Union interest considerations in a number of cases.[381]

In sum, the EU has a more developed public interest test than most of the peer countries. It is the only jurisdiction where the test is applied in each investigation. At the same time, the methodology remains underdeveloped, opening up the test to criticisms of discretionary application and limiting the predictability of the system. Finally, although the number of cases

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[378] Article 21(1) ADR/Article 31(1) ASR.
[379] Article 21(1) ADR (emphasis added) and, *mutatis mutandis*, Article 31(1) ASR.
[380] There were six such cases; see the discussion in section 5.1.6 below.
[381] For details, see section 5.1.6.4.

terminated based on public interest considerations is limited, a more comprehensive assessment of its role in TDI suggests that the test plays a role in the TD system which should not be underestimated.

4.7.4 Conclusions and recommendations

Comparative summary

Public interest considerations do not play any role in the decision whether or not to impose AD or CV measures in US AD and AS law and practice. In Australia's practice, public interest plays a very minor role: although the Minister in charge of deciding measures has full discretion, this discretionary power has never been used in view of public interest considerations. Nevertheless, in the most recent reform of the Australian practice the role of public interest has been marginally increased, as the investigating authority now has to report to the Minister on the potential impact that measures might have on users and consumers. In a similar way as in Australia, in New Zealand and South Africa the authorities have no mandate to take public interest issues into consideration, but these can be taken into consideration in the Minister's final determination. In China, the concept of public interest is mentioned in law but neither have procedures for its implementation been developed nor has a public interest test been applied in practice. India does not apply a separate public interest test but considers that the mandatory application of the lesser duty rule ensures that measures are in the public interest. Thus, only Canada and the EU have well established and (relatively) detailed frameworks for the implementation of public interest considerations, as well as implementation practice. The major difference between these two jurisdictions is that the public interest test in Canada takes place in a separate procedure after measures have been imposed; this creates a barrier – due to additional procedural steps and costs involved – for interested parties to access the test.

Evaluation team analysis

In order to assess the advantages and disadvantages of the different policy choices, the following criteria are considered:

- the extent to which the public interest test affects the degree of protection provided by the TD system; and
- the predictability of the system, i.e., the likelihood that, under comparable conditions of cases, comparable decisions/measures will be taken.

Protection

The usability of TDI primarily depends on whose interests are considered under the public interest test and their weighting. Thus, the more weight is given to the interests of the domestic industry, the more probable it is that measures will be imposed. If only the domestic industry's interests are considered, no public interest test takes place, and measures will be imposed whenever the three conditions – dumping or countervailable subsidies, injury and causal link – are present. This is the policy option which the peer countries except Canada have chosen – the USA *de iure* and the others *de facto*. Conversely, the more different interests that are taken into account, and the more weight that is given to other interests, the lower is the likelihood that measures will be imposed. At the other extreme, if all economic operators' interests are given the same weight, this would equate to the total welfare analysis and would (almost) invariably lead to the non-imposition of measures and would render the TDI regime unusable as an instrument to protect the domestic industry.

Since the degree of protection of the domestic industry is reduced by a public interest test, there must be another justification for such a test. This, it appears (both from the wording of the two basic Regulations and practice in the EU and also from the Canadian practice), is not welfare, not

the "public interest" – understood as some abstract "overall" interest – but rather the understanding that the imposition of AD or CV measures may entail "disproportionate" costs on other economic operators or groups. In other words, the public interest test serves as a safety valve against measures which would result in an unfair burden on others; but it is not an instrument to maximise economic welfare.

It is therefore not surprising that all of the countries that have TDI in place give more weight to the domestic industry. The question for the weighting of interests in the public interest test therefore is not *if* to give more weight to domestic industry in the public interest test but *how much* more weight domestic industry should enjoy – in other words, how to define which costs of measures would have to be considered as "disproportionate." As it seems, no country has found a convincing answer to this question, although some criteria have been developed which will help answer it; these are addressed in the recommendations section below.

Two features of the public interest test which have a bearing on the fairness aspect deserve to be addressed here, however. First, one core difference between the EU and Canadian public interest tests is that in the EU the test is applied *ex officio* in each investigation, whereas in the Canadian system a special petition for a public interest inquiry is required. From a fairness perspective, the EU system clearly seems superior as it ensures that public interest considerations are applied across all cases and not only in those ones where interested parties have requested it – bearing in mind that the public interest inquiry in Canada implies additional costs and favours well resourced and organised stakeholders.

Secondly, the dichotomous nature of the public interest test in the EU has been criticised by some stakeholders in the consultations. Indeed, the possibility of intermediate, compromise outcomes would be favourable. Thus, the "disproportionate" effects of certain measures could be rectified by adjusting the level, type or duration of measures. Adjustments to the level of measures are actually the effective practice in Canada, where public interest inquiries tend to lead to a compromise between industry and consumer interests (*Baby food* providing the most clear-cut example). The EU, in turn, has amended the type or duration of measures based on Union interest considerations, as has been discussed in section 5.1.6.

Predictability

The inclusion of a public interest test into AD/AS investigations by definition implies a certain decrease in predictability, simply because an additional variable (and a complex one, for that matter) is added into the equation. At the same time, the degree to which predictability decreases can be influenced by the design of the public interest test. Two key factors play a role in this regard: the degree of politicisation of the TD system and the degree to which criteria and methods for the implementation of the public interest test have been designed. The two factors are interdependent, however: the more a TD system is subject to political influence, the more important will be clear rules for the implementation of the public interest test in order to reduce discretionary (ab)use and enhance predictability.

In most of the peer countries, a non-desirable option has been chosen – the entity in charge of applying the public interest is a political actor (usually, the minister in charge of TDI), and clear criteria for deciding whether or not to invoke the public interest are lacking.

As the degree of political influence over the decision on TD measures is a matter of institutional design (and has been addressed in section 4.1), in this section only some considerations regarding the rules and methods for the public interest test are addressed.

It would be ideal if some kind of a universally agreed detailed methodology for the Union interest test could be developed in order to minimise discretionary power. However, such a universally accepted methodology simply does not exist. Therefore, it seems worthwhile to develop a list of criteria which could help Commission staff in the Union interest assessment:[382]

- In cases involving intermediate goods, the Commission could establish a formal test for value chain issues by requesting a statement of EU valued-added in the "like goods" produced by the complainants which would be compared to a statement of EU value-added in the imported goods under investigation. This would enable the Commission to establish the Union export consequences of applying measures. More generally, the Commission could establish the potential risk to exports of the like product to the country or countries named in the complaint due to the trade diversionary effects of duties.[383]
- In cases where impacts of dumping/subsidisation are regionally concentrated, the Commission could consider a formal test for evaluating communitarian impacts to both take into account important features of the broader economic welfare interests of the Union and to safeguard the application of TDI from criticism concerning protectionism. Communitarian arguments have already been addressed in a number of cases[384], and this practice could be applied in a more structured and consistent way.
- The Commission could assess if there is a clear indication that availability of non-dumped or non-subsidised imported or EU-produced like goods is guaranteed (both in quantity and quality aspects).
- If the EU industry's share of the domestic market for the goods concerned prior to the commencement of injurious dumping or subsidisation is low, with that share likely to remain low even if measures were imposed, the benefit to the Union of protection for EU producers will be out-weighed by the loss of benefits to consumers. This point has been intuitively appreciated by the Commission in its past decisions (e.g., the *CDR* and *Rewritable DVD* cases); the present report provides analytical underpinning for a more formal articulation of the rationale.
- The Commission should continue to request, as is already the current practice, views of DG Competition regarding to determine whether there is any *prima facie* evidence of collusive behaviour and resultant concerns from a competition perspective. Particularly in case of complaints submitted by highly concentrated industries, a more formal discussion regarding anti-competitive practices by the EU industry should be undertaken as part of the Union interest test.
- Finally, with regard to AS cases, taking a forward-looking perspective on the changing perspectives on industrial policy in the EU and abroad, the Commission might consider developing a policy regarding "safe harbours" for policies that are functionally similar to

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382 Some criteria can be derived from the economic analysis undertaken in chapter 2, while others have been identified in the evaluation of current TD practices in the EU in chapter 3 or in peer countries.

383 Logically, exports to the target country should decline since its domestic industry will shift its production from export to domestic customers, taking away some exports of EU producers. The more realistic test is whether EU comparative advantage, as evidenced by net exports in the sector, would be improved.

384 The impact of measures on regionally concentrated suppliers was discussed in *Frozen strawberries* (AD505; see discussion in section 5.1.6.3 above). Similar effects on a regionally concentrated Union industry were addressed in at least two other cases during the evaluation period:

- In *Ironing boards* (AD506), the Commission found that "[m]uch of the negative impact on employment would be in one geographical area of the Community as several producers and their parts suppliers are located in that one region" (OJ L 300/13 (provisional), 31.10.2006, at recital 144).
- In *Dihydromyrcenol* (AD514), the provisional duty regulation stated that "the direct employment in dihydromyrcenol production is moderate, much of the negative impact on it would be in one geographical area in Spain, where most of the Community production is concentrated" (OJ L 196/3, 28.07.2007, at recital 79).

industrial policies enacted within the Union, at the Union or Member State levels, including support for local/regional development, for clusters and for innovation. The issue of ensuring coherence between industrial policy and TDI should also be discussed at the multilateral level in order to arrive at a coherent treatment of subsidies internationally.

Conclusions/ recommendations

In view of the above discussions, the evaluation team has identified the following policy options regarding the Union interest test (regardless of the feasibility of their implementation in the EU):

1. Abolish the Union interest test altogether and align practice with that in the USA;
2. Reduce scope of Union interest test and introduce a discretionary provision that the Council (in future, the EU) can refrain from imposing measures in case the Union interest calls for it. This would be similar to the provisions in the two basic Regulations on the suspension of measures (in Article 14(4) ADR/Article 24(4) ASR) and introduce a Union interest provision comparable to that of Australia and other countries;
3. Retain the Union interest test as is.
4. Retain the Union interest, with operational and methodological refinements as deemed necessary in light of the analysis above.

Option 1 would be the most radical. It was, in fact, mentioned as an option by one Member State which suggested that the EU should apply the Union interest on a case-by-case basis, in line with the practices applied by other WTO members, or abolish it altogether "because the Community interest could make final decisions more discretionary, unpredictable and move us away of the actual aim of the TDI, that is, to defend EU producers from unfair trade." However, the evaluation team does not recommend this option as it would prevent the EU from not imposing measures in cases where the costs of such measures clearly outweigh the benefits. Indeed, the analysis in the present evaluation suggests that a public interest test will be even more important in the future to guard against inadvertent negative impacts on Union interests in an increasingly complex global economy.

Option 2 is also not recommended as it would lead to higher politicisation, less predictability and less transparency of the EU TD system. In fact, this option is considered to be the least desirable one.

As the evaluation in section 5.1.6 shows, the Union interest test as it is currently applied by the Commission is considered to have no fundamental flaws. The weighing of interests and the methodology applied are considered as appropriate in general terms. Therefore, retention of the status quo *(option 3*) is a recommendable option.

However, in the view of the evaluation team, useful refinements could be introduced into the administration of the test (*option 4*). Specifically, clearer criteria could be adopted for the determination of situations where the public interest would call for the non-imposition of measures or the modulation of measures in terms of level, duration or type. A number of criteria have been suggested above, and are further discussed in section 5.1.6 below.

4.8 Duration of Investigations and Use of Provisional Measures

4.8.1 Background, importance and policy options available

The WTO ADA and ASCM limit both the maximum duration of AD and AS investigations and minimum periods before provisional measures can normally be taken. The basic WTO rules are as follows:

- investigations shall be completed within 12 months, where possible, and in any case within 18 months from the date of the notice of initiation;
- provisional measures can be imposed at the earliest 60 days after initiation and these provisional measures may remain in place for a period of four months. Under the ADA only, where the lesser duty rule is considered the provisional measures may remain in place for a period of six months, and upon request by exporters representing a significant percentage of the trade involved, provisional measures may remain in place for up to six (without lesser duty rule) and nine months (with lesser duty rule). There is no requirement that an investigation has to include a preliminary determination and provisional measures.

There is clearly a trade-off between the speed of imposing measures and the thoroughness of investigations. Important policy decisions to be taken in this context are thus:

- how long investigations should take at a maximum; and
- how important it is to grant (provisional) protection to the domestic industry before the investigation is completed, i.e. whether and when provisional measures should be imposed.

4.8.2 Policy Choices of Peer Countries

4.8.2.1 Australia

Legal basis

The ACS must initiate an investigation within 20 days after receipt of a properly documented application once it has determined that the applicant has made a *prima facie* case for the existence of injurious dumping (or subsidisation) and the formal requirements have been properly fulfilled under section 269TC(1) of the Act. The 20-day period starts again at zero if the applicant submits new information. If the ACS is not satisfied, it will reject the application, a decision which may be appealed to the TMRO, which itself has 60 days to either affirm the rejection or refer the matter back to the ACS with a decision to initiate.

A preliminary affirmative determination (PAD) that there appears to be, or it appears there will be, sufficient grounds for the publication of a notice is issued, either in conjunction with or without the imposition of provisional duties. A PAD is issued where the CEO of the ACS is satisfied that it is necessary to impose provisional measures to prevent material injury to an Australian industry occurring while the investigation continues and can be issued any time after day 60 since receipt of the application but not after day 155, unless an extension has been granted.

The ACS must make a recommendation to the Minister on whether or not to impose (definitive) measure, before day 155 of the investigation. Since the enactment of new legislation, the Minister has 30 days to decide on whether or not to follow the recommendation of the ACS (bringing the law into line with previous practice).

Practice

On average, the ACS has applied provisional measures around day 140 of the investigation, with the earliest at day 80, as preliminary determinations are normally only made after conducting verification visits to exporters (Australian Customs and Border Protection Service 2011: 12). Industry has expressed concern that this does not adequately prevent injury to them, particularly given the length of time it can take to lodge an application for AD or CV measures (Australian Customs and Border Protection Service 2011: 12). In view of these criticisms, the ACS has now undertaken to making preliminary determinations when it has adequate information, without necessarily waiting to verify all data. Normally the ACS will have verified the domestic industry's data before day 60 and will by then have received data from the exporters. Should the exporters' data show evidence of dumping or subsidisation, this will be used in the preliminary

determination to impose provisional measures (Australian Customs and Border Protection Service 2011: 12).

Note that under currently applicable law, only one extension can be sought by the ACS and only prior to the publication of the Statement of Essential Facts (which is the disclosure document) at day 110. Extensions have been sought in an increasing number of cases and for significant periods of time due to the size and complexity of recent investigations. The Productivity Commission noted that "over the past decade, Customs has completed only around 40 per cent of investigations within the 155-day timeframe, with the average extension on the remainder being close to 60 days" (Australian Productivity Commission 2009: 141).

The Australian Government plans to amend the Antidumping Act so as to allow the ACS to seek more than one extension to the time frame at any point during an on ongoing investigation, during a review of measures already in place, or in the context of a continuation enquiry or duty assessment.

4.8.2.2 Canada

Legal basis

In Canada the CBSA has 30 days to determine if there is sufficient evidence of dumping or subsidisation and of support from the industry to begin an investigation. If this initial determination is affirmative, the CBSA begins its investigation and the Tribunal starts an injury inquiry. From initiation, the CBSA has 90 days (up to 135 in complex cases) to collect information from all parties involved and to make a preliminary determination on dumping/subsidisation. Meanwhile the Tribunal has 60 days to arrive at a preliminary determination of injury. If both processes yield affirmative determinations, temporary duties may be imposed at this time and the CBSA has 90 days to complete its investigation, while the Tribunal simultaneously continues its injury investigation. Once the CBSA makes its final determination, the Tribunal holds a public hearing, following which it has 30 days to make a final injury decision.

Practice

Provisional duties are usually imposed within three months. From initiation of an investigation until the Tribunal's final determination on injury takes about seven months.

4.8.2.3 China

Legal basis

According to China's Anti-Dumping Regulation, MOFCOM has 60 days from receipt of an application to initiate an investigation. The 60 days start running from the day on which MOFCOM signs an acknowledgement of receipt of the application. The Anti-Dumping Regulation and implementation rules do not contain any guidance on when a preliminary determination must be made, other than providing that no preliminary measures may be adopted within less than 60 days after initiation. Finally, by law Chinese TD investigations should be finalised within 12 months, although this may be extended to 18 months under special circumstances.[385] Where an investigation cannot be completed within 12 months, MOFCOM has to publish an extension notice. This is normally done several days before the lapse of the 12-month period.

Practice

Practice for the initiation of investigations differs considerably from the legal provision of a 60-day initiation period. For example, MOFCOM may receive an application on 1 January. It will then examine the accuracy and adequacy of the data, which may include a visit to the applicants

[385] Article 26 of the Regulations on Anti-Dumping.

to verify the submitted information. MOFCOM will only sign the acknowledgement of receipt after this whole process has been finalised. It could then sign the acknowledgement of receipt on 1 July and require the applicants to update injury information for the period 1 January to 30 June. The investigation will then have to be initiated within 60 days from 1 July (Xiaochen Wu 2009).

Regarding provisional measures, up to 2005, preliminary determinations tended to take approximately 12 months, mostly as a result of a lack of experience and personnel (Xiaochen Wu 2009: 176). Since 2005, however, preliminary determinations have typically been concluded within nine months, with the preliminary determination in some cases rendered within six months (Xiaochen Wu 2009: 177). Several provisional measures during the evaluation period have remained in place for more than six months.[386]

Finally, of China's first 48 investigations, 41 took more than 12 months to complete. Since 2005, however, most investigations have been completed within 12 months from initiation (Xiaochen Wu 2009: 202).

4.8.2.4 India

Legal basis

In India, there is no legal time limit on how soon after receipt of an application an investigation has to be initiated. Once initiated, by law investigations should be finalised within 12 months,[387] but a grace period of up to an additional six months is available.[388] Finalisation includes that the final determination must be submitted to the Central Government and that DGAD must have issued a public notice on its finding. Central Government must publish a notification in the Official Gazette imposing AD duties not exceeding the margin of dumping determined by the Ministry within three months of the date of publication of final determination by the Ministry (Chugh 2007: 26).

Provisional AD duties may only be imposed if an investigation had been "properly initiated"[389] and interested parties have been given adequate opportunities to make submissions to DGAD. In addition, DGAD must have entered an affirmative provisional determination of injurious dumping. The provisional duty may not exceed the margin of dumping provisionally established and may remain in force for a period not exceeding six months, extendable to nine months under certain circumstances (Chugh 2007: 22).

Practice

In practice, as a result of a lack of sufficient staffing, initiations can take more than a year (Raju 2008: 226). Aggarwal (2002: 61), on the other hand, indicates that investigations are normally initiated within 45 days of the date of receipt of a properly documented application. The

386 See (Bown 2010a). Xiaochen Wu (2009: 187) presents examples of at least five cases where preliminary measures were in place for more than six months, including two cases where such preliminary measures were in force for more than nine months. This duration of provisional measures would appear to be inconsistent with WTO rules which limit the duration to four months in the absence of the lesser duty rule.

387 Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, Rule 17(1).

388 Rule 17(1)(iv).

389 See Kumaran (2005: 116f) who argues that the "standard of evidence submitted by the domestic industry along with the petition and the examination by the Authority of the adequacy and accuracy of the evidence to justify initiation of the investigation do not meet the requirements of Article 5.1 and 5.6 of the ADA." He continues to indicate that these shortcomings relate to standing, normal value, export price, dumping margin and causal link issues, i.e. virtually all requirements, while in the specific case that he refers to *Butter oil from New Zealand*) no injury information had been submitted, yet the investigation was initiated. He also indicates that the period of investigation is often far removed from the date of initiation.

difference, however, is the time between the submission of an application and the date such application is accepted as properly documented by DGAD.

Preliminary determinations are normally issued within 150 days from initiation, while the final determination is normally issued within 150 days from the date of preliminary determination. These time limits place enormous pressure on the authorities particularly in complex cases, considering the small staff complement and the high number of investigations.

Most Indian investigations are finalised within one year of initiation, but this period may be extended to 18 months under special circumstances (Chugh 2007: 26). Very few cases take more than 15 months to complete.

4.8.2.5 New Zealand

Legal basis

The New Zealand legislation does not prescribe any time limit for the consideration of an application. The Act does require that a final determination must be made within 180 days of initiation. New Zealand legislation also provides that, at any time after the Minister makes a final determination, the Minister may give notice of the amount or rate of duty determined, and that notice could be given simultaneously with, or at any time after, the notice of final determination. Section 17 of the Act provides that the date on and from which AD or CV duty is payable is the day after the final determination or a specified day after that day. Provisional measures may be imposed at any time after 60 days from the date of initiation where the Minister has reasonable cause to believe that goods are being dumped or subsidised and by reason thereof material injury to an industry is being caused or threatened, and if the Minister is satisfied that action is necessary to prevent material injury being caused during the period of investigation.

Practice

The level of AD or CV duties is normally determined within 180 days from initiation. However, in *Oral Liquid Paracetamol from Ireland*, the determination of the rate or amount of AD duty was made on 17 July 2006 (474 days after the final determination was published) as a NV(VFDE) amount, with the duty terminated for the period between the final determination and the date of the notice of duty. In *Other Plasterboard from Thailand*, the imposition of final AD duties was deferred to allow interested parties to make submissions on the type and rate or amount of duty. The notice of duty was given 53 days after the final determination had been published.

Also, as a result of the short duration of investigations (normally a maximum of 180 days), provisional duties are seldom applied in New Zealand. Provisional measures have been imposed in seven cases since 1995. In all but one of the cases the duty was the *ad valorem* margin of dumping provisionally determined. The other case involved a category of plasterboard from Thailand where the NIFOB applicable under an existing duty for a similar product was applied. In virtually all of these cases the final duties imposed used reference prices.

4.8.2.6 South Africa

Legal basis

There is no provision in South African legislation regarding the duration of the merit assessment, i.e. the time between receipt of an application and the date that a decision must be made to either reject (or return) the application or initiate an investigation. In addition, there is no requirement in law that investigations or reviews have to be finalised within 12 months and only the maximum duration of 18 months is provided for.

Practice

As a consequence of the lack of a legal basis for the length of the initiation period, industries and consultants alike complain about the time taken to initiate investigations – typically a period of several months, especially as ITAC insists on all injury information being submitted and verified prior to initiation. South Africa prides itself on having the highest standard in the world for initiation of an investigation, but this is often to the detriment of the domestic industry.

With regard to the overall length of investigations, in practice a number of cases, especially AS investigations, have taken longer than 18 months to finalise. On average, a preliminary AD investigation takes 240 days from initiation, while the final investigation takes on average 253 days, for a total average of 482 days[390] to finalise an investigations. AS investigations have taken an average of 608 days to finalise (i.e., longer than the 18 months prescribed by WTO law), including 418 days for preliminary and 190 days for final determinations.

Virtually all verifications are undertaken during the preliminary investigation. However, where an exporter or foreign producer has substantially cooperated but its submissions are deficient and not addressed in time, it may update its information up to the deadline for responses to the preliminary report. Its information will then be verified during the final investigation. If incorrect information is discovered during verification the information is simply corrected. ITAC has often allowed parties to submit new information during the verification.

Provisional duties are virtually always imposed if an affirmative preliminary determination has been made and the lesser duty rule is already applied at this stage.

4.8.2.7 USA

Legal basis and practice

In the USA, the time frames for conducting investigations are strictly prescribed by legislation. Since a bifurcated system is followed, there are different time frames for Commerce (which conducts the dumping/subsidy investigation) and the ITC (which conducts the injury investigations). From receipt of an application, Commerce has only 20 days to decide whether to initiate or whether to refer the application back to the applicant. Often, however, several drafts are submitted to and discussed with Commerce before a final version is officially submitted.

The ITC has 45 days to reach a preliminary determination on injury, while Commerce must reach its preliminary determination of dumping within 140 days after initiation, although this deadline may be extended by up to 50 days in complex investigations. Verification of responses is done after the provisional finding has been made.

Commerce's final determination must be made within 75 days after its preliminary determination, although this may be extended by up to 60 days (to a maximum of 135 days) where exporters representing a significant proportion of total exports so request following an affirmative preliminary determination or where the applicant so requests following a negative preliminary determination. The ITC must render its final determination within 120 days of the Commerce's preliminary determination or within 45 days of Commerce's final determination, whichever is the later date. Commerce must publish the final notice within seven days after the ITC's final determination. Accordingly, most investigations are finalised within 260 days from initiation, with complex cases taking up to 310 days. Even where the applicant or exporters request an extension to better present their case, the maximum duration of an investigation is 370 days.

[390] Note that the preliminary and final days cannot be added to determine the total days, as no preliminary determination is made in some cases. These durations are exclusive of those cases that were withdrawn by the applicants after initiation.

Provisional duties are always imposed at the margin of dumping or subsidisation provisionally determined and this usually takes place within 140 days from initiation (or 190 days in complex cases).

4.8.3 The EU's policy choice[391]

Legal basis

The two basic Regulations[392] state that AD investigations shall be completed within 12 months, where possible, and in any case within 15 months from the date of the notice of initiation, while AS investigations shall be completed within 12 months, where possible, and in any case within 13 months from the date of the notice of initiation. Provisional measures may be imposed at the earliest 60 days from the date of the notice of initiation, and at the latest nine months after that date.

Practice

Most of the investigation work in the EU is done prior to the decision of whether or not to impose provisional measures. This decision is based on the information obtained from the questionnaires and verified in verification visits, or the available facts in case of non-cooperating firms, and includes the preliminary application of the lesser duty rule and the Union interest test.

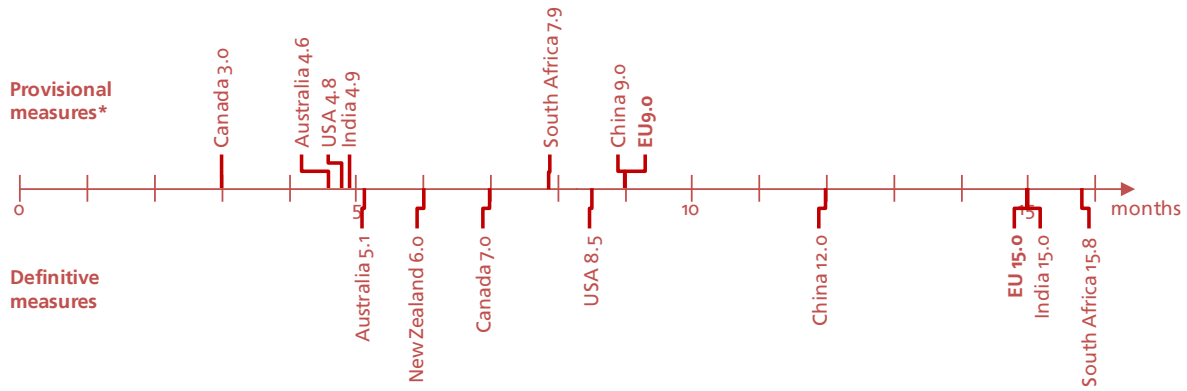
As a result of this practice, AD/AS provisional measures are typically imposed at the very end of the legally allowed period. The average duration until provisional measures are imposed is 8.9 months. For definitive measures the period required is 14.8 months in AD cases and 12.8 months in AS cases.

4.8.4 Conclusions and recommendations

Comparative review

The duration of peer countries' investigations differs both in law and practice. Countries fall into two groups (Figure 21). The first group (China, India and South Africa) bases law and practice on the maximum durations mentioned in the two WTO agreements. The second group (Australia, Canada, New Zealand and the USA) concludes investigations substantially faster. Furthermore, in all peer countries except China and South Africa at least provisional duties are usually in place within four to six months after initiation.

Figure 21: Normal/average time required until imposition of provisional and definitive measures



* New Zealand does not normally apply provisional measures.
Source: Summary by the evaluation team.

391 Also see section 5.2.2.1 below.

392 See Article 6(9) ADR and Article 11(9) ASR. On time limits for provisional measures: Article 7(1) ADR/Article 12(1) ASR.

When compared to peer countries, the EU clearly belongs in the group of WTO members that are guided by the deadlines for investigations established in the WTO agreements. What is more, it takes substantially longer to impose provisional measures than any of the peer countries except for China.

Regarding the use of provisional duties, Canada and the USA both had an elevated share of cases where provisional measures but no definitive measures were imposed (Table 37) while almost never failing to impose provisional duties in cases where definitive duties were subsequently imposed. New Zealand by contrast did not once impose provisional duties and then terminated the case without definitive duties. The EU and other peer countries struck a balance, with a roughly similar number of instances where protection was not provided early through provisional duties and those where provisional duties were applied and then cases were terminated without definitive measures.

Table 37: Use of provisional measures by EU and peer countries, AD and AS cases initiated 2005-2010

	Number of cases					% of initiated cases	
	Cases initiated	Cases with provisional measures	Cases with definitive measures	Cases with definitive but no provisional measures	Cases with provisional but no definitive measures*	Cases with definitive but no provisional measures	Cases with provisional but no definitive measures
EU	129	50	48	8	10	6%	8%
Australia	42	15	15	2	2	5%	5%
Canada	29	29	17	0	12	0%	41%
China	81	57	53	0	4	0%	5%
India	228	117	132	34	19	15%	8%
New Zealand	8	1	4	3	0	38%	0%
South Africa	39	16	16	5	5	13%	13%
USA	126	109	90	1	20	1%	16%

* May include ongoing investigations.
Source: Authors' calculation based on Bown (2010).

Conclusions/ recommendations

It is certainly true that the reliability of preliminary findings in the EU, based on which the decision about the imposition of provisional measures is taken, is relatively high. For example, it has been mentioned that, in the EU, verification of information provided takes place before the preliminary determination, unlike in the USA. Obviously this has implications for the timeline of investigations and the duration until provisional measures. However, it should also be noted that by the time the EU imposes provisional measures, investigations in Australia, New Zealand Canada and the USA are completed.

While it is clear that the EU does not provide quick relief to the domestic industry, there are some explanations for this. First, as discussed above, the complexity of EU investigations is higher, as both the lesser duty rule and the Union interest test require time. Second, decision making procedures in the EU are more complex, given the involvement of 27 Member States. Therefore, a direct comparison of the investigation durations would not appear to be fair. On the other hand, the evaluation team considers that options should be considered to reduce the duration of investigations, respectively the period until measures are in place.

First, the TQM project has developed a workflow management system (SHERPA) which should provide the necessary basis to consider which stages of the investigation *and* decision-making process can be advanced. The evaluation team understands that as part of the process optimisation the Commission is already working on the streamlining of internal decision-making. Furthermore, the duration of investigations is currently also under discussion as part of the Trade

Omnibus I proposal; these discussions should consider ways and means to reduce the duration of investigations – even if it means cutting deliberation periods of Member States.[393]

Second, Australian practice demonstrates that is possible to reach timely yet reasonably accurate provisional duty determinations. In the evaluation period Australia applied provisional measures in half the time of the EU but had about the same error rates as the EU (both in terms of providing protection where it eventually proves unwarranted and in failing to provide early protection where it ultimately is found to have been warranted). This appears to reflect the fact that Australia managed to undertake verification on a very timely basis. It remains to be seen whether Australia's balanced error rates will become skewed given the commitments to further shorten the period to the imposition of provisional duties by taking decisions prior to verification if necessary.

4.9 Duty Collection Systems, Form of Duty and Refunds

4.9.1 Background, importance and policy options available

The WTO ADA provides both for the prospective and retrospective collection of AD duties.

In a prospective system, the level of the duty is determined during the investigations then applied at this level for the duration of its application, unless changed pursuant to an interim review. In jurisdictions where the prospective system of duty collection is applied, parties are free to request refunds of the over-payment of any duties.

Conversely, under a retrospective system, the duty rate established in investigations (usually as an *ad valorem* rate) is for deposit purposes only. The final level of duties due is determined only after products have been imported, and then based on the actual level of dumping or subsidisation. In principle, the retrospective method is more accurate as parties only definitively pay whatever duties were in fact due, i.e. if the export price increases subsequent to the imposition of duties lower duties will be collected, while higher duties will be collected if the export prices decreases subsequent to the imposition of the duties. This negates the requirement for refund proceedings and also negates the possibility of absorption of the duty. On the other hand, since the definitive level of a duty collected retrospectively can only be determined after the importation had already taken place (and, in most instances, after the imported products had been sold) and as the importer has no control over domestic price movements in the exporting country, this adds significant uncertainty in the market, which may have a dampening effect in trade.

It must be noted, however, that the distinction between prospective and retrospective collection systems is somewhat simplistic. Different types of prospective systems exist, some of which have effects which liken them to a retrospective system. This depends to a large extent on the form of duty. Since the two WTO agreements provide no provisions regarding the form of duties, authorities can impose *ad valorem* duties, specific duties or formula (reference price) duties.

393 Also see the discussion in section 5.2.2.1.

4.9.2 Policy Choices of Peer Countries

4.9.2.1 Australia

Duty collection system

Australia applies a prospective system in terms of which the level of the AD or CV duties is determined at the final decision stage and then applied for the duration of the application thereof, unless changed pursuant to an interim review. The Australian procedure of setting the AD or CV duty at a "non-injurious price" level does have the effect of ensuring that if an exporter increases its price subsequent to the imposition of duties, thereby partially or fully offsetting the effect of the dumping or subsidisation or of the injury, the actual duty levied will be reduced in direct proportion to the increase in price. This does not, however, take into consideration changes in the normal value, as would be taken into consideration under the retrospective system.

Form of duty

Australia recognises four types of AD duties: *ad valorem* duties; specific duties; a combination duty (having fixed and variable components), and floor price or non-injurious price duties (Australian Customs and Border Protection Service 2011: 22). At present, Australia generally applies a combination duty. The effect is to impose an up-front duty that is never less than the fixed component of the duty regardless of the level of the actual export price, while the variable component of the duty applies if the actual export price falls below the floor price (Australian Customs and Border Protection Service 2011: 22).

The ACS recognises that while a combination duty may have certain benefits it does not suit all circumstances, especially where export prices are subject to frequent variation, which may result in the amounts ascertained at the conclusion of an investigation becoming outdated (Australian Customs and Border Protection Service 2011: 22). In addition, where there is a large number of models that are subject to an investigation, ascertaining amounts for each type increases administrative costs and complexity. In such cases it is easier to resort to *ad valorem* duties.

Refunds

In Australia, on average, six importers each year have applied for duty refunds, with around 90% of the duty collected from them having been returned. Between 2006 and 2009, some 40% of the total amount of AD and CV duties collected has been refunded (around $3.5 million out of $9 million on an annual basis). It is presumed that this followed increases in export prices, indicating that import prices were higher than the non-injurious price set by Customs.

In 2011, the ACS indicated that a more flexible approach would be taken to determining the appropriate form of an AD or CV duty, including *ad valorem* duty, fixed duty, combination duty, or a floor price (Australian Customs and Border Protection Service 2011: 4).

4.9.2.2 Canada

Duty collection system and form of duty

Canada applies a prospective system in terms of which the level of the AD or CV duties is determined at the final decision stage and then applied for the duration of the application thereof, unless changed pursuant to an interim review. However, the practice in Canada of establishing prospective normal values effectively eliminates the need to actually pay AD duties, as exporters can avoid AD duty liabilities by setting their export price equal to the assessed normal value. Similarly, foreign governments can avoid CV duties by imposing an offsetting tax or other arrangement to negate the effect of the subsidy on the price of goods exported to Canada. Accordingly, from the perspective of the exporters and importers, the distinction between duties and undertakings is more one of form rather than substance. Accordingly, if an exporter increases its price to the level of the prospective normal value, no AD duty will be levied.

In addition, as a result of the use of prospective normal values, there is little, if any, need for refund applications as there is seldom any over-payment of AD or CV duties.

Refunds

4.9.2.3 China

China applies a prospective system in terms of which the level of the AD or CV duties is determined at the final decision stage and then applied for the duration of the application thereof, unless changed pursuant to an interim review. No detailed information is available on China's choice of duties, i.e. *ad valorem*, specific or based on reference prices. However, it appears that most duties are imposed on an *ad valorem* basis.

Duty collection system and form of duty

Although in theory a party may submit a refund application if it can show that the duties collected were higher than the margin of dumping or of subsidisation, in practice this is seldom done.

Refunds

4.9.2.4 India

India applies a prospective system in terms of which the level of the AD or CV duties is determined at the final decision stage and then applied for the duration of the application thereof, unless changed pursuant to an interim review.

Duty collection system

AD duties can take any of three forms: *ad valorem*, specific or variable. *Ad valorem* duties are expressed as a percentage of the CIF export price and are related positively with the export prices, but according to Aggarwal (2002: 52), the Indian authorities consider *ad valorem* duties to be cumbersome to calculate. Specific duties are expressed as fixed amount per unit and are the easiest to administer.[394] The variable duty is expressed as the difference between the landed cost of the imported product and the normal value. Raju indicates that

Form of duty

> "The DA constructs a 'reference price' and the difference between the *actual landed prices for each consignment* to fix the dumping margin. In India, the customs duties are getting reduced every year. Once the duty is imposed, the exporter has to pay a higher dumping duty even when the customs duty is decreased" (2008: 322; own emphasis).

Aggarwal indicates that

> "Variable duties are calculated by subtracting landed value of exports from predetermined levels of domestic fair price. With changes in the landed value of exports, variable duties also vary. However since these duties are based on the fixed fair domestic price, these are not superior to specific duties. Moreover, with change in the exchange rates, the landed value of exports also changes. This results in change in the duty even if no other condition of dumping is changed" (2002: 52).

Accordingly, from 1999 onwards, DGAD has preferred imposing a variable duty. This is defeating the purpose of lowering tariff rates and is establishing the case of administered protection more strongly (Aggarwal 2002: 52) as a result of the AD duty being determined on the basis of the landed cost rather than the CIF price, which may result in AD duties collected in excess of the margin of dumping.

Refund applications are seldom submitted in India. Raju indicates that "the party claiming the refund [...] has to prove that it did not pass the burden [of the duty on] to the consumers" and

Refunds

[394] DGAD imposed specific duties until the late 1990s, but this posed a peculiar problem in the Indian context. With the downward revision in custom duties, the landed values of exports also changed, leading to several review cases on the basis that the domestic industry was not adequately protected. Accordingly, DGAD realised that specific duties might not be appropriate in a country where custom duties are revised downwards frequently (Aggarwal 2002: 52).

that this requirement is based on the principle of unjust enrichment.[395] The same rules apply in other indirect taxes in India, including customs duties, excise duties and service taxes (Aggarwal 2002: 53; Kumaran 2005: 124). It is therefore up to the person claiming the refund to prove that he has not passed the burden of the duty on to any other person.[396]

4.9.2.5 New Zealand

Duty collection system

New Zealand applies the prospective system for imposing AD duties where duty levels are calculated on the basis of historical data and applied to future transactions, with provision for refunds if the importers concerned consider that the actual margin of dumping is lower than the rate of duty imposed.

Form of duty

AD and CV duties can be applied in a number of ways and can be imposed as a rate or amount, including any rate or amount established by a formula. The basic approaches are:

- A specific amount per unit of product.
- An *ad valorem* rate.
- A reference price approach.

The Ministry's practice is to consider the suitability of all methods of imposing AD duties, i.e. a specific amount per unit, an *ad valorem* rate and a reference price[397], according to the circumstances of each dumping investigation. Historically the Ministry's preference has been to impose duties through a reference price mechanism, but this will depend on the circumstances of the product being investigated. For example, in the *Diaries from China, Hong Kong, Indonesia, Korea and Malaysia* case it was considered that duties should be imposed by means of an *ad valorem* duty as a practical method of imposing duties against a product where there is a large range of goods whose number of types could increase or decrease. It would not have been practical to establish reference prices for individual types of diaries given the very wide range in complexity in the make-up of products and the frequency with which product offerings changed.

An *ad valorem* duty is deemed appropriate where there is a large range of goods and the goods are of the nature that the number of types may increase or decrease, e.g. due to changes in consumer demands or obsolescence. An *ad valorem* duty is easy to administer at the border and does not involve releasing confidential information that has been provided by any party in the investigation. This can permit importers to budget for the full cost of the goods that they are importing, rather than having imposed a confidential rate that can only be worked out once the goods enter the country.

Ad valorem duties have been applied more frequently in recent cases, with four of the last five resulting in such duties being imposed. Since 1995, reference prices have been used in 61% of cases, and apply to 46% of current duties.

Refunds

The Ministry has established rules to implement the requirement in Article 9.3.2 of the ADA for the refund of duties paid in excess of the margin of dumping.[398] These rules took effect from 9

395 Raju (2008: 323). See also Aggarwal (2002: 53) and Kumaran (2005: 124).

396 S 27(2) of the Customs Act of 1962.

397 Under the reference price approach, the duty payable is the difference between the transaction price and a reference price. The reference price would normally be based on the normal value or the non-injurious price. A reference price duty only collects duty when the goods are priced below the non-injurious or undumped reference price.

398 Details of the rules and procedures for refunds are set out on the Ministry website at http://www.med.govt.nz/templates/Page____44795.aspx.

August 2010. Applications for refunds are considered in relation to all imports made by an importer of a product subject to AD duty which were imported in an 'importation period'. Importation periods for goods subject to AD duty when the rules were implemented are set out on the website, and for any new product subject to AD duty after 9 August 2010, the importation period is six months from the date the imposition of duty is notified in the *New Zealand Gazette*. There is no application form or prescribed format, but any application must include relevant evidence relating to the goods, the supplier and imports made, and especially evidence of export prices and normal values. The Ministry undertakes to advise, within 180 days, that a refund is not payable or will instruct the New Zealand Customs Service to pay a refund.

At the time of writing this report, the refund system is an administrative scheme, but there is a proposal to amend the Act to make statutory provision for the payment of refunds including the time frames and information required.[399]

To date, refunds have been paid in only three cases, two in 2009 and one in 2010.[400]

4.9.2.6 South Africa

Duty collection system

South Africa applies a prospective system in terms of which the level of the AD or CV duties is determined at the final decision stage and then applied for the duration of the application thereof, unless changed pursuant to an interim review.

Form of duty

In most instances *ad valorem* duties are applied. However, on a number of occasions specific duties, expressed as a value per unit of measurement, have been introduced. To date no duties have been imposed on the basis of a formula or reference price, despite requests from industry in this regard. There are no provisions in either the ITA Act or the Customs Act that would permit or disallow the use of reference prices, which appears to indicate that this is fully within the discretion of ITAC.

Refunds

Legislation also provides for interested parties to request a refund on the overpayment of any AD or CV duties, but in practice this can only be requested by, or with the assistance of, the exporter as the actual margin of dumping has to be proven.

Only one refund application has been submitted in South Africa. Although the refund was readily agreed to by the Commission, obtaining the actual refund from Customs placed a significant burden on the applicant, as the duties had to be claimed back on a shipment-by-shipment basis from the same customs port where the shipment was originally cleared and the claim could only be submitted by the original shipping agent, regardless of whether the importer had changed agents in the interim. The shipping agent also demanded a share of all duties refunded.

4.9.2.7 USA

Duty collection system

The USA is the only country that uses a retrospective system for the collection of definitive AD and CV duties, which means that, although the liability for duties attaches at the time of entry, AD duties are not actually assessed until much later and Customs only collects security in the form of a cash deposit or bond to cover the estimated duty liability at the time of importation.

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399 Statutes Amendment Bill (No 3) 349-1 (2011), Part 4 Dumping and Countervailing Duties Act 1988. Introduces new section 14A Refund of excess anti-dumping duty paid.

400 Advice received from the Ministry of Economic Development.

Form of duty

Normally, Commerce assesses duties on an *ad valorem* basis. For AD duties, the *ad valorem* rate is usually calculated on an importer-specific basis, by dividing the total amount of AD duties owed on the transactions examined (i.e., total difference between export price and normal value) by the entered value of the imports during the period of review. For CV duties, the *ad valorem* rate is normally calculated by dividing the total amount of the subsidy benefit received during the period of review by total value of the relevant sales during the period. In certain cases, such as those involving livestock, Commerce has found it more practical and appropriate to calculate a specific duty (e.g., a specific amount per kilogram).

While the USA usually levies *ad valorem* duties, the actual collection of duties under the retrospective duty collection system *de facto* is similar to a minimum import price (MIP) system (as imports which are imported at prices above the normal value will not attract a duty).[401]

The prime advantage of the retrospective duty collection system is the greater accuracy it may provide. Duties are levied based on the actual level of dumping – if prices are above the normal value, no duty is collected. Conversely, if prices are lower than normal value, the actual difference to the normal value is collected (assuming zeroing does not come into play); this might even result in higher duties payable than the *ad valorem* duty originally imposed. Likewise, as a result of the retrospective nature of the collection of duties under which only the required duties are definitively levied, there are no refund proceedings under the US system.

Refunds

The USA has acknowledged that, compared to a prospective system, its retrospective system is more complex and resource intensive and less predictable as, on average, an importer does not know the final duty liability for more than three years after import, when the results of the administrative review establishing the final duty are known.

In addition, a recent report by the US Government Accountability Office (GAO) found that the system is plagued by collection problems, in large part due to the retrospective element in the duty collection system.[402]

US stakeholders with significant importing interests, including manufacturers, processors and retailers, have seized on the GAO report and are pressing the case for a prospective duty assessment system before the administration and Congress, arguing that it is more predictable, easier to administer and as effective, if not more so. There is substantial opposition to those efforts by domestic interests who argue with equal conviction that the current retrospective system is more accurate and effective and that under a prospective system dumping or subsidisation could go unremedied. Several factors have coalesced to increase the visibility of this issue, including support from US Customs for a prospective system, which is easier for Customs to administer, and heightened interest in any potential savings in administrative costs caused by the current budget crisis. Nevertheless, significant changes to the AD and CV duty laws in the USA have been few and far between and it is not anticipated that the USA will change to a prospective system in the near future.

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401 With the elimination of zeroing the systems are not fully equivalent. While it is true that imports at prices above normal value do not attract a duty, imports below normal value receive less of a duty than would be the case if duties were collected at the time of entry on a transaction-by-transaction basis because in the retrospective system the negative margins now offset the positive in the final *ad valorem* calculation. There is no such offset in a prospective normal value system.

402 See US Government Accountability Office *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection* (March 2008) ("GAO Report"). Also see the report of the International Trade Administration, Department of Commerce. *Relative Advantages and Disadvantages of Retrospective and Prospective Antidumping and Countervailing Duty Collection Systems. Report to Congress*, November 2010.

4.9.3 The EU's policy choice[403]

Duty collection system

The EU applies prospective duties. The two basic Regulations do not prescribe the specific form of remedial measure to be taken against dumping or subsidised imports.

Form of duty

In practice, the EU has applied a variety of AD and CV measures, both duties and undertakings. Among duties, *ad valorem* duties have by far been the most often used type of measure. Specific duties and minimum import prices (MIP) have been used rarely and only in cases where the use of *ad valorem* duties was considered by the Commission to be inappropriate or ineffective.

Refunds

Importers of products subjected to AD or CV duties may request reimbursement of duties collected if it is shown that the dumping margin or the amount of countervailable subsidies, on the basis of which duties were paid, has been either eliminated or reduced to a level which is below the level of the duty in force.[404]

Refunds are provided fairly frequently with a clear increase in the number of refund applications since 2007; in total, during the evaluation period, 132 applications were submitted. The success rate of applications over the evaluation period was low until 2009 but substantially increased in 2010. On average, during the period 2005–2010 approximately one in three applications resulted in a partial or full refund of duties paid, with more applications being withdrawn rather than being rejected.

4.9.4 Conclusions and recommendations

Comparative summary

The USA is the only country that applies a retrospective duty collection system and while it may be more accurate, it leads to significant uncertainty as it can take as long as three years before an importer knows what the final amount of duty payable is. Furthermore, the need to undertake administrative reviews also means that the retrospective collection system is more resource consuming.

The choices of duty types of the peer countries operating a prospective duty collection system vary considerably. Reference price-based systems, in which the level of duty payable eliminates the difference between the actual export price and normal value, are applied by Australia, Canada, India and New Zealand:

- In Australia, the common practice has been to combine the variable duty with an *ad valorem* component. The system results in systematic over-collection of AD/CV duties and has led to a high number of refunds.
- Under Canada's prospective normal value system exporters are informed up-front of the normal value. In practice, this has led to very low duty collection as exporters tend to export at the prospective normal value level. New Zealand practice is comparable, although New Zealand has used *ad valorem* duties more frequently in recent times.
- In India the variable duty is not based on the difference between export price and normal value but landed cost and normal value, which may result in AD duties collected in excess of the margin of dumping.

The EU, South Africa and China primarily use *ad valorem* duties.

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403 See section 5.1.7.3 (in the form of duty) and 5.3.8 (on refunds) for more information.
404 Article 11(8) ADR/Article 21 ASR.

Conclusions/ recommendations

Based on the analysis of peer country experience, two findings are noteworthy. First, reference price based systems are used often. Second, there is a tendency towards greater use of *ad valorem* duties (viz. Australia and New Zealand). In view of this, there does not appear to be any imminent need to the EU to consider a change in its duty collection system. Furthermore, complex systems such as those used in the USA, Canada or Australia would be difficult to implement in the EU, given that 27 different customs authorities would need to apply these measures in the same way.

On the other hand, it should be noted that prospective ad *valorem duty* systems have a built-in bias against fair exporters (the higher the export price and hence the CIF import price, the higher will be the AD/CV duty). One way for exporters to remedy this is by requesting a partial interim review of their dumping. This has been done in a number of cases during the review period. However, it is contingent upon the finding of a lasting nature of the alleged changes and only has an effect on future duties, while not addressing past duty payments. For this, refunds are the only option.

4.10 Use of Undertakings

4.10.1 Background, importance and policy options available

The WTO ADA and ASCM provide for two types of definitive measures: AD/CV duties and price undertakings. Price undertakings may normally be submitted by exporting producers (importers or traders cannot submit undertaking offers) in AD investigations and either by the exporting producers or by governments in AS investigations.

The purpose of an undertaking, in terms of which the exporter or foreign producer undertakes to increase its price or the foreign government undertakes not to extend the subsidy, is to remove the extent of the dumping or subsidy or to prevent injury being caused by such dumping or subsidised exports.

4.10.2 Policy Choices of Peer Countries

4.10.2.1 Australia

Legal basis

As a policy matter, only the exporting producer of the injurious goods has legal standing to offer an undertaking in Australia, except in AS cases, where the foreign government may also offer an undertaking either to remove the subsidy or to remove the subsidy on exports to Australia. Offers of undertakings by a trader/intermediary alone will not be the subject of recommendations to the Minister (Australian Customs and Border Protection Service 2009: 119).

The ACS decides, in light of all circumstances, whether an undertaking as offered is sufficient to remove the injury or threat of injury which the application for import relief from the Australian industry originally sought to address, but no undertaking will be accepted if the price offered is not at least at the level of the non-injurious price and therefore at a level that is sufficient to remove the material injury to the Australian industry. The Minister is required to give public notice of any undertaking accepted.

An undertaking may be made subject to certain conditions, in particular such conditions that might help the ACS monitor compliance with the undertaking, such as providing information on

a regular basis to the ACS or providing access to such information on an appropriate basis by the ACS.

At the end of 2010, Australia had 21 AD measures in place, and there were three price undertakings in place, which related to only some of the exporters in those cases. Practice

The limited use of undertakings may be explained by the fact that Australia's typical duty collection system has the same effect as a price undertaking, but without the administrative burden on either the authority or the exporter, as no duties are payable if the export price is high enough.

4.10.2.2 Canada

Undertakings can only be accepted in Canada if they cover substantially all imports of the subject goods from a particular country and include all exporters. The terms of the undertaking must be sufficiently precise and well defined to permit effective monitoring and the agreement must provide for submission of evidence considered necessary by the CBSA to substantiate, on an ongoing basis, compliance with the undertaking. Undertakings may be given to either eliminate the dumping or subsidisation, or the injury caused by such imports. The number of exporters or countries involved in the investigation, the complexity of the goods involved, the frequency of price changes for the goods, and the terms in the proposed undertaking all play a role in the decision whether to accept an undertaking. Legal basis

For the most part, Canada applies duties rather than employing undertakings. Only 20 price undertakings have been accepted since 1984 and only two since 1995, the last of which in 2000, indicating that they do not play any significant role in TD investigations in Canada. However, as described in section 4.9.2.2, the practice in Canada of establishing prospective normal values effectively eliminates the need to actually pay AD duties; accordingly, from the perspective of the exporters and importers, the distinction is more one of form rather than substance. Practice

4.10.2.3 China

China introduced the concept of price undertakings in its first Anti-Dumping and Countervailing Regulations of 1997.[405] In terms of these regulations MOFTEC may suspend or terminate an investigation after having received an appropriate undertaking by an exporter to eliminate injury to the Chinese domestic industry. A price undertaking may only be offered after an affirmative preliminary determination. However, MOFTEC will reject a price undertaking offered by an exporter that did not fully cooperate in the investigation (Xiaochen Wu 2009: 189). Legal basis

MOFTEC first accepted price undertakings from one Japanese and six Korean exporters in the stainless steel investigation in December 2000.[406] Price undertakings were accepted in at least four subsequent investigations.[407] Very few price undertakings have been accepted in China since Practice

405 Article 25 of the Regulation of the People's Republic of China on Anti-dumping and Countervailing, the State Council Order [1997] No. 214.

406 AD-4, *Stainless steel (Final)*, MOFTEC Public Notice 2000-15 (18 December 2000).

407 Xiaochen Wu (2009: 190). However, note that Wu refers to cases against multiple countries, rather than counting on the WTO method, i.e. by product by country. Accordingly, the actual number of price undertakings accepted may be higher. Price undertakings were accepted in *inter alia* AD-23, *Chloroform (Final)*, MOFCOM Public notice 2004-81 (30 November 2004) (with five exporters); AD-27, *HH (Price undertaking notice)*, MOFCOM Public notice 2006-94 (14 December 2006); AD-33, *Furan phenol (Final)*, MOFCOM Public notice

2005. In other instances that price undertakings were offered, they were rejected on the basis that they were offered after the deadline for submitting price undertakings or that the matter was too complex and that it would be too difficult to administer. Considering that China has imposed one CV and 137 AD measures to date, it follows that price undertakings do not play a major role in Chinese TD investigations.

4.10.2.4 India

Legal basis

In terms of Indian legislation,[408] exporters may voluntarily undertake to revise their export prices so as to cease dumping or remove the injury to the Indian industry. If an exporter undertakes to revise its price immediately and stop exporting at "dumped" prices, the Ministry may suspend or terminate the AD investigation without applying provisional AD measures. The Ministry must also inform the Central Government of the acceptance of an undertaking and issue a public notice in this regard.[409] If the exporter fails to uphold the undertaking agreement, the Ministry must inform the Central Government of such violation and recommend imposition of provisional duties (Chugh 2007: 26). It appears that only exporters, to the exclusion of foreign governments, may offer price undertakings in AD investigations (Raju 2008: 229). However, in terms of section 9B(1)(c) of the Customs Tariff Act the government of the exporting country may offer an undertaking in AS investigations.

Practice

Undertakings, however, do not play a major role in investigations and only four undertakings were accepted between 1995 and 2007[410] and none since 2008, despite a total of 436 AD measures being imposed since 1995 (and 78 since 2008). Aggarwal indicates that there were cases where exporters offered an undertaking but the authorities did not accept them.

4.10.2.5 New Zealand

Legal basis

Section 15 of the Act provides that the Minister may terminate an investigation if he or she accepts an undertaking proposed by the exporter or the exporting country Government. A requirement for acceptance of an undertaking is that the Government's or the exporter's future export trade to New Zealand of like goods will avoid causing or threatening material injury to the New Zealand domestic industry. Before accepting an undertaking the Minister must have reasonable cause to believe that the goods are being dumped or subsidised and by reason thereof material injury to an industry is being caused or threatened. Any price increases in an undertaking shall not exceed the difference between the export price and the normal value or the amount of subsidisation, as the case may be. Amendments to an undertaking can be given and accepted, and if an undertaking is accepted, the investigation of the extent of injury shall be completed if the Minister, or the Government of the country of export, or the exporter, so desire. If such an investigation shows there is no injury then the undertaking will lapse, unless a finding of no threat of injury is due to the existence of the undertaking. The Minister may require any party providing an undertaking to provide information relevant to the fulfilment of the undertaking. Undertakings may be reviewed and will expire after five years from acceptance or review.

Practice

2006-07 (12 February 2006); and in *Acetone from Taiwan* (Final Determination of Anti-dumping Investigation on Acetone from Japan, Singapore, Korea and Taiwan, MOFCOM Announcement [2008] No. 40).

408 Rule 15.

409 Rule 15(6).

410 Chugh (2007: 26). Note that Aggarwal (2002: 52) indicates that five undertakings were accepted in 2001 alone, so the actual figure is not certain. However, the fact remains that price undertakings do not play any significant role in Indian anti-dumping investigations. Data corresponding to the evaluation period, 2005 to 2010, could not be obtained.

New Zealand has not accepted any undertakings in an AD investigation, but since 1995 has accepted undertakings in two subsidy cases involving canned fruit from South Africa. The undertakings from individual companies were that they would so conduct future exports to New Zealand to avoid causing or threatening to cause material injury to the New Zealand industry. In both cases the undertaking was terminated about eight months after its acceptance when it was confirmed through a review that the subsidy programme had been terminated.

In many AD cases New Zealand uses a reference price approach to implementing AD duties. It could be argued that such an approach lessens the likelihood of an undertaking being offered because it operates in the same way, by establishing a price for an exporter that will remove dumping, or will remove injury where a lesser duty has been implemented.

4.10.2.6 South Africa

Legal basis

The ADR provide for the acceptance of price undertakings after an affirmative preliminary determination has been made.

Practice

To date only one request has been received for a price undertaking and this was rejected on the basis that the exporter did not fully cooperate during the investigation. The lack of price undertaking offers may result from the fact that the South African economy is relatively small and that exporters may simply look for another market to replace South African sales rather than be burdened with the responsibilities of regular reporting where price undertakings are accepted. In addition, considering the administrative burden that would be caused in administering price undertakings it is doubtful whether the Commission would ever accept an undertaking, even if offered by an exporter.

4.10.2.7 USA

Legal basis

The US statute provides for price undertakings (called "suspension agreements"). Price undertakings, however, are fairly uncommon in the USA, which by mid-2011 had only eight price undertakings in place.[411] The rarity of undertakings is a function of a number of factors, including general US policy, opposition by the US petitioning industry, and monitoring and reporting requirements that make them unattractive to exporters.

The statute provides for the following types of agreements either with the foreign government or with exporters accounting for substantially all imports: (1) an agreement to eliminate or offset completely the dumping or countervailable subsidies or cease exports of the subject merchandise,[412] (2) an agreement that will eliminate completely the injurious effect[413] of the subject imports.[414] Commerce may not accept either type of agreement unless it finds that suspension is in the public interest and the agreement can be monitored effectively.[415] In addition, Commerce may only accept an agreement to eliminate injury in "extraordinary circumstances", i.e., if the investigation is complex and suspension would be more beneficial to the domestic

411 See List of Antidumping Suspension Agreements available on the Commerce website at http://ia.ita.doc.gov/agreements/index.html.

412 See, e.g., *Suspension of Antidumping Duty Investigation of Certain Cut-to-Length Carbon Steel Plate from the Russian Federation*, 68 Fed. Reg. 3859 (Jan. 27, 2003).

413 See, e.g., *Suspension of Antidumping Duty Investigation: Fresh Tomatoes from Mexico*, 67 Fed. Reg. 77044 (Dec. 16, 2002).

414 19 USC. §§ 1671c and 1673c.

415 19 USC. §§ 1671c(d) and 1673c(d).

industry than continuation of the investigation.[416] The latter requirement effectively gives the domestic industry veto power over such agreements. In subsidy cases, the statute also authorizes Commerce to accept an agreement by the foreign government to quantitative restrictions on the volume of imports.[417] Quantitative restriction agreements are not permitted in the context of an AD case, except in investigations involving a non-market economy that is not a member of the WTO.[418]

Practice

Given that US policy does not favour the use of suspension agreements, it is difficult to discern from the small number of agreements any particular patterns. The precise reasons for acceptance are also difficult to discern in some cases. In certain cases, such as *Uranium from Russia*,[419] a negotiated agreement was more suitable to addressing some of the obvious challenges and sensitivities in that case. In *Tomatoes from Mexico*,[420] certain aspects of how the tomato market operated in the USA were, in part, the reason an agreement was a more attractive option for both exporters and domestic producers than the imposition of duties. It is clear, however, that price undertakings do not play a major role in TD investigations in the USA.

4.10.3 The EU's policy choice[421]

Legal basis

In the EU, the two basic Regulations[422] specify procedures for accepting undertakings which eliminate dumping/subsidisation and injury; set out the consequences of breach or withdrawal of undertakings, including the retroactive application of duties in cases of suspected violation; and stipulate that undertakings be structured so as not to lead to anti-competitive behaviour.

In general, proposals for undertakings can only be made between the imposition of provisional measures and the deadline for comments on final disclosure. This imposes strict time limits for putting in place an undertaking within the framework of a given investigation. However, a specific interim review may be carried out, usually upon request by an exporter, in order to change the form of measures by accepting an undertaking.

Mutual agreement must be reached between the Commission and the exporting producer on the applicable conditions; an undertaking need not be accepted by either side. The Commission need not accept undertakings if administering them would be impractical (e.g., because of the number of exporters) or for other policy reasons. In subsidy cases, undertakings can be proposed by countries in the form of elimination or limitation of the subsidies concerned. Furthermore, the Commission can also propose undertakings to exporters or exporting countries.

Practice

In the evaluation period, undertakings were accepted by the Commission in 8% of the 65 cases where definitive measure were imposed. At the same time, the success rate of offers for undertakings is relatively low – for cases initiated over the period 2005 to 2010, only in five out

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416 19 USC. §§ 1671c(c)(4) and 1673c(c)(2).

417 19 USC. §§ 1671c(3).

418 See, e.g., *Suspension of Antidumping Duty Investigation: Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation*, 65 Fed. Reg. 37759 (June 16, 2000).

419 57 Fed. Reg. 49220 (Oct. 30, 1992).

420 The original agreement was entered into in 1996, then the Mexican growers withdrew from that agreement in 2002, but a new agreement was entered into after the investigation resumed. In 2007, the Mexican growers withdrew from the 2002 agreement but entered into a new agreement in 2008. See *Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico*, 73 Fed. Reg. 4831 (Jan. 28, 2008).

421 For more details on the EU's use of undertakings see section 5.1.7.4 below.

422 Article 8 ADR/Article 13 ASR.

of 35 cases (14%) were proposed undertakings accepted. In most cases, difficulty of monitoring was cited as the reason for not accepting undertakings.

4.10.4 Conclusions and recommendations

Comparative summary

Price undertakings play a very limited role in the peer review countries, with the approximately 10% of cases in Australia settled by undertakings being by far the largest figure. The frequency of the EU's use of undertakings (in 8% of all cases) is comparable to Australia's. No undertakings have been accepted in South Africa; in Canada, China, India, and the USA, only approximately 1% of cases result in price undertakings being accepted.

Conclusions/ recommendations

The evaluation team considers that the limited use of undertakings by all countries studied is explained by a variety reasons. In countries with retrospective duty collection systems, or in other systems which amount to the establishment of a minimum import price, the duty applied (see section 4.9) is equivalent to an undertaking, and there is thus no benefit to be expected for the exporter from proposing one. Meanwhile, in countries where targeted firms would find it attractive to offer undertakings, the administrative authorities may be reluctant to accept undertakings because of the administrative burdens of monitoring compliance and the fact that undertakings entail a shift of welfare (the duty foregone) from the importing country to the exporter. The fact that undertakings may induce price cartels in the importing market may also explain the limited use of undertakings.

Given the differences in incentives for offering and accepting undertakings in different TD systems, there is no particular benchmark against which to evaluate the frequency of the EU's use of this instrument. The relatively limited use of undertakings by the EU is not inconsistent with international practice, in view of the considerations mentioned above. The evaluation team therefore has no policy recommendations regarding the use of undertakings in the EU.

4.11 Policy of Reviews and the Duration of Measures

4.11.1 Background, importance and policy options available

The WTO ADA and ASCM provide that AD and CV duties may only remain in place to the extent and for the duration required to counter the injurious effects of dumping and subsidised exports. For this reason the two agreements provide for a variety of reviews, including sunset reviews (also known as expiry reviews), interim reviews (also known as changed circumstances reviews) and new exporter reviews (also known as newcomer or new shipper reviews).

According to WTO rules, no duty may remain in place for a period of more than five years from imposition or the last substantive review thereof. A substantive review requires the consideration of both the margin of dumping or subsidisation and injury. A duty may remain in place "pending" the outcome of a sunset review,[423], but no dispute has considered the meaning of this word, i.e. whether, if it is found that a duty needs to be maintained it can be re-imposed for another five years from the date it would have lapsed or from the date of the finalisation of the review, and also whether this means that where it is found that the duty should not be maintained it has to be withdrawn with retrospective effect to the date the five years would have lapsed.

[423] Article 11.3 ADA/Article 21.3 ASCM.

Although some countries have made submissions to the WTO Committee on Anti-Dumping Practices that only one sunset review of a measure should be possible, to date countries are free to maintain duties indefinitely provided they undertake a substantial review within five years from the last imposition of such measure.

4.11.2 Policy Choices of Peer Countries

4.11.2.1 Australia

Australian TD legislation provides for interim, sunset and accelerated exporter (new shipper) reviews.

Interim reviews

Once imposed, measures can be periodically reviewed to ensure they are only in force for as long as and to the extent necessary to counteract the injurious dumping or subsidisation. This may occur no more than once in any 12-month period on the initiation of an affected party, or if initiated by the Minister, at any time. Australia's system of review recognises that factors affecting the dumping margin may be subject to change over time, and grants interested parties the right to apply to the ACS for a review of the normal value, export price and/or the non-injurious price (the so-called "variable factors"). At the same time, it recognises that factors might have changed so substantially that the measure is no longer needed, or so that the conditions leading to the measure no longer exist, thereby justifying the total revocation of the measure.

Similar to an initial application, the ACS has 20 days to make an initial assessment or screening of an application for review and in this time must "establish whether there are reasonable grounds for either asserting that the variable factors have changed or that a dumping or countervailing duty notice should be revoked" (Australian Customs and Border Protection Service 2009: 124). If the review application passes the initial screening the ACS is required to publish a notice in a nationally circulating newspaper. Reviews, like initial applications, must be completed within 155 days of the publication of the notice and the CEO's report to the Minister must set out reasons for the recommendation. The recommendation can be one of three options:

- that the notice imposing AD or CV duties remain unaltered; or
- that the notice imposing AD or CV duties be revoked in its application to a particular exporter or to a particular kind of goods or revoked generally; or
- that the notice imposing AD or CV duties have effect in relation to a particular exporter or to exporters generally, as if different variable factors had been ascertained.

Once a measure has been reviewed and the result notified, no further applications for a review may be submitted for another 12 months from the date of notification, unless requested by the Minister.

The issue of interim reviews was recently addressed by both the Productivity Commission and the government. The Productivity Commission sought to have a system of automatic annual reviews adopted, which the government ultimately rejected on the grounds that it would be overly burdensome administratively and would undermine market certainty. The government did propose some changes to the previous system, essentially to make it easier for affected parties, particularly Australian industry, to have measures more easily adjusted to constantly changing market conditions. In justifying this approach, the government argues that under existing law "the work involved in a review is said to be as significant as for the original investigation, arguably deterring parties from seeking a review" (Australian Customs and Border Protection Service 2011: 9). In response, the government has announced that it will allow businesses to apply for a partial review of measures, namely a review that "need not be comprehensive in terms

of the exporters covered, or the variable factors or injury considerations examined" (Australian Customs and Border Protection Service 2011: 9).

A number of stakeholders have commented, during the parliamentary process of enacting such legislation[424] (which is still outstanding at the time of writing), that this approach seems to be in breach of WTO commitments, given the Appellate Body's ruling in *Mexico—Definitive Anti-Dumping Measures on Beef and Rice*.[425]

Expiry reviews

Australian legislation provides for sunset reviews and refers to them using the terminology "continuation reviews". As a rule, AD measures are imposed for five years, unless revoked prior to the expiration date following a review as described above.[426] An application for a continuation review "must demonstrate that there appear to be reasonable grounds for asserting that the expiration of the measures might lead to a continuation of, or a recurrence of, material injury that the measures were intended to prevent" (Australian Customs and Border Protection Service 2009: 128). Within 20 days of receipt of the application the ACS must decide whether or not to initiate a continuation review, i.e. "whether reasonable grounds exist for an inquiry to be undertaken" (Australian Customs and Border Protection Service 2009: 128).

As a matter of practice, no later than nine months before a measure is set to expire, the ACS will publish a notice in a nationally circulating newspaper, inviting interested parties to apply, within 60 days, for the continuation of the measure. If no application is received the measures expire. If an application is received and the ACS decides, after its 20 day screening not to reject the measure, it will again publish the initiation of the continuation review in a nationally circulating newspaper. Procedurally, this investigation is conducted in much the same way as the initial investigation, with the obvious exception of the PAD. On or before day 155, the ACS submits a report to the Minister with a recommendation on whether the measures should continue. The report must have regard to the application, any submissions received, the statement of essential facts and any submission in response to the statement of essential facts lodged within the specified time limit.

The Minister decides whether or not to continue the measure (based on the recommendation of the ACS) and publish his or her decision in the Gazette and a nationally circulating newspaper. Where the Minister decides to let the measure expire, the expiry date must be publicly notified. If, however, the Minister decides to keep the measure in place beyond their original expiration date, the measures will be extended for an additional five years from the date the measures were to have expired.

In the course of its investigation, the ACS examines a range of factors in order to determine both the likelihood of continuing or recurring dumping and of continuing or recurring injury to a domestic industry. Table 38 provides some of the factors the ACS may review when trying to make these two determinations.[427]

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424 See the report of the Senate Standing Committees on Economics on the Customs Amendment (Anti-dumping Measures) Bill 2011 [Provisions], at p. 17; available for download at http://www.aph.gov.au/senate/committee/economics_ctte/customs_amendment_Measures_2011/report/report.pdf.

425 See Appellate Body Report in *Mexico - Definitive Anti-Dumping Measures on Beef and Rice* (WT/DS295/AB/R), circulated on 29 November 2005.

426 Few measures have been revoked before term.

427 A more comprehensive list can be found in Customs and Border Protection Services (2009: 129).

Table 38: Factors for assessing the likelihood of continuing or recurring dumping and injury in Australia

Factors for assessing the likelihood of continuing or recurring dumping	Factors for assessing the likelihood of continuing or recurring injury
Pattern of exports since the measures were imposed	State of the Australian industry
Volumes and values of the imported goods	Production capacity
Effectiveness of the measures	Other causes of injury
Exchange rate fluctuations	Market size, share and shape
Changes in technology	Demand for the goods
Exporters' historic margins	Any changes in the structure and operation since the measures were imposed
Exporters' historic volume and value of exports	Price of exports compared with NIP and USP
Changes in distribution channels	Measures relevance to selling prices
Changes in transport costs	The impact of imports of the goods not dumped from other sources
Global capacity	Changes in technology, product types, consumer preferences, demand and supply

New exporter reviews

The ACS conducts accelerated reviews in the case of an application by a new exporter, i.e. an exporter who did not export the subject goods at any time during the period between the start of the investigation period and immediately before the publication of the statement of essential facts. The ACS must complete its review as soon as practicable and no later than 100 days from receipt of the application. The ACS' report to the Minister will either recommend that the duty notice remain unaltered or that the notice be amended so as not to apply to the new exporter or "so as to apply as if different variable factors had been fixed" (Australian Customs and Border Protection Service 2009: 126).

There is no public file for accelerated reviews, nor is a statement of essential facts issued. Applicants seeking an accelerated review do not have the right to seek a review of any findings or decisions to the Trade Measures Review Officer.

Duration of measures

The Productivity Commission criticised the fact that some measures (for example PVC exports from Japan and the USA, and brandy from France) had been in place for almost two decades and that such measures "cannot reasonably be construed as anything other than long-term industry protection" (Australian Productivity Commission 2009: 112). However, the government defended the current system stating that "[over] the past five years, 46 measures were due to expire. Applications for continuation were made in 20 cases, and only eight of these cases resulted in continuation of the measures" (Australian Customs and Border Protection Service 2011: 27).

4.11.2.2 Canada

Canadian legislation provides for interim reviews and sunset reviews (called expiry reviews). At the same time, there are regular (usually annual) re-investigations to update normal values, export prices or amounts of subsidy, and to establish values for new exporters or new models of the subject goods.

Interim reviews

The CITT has set a high standard for interim review applications and approximately half of all applications are rejected without initiation of a review. Of those reviews that are initiated, one third results in no change to the measure, with full rescissions evident in only two of the 16 reviews conducted over the last two decades.

Expiry reviews

The Secretary publishes a notice of expiry of the order or finding no later than ten months before its expiry date. As of this time, if a party is interested in initiating a review, the request to do so must be made within 25 days of the expiry notice being issued. If no application for a sunset

review is received, or if no review is initiated, the order will automatically lapse at the expiry of the five years for which the order was imposed. The Tribunal may combine expiry reviews of orders of like goods when these orders are set to expire within a year of each other. In this event, the Tribunal will issue the notice of expiry no later than ten months before the expiry of the first order, inviting "the interested parties to indicate in their submissions whether there are any reasons why the expiry of the orders should not be reviewed together".

Duration of measures

The average duration of Canadian TD measures is slightly longer than seven years. Of the 215 Canadian AD and CV measures that had either expired or were still in force at the end of the evaluation period (excluding in-force measures which had not yet reached their first sunset term and counting AD and CVD duties as separate measures and each country as a separate case), about 44% were in place for longer than five years, including 12% that were in place for ten years or longer, and 3% that were in place for more than 15 years.[428] The longer-standing measures that have attained an essentially institutionalised character are quite a heterogeneous group, including potatoes from the United States, bicycles from China and Taiwan, and refined sugar from the United States. About 39% of Canadian measures are in place for approximately five years. About 16% are in place for less than full term.

4.11.2.3 China

China's legislation makes provision for interim, new shipper and sunset reviews, as well as for duty scope revisions.

Interim reviews

China's interim review regulations are contained in two separate pieces of legislation. Firstly, on the basis of the Anti-Dumping Regulations[429] MOFCOM may decide, on justifiable grounds, to review the need for the continued imposition of an AD duty; such a review may also be conducted, "provided that a reasonable period of time has elapsed", upon request by the interested parties and on the basis of examination of the relevant evidence submitted by the interested parties.

Secondly, the MOFCOM Rules on Interim Review of Dumping and Dumping Margin govern interim reviews which limited in scope to the margin of dumping.[430] MOFCOM may self-initiate an interim review if it has reasonable grounds for such review, but only after consultation with the SETC.[431] Interested parties can apply for an interim review "within 30 days from the date after each single year has elapsed following the anti-dumping measures entering into force."[432] Interested parties include foreign exporters or producers, but these may lodge an interim review application only provided they have exported a sufficient volume of the subject product to China during the 12 months prior to the date of the application for BOFT to establish an export price on the basis of normal commercial sales volumes.[433]

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428 Five AD and one CV measure expired at 15.16 years and are classified with the measures falling into the 10 to 15 year period, since to include this group in the over 15 years would be somewhat misleading.

429 Article 49 of the Regulations on Anti-Dumping.

430 Article 3 of the Rules on Interim Review of Dumping and Dumping Margin (Interim Review Rules).

431 Article 4 of the Interim Review Rules.

432 Article 6 of the Interim Review Rules.

433 Article 7 of the Interim Review Rules. A further condition is that only exports which were subject to AD duties are considered for the determination of "sufficient export volume", i.e. the products must be exported through normal export channels and must not be destined for the processing trade in China (Article 8). This excludes those transactions where the product is imported to be used in the production of goods for export, as such imports are exempt from AD duties (Wu Xiaochen 2009: 232).

The domestic industry may also request interim reviews, which may be aimed against all exporters in all exporting countries subject to the AD duty or against only specific producers.[434]

If an interim review is brought against all exporters in a country it automatically includes those exporters that have been exempted from AD duties on the basis of negative or *de minimis* margins of dumping.[435] This rule might be inconsistent with WTO rules as interpreted in the *Beef and Rice* case, which state that exporters whose margin of dumping or subsidisation in the original investigation were below *de minimis* must not be subject to reviews.

Interim review applications are provided to opposing parties within seven days of receipt thereof and they have 21 days to comment. Initiation only takes place after comments have been received from opposing parties.[436]

Until the end of 2007 three interim reviews were conducted.[437] Since 2008, when China started to include reviews in its semi-annual reports to the WTO, five interim reviews were undertaken. About half of these resulted in a reduction of duties whereas the other half led to increased duties.

Expiry reviews

AD duties are not amended on the basis of sunset reviews, i.e. the duties are either terminated (if there is no likelihood that dumping or injury will continue or recur) or the duties are maintained at the level previously set.

Since China only became a WTO Member at the end of 2001, sunset reviews started to be conducted in the evaluation period, and reporting on these reviews to the WTO only started in 2008. Since the beginning of 2009, 17 expiry reviews were initiated, while for another ten cases the domestic industry did not request a review, and accordingly these measures expired. All 17 expiry reviews lasted exactly 12 months and resulted in the continuation of measures.

New exporter reviews

New shipper reviews can be requested by exporters that did not export to China during the original investigation period.[438] A new shipper must have exported sufficient volumes of the subject product to China after the investigation period to allow BOFT to calculate an export price based on commercial volumes. Sales for trade processing must be excluded from such export volumes. All new shipper reviews must be applied for within three months of the date of export. Only one new shipper review had been conducted by 2009, while a new shipper also cooperated in an interim review (Wu Xiaochen 2009).

Duration of measures

Measures are usually imposed for a duration of five years. One third of all 75 cases for which data are available and which were closed or not in their original five-year term at the end of the evaluation period, expired at the end of the first five year period without an expiry review.[439] The other two thirds of cases, with one exception, were in force for between five and ten years. The only case in force for more than ten years at the end of the evaluation period was PET from Korea, which had been imposed on 25 August 2000. The average duration of all the 75 measures was 6.2 years.

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434 Article 13 of the Interim Review Rules.

435 Article 26 of the Interim Review Rules. Wu Xiaochen (2009: 233) correctly questions whether this procedure is WTO consistent.

436 Articles 11, 15, 16 and 20 of the Interim Review Rules.

437 Wu Xiaochen (2009: 234), indicating two interim review applications lodged by the domestic industry; and *ibid* 241, which indicates a review lodged by an exporter.

438 Article 3 of the New Shipper Review Rules.

439 These calculations are based on Bown (2010).

4.11.2.4 India

Indian TD legislation provides for interim (usually referred to as "Mid-term reviews" in India), expiry and new exporter reviews. Until recently, rules for interim and particularly expiry reviews were very general, but the last amendment of March 2011 established more detail. The amended Rule 23 of the Customs Tariff Act provides that:[440]

> "(1) Any anti-dumping duty imposed under the provision of section 9A of the Act, shall remain in force, so long as and to the extent necessary, to counteract dumping, which is causing injury.
> (1 A) The designated authority shall review the need for the continued imposition of any anti-dumping duty, where warranted, on its own initiative or upon request by any interested party who submits positive information substantiating the need for such review, and a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty and upon such review, the designated authority shall recommend to the Central Government for its withdrawal, where it comes to a conclusion that the injury to the domestic industry is not likely to continue or recur, if the said anti-dumping duty is removed or varied and is therefore no longer warranted.
> (1B) Notwithstanding anything contained in sub-rule (1) or (1A), any definitive antidumping duty levied under the Act, shall be effective for a period not exceeding five years from the date of its imposition, unless the designated authority comes to a conclusion, on a review initiated before that period on its own initiative or upon a duly substantiated request made by or on behalf of the domestic industry, within a reasonable period of time prior to the expiry of that period, that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry."

Interim reviews

As regards interim reviews, DGAD has published guidelines on how these reviews are to be conducted.[441] This includes that any interested party as defined under Rule 2(C) may seek mid-term review of AD duties, provided at least 12 months have lapsed from the date of the imposition of the AD duties. The review application may seek the modification or withdrawal of the AD duties based on the changed circumstances, which may include changes in the normal value, export price, landed cost, the non-injurious price of the domestic industry, domestic production patterns, change in legal status of the domestic producers or exporters, a change in the condition of the domestic industry or any other relevant circumstances that may have bearing on the dumping, injury or causal link.[442]

The interim review investigation is not necessarily limited to the matters raised in the application and DGAD may broaden the review to include additional exporters or to have regard to any other matter considered relevant to the review.

All interim reviews must be finalised within 12 months of initiation.[443]

Expiry reviews

Rules to initiate and conduct expiry reviews are contained in Trade Notice No. 1/2008 of 10 March 2008.[444] According to these, domestic industry must request an expiry review six months before the date of expiry of the measures. Measures will be extended – with or without modification – if there is "sufficient ground for continuation" after receipt of information from various parties. If expiry reviews have been initiated but not been completed at the end of the five year period, measures continue to remain in force until the completion of the review but not longer than 12 months from the original expiry date.

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440 WTO *Notification of Laws and Regulations under Article 18.5 of the Agreement: India* G/ADP/N/1/IND/3 (19 October 2011). Previously, sunset reviews had only been governed by Section 9A(5) of the Customs Tariff Act, while Rule 23 of the Act had provided for interim reviews.

441 See DGAD *Guidelines for preparing an application for review of anti-dumping duties.*

442 *Idem.*

443 Rule 23(2) of the CT Act.

444 Available at: http://commerce.nic.in/traderemedies/ad_tradenotices.asp?id=14.

New exporter reviews

Rule 22 of the Customs Tariff Act provides for new exporter reviews. According to this, DGAD shall carry out a "periodical review" for the purpose of determining individual dumping margins for "any exporters or producers in the exporting country in question who have not exported the product to India during the period of investigation, provided that these exporters or producers show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." Duties are suspended during the review but exporters must provide a guarantee, and the individual duties determined will then be levied retroactively.

Duration of measures

Half of all Indian measure expire at or before the end of the first five-year period, and another 22% are terminated in the following 15 months, presumably as a result of revocation in expiry reviews. 7% of measures were in force for more than 10 years, but none 15 years or longer (the longest measure in force is *Acrylonitrile Butadiene Rubber (Nbr) from South Korea*, which was imposed in January 1997. The average duration of measures is 6.0 years.

The duration of measures at least until recently was counted from the date of the imposition of *provisional* measures. This seems to have changed at least with the March 2011 legislative change, as Rule 23 now explicitly states that a "*definitive* antidumping duty levied under the Act, shall be effective for a period not exceeding five years from the date of *its* imposition" (emphasis added).

4.11.2.5 New Zealand

New Zealand TD legislation provides for the following types of reviews: reassessments of the rates or amounts of AD or CV duty (including determination of duties for new exporters); interim reviews and sunset reviews. Section 14(9) of the Act provides that duties must cease to be payable after the "specified period" from the date of final determination or of any reassessment of duty following a review. The "specified period" is three years in the case of Singaporean goods and five years for all other goods. Reviews initiated for whatever reason must be completed within 180 days.

Reassessments and new exporter reviews

A reassessment can be initiated on the initiative of the Secretary or at the request of an interested party who submits evidence justifying the need for a reassessment. The Ministry would not normally carry out a reassessment for at least six months after the completion of an investigation in order to allow sufficient time for the operation of the duties to be properly assessed. A reassessment under this section is also carried out following the completion of a sunset review if such a review has determined that the continued imposition of the duty is necessary.

A reassessment looks solely at the rate or amount of the AD or CV duty, the outcome of which could be an increase, decrease, the setting of a zero rate of duty or no change to the current duty. Therefore, much of the focus of any reassessment of duties should be on establishing accurate and reliable normal values. This is because the Ministry usually establishes AD duty rates on the basis of reference prices.

New shipper reviews are undertaken as reassessments, since a new shipper is seeking to have a rate applied to it that differs from the "all others" rate.

Interim reviews

Changed circumstance reviews are provided for in section 14(8) of the Act, and will be undertaken by the Secretary on the Secretary's own initiative or where requested to do so by an interested party that submits positive evidence justifying the need for a review.

There have been few changed circumstances reviews undertaken by the Ministry. In 1997, CV duties and undertakings applied to canned peaches and canned apricots from South Africa were revoked following a review that confirmed that the subsidy programmes had been terminated.

Expiry reviews

Just over six months before a duty is due to terminate, the Ministry will publish a notice in the *Gazette* stating that AD or CV duties will cease to apply on the relevant expiry date unless at that date they are subject to review under section 14(8) of the Act. Interested parties are advised that in order to initiate a review the Secretary must be provided with positive evidence justifying the need for a review, and that if a review is initiated it must be completed within 180 days.

In considering whether removal of the duty would be likely to lead to a recurrence of dumping/subsidisation and injury, the Ministry considers what is likely to happen in the foreseeable future. The extent to which the Ministry is able to make judgements on the likelihood of events occurring in the foreseeable future will depend on the circumstances of each case and, therefore, the foreseeable future will range from the imminent to timeframes longer than imminent.

Duration of measures

In AS cases, duties or undertakings have been revoked five years from the date of the final determination or a review and reassessment without a further review on two occasions. In those cases, no interested party requested the initiation of a review. Reviews were initiated in relation to *Canned Peaches from the European Union*, with the review at the end of the first five years resulted in the continuation of duties, but at the end of the second five years the duties were revoked on the grounds that exporters were not benefiting from a subsidy.

In AD cases, counting on a country by product basis since 1995, duties have been revoked five years from the date of the final determination or a review and reassessment without a further review on 12 occasions, five of which involved cases that pre-dated 1995. Sunset reviews were undertaken in at least 18 cases (some of which have had more than one sunset review), with ten resulting in the revocation of the duty and eight being continued.

New Zealand currently has two products on which AD duties have been applied for over 20 years – *hog bristle paintbrushes* from China, and *plasterboard* from Thailand. Duties on other sizes of plasterboard from Thailand and canned peaches from South Africa have been in place for 15 years, for 13 years on canned peaches from Greece, and 11 years for another size of plasterboard from Thailand. In all of these cases, sunset reviews have determined that the continuation of duties was necessary to offset dumping and to prevent the continuation or recurrence of injury.

4.11.2.6 South Africa

All definitive AD and CV duties are imposed for a period of five years. However, following a High Court decision[445] the five years are counted from the day the measure was imposed provisionally. Accordingly, if a provisional measure is imposed on 1 January and the definitive measure is imposed on 30 June, the five-year period will be counted from 1 January.

South Africa's TD legislation provides for interim reviews, sunset reviews, and new shipper reviews.

Interim reviews

[445] See *Progress Office Machines v South African Revenue Services* Case [2007] SCA 118 (RSA). See Brink (2007); Brink (2008a); and Brink (2008b) for discussions on the erroneous decision taken by the Supreme court of Appeals in this case.

Only two interim reviews have been conducted since 2003, both relating to the same product (*wire, rope and cable*), with one relating to an AD duty against the UK and the other to a CV duty against India. In the AD interim review, lodged by an exporter, ITAC did not find significantly changed circumstances and it therefore retained the duties. In the countervailing interim review it found changed circumstances and decreased the level of the duty, not only for the applicant, but for all Indian exporters.

Expiry reviews

In sunset reviews, a list is published around June or July each year indicating all duties set to expire within the next calendar year. Although contrary to its Anti-Dumping Regulations, the domestic industry is then required to indicate within 30 days whether it will request a sunset review to be undertaken (even if this may be more than 12 months before the duties lapse). Industry then has to submit a properly documented sunset review application six months before the lapse of the duty.

New exporter reviews

Only one new shipper review has been conducted since 2003. In new shipper reviews the exporter merely has to indicate the expected export price, without having to have entered into an irrevocable contract or to have actually exported, which leaves this open to manipulation. New shipper reviews take long to initiate, as the Minister of Trade and Industry has to request the Minister of Finance to remove the existing duty, while the Commission has to request Customs to impose a provisional payment on the same date the duties are removed.

All reviews must be finalised within 18 months from initiation. In the *Paper (Indonesia)* sunset review, Indonesia formally requested consultations under the dispute settlement rules of the WTO after a sunset review on paper from Indonesia had not been completed three years after initiation. South Africa subsequently revoked the AD duty.

Duration of measures

Around 40% (26 of 67) of cases are terminated without the initiation of a sunset review, while 50% of sunset reviews initiated (21 of 41) also lead to the termination of duties. The oldest remaining AD duty relates to *acetaminophenol* from China, which dates back to 1993. It was last maintained for another five years with effect from March 2011.

4.11.2.7 USA

There are three types of reviews in the US system: administrative reviews (including new shipper reviews) to calculate definitive AD and CV duties, changed circumstances reviews (comparable to interim reviews in the EU), and sunset (expiry) reviews.

Administrative (incl. new exporter) reviews

As described above, under the US retrospective system, definitive duties are not assessed at the time of entry. Rather, at the time when goods enter the USA, Customs only collects a security to cover the estimated duty liability at the time of importation while the actual amount of the duty to be paid is calculated only ex post, in an administrative review. There is an annual opportunity to request a review of the imports during the preceding 12 months. The review process is very similar to an original investigation, both procedurally and substantively. Commerce issues questionnaires to collect export price and normal value data on the entries during the period of review and issues both a preliminary and final determination. As in an investigation, parties have full access to the data under APO and an opportunity to submit case briefs and request a hearing. New shippers will attract the residual AD duties on their shipments until such time as they have received an administrative review and their duties can be definitively assessed.

Interim (changed circumstances) reviews

Commerce currently has two procedures under which an order may be revoked, in whole or in part, other than through a five-year sunset review (discussed below in this section). First, if

Commerce has found that the foreign producer has not been dumping for three consecutive review periods or has not been subsidised for five consecutive review periods, Commerce will revoke the order with respect to that foreign producer, unless there is substantial evidence that revocation is likely to lead to a recurrence of dumping or subsidisation.[446] In addition, Commerce has broad authority to revoke an order, in whole or in part, whenever it determines that there are "changed circumstances" sufficient to warrant revocation.[447] Normally, this procedure is used when the domestic industry expresses no further interest in maintaining all or a part of the order. If substantially all of the industry expresses no further interest, Commerce will revoke.

Commerce recently announced its intent to eliminate revocations based on three years of no dumping or five years of no subsidies.[448] Commerce stated that the reasons for the change were: (1) the additional resources expended in conducting additional mandatory verifications, (2) the fact that only a small fraction of exporters are ultimately eligible for revocation, (3) if the companies maintain their zero rates their imports will not be subject to AD or CV duties, and (4) because Commerce frequently has to limit the number of companies it can individually examine in a review, many companies never get the opportunity to get their own rate and potentially qualify for revocation.

Expiry reviews

Every five years an AD or CV duty order must be reviewed to determine whether dumping or subsidies and material injury are likely to continue or recur if the order were revoked. If the decision regarding either dumping/subsidies or injury is negative, the order is revoked. As in the original investigation, Commerce makes the determination with respect to dumping or subsidies and the ITC makes the determination with respect to injury.

The initiation of the sunset review is automatic. No later than 30 days prior to the fifth anniversary of the order, Commerce must publish a notice initiating the review. If no interested exporter or foreign producer responds to the Notice of Initiation, or the responses do not contain all the required information, Commerce and the ITC will conduct the review under an expedited schedule. Parties may waive participation in the Commerce proceeding, in which case Commerce would issue a decision that dumping or subsidies are likely to continue or recur. Parties would then focus solely on the ITC's review of injury.

Under the US sunset provisions, Commerce will revoke an AD or CV duty order unless Commerce finds that dumping would likely continue or recur, and the ITC finds that revocation of the order would likely lead to continuation or recurrence of injury.[449] In making a "likelihood" of injury determination, the ITC must take into account certain statutory factors, including its prior injury determinations, whether improvement in the industry is related to the order, whether the industry is vulnerable to injury if the order is revoked and, in an AD case, any findings of duty absorption by Commerce.[450] The Commission also examines likely volume and price effects if the order were revoked. The nature of the "likelihood" inquiry is, much like a threat analysis, inherently speculative and requires drawing reasonable inferences based on known facts.

In a subsidy case, Commerce generally makes its likelihood determination by examining the net countervailable subsidies found in the investigation and subsequent reviews, and any changes in those subsidy programmes. Similarly, in an AD case, Commerce considers the weighted-average

446 19 C.F.R. §§ 351.222(b) and (c).
447 19 C.F.R. § 351.222(g).
448 *Proposed Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 76 Fed. Reg. 15233 (March 21, 2011).
449 19 USC. § 1675(d)(2).
450 19 USC. § 1675a(a).

dumping margins found in the investigation and subsequent reviews, and the volume of imports before and after imposition of the AD measure. In practice, Commerce has normally found a likelihood that dumping or subsidisation would continue or recur if the order were revoked, unless the domestic industry declined to participate in the sunset review. In part, that is because there are usually one or more producers under an outstanding order with a dumping or subsidy rate. In such cases, because dumping or subsidisation is actually occurring even with the order in place, Commerce will infer that such dumping or subsidisation would continue if the order were revoked.

Duration of measures

Approximately 39% of all sunset reviews have resulted in revocation. Although the number of revocations by Commerce (19%) appears to be roughly the same as the number of negative determinations by the ITC (20%), the vast majority of the Commerce revocations were based on a lack of participation by the domestic industry as opposed to a negative determination by Commerce. As a practical matter, therefore, exporters and interested importers frequently choose not to participate in the Commerce proceeding and devote their resources to the ITC proceeding.

As of 30 June 2011, the USA had 308 AD and CV duty orders in place. Of those, 117 (approximately 38%) were more than ten years old, while 12% had been in place for more than 20 years. Three AD duties had been in place since before 1980.

4.11.3 The EU's policy choice[451]

Like other countries reviewed in this report, EU TDI rules provide for interim, expiry and new exporter reviews:

- If circumstances with regard to subsidy/dumping and injury have changed and it is questionable whether the continuation of the existing measure at its current level is needed or, conversely, if it is doubtful whether the measure is still sufficient to remove injury, an *interim review* will be undertaken.
- Prior to the end of an existing measure, an *expiry review* might be conducted in order to assess whether an extension of the measure is needed.
- When new exporters from the country against which the measure is in place enter the EU market after the investigation period, they may request a *new exporter review*, the aim of which is to determine if a duty lower than the residual duty (or no duty at all) should be applicable to them.

Interim reviews

An interim review can be requested by exporters, importers or the Union industry provided that the measure has been in place for at least one year. Member States can request initiation of an interim review at any time while the measure is in place. Furthermore, the Commission can also initiate a review at any time on its own initiative. The scope of an interim review can be comprehensive ("full interim review") or be restricted to certain aspects of the scope of investigation, e.g. only dumping or only injury ("partial interim review").

The methodology applied in interim reviews for the determination of dumping/subsidisation and injury involves, first, a retrospective analysis of the issue(s) within the scope of the review is undertaken. This is followed by the (more important) prospective analysis the purpose of which is to determine the likelihood with which dumping/subsidisation and/or injury are likely to recur if the measure is amended.

451 Also see section 2.3.2.2 and 5.3.

Expiry reviews

In the EU, Article 11(1) ADR specifies that an AD measure "shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury." The common practice of the EU (as well as in peer countries) is to impose measures for a standard duration of five years, and to provide a justification only when a shorter duration is chosen; this also applies to expiry reviews (see section 5.3.2 below). The provision for CV measures is the same.

An expiry review can be requested by the EU industry or be initiated by the Commission on its own initiative.[452]

The continuation of measures requires that the Commission concludes that there has been either continuation of dumping/subsidisation and injury (the retrospective analysis) or that the repeal of the duties would be "likely" to result in a recurrence of dumping/subsidisation and injury (the prospective analysis).

If an expiry review is initiated, the measures will remain in force during the period of investigation, which must not exceed 15 months.

An expiry review can have only two possible outcomes, i.e. either the repeal or continuation of the measures in force; it cannot lead to a change in the level or form of the duties, unless accompanied by an interim review. If measures are maintained, they will normally remain in force for another five years (from the date of the completion of the expiry review).

New exporter reviews

When new exporters from the country against which measures are in place start to export to the EU after the investigation period, they will be subject to the residual country wide duty, which is typically higher than individual duties applied to cooperating exporters. In such situations, new exporters may request a new exporter review (the ASR refers to this under its provisions for accelerated review), the aim of which will be to determine an individual duty (or no duty at all) for the new exporter.

A new exporter review will be initiated only if the new exporter is not related to any of the exporters subject to the AD measures on the product and it has actually exported to the Union following the investigation period (or has entered into an irrevocable contractual obligation to export a significant quantity to the EU).[453]

Once a review has been initiated, the measures in place will be repealed for the new exporter during the period of investigation. At the same time, imports from the new exporter will be subject to registration so that duties can be collected retroactively, pending the outcome of the review.

In the evaluation period, 15 new exporter reviews were undertaken. Of these, six did not lead to changes in measures, i.e. residual duties continued to apply to the new exporters.

Duration of measures

As of 31 December 2010, the average duration of TD measures in force on that date was 10.0 years. The average duration of expired AD and CV measures had been 5.9 years and 3.9 years, respectively. The overall average duration of measures was thus 6.8 years. Accordingly, TDI protection in EU practice is usually temporary.

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452 Article 11(2) ADR/Article 18(1) ASR.

453 Article 11(4) ADR. The provisions in the Article 20 ASR are less specific; nevertheless in practice the same conditions and procedures apply.

52% of EU TD measures are revoked during the initial five-year period or expire at the end of it without an expiry review. An additional 14% are terminated following the expiry review. 4% of measures were in place for 15 and more years, and another 13% for between ten and 15 years. The measure which has been in place for the longest time (*Tungsten carbide and fused tungsten carbide;* AD238) was imposed in September 1990. Most measures which are in place for long periods (more than 10 years) are in the chemical sector (fertilisers, organic chemicals and salts).

4.11.4 Conclusions and recommendations

Comparative summary on reviews

There are few differences in the policies on reviews. All peer countries foresee expiry, interim and new exporter reviews. Rules on interim reviews are almost identical. For expiry reviews, a noteworthy deviation from common practice is the automatic initiation of sunset reviews in the USA, i.e. measures never expire without a review. Perhaps because of this, measures in the USA remain in force longer than in any of the other peer countries, in extreme cases for more than 30 years. With regard to the duration of review proceedings, these are the same as original investigations in all countries, with the exception of new exporter reviews, for which shorter deadlines apply. As a result of this, the duration of EU reviews is longer than that of most peer countries.[454]

Comparative summary on duration of measures

In all countries reviewed, sunset provisions imply a normal period of protection of five years. The provision for interim reviews based on changed circumstances could lead to shorter average durations, while the provision for extension of protection in expiry reviews could lead to longer average durations.

Measuring the duration of TD measures is complicated by the fact that recent cases that have not yet reached their first expiry review tend to bias downwards the average, while measures that have become effectively permanent have differing impacts on the average depending on how long ago they were implemented. Strict international comparisons are also impossible due to the differences in sectors and countries targeted.[455]

Table 39 compares the average duration of AD and CV measures across the countries reviewed. As can be seen, measures in the USA are applied for the longest periods by far (on average 10.2 years), whereas averages for the other countries, including the EU, are all in the range of 5.8-7.8 years. It is noteworthy that in all countries the average duration of CV measures is shorter than for AD measures.

The duration of measures is further analysed in Figure 22, which presents the number and percentage of different duration periods, thus allowing to draw further conclusions on policies on reviews and the duration of measures: First, in Australia, Canada and the EU the share of measures that expire at the end of the five-year period without a review is comparatively high. This may be an indication that measures could have been revoked earlier, as in such cases either the domestic industry is not interested in an extension of measures, or there is no *prima facie* evidence which would justify an extension.

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454 See section 4.8 above.

455 Several alternative approaches to measuring duration have been suggested in the literature. See Arnold (1998), Cadot, de Melo and Tumurchudur (2007), and Rovegno and Vandenbussche (2011) for examples.

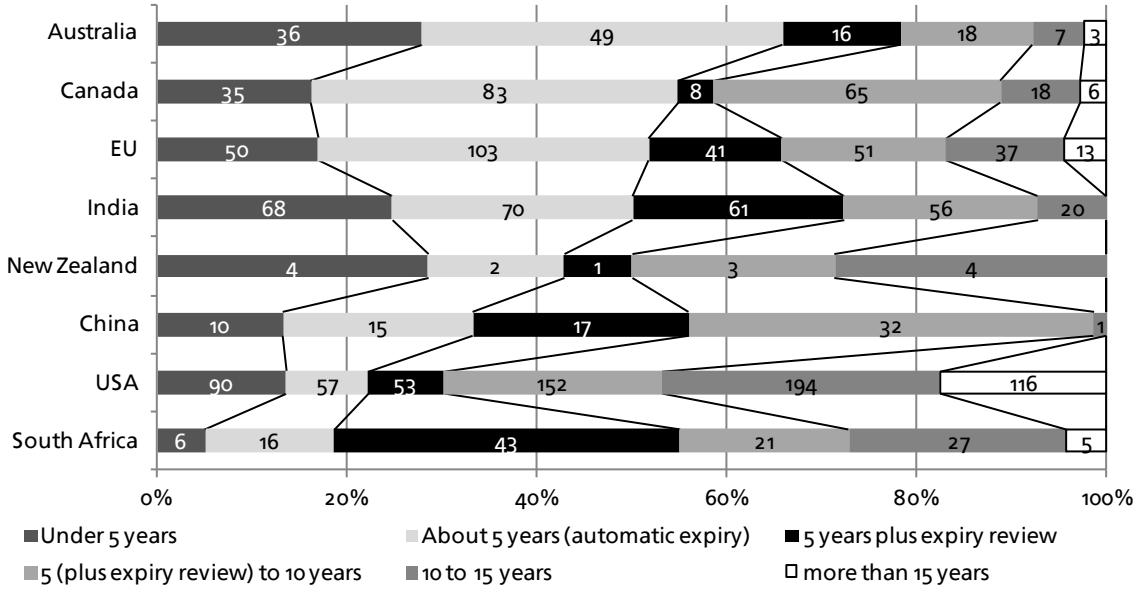
Table 39: Average duration of AD and CVD measures, EU and peer countries

	AD measures			CV measures			All measures		
	Expired	In force >5	All	Expired	In force >5	All	Expired	In force >5	All
Australia	5.5	9.9	5.8	n.a.	n.a.	n.a.	5.5	9.9	5.8
Canada	6.8	10.2	7.2	6.3	7.7	6.5	6.8	10.0	7.1
China	4.8	7.0	6.2	n.a.	n.a.	n.a.	4.8	7.0	6.2
EU	**5.9**	**10.0**	**6.8**	**3.9**	**9.7**	**6.0**	**5.8**	**10.0**	**6.8**
India	4.8	8.5	6.0	n.a.	n.a.	n.a.	4.8	8.5	6.0
New Zealand	3.3	10.5	6.9	n.a.	n.a.	n.a.	3.3	10.5	6.9
South Africa	6.9	11.4	7.9	5.2	8.8	6.7	6.9	11.2	7.8
USA	9.1	13.5	10.9	7.0	14.0	8.0	8.4	13.6	10.2

Source and calculation: Authors' calculations based on Bown (2010). The average duration of expired measures was calculated based on all cases for which dates of imposition and revocation of measure are reported in the datasets. The average duration of measures in force includes only those measures which were in force for at least five years on 31 December 2010 (the end of the evaluation period), and the duration was calculated as the time between imposition of the definitive measure (except for India, where the based date was the imposition of the provisional measure) and 31 December 2010.

Second, expiry reviews in India, China and South Africa lead to the termination of a comparatively high share of measures. This could be interpreted in two ways: either, the threshold for initiating an expiry review is low (leading to an unjustified extension of measures as long as the review is going on), or reviews are being carried out more open-ended than in other countries (such as Australia and Canada), where a vast majority of expiry reviews result in an extension of measures. Based on the evidence collected in this study no conclusion can be drawn which of the two interpretations has more merit, although there are indications that point to the former, e.g. it has been noted that in Canada the threshold for initiating a review is particularly high – i.e., a strong case for continuation must be presented for the authorities to commit the resources to undertake the review. The EU practice is on middle ground in this respect.

Figure 22: Duration of measures decomposed, EU and peer countries



Note: "Under 5 years" includes all measures terminated at less than 4.8 years. "About 5 years": duration of 4.8-5.1 years; "5 years plus expiry review": duration of 5.1-6.3 years. "5 (plus expiry review) to 10 years: duration of 6.3-10.1 years; "10 to 15 years": duration of 10.1-15.1 years; "more than 15 years": duration of 15.1 years and longer.
Source and calculation: same as for Table 39 above.

Third, after Australia and India, the EU is the jurisdiction with the highest share of measures expiring or being terminated at the latest after the initial five-year period: 66% of all EU TD

measures are not extended (Australia: 78%; India: 72%). This points to a comparatively low degree of institutionalised protection being granted by EU TD measures.

Conclusions/ Recommendations

Apart from the relatively long duration of reviews, the use of reviews in the EU is in line with international practice.

Regarding the duration of measures, EU TD measures have a low degree of institutionalisation, with long-standing measures being concentrated in few sectors. The EU policy on the duration of measures can thus be considered good international practice. One area where a change in practice could be warranted is the limited use of (full) interim reviews. The relatively high degree of measures expiring automatically without an expiry review is an indication that such measures have actually been in force longer than necessary. At the same time, the practice in peer countries in this regard is not significantly different from the EU practice.

4.12 Anti-circumvention and Anti-absorption Policies

4.12.1 Background, importance and policy options available

Although anti-circumvention (including anti-absorption) was one of the discussions points for the ADA during the Uruguay Round, Contracting Parties failed to reach agreement on the issue and no rules were adopted. At present, therefore, the ADA does not contain any provisions in this regard. Circumvention of AD and CV duties, however, is a problem in many countries. Although "classic circumvention", in the form of assembly of the components in the importing or a third country, might be dealt with, in some instances, through the enforcement of strict rules of origin, this may not always suffice. Where absorption of the duty takes place, this could theoretically be dealt with through an interim review lodged by the domestic industry. In practice, however, countries are free to deal with the circumvention or absorption of AD and CV duties however they choose, provided their procedures are in line with the provisions of the two agreements. Countries therefore need to address the following issues when determining how to address circumvention or absorption of measures:

- whether to introduce special instruments to address absorption and circumvention of measures;
- how to define absorption and circumvention and which types of behaviour to classify as circumvention;
- which measures to apply in order to detect circumvention.

4.12.2 Policy Choices of Peer Countries

4.12.2.1 Australia

Rules

Once a notice is published imposing an AD or CV duty, it creates a liability under the Dumping Act, to which any goods covered by its terms are subject to payment of a special duty upon their importation into Australia, or, pending assessment of such special duty, to pay interim AD or CV duties.

Customs undertakes monitoring activities with regard to the goods against which a notice has been published. Such monitoring is limited to identifying cases of circumvention and non-compliance (including absorption) with the imposed measures by exporters or importers of the injurious imports.

Such monitoring will typically be initiated on the basis of a risk assessment process, but may also be initiated as a result of specific complaints alleging non-compliance, or inconsistencies identified from an analysis of import data during investigations into the review or continuation of measures.

Practice

In practice, commodities which are subject to AD/CV measures, in the form of securities, are monitored for possible non-compliance during the period between imposition of the securities and the imposition of the final measures. Where imports are covered by measures other than securities, these will be subject to monitoring within the first 12 months after imposition of the AD/CV duty. Additional monitoring will also occur at least once during the life of the measures, whereby monitoring may be stepped up where commodity risk profiles or other risk management processes give Customs ground to believe this is necessary.

Monitoring can comprise anything from a simple "desk top" audit to verification visits to importers' premises and may even include a visit to the premises of exporters. Importers may be required to lodge amended import declarations in order to correct any factual errors found, and where necessary, they may be required to pay outstanding securities and/or AD and/or CV duties.

As a result of the constant monitoring of AD and CV duties, Australia has not experienced significant problems with the circumvention or absorption of duties and no anti-circumvention or anti-absorption action has been taken to date. Despite this, the ACS has recognised that its present system does not contain a meaningful framework for identifying and taking action in respect of circumvention where an importer or exporter makes a slight modification to a product to make it fall outside of the description of the goods subject to the measures; imports a consignment of the product subject to measures via a third country; reorganises export sales through exporters benefiting from a lower individual duty rate, or purchases parts and assembles them in Australia or in a third country (Australian Customs and Border Protection Service 2011: 24f.).

4.12.2.2 Canada

Canadian legislation does not incorporate specific references regarding circumvention or absorption, but invokes the concept of "directly or indirectly" to capture tactical adjustments to get around a TDI or to offset the TDI in part or in whole within the supply chain such that it is not passed on fully to the final customer. That is, SIMA provides for alternative calculations of the export price in cases "[w]here the manufacturer, producer, vendor or exporter of goods sold to an importer in Canada undertakes, directly or indirectly in any manner whatever, to indemnify, pay on behalf of or reimburse the importer or purchaser in Canada of the goods for all or any part of the anti-dumping duty that may be levied on the goods". Specific provisions cover issues such as importing parts for assembly in Canada or providing the benefit not directly to the importer but to the final purchaser. Canada has included explicit anti-circumvention terms in undertakings, addressing issues such as sales through intermediaries or through third countries.

4.12.2.3 China

Legal basis

China's Anti-Dumping Regulations provide that the "Ministry may take appropriate measures to prevent the circumvention of anti-dumping measures."[456] MOFCOM has not promulgated detailed rules on how to implement this provision (Wu Xiaochen 2009: 270). Circumvention

[456] Article 55 of the Regulations on Anti-Dumping.

covers the following issues (the US definition appears to have been a model): assembly in a third country or in China; making superficial changes to the product or processing it for reclassification into a different tariff subheading; and exportation of later-developed products.[457]

Regulations on anti-absorption do not appear to exist in China.

In practice, China has not conducted any anti-circumvention or anti-absorption investigations by December 2011. Practice

4.12.2.4 India

At present Indian legislation does not contain any provisions on the circumvention or absorption of AD or CV duties (Raju 2008: 292 and 323). Legal basis

Where a product has been transshipped through an intermediate country, the Tribunal has held that DGAD carries the burden to prove that the goods originated in a country other than that from which it was shipped.[458] In addition, AD or CV duties in India can easily be circumvented by importing the dumped/subsidised product into a designated export processing zone, as India's legislation provides that Practice

> "Notwithstanding anything contained in subs (1) and subs (2), a notification under subs (1) or any anti-dumping duty imposed under subs (2), unless specifically made applicable in such notification or such imposition, as the case may be, shall not apply to articles imported by a 100% export-oriented undertaking or a unit in a free trade zone or in a special economic zone."[459]

Given the lack of a legal basis, India has not undertaken anti-circumvention or anti-absorption investigations.

4.12.2.5 New Zealand

New Zealand law and practice does not specifically envisage anti-circumvention or anti-absorption investigations. Legal basis

There have been situations where goods subject to AD duties have been imported from other sources, and normal investigations into those imports have been initiated, e.g. *canned or preserved peaches*, but these were not considered by the Ministry to be circumvention attempts of the kind that anti-circumvention provisions would be designed to address. In other cases, goods similar to those subject to AD duties and imported from the same supplier have also been investigated normally, e.g. *plasterboard from Thailand*, where a product with slightly different specifications was exported, while in the case of *hog bristle paint brushes*, an importer attempted to import handles and bristle sets separately, but based on legal interpretations it was determined that these importations should be treated as brushes and AD duties were extended to cover the 'parts'. Practice

The need to undertake a new investigation in the case of plasterboard did impose pressures on resources that could have been avoided if an expedited process for anti-circumvention investigations had been available. The *hog bristle paint brush* case demonstrated that the issue could be addressed by implementing existing procedures for Customs classification and for dealing with Customs fraud, but emphasises the desirability of allocating resources to ensuring that AD and CV duty orders are enforced effectively at the border.

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457 Article 53 of the SETC Injury Investigation and Determination Rules.
458 See *M/s Pet Plastics Ltd*, as referred to by Raju (2008: 291 and 323).
459 Section 9A of the Customs Tariff Act.

4.12.2.6 South Africa

Legal basis

South African legislation defines circumvention as taking place when there is a change in the pattern of trade between third countries and South Africa; the remedial effects of the AD measure are being undermined in terms of the volumes or prices of the products under investigation; or if dumping can be found in relation to normal values previously established for the like or similar products, including from a different country.

South Africa has comprehensive anti-circumvention provisions in its Anti-Dumping Regulations[460] and its Countervailing Regulations,[461] in terms of which several different types of circumvention are identified. These include incorrect tariff classification, assembly operations in a third country or in South Africa, absorption of the duty and country hopping, i.e. the practice where a multinational company moves its supply to a different country after AD duties have been imposed against it (this does not apply to AS cases); this latter form of circumvention definition is probably WTO-inconsistent.

Practice

Despite the potential problem with WTO compliance, at least four country hopping investigations have been conducted in recent years, including two in 2010 (neither of which resulted in the imposition of AD duties). In most anti-circumvention cases, the industry is not required to update injury information if the application is lodged within one year of the publication of the final determination in the original investigation and the Commission sets a very low threshold for initiation, including in the documentation required in support of an allegation of circumvention. No proper application is required[462] and the industry is only required to submit some form of evidence that circumvention is taking place.

Although the provisions related to circumvention are included under the heading "reviews", it is not clear whether the Commission undertakes reviews or investigations. Reviews typically consist of only a single investigation phase, whereas original investigations include both a preliminary and a final investigation. Anti-circumvention reviews often include both a preliminary and a final investigation, [463] which allows the Commission to impose a provisional payment at an early stage to prevent further injury to the industry.

Absorption of measures is considered as a type of circumvention. For example, one circumvention case was against carbon black from Egypt, but although the Commission found proof of absorption of the duty, i.e. where the exporter decreased its price to absorb the anti-dumping duty, no additional duty was imposed on the basis that the existing duty still provided adequate protection as imports had been very low during the review period.[464]

4.12.2.7 USA

Legal basis

Once an AD or CV duty order is in place, circumvention and fraudulent evasion can become a significant problem. US legislation differentiates between four different types of circumvention: (1) assembly of the product in the USA or (2) elsewhere, (3) slight modifications to the product, and (4) later-developed models of the product. In its circumvention deliberations Commerce will consider changes in the pattern of trade, whether the producer of the parts is related to the

460 ADR 60-63.
461 CVR 60-63.
462 ADR 62.2 and 62.3 specifically refer only to 'an anti-circumvention complaint' rather than an application.
463 ADR 62.1 provides that an anti-circumvention review may consist of either one or two investigation phases.
464 See *Carbon black (Egypt)(Circumvention)(Board Report 4189)*.

assembler and whether shipments of parts increased after the AD order was issued. As regards modifications to the product, the scope of an AD order can only be extended to include minor alterations, but cannot include products that were originally unambiguously outside the scope of the investigation. Commerce generally deals with circumvention. Fraudulent evasion, however, falls within Customs' jurisdiction.

Practice

Although the vast majority of US importers play by the rules, there have always been those who attempt to evade duties. Typical evasion schemes include transshipping through a third country and falsely declaring the country of origin or misclassifying or mislabelling goods. In addition, under the US retrospective duty assessment systems, an exporter with a low cash deposit rate can drop its US prices significantly increasing the dumping margin, then disappear before Customs attempts to collect the duties years later.

Domestic producers report that incidents of evasion have increased in recent years, particularly in cases involving Asian countries. As a result, both Congress and Customs have come under increasing pressure to find better ways to address the problem. It is, however, a complex problem: First, the fact that many of the fraudulent activities take place outside the USA poses significant problems for US investigators. In addition, as the perpetrators are often beyond US jurisdiction it is difficult to impose penalties even when Customs succeeds in establishing the existence of a fraudulent scheme to evade duties.

4.12.3 The EU's policy choice[465]

Legal basis

The EU has comparatively well developed and detailed regimes for anti-absorption and anti-circumvention investigations:

- Anti-absorption reinvestigations[466] can be initiated if, after the investigation period or following the imposition of measures, prices further decline or the post-duty import price in the EU does not increase;
- Anti-circumvention investigations[467] can be undertaken if there is *prima facie* evidence that measures are circumvented, e.g. through relocation of production, changing the products in such a way that they are no longer covered by the measure, etc..

The types of circumvention explicitly addressed in the two basic Regulations are: assembly of the product in the EU or elsewhere; slight modifications to the product; transshipments (including falsification of customs declarations regarding the country of origin), and channelling of exports through exporters which are subject to lower duties (or no duties at all). EU anti-circumvention investigations have not addressed other types of circumvention not listed in the two basic Regulations.

The purpose of anti-absorption reinvestigations is to provide an early, "accelerated" and simplified alternative to an interim review of the level of dumping or subsidisation: However, their practical importance is negligible – in only one case in the evaluation period (of three anti-absorption reinvestigations undertaken) have measures been revised upwards.

Practice

During the evaluation period, 16 anti-circumvention investigations were undertaken, of which two related to CV measures (with parallel AD measures in force).[468] Although many stakeholders

465 A more detailed assessment of the two instruments is provided in section 5.3.5 and section 5.3.6.
466 Article 12 ADR/Article 19(3) ASR.
467 Article 13 ADR/Article 23 ASR.
468 *Graphite electrode systems* (AS470, R417) and *Biodiesel* (AS532, R507).

stated that circumvention was a growing problem there was no clear trend in the number of investigations over the evaluation period. A majority of investigations resulted in an extension of measures to additional exporting countries or similar products.

Anti-absorption reinvestigations are rare: Only three were carried out in the evaluation period, all of which were initiated upon initiative of the Union industry, and none was initiated after 2006.

4.12.4 Conclusions and recommendations

Comparative summary

Among the peer countries, Canada, India and New Zealand have no specific legal provisions respectively separate instruments to counter circumvention or absorption of measures; they would resort to the standard instruments available, i.e. reviews or initiation of new investigations. China's law foresees anti-circumvention measures but as of yet does not have any regulations, and no anti-circumvention investigations have yet been conducted. Australia has an elaborate monitoring system in place and considers that this has prevented circumvention to occur. Canada and New Zealand have a limited case history of dealing with circumvention issues (e.g., *paint brushes* in Canada and *hog bristle brushes* in New Zealand both involved separate importation of the heads and handle of paint brushes and were addressed in similar fashion by extending duties to the parts).

However, apart from the EU, only South Africa and the USA both have detailed legal provisions and rules and anti-circumvention enforcement experience. They list the following types of circumvention:

- South Africa: incorrect tariff classification, assembly operations in a third country or in South Africa, absorption of the duty and country hopping, i.e. the practice where a multinational company moves its supply to a different country after AD duties have been imposed;
- The USA distinguishes between circumvention activities in a strict sense – assembly of the product in the USA or elsewhere, slight modifications to the product,[469] and later-developed models of the product – and fraudulent evasion schemes include transhipping through a third country and falsely declaring the country of origin or misclassifying or mislabelling goods. Fraudulent evasion is addressed by Customs, not by the trade defence investigating authorities.

Conclusions/ Recommendations

In view of the fact that anti-circumvention practice has been confined to the types of circumvention listed in the two basic Regulations, the Commission could consider addressing also additional types of circumvention not listed in the Regulations, e.g., an update to or modification of the targeted product (a "later developed model"), a mode of circumvention addressed by peer countries.

With regard to anti-absorption measures, no lessons or, indeed comparison with the peer countries can be made due to the absence of practice in the evaluation period. Section 5.3.5 presents further analysis and conclusions, however.

469 Products that were originally unambiguously outside the scope of the investigation cannot be covered under this provision and would require a separate new investigation.

4.13 Conclusions of the Comparative Evaluation

This chapter has provided a structured examination of international TD policy decisions, focusing on a number of issues bearing on the efficiency and perceived fairness of practice, and drawing on more complete reviews of the seven peer country systems presented in appendix I. The main findings of the evaluation team can be summarised as follows.

Institutional structure of TDI and the question of independence from political influence

Different countries have adopted different institutional structures to administer TDI. A central question concerns the objectivity of the system and whether decisions are rules-based or subject to political influence. Several countries (including Australia and New Zealand) rely on the established and institutionalised neutrality of their civil service to deliver objective decisions consistent with the rules and principles of the WTO rules-based system; others (including Canada, South Africa and the USA) have established independent investigating authorities to distance TDI proceedings from overt political influence.

In the EU framework, by contrast, the investigating authority is a Directorate within the Commission, and definitive decisions are taken by a political body (the Council). Notwithstanding the direct involvement of political bodies in the EU's decision-making process, there is only anecdotal evidence in the context of particularly contentious cases regarding politicisation of decisions; the evaluation team could find no systematic evidence for such interference. In terms of decisions rendered, the EU TD system does not appear to be more politicised than that of most peer countries, an interpretation supported by the degree to which decisions have withstood legal challenge.

Initiation policies

The emergence of global value chains calls into question the established understanding of what constitutes the "domestic industry" under TD practice. With inward and outward FDI, and various business outsourcing and offshoring strategies, a divergence in interests within the domestic industry can emerge, depending on the business strategy chosen by different firms, thus making it more difficult to meet standing requirements for the initiation of investigations. As well, a divergence between the interests of mobile capital and immobile labour emerges which raises the question of whether TDI will be effective in protecting domestic value-added in the emerging global production framework.

In this context, the question has emerged for the EU of whether labour unions should have the right to bring cases and/or whether the Commission should initiate cases *ex officio*.

International practice varies in both regards. Australia and the USA provide for labour union-initiated complaints; New Zealand and South Africa do as well, but only in cooperation with industry; the EU, along with Canada, China and India do not allow such proceedings. Clearly, given the importance of confidential business information to investigations, such an innovation would have far-reaching procedural implications, including the possible need to impose obligations on industry to cooperate, a power which the Commission does not presently have. Nonetheless, although it is not a panacea for all of the situations mentioned where domestic producers might refrain from submitting or supporting a complaint, it is recommended that the right to submit complaints and have standing be extended to labour representatives. Regarding conflicts between employees and management of domestic producers, guidance could be taken from the history of practice under US rules in this area.

The main alternative is for the TDI authorities to step in with *ex officio* investigations, particularly in respect of subsidies, given that subsidy investigations directly target a foreign government's policies and firms might be reticent to take such steps because of the possibility of retaliation or pressure on their business interests in that country. Most peer countries (New Zealand being the exception) provide for *ex officio* investigations but seldom use it. The EU system also provides for this option but the authorities have not made use of in the past except for reviews; the Commission has indicated that it is willing to consider *ex officio* cases against subsidies in some cases.

The evaluation team recommends that the EU respond flexibly to this situation, including by continuing to use the tested method of maintaining the identity of the applicant confidential, where that would be effective, to use *ex officio* initiations of new investigations in special circumstances where the business interests of some EU firms in the country of export might militate against their joining a specific complaint and thus compromise the ability of the industry to gain standing for a complaint, and to provide for initiations on the basis of labour union complaints.

Transparency and confidentiality

WTO rules require that non-confidential information be made available to interested parties but allow members the discretion of whether to provide access to confidential information and the design of the system of controls regarding such access. Countries have used the policy space afforded by WTO rules to develop different systems with differing implications for cost and transparency. The USA through its Administrative Protective Order (APO) system, and Canada through individual confidentiality agreements, provide legal counsel for the parties access on a controlled basis, with sanctions for unauthorised disclosure. Other peer countries and the EU do not allow access to confidential information, although the EU does provide access to confidential information to the courts.

The evaluation team notes that an alternative to an APO system such as the one in the USA is to provide for the possibility of having the Hearing Officer check, upon request by interested parties, that confidential information has been taken into account correctly by the Commission in the investigations. This option has in fact already been selected by the Commission and awaits full implementation. The introduction of a system to provide access to confidential information (such as the APO system) is therefore not recommended at this stage. However, it is recommended that a review be undertaken once some experience has been gained with the Hearing Officer's role of verifying that confidential information has been duly considered in an investigation.

Treatment of non-market economies

Although the WTO Anti-dumping Agreement does not specifically refer to NMEs, in the case of a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, or in which a "particular market situation" exists, WTO rules provide for TDI authorities to determine export prices on a basis other than the normal domestic selling prices in the exporting country. Significant trading countries for which NME status is an issue internationally include China, Vietnam, Russia, the Ukraine and other former Soviet Republics (notably, the EU treats Russia and the Ukraine as market economies whereas some of the peer countries do not). However, international practice varies in terms of how the latitude for NME status is used, ranging from the absence of the concept of NME (in China), a case-by-case assessment (most peer countries), to fixed lists of NMEs (India, USA, and the EU).

Likewise, the modalities for a country being granted market economy status (MES) or market economy treatment (MET) for exporters from NMEs vary considerably.

In the EU, NME countries are listed in the ADR. By contrast, in some peer countries, the determination of whether non-market conditions exist is determined by the administrative authorities on the basis of the factual context of the industry and country concerned. The establishment of MES by the EU tends inherently to be a long process and so far has been completed only by two countries. Regarding the treatment of NMEs at the country level, the EU system provides less flexibility than others that are presently in use. On the other hand, requests for MET, which is treated on an enterprise level (rather than on a sector/industry level as in Canada or the USA), are frequent.

The evaluation team considers that the differences in treatment of NMEs across WTO members' AD systems introduce inconsistencies in the international trading system which should be avoided. A harmonisation of NME concepts at the multilateral level would therefore be desirable.

Furthermore, flexible systems that do not rely on lists of countries established by regulation have not apparently impaired the application of NME status to countries/sectors where such is warranted. Also, the status of China and Vietnam, the two major economies with significant NME characteristics, will be changing in 2016 and 2019, respectively.

These considerations suggest that a flexible system of NME treatment such as practiced in some peer countries could be more appropriate than the current system applied by the EU, in particular with regard to the lists of NMEs and the granting of country-wide MES. The practices of Australia, which has granted China MES and utilises the "particular market situation" provisions to address cases where domestic Chinese prices may be distorted, and Canada, which applies market treatment as the default but has used the latitude in its system to successfully apply non-market treatment where warranted, are worth examining as the EU considers its next steps.

Application of the lesser duty rule

The WTO rules urge countries to consider applying lesser duties than those indicated by the dumping or subsidy margin, if that would suffice to eliminate injury. The method of calculation of an injury margin is not however specified. Practice internationally varies and no approach grounded in economic theory has so far been developed. Practice in Australia and New Zealand is most comparable to that in the EU, which applies the lesser duty rule in each case. Both countries apply a "non-injurious price"; while alternative calculation methods are used, the concept is based on levelling import prices with what domestic industry prices would be absent dumping or subsidisation (i.e., an "unsuppressed selling price" or pre-injury price). The USA does not apply lesser duties, while Canada only rarely does pursuant to a public interest test and with no established methodology. In none of the countries reviewed is the effect of the lesser duty rule on the number of measures affected and the reduction in the level of measures comparable to the EU. In view of the findings in the economic evaluation part, the EU approach is considered preferable to that practiced in the peer countries.

Use of the public interest test

WTO rules require that countries provide opportunities for parties adversely affected by duties (industrial users or consumer organisations) to be heard, and urge countries to make the imposition of duties voluntary, rather than mandatory. However, there is otherwise no detailed provision for a public interest test. International practice varies. The USA has no provision for a

public interest test. Australia, New Zealand and South Africa have no formal provisions but the Minister responsible for TDI can exercise discretion as to whether to apply duties or not. India and China have mentions of public interest in their legislative framework but no evidence of application. Only Canada among the peer countries has provisions for a public interest inquiry and a case history of use. However, whereas the EU applies the test in every case, Canada rarely does and only in a separate procedure after measures have been imposed. EU practice thus clearly stands out.

As regards its impact, although the number of cases terminated based on public interest considerations is limited, a more comprehensive assessment suggests that the role of the test in the EU's TD system should not be underestimated. At the same time, the EU's methodology remains underdeveloped, opening up the test to criticisms of discretionary application and limiting the predictability of the system.

Duty collection systems and form of duty

The WTO Agreements provide both for the prospective and retrospective collection of anti-dumping or countervailing duties. In a prospective system, the level of the duty is determined during the investigations then applied at this level for the duration of its application, unless reviewed at an earlier stage. Conversely, under a retrospective system, the duty rate established in investigations is for deposit purposes only; the final level of duties due is determined only after products have been imported, and then based on the actual level of dumping or subsidisation. Moreover, duties can be applied on an *ad valorem* basis, as specific duties, or based on reference prices (which involves applying duties equal to the amount that imports are priced below the reference price indicated). Based on the analysis of peer country experience, reference price based systems are used often; as well, there is a tendency towards greater use of *ad valorem* duties (viz. Australia and New Zealand).

The various approaches to applying duties have their advantages and disadvantages. In principle, the retrospective method is more accurate as parties only definitively pay whatever duties were in fact due, i.e. if the export price increases subsequent to the imposition of duties lower duties will be collected, while higher duties will be collected if the export prices decreases subsequent to the imposition of the duties. This negates the requirement for refund proceedings and also negates the possibility of absorption of the duty. However, since the definitive level of a duty collected retrospectively can only be determined after the importation has already taken place (and, in most instances, after the imported products has been sold) and as the importer has no control over domestic price movements in the exporting country, this adds uncertainty to the market, which may have a dampening effect on trade. Prospective reference price systems induce exporters to raise their price to avoid duties, which also means that the economic benefits to the importing country from TDI are reduced. Meanwhile, prospective ad *valorem duty* systems, such as the one used in the EU, are simpler to administer but have a built-in bias against fair exporters (the higher the price charged, the higher will be the duty). One way for exporters to remedy this is by requesting a partial interim review of their dumping. This has been done in a number of cases during the review period. However, it is contingent upon the finding of a lasting nature of the alleged changes and only has an effect on future duties, while not addressing past duty payments. For this, refunds are the only option, and they are increasingly being used in the EU.

Complex systems such as the retrospective system used by the USA or the prospective reference price systems applied by Canada and Australia would be difficult to implement in the EU, given that 27 different customs authorities would need to apply these measures in the same way. In

view of these considerations, and given that no system is clearly superior in all respects, the EU need not consider a change in its duty collection system.

Policies of review and duration of measures

The WTO Agreements provide that trade defence measures may only remain in place to the extent and for the duration required to counter the injurious effects of dumping and subsidised exports. No duty may remain in place for a period of more than five years from imposition or the last substantive review thereof. The two agreements provide for a variety of reviews, including expiry reviews, interim reviews and new exporter reviews.

There are few differences in the policies on reviews among peer countries. For expiry reviews, a noteworthy deviation from common practice is the automatic initiation of sunset reviews in the USA, i.e. measures never expire without a review. Perhaps because of this, measures in the USA remain in force longer than in any of the other peer countries. With regard to the duration of review proceedings, these are the same as original investigations in all countries, with the exception of new exporter reviews, for which shorter deadlines apply. As a result of this, the duration of EU reviews is longer than that of most peer countries.

With regard to the duration, measures in the USA are applied for the longest periods by far (10.2 years), whereas averages of the other countries, including the EU, are all in the range of 5.8-7.8 years. In all countries the average duration of CV measures is shorter than that of AD measures. A further analysis reveals that, first, in Australia, Canada and the EU the share of measures that expire at the end of the five-year period without a review is comparatively high. This may be an indication that measures could have been revoked earlier, as in such cases either the domestic industry is not interested in an extension of measures, or there is no *prima facie* evidence which would justify an extension.

Second, expiry reviews in India, China and South Africa lead to the termination of a comparatively high share of measures. This could be interpreted in two ways: either, the threshold for initiating an expiry review is low (leading to an unjustified extension of measures as long as the review is going on), or reviews are being carried out more open-ended than in other countries (such as Australia and Canada), where a vast majority of expiry reviews result in an extension of measures. Based on the evidence collected in this study no conclusion can be drawn which of the two interpretations has more merit, although there are indications that point to the former, e.g. it has been noted that in Canada the threshold for initiating a review is particularly high. The EU practice is on middle ground in this respect.

Third, after Australia and India the EU is the jurisdiction with the highest share of measures expiring or being terminated at the latest after the initial five-year period: 66% of all EU TD measures are not extended (Australia: 78%; India: 72%). This points to a comparatively low degree of institutionalised protection being granted by EU TD measures.

Anti-circumvention and anti-absorption policies

The effectiveness of anti-dumping or countervailing measures may be jeopardised by various practices aimed at circumventing them in order to avoid payment of duties. Although the evaluation team found no evidence that there has been a systematic increase in circumvention, the issue has received increasing attention from policymakers internationally. However, only a minority of countries – among the peer countries, only South Africa and the USA – have

designed special anti-circumvention instruments. The EU's anti-circumvention instrument is well developed and counters circumvention to a certain extent.

Anti-absorption tools are even less common internationally. In the EU, anti-absorption reinvestigations aim at providing an early, "accelerated" and simplified alternative to an interim review of the level of dumping or subsidisation. However, their practical importance is negligible – in only one case in the evaluation period (of three anti-absorption reinvestigations undertaken) have measures been revised upwards.

5 EVALUATION OF THE EUROPEAN UNION'S TRADE DEFENCE POLICY AND PRACTICE

This chapter assesses the EU's trade defence policy and practice as applied in the evaluation period. The assessment covers the utilisation, methods and performance of the two basic Regulations and their application. The findings and recommendations made in this chapter are based on: case documentation (EU regulations and notices published in the *Official Journal*); the views of stakeholders (Commission, Member States, European Parliament, interested parties) and trade practitioners; and the conclusions drawn by the evaluation team from the economic analysis in chapter 2, the legal analysis in chapter 3, and the review of international policy and practice in chapter 4.

The chapter first discusses substantive issues (section 5.1) and then procedural issues (section 5.2) related to investigations. The substantive and procedural aspects of the various types of reviews are presented in section 5.3, while the implementation of judgments regarding EU TDI is discussed in section 5.4.

As the AD and AS instruments are governed by essentially the same rules, they are addressed simultaneously in this chapter, except that the determination of dumping respectively subsidisation is addressed in separate sections (dumping in 5.1.2 and subsidisation in 5.1.3). Other differences in rules pertaining to dumping versus subsidisation, such as the special and differential treatment of developing countries or certain procedural matters (such as the maximum duration of investigations) are addressed in the respective sections.

Insofar as reference is made to EU AD/AS case law, this chapter does not purport to constitute a commentary on this body of law, but rather an evaluation of practices in view of legal decisions.

5.1 Substantive Issues

In this section, the main substantive issues to be covered in investigations are discussed. The structure of the section generally follows the procedural stages in AD/AS investigations. The various rules that bear on the Commission's decision of whether to launch an investigation and that delineate the scope of the investigation are discussed in sub-section 5.1.1. The sub-sections that follow address in turn the determination of dumping (sub-section 5.1.2) respectively subsidisation (sub-section 5.1.3), injury (sub-section 5.1.4), causality (sub-section 5.1.5), the Union interest test (sub-section 5.1.6), and the determination of the type and level of AD/CV measures (sub-section 5.1.7). Finally, a short discussion of special and differential treatment of developing countries (sub-section 5.1.8) concludes this section.

5.1.1 Definition of Union Industry

Legal basis

The two basic Regulations define the Union industry as:

> "the Community producers as a whole of the like products or [...] those of them whose collective output of the products constitutes a major proportion [...] of the total Community production of those products, except that:
>
> > (a) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'Community industry' may be interpreted as referring to the rest of the producers;

> (b) in exceptional circumstances the territory of the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if:
>
> (i) the producers within such a market sell all or almost all of their production of the product in question in that market; and
>
> (ii) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community [...]"[470]

Accordingly, the definition of the Union industry, which determines which firms comprise the industry for purposes of the Regulations and thus serves to establish the level of support a complaint must have to meet the threshold requirement for an investigation to be launched, depends on several factors:

1. Definition of the "like product";
2. Definition of "major proportion";
3. Determination of the conditions under which producers are considered as "related" to exporters or importers of the allegedly dumped product; (as Article 4(1)(a) ADR/Article 9(1)(a) ASR state that producers related to exporters or importers "may" be excluded from the Union industry);
4. Determination of the precise conditions for defining regional industries.

These factors are discussed in turn in the following sub-sections. As a preliminary observation, it is important to bear in mind the assumptions concerning the nature of producers, products and production processes that are implicit in the construction of the Regulations. The origin of a product which draws inputs from more than one country is, under customs practices, determined by the "substantial transformation criterion" according to which the country of origin is "the country in which the last substantial manufacturing or processing, deemed sufficient to give the commodity its essential character, has been carried out".[471] While simple assembly, the breakage of bulk into retail portions, or packaging does not qualify as "substantial transformation", the final processing of a good, no matter the extent of value-added it provides to the final product, determines the origin. By the same token, the producer of the good is not identified with the firm that provides the bulk of the value-added, but with the firm that drives the final nail. Thus, in *Footwear with leather uppers* (AD499) the Commission concluded as follows:

> "producers that fully delocalised their production outside the Community are not included in the definition of Community industry, and therefore the extent to which those companies would have also caused injury to the Community industry is analysed together with the impact of the imports from other third countries."[472]

As discussed in chapter 2, some of these producers retained a considerable share of the value-added production in the EU. The definition of EU products and EU producers is thus based not on the share of the value of the product originating in the EU but on which slice of the value chain is located in the EU. As noted in chapter 2, this state of affairs can result in perverse impacts of TDI and, as discussed below raises further conundrums for an economically sound application of TDI policy.

5.1.1.1 Like product

The Union industry is defined in terms of the producers of the EU-origin "like products"; in law this means goods that are identical to or "closely resemble" the imported goods.

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[470] Article 4(1) ADR/Article 9(1) ASR.

[471] See World Customs Organisation, Specific Annex K, Chapter 1, Rules of origin; http://www.wcoomd.org/Kyoto_New/Content/body_spank.html.

[472] OJ L 275/1, 06.10.2006, at recital 236.

Practice

The meaning of "closely resemble" is in practice interpreted by the Commission to be determined by its basic technical, physical and/or chemical characteristics, as well as the substitutability of the domestic product for the imported good from the perspective of the user.[473]

While the last criterion reflects generally sound economic principles, its approach is not without its potential difficulties. In particular, while "likeness" is determined by the eye of the user, TD cases are initiated by the producers interacting with the Commission; users enter into the process only after a case has been launched. Accordingly, in a procedural sense, the determination of "likeness" is conducted in the first instance by the wrong parties and a considerable investment of resources can be made in a case before the parties who actually can properly determine "likeness" are consulted. However, in cases where the product characteristics and its main use would lead to different product definitions, priority is given to the former.

In most instances, this is not likely to be a source of serious problems. However, in cases involving a large number of differentiated suppliers of industrial inputs and a large number of differentiated users, where switching is not costless because users must determine conformance of the product with regulatory and quality requirements, this can result in problems (e.g., see the discussion of *Polyester staple fibres* case in section 2.3.4).

In some cases, products are not substitutes for each other and enter the EU under a number of different tariff codes yet clearly fall into the same industry (e.g., in *Fasteners*, the imported goods concerned entered the EU under 10 different 8-digit tariff classes). The various conundrums raised in this regard are well brought out in the discussion of the Canadian TD case *Copper pipe fittings* of tee- and elbow-joints, which are obviously not substitutes for each other but yet fall into a generic class of "pipe fittings".[474] In other cases, products might be substitutes (at least to a certain degree) yet fall into recognisably different industries. An example of the latter situation is where producers supply niche advanced products to some sectors but depend for their viability on mass production for other markets. For example, in *Dicyandiamide* (DCD, AD512) the sole Union producer was highly profitable in its production of micro DCD, which constituted a relatively small part of its production and which faced no competition from Chinese imports, but under price pressure from Chinese producers on the less-refined standard DCD supplied to a range of other industries (textile, paper, water treatment and fertiliser industries were mentioned in the case documentation).[475] The difference in profitability indicates the products were not substitutes for practical purposes (although typically in such cases, highly refined product can substitute downwards for less-refined product but users of the highly refined product cannot use the less-refined product). Accordingly, there were in effect two Union industries combined in the sole Union producer, with different downstream users, facing opposite consequences of the Union producer receiving or not receiving protection from TDI: the micro DCD users would find themselves without a source of supply if the Union producer closed shop while the consumers of the standard product would face price increases if TDI duties were applied.

In some cases, final products and parts may be classified as "like goods", even though they are clearly non-substitutable from the perspective of the final consumer; this approach to defining "like product" and by extension the industry may be required out of consideration of

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473 For example, in *Tungsten electrodes* (AD502), the Commission observed as follows: "Based on the physical characteristics and the *substitutability of the different types of the product from the perspective of the user*, all [tungsten electrode products] are considered to constitute a single product for the purpose of this proceeding." (OJ L 250/10 (provisional), 14.09.2006, at recital 13).

474 See appendix I3 at 51.

475 OJ L 296/1, 15.11.2007, at recitals 89 and 119.

circumvention issues. For example, in *Bicycles* (AD287), duties applied to the finished product were subsequently extended to parts for anti-circumvention reasons.[476]

Given the kaleidoscopic heterogeneity of circumstances that are met in TD cases, procedural flexibility and judgemental leeway must be afforded to TDI authorities if TDI are to be applied effectively. However, one general conclusion can be drawn at this stage: the greater the extent of product differentiation in a case, and the greater the number of firms involved in cases of industrial inputs, the greater the risk of inadvertent problems from the application of TDI.

A more detailed analysis of the determination and definition of like products in EU TD practice is presented in section 5.1.4.1 below, as this issue is typically a crucial step in the injury determination.

5.1.1.2 Standing

Legal basis

The two basic Regulations specify the Union industry standing for initiation purposes as follows:[477]

> "An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 % of total production of the like product produced by the Community industry."[478]

Practice

In practice, the 25% threshold is more relevant than the 50% threshold. Indeed, no cases in the evaluation period could be identified in which a majority of producers consulted have expressed opposition to a complaint. Furthermore it should be noted that according to EU case law the threshold must be met only at the stage of initiating an investigation. If the level of support drops below 25% during investigations, there is no obligation for the Commission to terminate investigations.[479] However, this practice might have to be reassessed in view of recent WTO case law which has stated that a major proportion of the domestic industry ensuring the absence of major distortions in data and findings must be ensured (the *EU – Fasteners (China)* case; see below in this section).

At the same time, in EU practice there is no systematic relationship between low initiation support and the eventual termination of cases. The average support level for terminated cases during the evaluation period was 68%, almost the same as for investigations leading to the imposition of measures (70%).

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476 In this case, an exemption scheme on the basis of Article 13(2) ADR was established. Under this scheme, bicycle producers could receive an exemption from the extended duty, provided they respected the conditions of Article 13(2) ADR, namely to respect a ratio of less than 60% of Chinese bicycle parts in their operation or the addition of more than 25% value to all parts brought into the operation; see OJ L 261/2, 06.10.2011. See also in this regard the discussion of several Canadian TD cases that involved inclusion of parts with final products for anti-circumvention purposes, in appendix I3 at 111-112.

477 This definition is taken directly from the WTO agreements. See Article 5.4 ADA/Article 11.4 ASCM.

478 Article 5(4) ADR/Article 10(6) ASR.

479 See Judgment of the CFI 2009-03-10 in Case T-249/06 *Interpipe Niko Tube v Council.*

Table 40 shows the distribution of cases based on the support by the Union industry as reported in notices of initiation. A number of observations can be made based on these data. First, initiation notices for 32 distinct cases[480] out of a total of 78 (or 41%) initiated during the evaluation period stated that the respective complaint represented "more than 25%" of the Union production of the good in question, i.e. merely complied with the minimum requirement, whereas the average share over the period 2001 to 2004 was only 8%. This would indicate that the Union industry support for complaints is falling. However, as confirmed during interviews with DG Trade staff, the conservative formulation "more than 25%" is standard (apart from those cases where it is certain that the standing level is more than 50%) and has been chosen in view of earlier experience with complaints that indicated a higher level of support than was actually confirmed during the standing test.

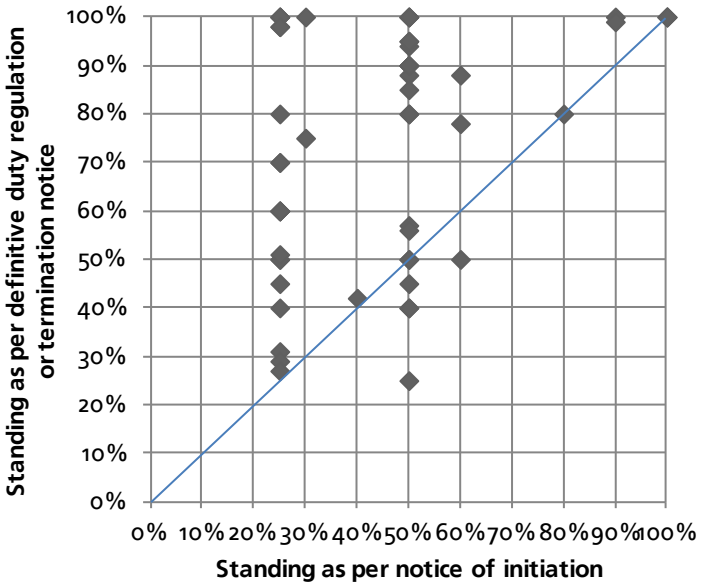
Table 40: Support for AD and AS cases by the Union industry, number of cases, 2005-2010

Year	25%	30%	35%	40%	45%	50%	60%	70%	75%	80%	85%	90%	100%	Total	Share 25% support in total
2005	3	2		1		3	2					1	1	13	23%
2006	7	1				7						1	2	18	39%
2007	3					1							2	6	50%
2008	8					2							2	12	67%
2009	3					8	1			1				13	23%
2010	8	1				5							2	16	50%
Total	**32**	**4**	**0**	**1**	**0**	**26**	**3**	**0**	**0**	**1**	**0**	**2**	**9**	**78**	**41%**

Source: Calculations by the authors based on Notices of initiation (see list of cases in appendix D).

Indeed, when the information on standing provided in notices of initiations is compared with the definition of the Union industry as presented in investigation outcomes, i.e. in definitive duty regulations or termination notices, there is only a relatively weak correlation between the two (Figure 23) and the points are widely scattered rather than being clustered around a 45 degree line as one would expect. For example, in spite of the mentioning of "more than 25%" in initiation notices, actual support in most cases was higher and in one case 100%.

Figure 23: Union industry in notices of initiation and definitive duty regulations/termination notices, AD & AS investigations 2005-2010



Note: There were 55 cases for which information on standing/support was provided both at initiation and conclusion of investigations
Source: Authors' calculations based on notices of initiation, definitive duty regulations and termination notices.

480 Remember that one "distinct case" may involve investigations against various exporting countries.

While it is acknowledged that this conservative formulation reduces the Commission's risk of being challenged, this goes to the detriment of the transparency of TDI at least as far as the general public and external observers are concerned. Interested parties are provided with more details in detailed standing note contained in the non-confidential file.

Stakeholder views

EU producers' views on the current threshold vary considerably across associations. Concentrated sectors do not see this threshold as a source of concern, while some (although not all) fragmented sectors composed of a large number of producers (SMEs) see it as heavily discriminating. Some representatives of fragmented sectors (esp. those characterised by a high number of SMEs) stated that without the support of European associations it was virtually impossible to meet the standing requirements. Other associations representing SMEs however stated that the key problem for SMEs was the limited awareness for and understanding of TDI, rather than the standing threshold.

Furthermore, according to certain associations interviewed, the 25% threshold is a *minimum* figure and the Commission often requests a higher level between 50% and 70% of support. (According to information provided by the Commission, a level of support slightly higher than 25% – but not 50% or more – is typically requested in order to ensure that the complaint is indeed supported by the necessary *quorum*. Neither view could be confirmed or refuted by the evaluation team because no access to case files was available.)

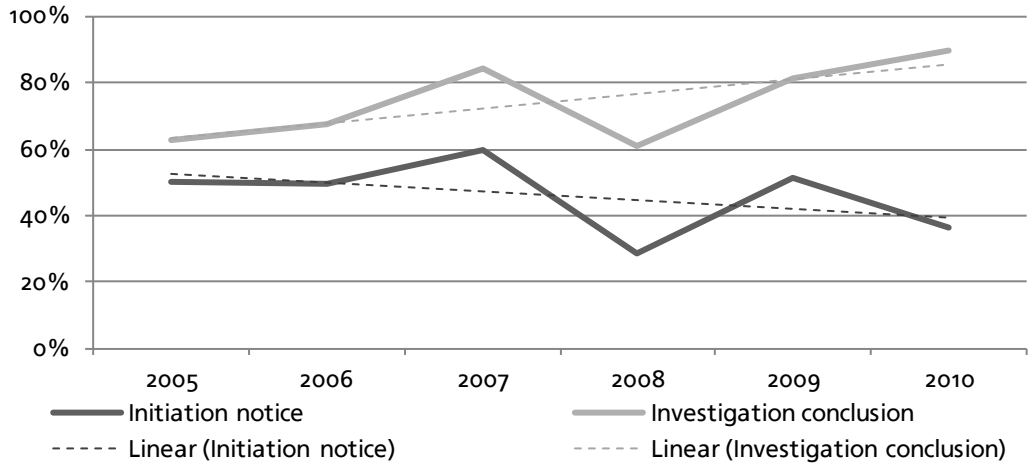
Evaluation team analysis

As the WTO agreements establish a floor for minimum support level for complaints by the Union industry, a potential revision of threshold levels, as called for by some stakeholders, could only mean to increase the threshold. The impact of such an increase on the accessibility of TDI for the Union industry would obviously depend on the scope of the increase. Thus, based on the information on Union industry support in the regulations and termination notices of the evaluation period, an increase in the support threshold by 5% (to 30%) would have led to a reduction in the number of cases of 5%; had the minimum support threshold been 50% instead of 25%, the number of cases initiated over the evaluation period would have been roughly 27% lower.

Over time, there has been no clear tendency regarding support to complaints (Figure 24). Thus, those cases which are initiated do not, on average, feature decreasing support by EU producers. However, it might still be that the number of cases in recent years has been lower due to complainants' increasing difficulties in obtaining the required quorum of support, as was indicated by some stakeholders during consultations.[481] Furthermore, it has been reported that there is an increasing tendency by some exporting countries to put pressure on EU producers (which either have investments in the exporting country or for which the exporting country is an important market) to oppose or not to initiate a complaint (see in this regard the discussion of retaliation risks in chapter 2).

[481] Other main reasons for not filing a complaint mentioned by stakeholders (see section 5.2.1.4) include the complexity of procedures as well as cost considerations, but these could not explain a reduction of complaints over time.

Figure 24: Union industry support in notices of initiation and definitive duty regulations/termination notices, AD and AS investigations, annual average level of support, 2005-2010



Source: Authors' calculations based on notices of initiation, definitive duty regulations and termination notices.

Conclusions/ recommendations

In the view of the evaluation team, the comparability of the average support level for terminated cases (68%) and for investigations leading to the imposition of duties (70%) in the evaluation period indicates that current support threshold levels as applied by the Commission are appropriate. This is an important metric for the Commission to monitor, given the negative effect of investigations on imports that has been identified in the economic literature. A significantly lower support level for terminated cases would indicate that marginal cases were being mounted that could not ultimately be vindicated by the findings but that nonetheless have negative effects on trade.

5.1.1.3 Exclusion of producers from Union industry

Summary of the issue

Although in principle the "Community producers as a whole of the like products" are to be considered the Union industry, two categories of EU producers can be excluded from the Union industry definition: producers related to importers or exporters; and producers which are themselves importers of the product concerned. The policy on producer exclusions has become more important in recent years with the increased role of globally integrated producers and outsourcing and is a matter of controversy amongst stakeholders.

The controversy is deep-seated. On the one hand, the effect of dumping or subsidised imports may be less negative for those producers which are importers themselves or which are related to importers or exporters than for purely domestic producers. Moreover, EU producers with significant investments interests in the target country are hostage to the threat of retaliation. Hence, such companies will be less likely to support a complaint, and including them among the Union producers makes it more difficult for complainants to pass the threshold of 25% expressed support for the complaint.

On the other hand, the very presence of such firms in the industry raises significant questions concerning the net benefit of TD measures for the EU. As noted earlier, applying TD measures to imports into the EU from the offshore platforms of EU producers without further question would be to ignore the possibility of substantial EU value-added in these products and indeed to damage the interests of producers that have taken measures to protect their EU value-added by offshoring the non-competitive slice of their value chain or the portion of their product line that can no longer be competitively produced in the EU.

Moreover, these firms, if they cooperate in the investigation, may shed important light on whether the prices of the goods in question are in fact being dumped under constructed cost calculations, given the share of value-added in the product generated in the EU.

Producers related to importers or exporters – Legal basis

The two basic Regulations provide specific guidance on the conditions which must be met for producers to be considered as related to exporters or importers:

> "producers shall be considered to be related to exporters or importers only if:
>
> (a) one of them directly or indirectly controls the other; or
>
> (b) both of them are directly or indirectly controlled by a third person; or
>
> (c) together they directly or indirectly control a third person provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.
>
> For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter."[482]

Again, this definition literally follows the WTO agreements,[483] and it is also in line with commonly used standards for defining related parties in competition law, which are based on the "control" aspect.

EU producers importing the product concerned – Legal basis

The formulation in the basic Regulations – Article 4(1)(a) ADR and Article 9(1)(a) ASR – that producers related to exporters or importers or producers which are themselves importers of the product under consideration "may" be excluded from the Union industry closely follows the WTO agreements which state that "when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'domestic industry' *may* be interpreted as referring to the rest of the producers."[484] Again, therefore, the key question concerns practice: What are the criteria on the basis of which the Commission decides whether or not to exclude Union producers from the definition of the Union industry? Are these criteria transparent and applied consistently across cases?

Practice

According to information provided during consultations the Commission applies rule of reason to this question: the main consideration is whether production in the EU or imports constitute the core of the business. In its recent review in the *Magnesia bricks* case, the Commission applied the following criteria in determining that a Union producer with production facilities in China should be included in the definition of "Union industry":[485]

- The company's headquarters, shareholders and R&D centre were located in the EU.
- The company had five plants in the Union producing the product concerned, the production capacity in these plants had increased during the period in which TD measures were in force, and a significant portion of the company's investment had been committed to these plants.
- While the company had a joint venture in China involved in magnesia bricks production, the company had imported only one small shipment from China to the EU in the investigation period, as it is subject to the highest AD duty rate of 39.9 %.
- The impact of these sales on the company's total Union sales was insignificant.

While considerations concerning headquarters and R&D activities are consistent with applying an eclectic set of criteria to evaluate overall contribution of the firm's operations to the EU economy, it can be observed that the Commission's decision in this case would have been the same had it simply considered the imports from the firm's related enterprise in China. Accordingly, it does not provide a litmus test for the Commission's position in a case where the

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482 Article 4(2) ADR/Article 9(2) ASR.

483 Footnote 11 to Article 4.1 ADA, respectively Footnote 48 to Article 16.1 ASCM.

484 Article 4.1(i) ADA (emphasis added, footnote left out). Article 16.1 of the ASCM includes an equivalent clause.

485 See *Magnesia bricks* (AD483, R511), OJ L 166/1 (termination of expiry review), 25.06.2011.

firm might be importing substantial quantities of the final product from its off-shore plant, but nonetheless maintaining the majority of the value-added in the production chain in the EU.

Other considerations also play a role in the Commission's rule of reason approach, such as whether or not imports are used to complete the product portfolio or if they are used as a business strategy to cope with low-priced imports. This is consistent with practice by other TDI authorities. For example, Canadian practice provides explicit precedents for the exercise of these criteria. In Canada, the CITT considers the following factors:[486]

- whether the firm's domestic production of like goods constitutes the larger share of its sales;
- whether imports of subject goods were defensive in nature; and
- whether use of imports to round out its product line was a common practice in the industry.

Stakeholder views

Stakeholder views on this issue are divided. Associations that do not include importers tend not to want producers with related exporters to be included in the definition of the EU industry, at least where the import share is "significant." Some also argued that EU producers with related parties/importing business should be included only if they support a complaint. Conversely, associations with producer/importers as members tend to recognise that it is becoming more difficult to exclude these firms, given the trend towards global production strategies that EU firms are taking to remain competitive.

Member States' views are also divided. Some Member States expressed the strong view that the definition of the EU industry should be broadened. It was argued by these parties that conventional lines between producers and importers are not relevant in the current context of globalisation, where the response of EU businesses to global pressures called for offshore manufacturing, outsourcing and FDI in third countries. It was furthermore argued that the Commission's current way of defining the Union industry was random, and a clear-cut approach when and under which conditions to include a certain producer was lacking. In response, the following suggestion was made: The Union industry definition should not be confined to those firms (only) manufacturing in the EU but should include firms with global manufacturing and supply chains. These latter firms tended to be the most innovative and productive ones and should not be penalised by being excluded from the Union industry definition. Other Member States expressed the view that EU firms which have delocalised their production (or part thereof) should not be privileged over those which decided to maintain their production in the EU. It was suggested that the right to be heard should be guaranteed to all EU firms, regardless of the location of their production facilities, but that an opening up of the definition of the Union industry would carry the risk of undermining the use of TDI.

Conclusions/ recommendations

It is recommended that the Commission issue a statement of administrative practice setting out criteria for including or excluding EU producers from the Union industry definition in light of the globalisation of production chains. These criteria should draw heavily on existing practice in the EU and in peer countries. Specific criteria that would favour inclusion of a firm in the Union industry, notwithstanding its relationship with exporter or importer interests, would include:

- The company cooperates in the investigation.
- The company's headquarters, shareholders and significant activities such as R&D are located in the EU.
- The company has production facilities in the EU for (a) a significant portion of the line of products concerned (e.g., the high end of a product line); or (b) a significant portion of the inputs into the product(s) concerned which are exported and re-imported in finished form.

[486] See discussion of Canadian practice in *Producer Exclusions from the Domestic Industry due to Role as Importer* in appendix I3, at 54-57.

- The company has demonstrated commitment to its EU presence by investing in its EU operations.
- Where the company imports a part of the product line concerned, the business strategy is defensive in nature (e.g., the company is not a price leader in the product segment).
- The company's imports constitute a common practice in the industry to round out a product line to maintain customer relations.
- The majority of the firm's sales revenues in the EU are derived from EU-based production.
- More controversially, the Commission might consider including firms for which the majority of the *value-added* is from EU-based production, notwithstanding the formal origin of the goods based on the "substantial transformation" criterion. In the first instance, the Commission could take the forward-looking step of requesting EU value-added accounts from all firms involved in investigations, including the complainants, which might have adopted alternative defensive strategies of outsourcing production inputs while retaining final assembly in the EU. In the interests of fairness, the Commission could then evaluate the public interest without tilting the playing field in favour of one defensive strategy over another.

As regards the threat of retaliation by exporting countries, which may affect not only EU producers which are related to exporters of the product concerned but any EU producers which have any stake in the exporting country, including export interests to that country, it is recommended that the definition of related EU producers be widened to include firms whose business interests in the country of export are such as to constitute grounds for believing their behaviour in the investigation would be different from non-related producers. Specific criteria that could be applied in the first instance include:

- There is a history of firms requesting anonymity in respect of TDI actions in respect of the country concerned.
- There is prima facie evidence of tit-for-tat retaliatory behaviour by the country concerned (e.g., a pattern of launching of reciprocal investigations immediately following decisions to apply measures against that country either in the same product group or on an equivalent amount of exports).
- The producer has significant investments in the country concerned or exports a significant portion of its production to that country.
- There are indications of indirect pressure through the government of the domestic producer, e.g. through suppliers or clients of the EU producer.
- The identity of firms cannot be kept confidential due to concentrated industry structure.

5.1.1.4 Use of regional industry concept

Legal basis

Generally, under EU TDI the concept of "domestic industry" as defined in the WTO ADA is equated with the Union industry. However, the two basic Regulations determine that:

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

> and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such a market."[487]

This formulation literally follows Article 4.1(ii) of the WTO ADA.

Practice

In EU TD practice, the regional industry concept has not been applied during the evaluation period, nor in the five years before. In *Large rainbow trout* (AD466) exporting producers argued that the Finnish market constituted a separate market, but this was rejected by the Commission as the share of imports from other EU producers represented more than 12%.[488] This is consistent with decisions in other jurisdictions (e.g. in the Canadian case, *Solid Urea*, the CITT found that a regional market did not exist where 11.5% of the regional demand was satisfied from other Canadian regions[489]).

Conclusions/ recommendations

In view of the fact that the legal basis for the EU's use of the regional industry concept is in line with WTO rules and practice abroad, that stakeholders have not raised any comments, and that there is no practice to be evaluated in the evaluation period, the evaluation team has no recommendations.

5.1.2 Determination of Dumping

5.1.2.1 Calculation of normal value

Legal basis

Under WTO rules, normal value can be calculated using three different methods:

- "based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country"[490];
- constructing the normal value "on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits" [491]; or
- "on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative."[492]

While precedence is accorded to the first method, no ranking exists between the construction of normal value or the determination based on export prices to third countries.

Data can be sourced from three sources: (a) the exporter; (b) other sellers or producers in the country of export (for the first method); and (c) in the case of NMEs for exporters not having been granted MET, analogue country producers. Combining the three methods with the three data sources yields a matrix of possible combinations for the calculation of normal value, although not all options are in fact feasible. Table 41 sets out the feasible options.

487 Article 4(1)(b) ADR/Article 4(1)(b) ASR.
488 OJ L 72/23, 11.03.2004, at recital 31.
489 There is an extensive case history of applying the regional markets provision in Canada; see Appendix I3, pp 10-14.
490 Article 2(1) ADR.
491 Article 2(3) ADR.
492 Article 2(3) ADR.

Table 41: Methods and data sources for determining normal value

Data source	Domestic sales price in exporting country	Constructed normal value	Export price to third country
Exporter	x	x	(x)
Other sellers or producers in exporting country	(x)		
Analogue country producers (NME only)	x	x	x

Note: "(x)" indicates theoretically possible combination; "x" combination used in practice during the evaluation period.
Source: Developed by the evaluation team.

Practice

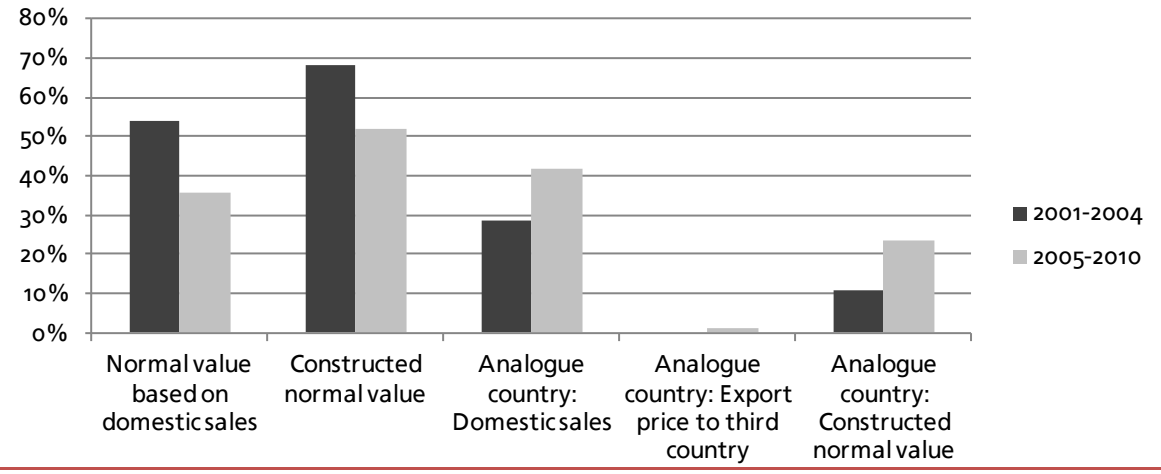
In practice, only four of these options are applied, i.e.:

- calculation of the normal value based on the exporter's domestic sales;
- constructed normal value;
- in case of NMEs, calculation of the normal value based on the domestic sales of an analogue country producer;
- in case of NMEs, constructed normal value of an analogue country producer;
- finally, in one NME case (Molybdenum wires, AD540), normal value was determined on the basis of export prices from the analogue country, the USA, to other third countries.[493]

Figure 25 shows the extent to which the Commission has used the various methods in AD investigations over the evaluation period and compares these results with earlier data from 2001 to 2004. It can be seen that the basic rule, i.e. determining normal value based on sales prices of the exporter in its domestic market, was actually only applied in 36% of cases in the evaluation period, less often than the method of constructed normal value, and less often than at the beginning of the decade. The increase in the evaluation period of cases where normal value was established by resorting to analogue countries simply reflects the increased share of cases against NMEs and the relatively rare granting of MET.

Prices of other sellers or producers have not been used at all, and export prices to third countries in only one NME case, as mentioned above. Both of these methods are considered to be unreliable – other exporters might not be comparable to the exporter in question, and exports to third countries might also be dumped.

Figure 25: Use of methods to determine normal value, AD cases 2001-2010



Note: Each exporting country counted as separate case. Data could be determined for a total of 152 country-cases. In each case, more than one method can be applied. Methods not applied are not shown.
Source: Provisional and definitive duty regulations, termination notices.

493 OJ L 336/16 (provisional), 18.12.2009, at recital 25.

Normal value based on domestic market prices

Representativeness
Normal value is determined based on domestic market prices only if sales on the domestic market are considered to be representative. For this, the general rule is that at least 5% of the exporter's output is sold on the home market, but the threshold can be lower if prices are still considered to be representative.[494] This rule is in line with the WTO ADA.[495] In practice, the Commission determines domestic sales by excluding captive sales (i.e., to a firm's affiliates) and sales to distributors that are not resold to final domestic customers or that are resold into export markets.

Ordinary course of trade
No comprehensive positive definition is provided in the ADR for what constitutes the "ordinary course of trade". However, the Regulation does provide a non-exhaustive list of transactions which are not in the ordinary course of trade, i.e.:

- sales at prices below total production cost;
- transactions between associated parties; and
- transactions between parties with a compensatory agreement in place between the two.

Sales at prices below total production cost
Sales are considered as not in the ordinary course of trade if they are transacted

> "at prices below unit production costs (fixed and variable) plus selling, general and administrative costs [...]if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time"[496]

An "extended period of time" is defined by the ADR as usually at least one year but in no case less than six months. The threshold for "substantial quantities" is met if the weighted average selling price is below the weighted average unit cost or if the volume of sales at loss constitutes at least 20% of sales; if sales below cost account for more than 20%, the Commission determines normal value based on profitable sales only, excluding the sales at below cost.

Under earlier practice, not stated in the Regulation but reported by the previous evaluation study (Stevenson 2005), if sales below cost accounted for more than 20% but less than 90%, the Commission would determine the normal value based on profitable sales only (excluding the sales at below cost), while, if sales below cost exceeded 90% of domestic sales, an alternative method for determining normal value would be used. Since 2009, and following the WTO Panel Report in *EC – Salmon (Norway)*[497], the 10% rule has been abandoned in practice.

Transactions between associated parties, compensatory agreements and other factors
Although the basic Regulation provides some guidance as to how "association of parties" is to be determined[498], in practice the Commission enjoys considerable discretion, not least because the "appearance" of association or compensatory agreements is sufficient for excluding such transactions from the determination of normal value. Nevertheless, despite this latitude, the Commission appears to have used the associated party clause rarely, and not at all during the evaluation period.

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494 Article 2(2) ADR.
495 Article 2.2 ADA, in particular Footnote 2.
496 Article 2(4) ADR.
497 See section 3.2.2.2.
498 Article 2(1) ADR refers to Article 143 of the implementing Regulation No. 2454/93 of 02 July 1993 for the Union Customs Code.

As regard compensatory agreements, no definition is provided in the basic Regulation, but this clause is used even less frequently; no single use could be determined over the course of the past ten years.

Particular market situation

A condition for determining normal value based in domestic sales is that these sales do not take place in a "particular market situation" [499]. The particular market situation clause can be invoked under various circumstances, "inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements". The concept was clarified when Russia was granted MES in 2002.[500]

To the knowledge of the evaluation team there is just one case during the evaluation period in which the particular market situation was discussed in connection with the choice of method for determining the normal value: in *Polyvinyl alcohol* (AD517), where the Union industry alleged that prices for the goods in question in Taiwan were artificially low and on those grounds normal value should not be based on domestic prices. The argument was however rejected by the Commission.[501]

The limited use of the "particular market situation" concept may be explained by the fact that it overlaps with the rules on non-market economies, ordinary course of trade, and below-cost pricing. Thus, barter trade is typically found in NMEs for which normal value is determined using the analogue country method. "Non-commercial processing arrangements" and "artificially low prices" are subsumed under the "ordinary course of trade" clause as far as they affect the exporter under investigation. In view of this, there is just a residual role for the "particular market situation" clause which could be applied in situations where domestic sales prices of the exporter are in the ordinary course of trade and profitable, and the latter despite an artificially low price level in the exporter's home market (which would have to be a market economy).

Other considerations

A factor that is not taken into consideration when determining normal value based on domestic sales prices in the exporting country is the structure in that market, i.e. it is implicitly assumed that there is competition in the market. However, exporters with domestic market power will charge prices above the competitive price in their home market, which will lead to an overestimation of normal value. At the same time, neither the basic regulation nor WTO rules require the Commission to consider the exporting country market structure when determining normal value (except for the "particular market situation" discussed above); likewise, the practice in the peer countries reviewed also does not take into account the possibility of market power in exporting countries. As discussed in chapter 2, dumping in theory is a case of third degree price discrimination. The very nature of price discrimination implies that the domestic market price must be above the competitive market equilibrium.

499 Article 2(3) ADR.

500 Council Regulation (EC) No 1972/2002 of 05 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community, OJ L 305/1, 07.11.2002.

501 OJ L 75/66 (termination), 18.03.2008, at recitals 27-32. However, in the partial interim review of *Ammonium Nitrate* (AD330, R411), the Commission determined SGA costs and profits for the exporter having requested the review in accordance with Article 2(3) ADR; see OJ L 185/1, 12.07.2008, at recital 36. This issue is the matter of an ongoing Court case, Case T-459/08 *Eurochem MCC v Council*.

Constructed normal value

Legal basis

In practice, as shown above, normal value is more often constructed than based on domestic market prices. The constructed normal value consists of three components:[502]

- the cost of production in the country of origin; plus
- a reasonable amount for selling, general and administrative (SGA) costs; plus
- a reasonable amount for profits.

Article 2(5) and 2(6) ADR provide rules for the determination of a constructed normal value, governing the information to be used in determining the amounts for costs and profits, the allocation of these elements to the product in question, and adjustments for particular situations such as start-up costs. Nevertheless, in practice the Commission has a considerable degree of discretionary power in determining SGA costs as well as in allocating costs to products.

Practice

Generally, provisional and definitive duty regulations do not provide details about how normal value is constructed; therefore, the assessment of this part of the investigation practice must be confined to some rather general statements, as follows.

Sources for constructing normal value and allocating costs

The general principle is that as far as possible the calculation of the cost shall be based on actual data taken from records kept by the exporter, provided that these are in accordance with "generally accepted accounting principles" (GAAP) and "it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration"[503]. If such data are not deemed appropriate, the Commission may adjust them (which it commonly does) or establish them

> "on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets"[504].

Likewise, the basic Regulation provides rules regarding the allocation of costs to the product under consideration but also leaves considerable space for discretion. The general rule is to base constructed value on the exporting producer's historically utilised cost allocations. Failing this, costs allocated to a product should be based on the product's share in the exporter's turnover. Nevertheless, discretionary power exists as "costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production"[505].

Cost of production

Based on exporting producer questionnaires it is observed that the Commission distinguishes between direct manufacturing costs (material, energy, depreciation, direct labour, packaging, and others) and indirect manufacturing costs (indirect labour, indirect energy, rent/lease, depreciation, maintenance and repairs, stock variations of work in progress, and others). This appears to be in line with standard practice, and indeed the calculation of manufacturing costs appears to be one of the less controversial components of the investigation (with the exception of potential adjustments to energy). Nevertheless, the allocation of non-recurring costs can involve very difficult judgements in respect of issues ranging from the allocation of interest expenses related to non-recurring transactions (and offsetting interest income from provisions

502 See Article 2(3) ADR.
503 Article 2(5) ADR.
504 Article 2(5) ADR.
505 Article 2(5) ADR.

related to such transactions) to pension liabilities and expenses related to bankruptcy of affiliated companies, as trade litigation has brought out.[506]

Selling, general and administrative costs and profits

Based on exporting producer questionnaires the Commission considers the following costs items as SGA costs: domestic and export insurance; export freight, handling and ancillary; domestic freight, handling and ancillary; indirect taxes, export duties and import charges; warranty and guarantee expenses; commissions; discounts and rebates; financing; administration; selling/advertising/ publicity; research and development; technical assistance; finally, exporters can also add other cost items which they consider to be SGA costs.

For the calculation of SGA costs, the ADR establishes the basic rules in Article 2(6). In line with the general principle, the basic method to be applied is to base SGA costs and profits "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".

The "ordinary course of trade" condition implies that sales at loss, sales to associated parties and sales under compensatory agreements are to be excluded. In practice, however, this does not always seem to be the case and the Commission simplifies the calculation by assigning SGA costs on a pro rata basis to the production of the like products.[507]

If a determination of SGA costs and profits based on the exporting producer's actual data is not possible, the ADR foresees three alternative methods:

- "the weighted average of the actual amounts determined for 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;
- the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin; and
- 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"[508].

The Commission has extensively used these methods during the evaluation period. The practice is that it first tries to use SGA costs and profits on the basis of the exporting producer's actual data and then it goes through the alternative methods in the order listed. The "any other reasonable method" is used as a last resort when all other methods cannot be used,[509] but in practice, this has in quite a few cases where normal value is constructed. Under the "other

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506 See, for example, the relevant discussion of panel reviews of the use of constructed value in four Canada-US cases discussed in the Canada case study in appendix I3.

507 See the analysis in Van Bael & Bellis (2011: 72-74).

508 Article 2(6)(a)-(c) ADR.

509 The order of preference of the three methods was confirmed in court case C-105/90 *Goldstar v Council*. The Court held that:

> "the three methods of calculating the constructed normal value [...] should be considered in the order in which they are set out. The profit margin must therefore be calculated primarily by reference to the profit realized by the producer on profitable sales of like products on the domestic market. Only if the data are unavailable, unreliable or not suitable for use is the profit margin to be calculated by reference to the profits realized by other producers on sales of the like product. In giving priority in that way the use of data relating to the individual producer concerned, the aforesaid Article [...]seeks to ensure that the constructed normal value corresponds as closely as possible to what the situation would have been if the producer had actually sold the product in question on the domestic market in sufficient quantities" (paras. 35-37).

methods" SGA costs and profits are often established based on producers in third countries or the EU.

Provisional and definitive duty regulations typically provide a justification for the choice of the method.

Conclusions/ recommendations

In sum, given the discretionary power which the Commission enjoys as well as the complexity of cost calculations, it is not surprising that the constructed value is among the more contentious issues during an investigation, and that the Commission is frequently confronted with claims by interested parties in this regard. Also, the construction of normal value is comparatively often the subject of court cases (see section 3.1). By the same token, this aspect of Commission practice has been subjected to intensive scrutiny. No evidence could be found that the Commission is using its discretionary power in a biased way.[510] In view of this, and the fact that the Commission provides justifications for the application of a given method, the present evaluation has no recommendations for changes in law or practice.

Third country price as normal value

The other alternative method for determining normal value is to look at the comparable price of the product when exported to an appropriate third country, provided that the price is representative, in the ordinary course of trade and above average total cost. In practice, this alternative plays no role as the Commission has always used the constructed normal value. In the evaluation period, in *Bicycles* (AD476) one Vietnamese exporter requested use of this method, but the request was rejected. The definitive duty regulation stated that:

> "it should be noted that the construction of normal values on the basis of the cost of production in the country of origin is the first alternative listed in Article 2(3) of the basic Regulation for cases where there are no domestic sales. The use of constructed normal value, instead of export prices to third countries, as the basis for the determination of normal value is also the consistent practice of the Community in the absence of representative domestic sales. It is also noted that the export sales to third countries could be equally dumped."[511]

Conclusions/ recommendations

Although it does not appear imperative to interpret the ordering of the two alternative methods as establishing a ranking between them, the Commission's argument that export sales to third countries might also be dumped, as well as administrative efficiency considerations (cost data must be provided and analysed as part of the investigations anyway), are valid reasons to give preference to the constructed normal value method.

Furthermore, the consistent practice of using the constructed normal value method contributes to the consistency of approach and predictability of investigations. The evaluation therefore supports the current practice and has no recommendations to make.

5.1.2.2 Calculation of export price

Legal basis

For the determination of the export price, Articles 2(8) and 2(9) ADR foresee the following methods:

- when the product is directly sold from the exporting country to independent customers in the European Union the export price is the price actually paid or payable for the product;

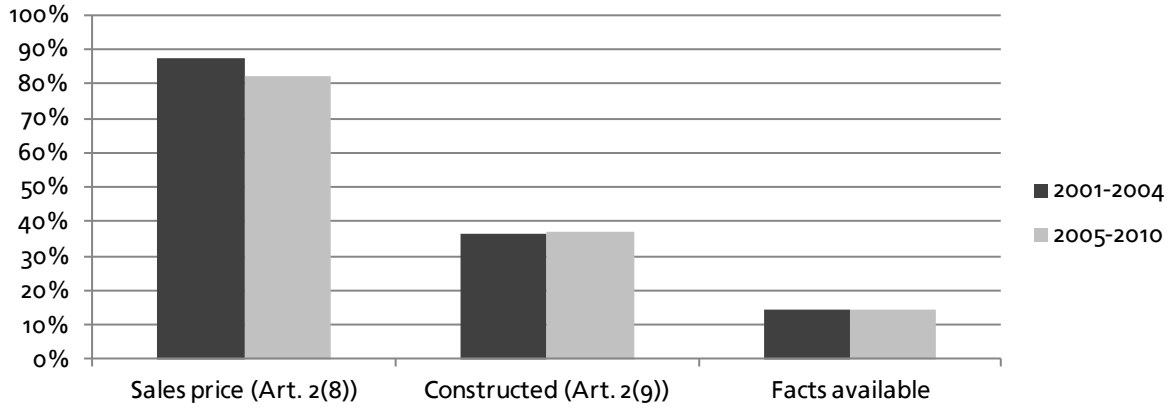
[510] See the discussion of EU Court cases in section 3.1 and appendix H1.
[511] OJ L 183/1, 14.07.2005, at recital 78.

- if the export transaction takes place between related parties, the export price will be constructed on the basis of the price at which the imported products are first resold to an independent buyer;
- if neither of the above two methods is feasible (e.g. in case of non-cooperation or if there are no sales to an independent buyer), the Commission may construct the export price on any reasonable basis.

Practice

There is a clear order of precedence between these methods, and this is regularly reflected in the provisional and definitive duty regulations, as well as in the frequency of use (Figure 26): in 85% of all cases, the export price is determined based on the methodology in Article 2(8) ADR (although this rate was slightly lower in the evaluation period compared to the first years of the decade), whereas it is constructed in only 37% of all cases, and facts available are used in 14% of all cases. Often, the first and second methods are simultaneously used in the same case, depending on how export transactions take place.

Figure 26: Use of alternative methods to determine export price, AD cases 2001-2010



Note: Each exporting country counted as separate case. Data could be determined for a total of 152 country-cases. In each case, more than one method can be applied.
Source: Provisional and definitive duty regulations, termination notices.

Determination of export price based on Article 2(8) ADR

The determination of the export price based on the price actually paid poses few conceptual issues. Specific issues that may arise under this method in certain circumstances, in particular in the context of reviews, are:

- the treatment of price floors which may distort the export prices actually paid; and
- the calculation of export prices for new exporters.

Determination of export prices in cases of price floors

Legal analysis

In the Case T-143/06 *MTZ Polyfilms v Council*, the Court ruled against the use of alternative third country export prices in case the EU export prices may have been affected by the existence of minimum price undertakings in review proceedings. The Court took the view that while prospective analysis is permitted in review proceedings, the measures need to comply with Article 2 ADR. It stated that:

> "41 […] it is not provided in Article 11(3) of that regulation that the Council has the power in an initial review to use, as it has done in the present case, a methodology for the determination of the export price which is incompatible with the requirements laid down in Article 2(8) and (9) of the Basic Regulation, by referring to the need to make a prospective assessment of the prices charged by the exporters concerned.

42 It is clear from Article 11(9) of the Basic Regulation that, as a general rule, in a review, the institutions are required to apply the same methodology, including the method of determining the export price under Article 2(8) and (9) of the Basic Regulation, as that used in the initial investigation which led to the imposition of the anti-dumping duty. The same provision contains an exception whereby the institutions may apply a methodology other than that used in the initial investigation only where the circumstances have changed, an exception which must however be interpreted strictly. Furthermore, it is clear from Article 11(9) of the Basic Regulation that the methodology applied must take account of the provisions of Articles 2 and 17 of the Basic Regulation.

43 Accordingly, in an interim review, just as in an initial investigation, the institutions are, as a general rule, required to determine the export price in accordance with the criteria established by Article 2 of the Basic Regulation.

[…]

48 It must be observed, in that regard, that the practical effect of Article 11(3) of the Basic Regulation is broadly ensured by the fact that when assessing the need to continue existing measures the institutions have a wide discretion, which includes the option of carrying out a prospective assessment of the pricing policy of the exporters concerned.

49 However, once the institutions have assessed that need and decided to amend the existing measures, they are bound, when determining the fresh measures, by the provision in Article 11(9) of the Basic Regulation which confers on them the express power and obligation to apply the methodology prescribed by Article 2 of that regulation."

The ruling of the Court of First Instance on this point seems in line with the WTO case law, where the WTO Appellate Body ruled in *USA – Corrosion-Resistant Steel Sunset Review* that, if investigating authorities choose to rely upon dumping margins in making their likelihood determination in sunset reviews, the calculation of these margins must conform to the disciplines of Article 2 in general and Article 2.4 in particular:

> "It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 1.3"[512]

Conclusions/ recommendations

Accordingly, it seems that in reviews (interim or sunset) the provisions of Article 2 ADR on the calculation of the dumping margin continue to apply and that the authorities cannot create divergent ad hoc methodologies for calculating dumping margins in reviews.

Furthermore, as stated in section 3.1.2.8 above, the Court also ruled that the EU institutions have a wide discretion in deciding whether to update the measures in an interim review (or whether to continue measures in an expiry review) and a prospective analysis of the pricing behaviour of the exporter may be carried out in determining whether there is a real need for change in the measures. At the same time, this appears to be an issue of practice rather than codification in the ADR, as the issue of prospective analysis is already possible under the current ADR rules.

Determination of export price based on Article 2(9) ADR – constructed export price

In constructing the export price, the Commission adjusts (deducts) all costs, including duties and taxes, incurred between importation and resale, and imputes a reasonable margin for SGA costs and profit. SGA costs are generally determined based on the actual costs incurred by the related importer, while profits are determined based on average or typical profits of unrelated importers. In the evaluation period, this method was used in 52% of the cases where the export price was constructed (Figure 27). In four additional cases (13%), SGA costs were determined based on the

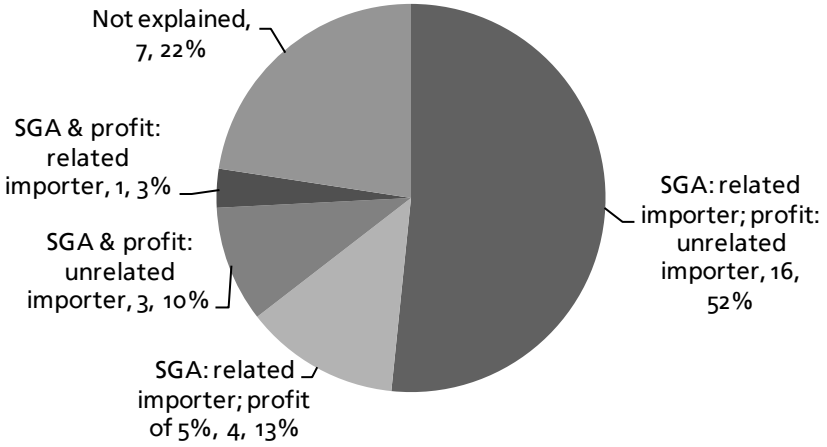
[512] At para 128.

actual costs incurred by the related importer but the profit was assumed to be 5% due to the lack of a better information source.

In several cases during the evaluation period, alternative approaches were taken. In one case, both SGA costs *and* profits were determined based on the related importer[513]; in two other instances, SGA costs and profits were determined based on unrelated importers[514]. The use of the related importer data is striking given that regulations typically refer to the unreliability of profits reported by related importers. It should be noted, however, that the existence of a relationship between the exporter and the importer does not automatically mean that export prices are unreliable. If export prices are in line with those to an unrelated importer, they can be used.

Finally, in seven cases (22%) no specific explanation regarding the method to determine SGA costs and profits was provided in the definitive of provisional duty regulations, or termination notices.

Figure 27: Use of sources to construct export price, AD cases 2005-2010 (number and % of cases)



Note: Total number of 31 cases which were identified as using Article 2(9) ADR method.
Source: Provisional and definitive duty regulations, termination notices.

Conclusions/ recommendations

The treatment of SGA costs and profits is a frequent area of contention, particularly with exporters who often disagree with Commission decisions. At the same time, conflicts regarding SGA costs and profits highly depend on the specifics of a case (and are often subject to confidentiality issues); therefore it is difficult to make specific recommendations. In any case, it is recommended that the Commission clearly presents the reasons whenever it does not apply the standard practice of determining SGA costs based on related importers and profits based on unrelated importers.

Determination of export price based on facts available

This method is used in approximately 15% of all cases, typically in case of non-cooperation. The most frequently used sources of information in these cases are Eurostat data, sometimes complemented with additional data, e.g. provided by importers; and the complaint documentation.[515] In cases where both cooperating and non-cooperating exporters coexist in the same case, export prices for the non-cooperating exporters are typically calculated based on those

513 *Tungsten electrodes* (AD502).
514 *Ironing boards* – Ukraine (AD506) and *Aluminium Foil* – Armenia and China (AD534).
515 *Tube and pipe fitting, of iron or steel* (AD442); *Pentaerythritol* (AD504).

transactions of cooperating exporters with the lowest export price[516] or the highest dumping margin[517] or dumping and injury margin[518].

5.1.2.3 Comparison of normal value and export price

Legal basis

The comparison between normal value and export price is guided by the principle of "fair comparison" which requires that the comparison is

> "made at the same level of trade and in respect of sales made at, as closely as possible, the same time and with due account taken of other differences which affect price comparability"[519].

In practice, the comparison is usually made at the ex-factory level, product by product. The ex-factory price is the price of a product at the moment that it leaves the factory. Costs incurred after that are deducted to the extent that they are included in the price.

As a result, adjustments to the normal value and/or export price are typically required. Article 2(10)(a)-(j) ADR provides a non-exhaustive list of such adjustments:

- physical characteristics;
- import charges and indirect taxes;
- discounts, rebates and quantities;
- level of trade;
- transport, insurance, handling, loading and ancillary costs;
- packing;
- credit;
- after-sales costs;
- commissions; and
- currency conversions.

Finally, under the ADR other adjustments can be made under Article 2(10)(k) which provides:

> "(k) Other factors
> An adjustment may also be made for differences in other factors not provided for under subparagraphs (a) to (j) if it is demonstrated that they affect price comparability as required under this paragraph, in particular that customers consistently pay different prices on the domestic market because of the difference in such factors."

An example of an issue which affects comparability and could be treated under Article 2(10)(k) ADR is that of export taxes. Article 2.4 of the WTO ADA provides:

> Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, *taxation*, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability" (emphasis added).

The fact that an export tax is only incurred in case of export sales and is not due by domestic customers will result in domestic customers paying different prices that are net of such export taxes.

Conclusions/ recommendations

The adjustments to be made depend very much on the specific conditions of the case (and, within the case, on the specific conditions of transactions). As such, it is difficult to derive any

516 *Okoumé plywood* (AD471).
517 *Monosodium glutamate* (AD521).
518 *Ferro-silicon* (AD516).
519 Article 2(10) ADR.

general findings from the observed practice of the Commission, especially because only very limited information about details of adjustments is made available in the regulations.[520] What can be observed, however, is that, like the treatment of SGA costs and profits for the purpose of constructing the export price, the adjustments to be made for comparison purposes are frequently disputed by exporters during investigations. Nevertheless, this is to be considered as a normal part of the investigation process – Article 2(10) ADR explicitly states that adjustments are to be made "for differences in factors which are claimed, and demonstrated, to affect prices and price comparability". In other words, while the Commission is bound by the principle of fair comparison, interested parties also must assume an active role and claim and demonstrate that factors for adjustments be considered for the comparison.

Adjustments in cases involving traders outside the EU

Legal analysis

Traders outside the EU can either be considered as agents of the exporter working on a commission basis or as an internal sales department. This decision may have an impact on how adjustments are made.

In EU case law, the Court of First Instance took the view in Case T-249/06 *Interpipe Niko Tube v Council* that no allowance could be made for sales commissions for a related company established in a third country as part of the export chain to the EU. The Court of First Instance took the view that in case of related companies forming a "single economic entity" the export prices should be established based on the prices paid by the first independent buyer from the affiliated distributor.[521]

A few days later, in its judgment of 18 March 2009 in *Shanghai Excell v Council*[522], the Court of First Instance dismissed the argument by the applicants that no deductions should have been made for sales commissions by related companies from the export price. The Court of First Instance in this case stated that:

> "281 Therefore, Article 2(10)(i) of the basic regulation allows an adjustment to be made not only for differences in commissions paid in respect of the sales under consideration, but also for the mark-up received by traders of the product if they carry out functions which are similar to those of an agent working on a commission basis.
>
> 282 It follows that the sole argument relied on by the applicants against the deduction made, namely that no commission was paid to the marketing companies which are related to them, is not such as to call into question the legality of that deduction, since a deduction may also be made if no commission has actually been paid but the traders in question carry out functions similar to those of an agent and receive a mark-up."

The essential point is that any adjustments made to the export price or normal value need to be necessarily assessed in view of the basic principle in Article 2(10) ADR that a fair comparison shall be made between the export price and normal value and that such comparison shall be made at the same level of trade. Different from the WTO ADA Article 2.4 – which provides that "[t]his comparison shall be made at the same level of trade, *normally at the ex-factory level*, and in respect of sales made at as nearly as possible the same time" (emphasis added) – the ADR does not contain an explicit reference that the comparison shall be made "normally at the ex-factory

520 A detailed summary and analysis of relevant case law can be found in Van Bael & Bellis (2011: 108-128).

521 For a more detailed summary of the judgment see section 3.1.2.5 below and appendix H1. The case is currently under appeal.

522 Also see the case summary in appendix H1.

level". The wording "normally" in the WTO ADA further suggests that such ex-factory comparison is not mandatory as it recognises exceptions may occur.[523]

Since it is not necessary to make the comparison at ex-factory level, the key issue in considering whether to make an adjustment to the export price for commissions paid to traders outside the EU is therefore whether this results in establishing the export price at the same level of trade as the normal value for a fair comparison.

Whether such an adjustment is appropriate depends on the facts of each case.

The judgment of the Court of First Instance in *Interpipe Niko Tube* is currently under appeal and it can be expected that the judgment of the Court of Justice will provide further clarification on the issue of the scope of application of the "single economic entity" approach with regard to the export price determination and allowances.

Exchange rates and exchange rate fluctuations

In addition to adjustments, the comparison of export prices and normal value may also require currency conversion, if the export sales are quoted in a different currency than domestic sales.[524] For example, domestic sales are typically priced in the local currency but export sales may be priced in the destination market currency; in this case of sales into the EU, this could be the euro or another EU Member State currency.

Legal basis

When the price comparison requires a conversion of currencies, the ADR stipulates that "such conversion shall be made using the *rate of exchange on the date of sale*, except when a sale of foreign currency on forward markets is directly linked to the export sale involved, in which case the rate of exchange in the forward sale shall be used." Accordingly, if the sales transaction is not linked to a currency hedge, the rate of exchange on the date of sale is to be used.

As regards the date of sale, the ADR further provides that "[n]ormally, the date of sale shall be the date of invoice but the date of contract, purchase order or order confirmation may be used if these more appropriately establish the material terms of sale"[525]. The Commission's consistent practice is to use exchange rates pertaining to the date of the invoice.

Practice

However, as regards the value of the exchange rate to applied, divergent practices can be observed. For example, in *Polyethylene terephthalate (PET)* (AD468), the Commission used "the monthly average exchange rate applicable to the month in which the sales invoice was issued"[526], whereas in *Graphite electrode systems* (AD469), "it was agreed to use the actual exchange rates prevailing at the date of invoice instead of the average monthly exchange rates pertaining to that date."[527]

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523 Article 2(10)(e) ADR provides that an "adjustment shall be made for differences in the directly related costs incurred for conveying the product concerned *from the premises of the exporter* to an independent buyer, where such costs are included in the prices charged" (emphasis added). The term "premises of the exporter" seems broader than ex-factory.

524 Note that exchange rate issues are dealt in the ADR as part of the comparison of normal value and export price (Article 2(10)(j)). However, implementing regulations often refer to exchange rate issues in the export price section.

525 Article 2(10)(j) ADR.

526 OJ L 271/1, 19.08.2004, at recital 13; the same approach was used in *Ferro-silicon* (AD516).

527 OJ L 295/10, 18.09.2004, at recital 11.

The divergence in practice is rooted in a further provision in Article 2.4.1 WTO ADA, which is repeated verbatim in relevant part in the ADR, which addresses exchange rate fluctuations and trends:

> "Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation."

However, the ADA does not define "fluctuations", nor does it indicate in what manner they are to be "ignored". Moreover, it does not provide guidance as to how to distinguish between changes that fall into the category of "fluctuation" and those that fall into "sustained movement", or the point in time from which the 60 day grace period is to be calculated, or by how much the export price is to be adjusted.

International practice

Authorities around the world have adopted different approaches in terms of giving meaning to the injunction to ignore "fluctuations". The EU, as noted, normally uses calendar month averages to represent the "rate of exchange on the date of sale." While this approach "ignores" fluctuations on a day-to-day basis, it does not "ignore" fluctuations on a month-to-month basis. Nor does it attempt to give meaning to the term "sustained movement" or to implement the 60-day grace period.

The United States by contrast normally applies actual daily rates but has developed a benchmark rate to serve as the reference point for implementing the injunction to ignore fluctuations, to reflect sustained movements and to provide the stipulated 60-day grace period.[528] The benchmark is a moving average of the actual daily exchange rates for the eight weeks immediately prior to the date of the transaction for which the currency conversion is to be made. Whenever the actual exchange rate on the transaction date varies from the benchmark rate by more than two-and-a-quarter percent, the actual daily rate is classified as "fluctuating"; if is within two-and-a-quarter percent, the actual daily rate is classified as "normal". Actual daily rates classified as normal serve as the official exchange rate for that day. However, when an actual daily rate is classified as fluctuating, the benchmark rate is the official rate for that day. To give meaning to the term "sustained movement", the US system provides for a "recognition period". Whenever the weekly average of actual daily rates exceeds the weekly average of benchmark rates by more than five percent for eight consecutive weeks (the recognition period), the exchange rate change is classified as a sustained movement. During the eight week recognition period, daily rates continued to be classified as normal or fluctuating and the benchmark rate is substituted for the actual daily rate when the latter is classified as "fluctuating". When there has been a sustained movement increasing the value of a foreign currency in relation to the dollar, respondents under investigation, but not review, are given 60 calendar days to "correct" their prices. The 60-calendar-day grace period begins on the first day after the recognition period. During that period, the official rate in effect on the last day of the recognition period will be the official rate in investigations.[529] On the 61st day, the US returns to comparing the actual daily rate to the benchmark rate. The WTO ADA does not distinguish between movements of the exchange rate up or down; but the United States has asserted that the requirement for export prices to reflect currency movements only applies in respect of an exchange rate appreciation and simply uses the benchmark system for currency depreciations (except in the case of large precipitous declines in which case it arbitrarily shifts to current daily rates).

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528 See Import Administration Policy Bulletin 96-1, "Import Administration Exchange Rate Methodology"; available at http://ia.ita.doc.gov/policy/index.html.

529 For reviews, the US continues to apply the eight-week average to determine whether daily rates are normal or fluctuating.

Evaluation team analysis

The evaluation team has a number of observations on these provisions. First, it is noteworthy that the United States in its first submission in *United States – Stainless Steel* characterised the rule as follows:

> "In our view, Article 2.4.1 relates to the selection of exchange rates to be used where currency conversions are required. It establishes a general rule – conversion should be made using the rate of exchange on the date of sale – and an exception to this general rule for sales on forward markets. It also establishes special rules in the case of fluctuations and sustained movements in exchange rates."[530]

Second, the currency conversion provisions in the WTO Agreement on Customs Valuation require use of the exchange rate in effect for current transactions and contain no provisions for averaging in case of fluctuations of exchange rates. Article 9 of that Agreement reads as follows:

> "Where the conversion of currency is necessary for the determination of the customs value, the rate of exchange to be used shall be that duly published by the competent authorities of the country of importation concerned and shall reflect as effectively as possible, in respect of the period covered by each such document of publication, the current value of such currency in commercial transactions in terms of the currency of the country of importation."

Accordingly, the preferred practice should be the use of exchange rates prevailing on the date when the terms of the transaction were set.

Third, the provisions concerning fluctuations/sustained movement/grace period/price correction in the ADA/ADR are not rooted in current institutional or commercial realities. They may, however, be readily understood in the framework of the fixed exchange rate system that prevailed during the Bretton Woods era. In that system, IMF Members established a par value for their currency and were required to intervene in currency markets to limit exchange rate fluctuations to within a fixed band of plus or minus one per cent above or below the par value. However, they retained the right, in accordance with agreed procedures set out under the IMF Articles of Agreement, to alter their par value for balance of payments reasons. Given a published par value for a currency, the injunction to ignore fluctuations makes perfect sense, as exporters would presumably quote sales in terms of the par value and fluctuations, which are defined by the band, can safely be ignored. Absent a par value and a stipulated intervention band, the injunction to ignore fluctuations has no meaning in terms of established institutions or commercial practice. Similarly, the grace period of 60 days for exporters to change their prices (which implies a discrete change) in response to a notified change in the par value of their currency makes perfect sense both in respect of timing (from the date of the change in par value) and in terms of the size of the "correction" (by the change in the par value). Absent such a reference point, however, the grace period and "correction" requirement also lack meaning in terms of established institutions or commercial practice. Finally, whereas in a par value system, the injunction to ignore fluctuations requires that small, commercially insignificant exchange rate movements be ignored, the use of monthly averages as by the EU or of a benchmark system as by the US results in large, commercially significant exchange rate movements being ignored.

The foregoing suggests that the provisions concerning fluctuations/sustained movement/grace period/price correction in the ADA, which were introduced in the WTO Agreement in 1995, long after the demise of the Bretton Woods system, appear to have drawn on prior history of par value systems. There is almost no secondary literature on these provisions; Kim (2000) is an exception in discussing some features of these provisions but does not call them into fundamental question.

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[530] United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea: Report of the Panel. WT/DS179/R, 22 December 2000. Evaluation by the Panel, at para. 6.129, p. 45.

Given the volatility of exchange rates, conversion is a major issue for trading firms, especially in cases where there is a significant lag between the date at which contractual commitments are made to produce a product for export and the date at which the invoice is issued and the payment is collected (exchange rates might be specified in a forward sale agreement). Firms that use imported intermediate inputs, which are increasingly important in value chains, typically face different exchange rates at times of sale of the product than at the time of acquisition of the inputs and so may face variation in profitability on contracted export sales as compared to contemporaneous domestic sales. Because of differing exchange rate policies of central banks, bilateral exchange rates behave differently depending on the bilateral pairing (e.g., a crawling peg against a basket of currencies will result in different observed degrees of fluctuation against the various currencies in the basket, depending on the weight assigned by the administering central bank). Accordingly, a variety of pricing practices are to be expected by firms given the heterogeneity of contexts in which their specific production and sales strategies are conducted. This may include, for example, passing through exchange rate changes fully in some markets while "pricing to market" in others, combined in the latter case with the use of hedges which may transfer exchange rate risk to financial institutions and which, by the same token, result in realised transactions prices that are very different than implied by the exchange rate prevailing on the date of invoice.

The issue of trade and exchange rates has recently been aired in the WTO context (the WTO has just released a staff paper surveying the literature; see Auboin and Ruta 2011); however, the specific issues pertaining to exchange rate fluctuations in TDI contexts has received no apparent attention. The draft ADA in the Doha Round apparently has not addressed this issue at all (Hindley 2008). This is an area which, in the view of the evaluation team, deserves greater attention.

Conclusions/ recommendations

To promote transparency and indeed to highlight the issues posed for trading firms by volatility in exchange rates and differing exchange rate regimes it is recommended that a statement of administrative practice regarding exchange rates be developed concerning the conditions under which the Commission would vary from the standard practice of using the market exchange rate on the date of the invoice. Variance from the standard approach could then be indicated in regulations by reference to the statement of administrative practice.

In the view of the evaluation team, it is only possible to simultaneously comply with the dual requirements of the ADA to use the prevailing market rate and to ignore fluctuations while also taking account of sustained movements by interpreting fluctuations in the sense that the United States model does, which is short-term movements that are larger than some arbitrary amount from a mean rate. The US benchmark approach is one option for "ignoring" fluctuations defined in this manner, but it suffers from the fact that fluctuations near the top or bottom of the chosen band can result in a small movement that takes the exchange rate just above (below) the band can be replaced by a larger movement in the opposite direction, down (up) to the benchmark rate calculated for that date.

Since there is no guidance as to how to interpret the relevant measures of the ADA, the EU has considerable latitude. However, the use of calendar month averages cannot easily be squared with the dual requirements and cannot be recommended, except in the absence of quoted daily rates, in which case the calendar month averages would constitute the best information available as a substitute for the daily rate. One straightforward option would be to adopt the US system or a variant thereof (e.g., the fluctuation band might be defined in terms of one standard deviation of movement around a stationary or trending mean rate rather than an arbitrary percentage, and fluctuations could be ignored by replacing values that are greater than one standard deviation

from the mean by the mean plus one standard deviation, rather than by the mean). An alternative would be to include in regulations a standard statistical analysis of the behaviour of the exchange rate in the period of investigation and to characterise it as stationary, trending or featuring a discontinuity, which could be interpreted as a "sustained movement". The development of a case history of reasonable practice would then permit the distillation of a method.

5.1.2.4 Calculation of dumping margin

Basic rule: weighted average-to-weighted average method or transaction-to-transaction method

Legal basis

According to the basic ADR, the Commission will usually apply the weighted average-to-weighted average method or the transaction-to-transaction method.[531] However, the regulation provides no guidance on which of the two methods is to be preferred.

Practice

In practice, the transaction-to-transaction method has never been applied. In several cases (prior to the evaluation period), the transaction-to-transaction method was considered but rejected by the Commission. In *Polyester staple fibres* (AD472), the Commission considered it:

> "because the average-to-average method did not reflect the full degree of dumping practiced [...]. A transaction-to-transaction comparison was, however, not possible, due to the fact that the number of the domestic and the export transactions was significantly different. Furthermore, no domestic transactions coinciding in time with export transactions could be found."[532]

In *Recordable Compact Discs* (AD439), the Commission responded as follows to an argument by the exporters that the transaction-to-transaction method should have been applied:

> "the Community does not use this methodology because the process of selecting individual transactions in order to make such a comparison is considered too impracticable and arbitrary, at least in cases such as this one, where thousands of export and domestic transactions existed."[533]

In *Seamless Pipes and Tubes – Romania* (AD358), the Commission was required, pursuant to a remand from the European Court of Justice, to explicitly consider this method on procedural grounds. The Commission nevertheless rejected the use of the transaction-to-transaction method because necessary conditions for its application were not met. The EU institutions noted:

> "A transaction by transaction comparison excludes by definition the use of averages (be it on the domestic sales side or on the export sales side). To be comparable, transactions can only be used if made on the same day, on both the domestic and the export side. Any deviation from this principle by using prices of transactions not made on the same day would be arbitrary. Only domestic and export sales relating to the same or a comparable product type can be used for a transaction by transaction comparison, otherwise the comparison cannot be valid. Domestic sales can only be used if they are in the ordinary course of trade. Domestic sales must be made in the ordinary course of trade in a quantity amounting to at least 5 % of the volume of the export transactions, in accordance with Article 2(2) of the basic Regulation. The identification of sales not made in the ordinary course of trade at the level of the transaction was made in accordance with Article 2(2) of the basic Regulation. Under the second symmetrical method, export prices cannot be compared to constructed normal values. Finally, it is considered that this method can only be representative if a sufficiently large volume of export transactions and domestic sales transactions are covered."[534]

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531 Article 2(11) ADR, first sentence.
532 OJ L 71/1, 17.03.2005, at recital 44.
533 OJ L 160/2, 18.06.2000, at recital 29.
534 OJ L 40/11, 12.02.2004, at recital 11. For a full exposition of the Commission's approach to the potential use of the transaction-to-transaction method in this case, see recitals 11-13.

Targeted dumping: weighted average-to-transaction method

Legal basis

Contrary to the first two methods, the weighted average-to-transaction method can only be applied under certain conditions, i.e.:

> "if there is a pattern of export prices which differs significantly among different purchasers, regions or time periods, and if the methods specified in the first sentence of this paragraph [i.e. the weighted average-to-weighted average method or the transaction-to-transaction method] would not reflect the full degree of dumping being practised"[535].

It is to be noted that a difference exists in the formulation of the weighted average-to-transaction method between the ADA and the ADR. While the ADA stipulates that a "normal value established on a weighted average basis may be compared to prices of individual export transactions"[536], the ADR states that "normal value established on a weighted average basis may be compared to prices of *all* individual export transactions to the Community"[537]. Hence, apparently the ADR grants less discretionary power to the Commission than the ADA would allow.

Practice

Nevertheless, in practice, when the conditions for applying the asymmetrical method are fulfilled – i.e. a pattern of export prices across type of customers, Member States or time periods can be shown – the Commission does not compare the weighted average normal value to *all* individual export transactions but applies zeroing by setting all negative dumping amounts to zero in the calculations. This practice has been confirmed by the EU Court of First Instance, which ruled:

> "100 The Court points out, as regards the asymmetrical method, that nothing in the wording of Article 2.4.2 of the 1994 Anti-dumping Code provides for a comparison of the weighted average normal value with all individual exports, which provides instead that that normal value 'may be compared to prices of individual export transactions'. The Appellate Body's reasoning, developed in connection with the first symmetrical method, is therefore not applicable to the asymmetrical method. On the contrary, that reasoning, which the Appellate Body based with emphasis on the word 'all', suggests rather the opposite: that in the context of the asymmetrical method, the authorities of the importing country may make a selection of the export transactions to be compared with the normal value.
>
> 101 This is moreover what Advocate General Jacobs suggests in his Opinion in Petrotub, paragraph 35 above (point 11). It is also what the Council argues in its defence, when it points out, in essence, that in the light of the wording of Article 2.4.2 of the 1994 Anti-dumping Code in relation to the asymmetrical method, the Community institutions could proceed in the context of this method in one of two ways: either by making a selection of individual export transactions to be compared with the weighted average normal value and, thereby, excluding entirely from that comparison certain exports (those not dumped) or by taking into account all the exports in that comparison, but subject to zeroing of the individual negative dumping margins, precisely in order to prevent those margins from masking the dumping practised elsewhere. The Council states that it is that second approach, which is less severe on the exporters, which was finally adopted by the institutions when Article 2.4.2 of the 1994 Anti-dumping Code was transposed into Community law. It explains that, as an expression of the choice not to exclude certain export transactions, the second sentence of Article 2(11) of the basic regulation provides, in relation to the asymmetrical method, that the weighted average normal value is 'compared to prices of all individual export transactions'.
>
> 102 The Court considers the Council's explanation to be correct."[538]

The Court also validated an alternative method which could have been adopted in the ADR, i.e. to exclude the transaction showing negative dumping from the calculation altogether.[539]

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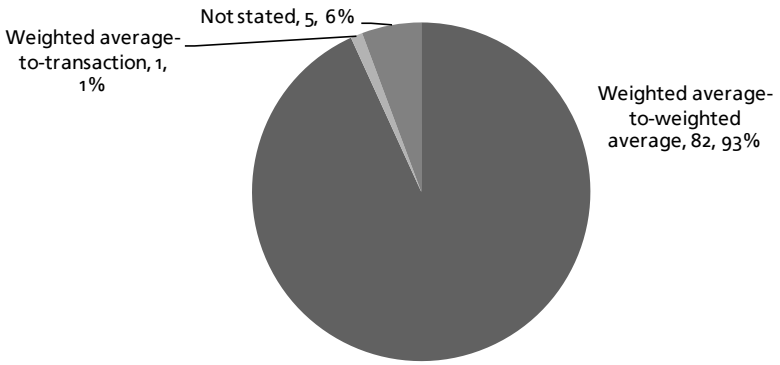
535 Article 2(11) ADR, second sentence.
536 Article 2.4.2 ADA.
537 Article 2(11) ADR, emphasis added.
538 CFI judgment of 24 October 2006 in Case T-274/02 *Ritek and Prodisc Technology v Council*.
539 See also case T-167/07 *Far Eastern New Century Corp v Council*, judgment of General Court of 13 April 2011.

It remains to be assessed in which situations the Commission may use the asymmetrical method. Indeed, in practice, the Commission has used it only in exceptional circumstances (Figure 28): over the evaluation period, out of 83 new investigations for which information is available, only one case could be found where the asymmetrical method was used: *Side-by-side refrigerators* (AD 493).[540] In five other cases, the regulations failed to state the methods applied.

Figure 28: Use of alternative methods to calculate the dumping margin, AD cases 2005-2010 (original investigations)



Note: Each exporting country counted as separate case; total number of cases: 88.
Source: Provisional and definitive duty regulations, termination notices.

In addition, in the partial interim and expiry review of *Polyethylene terephthalate (PET)* (AD425, R380a), a pattern of targeted dumping was found with respect to one exporter from Taiwan, and the asymmetrical method was used accordingly.[541]

In view of the above analysis, the evaluation team considers that the EU's methodology and applied practice for the calculation of the dumping margin is appropriate.

Conclusions/ recommendations

5.1.2.5 Zeroing

Apart from zeroing in the weighted average-to-transaction method described above, the Commission has not used zeroing in the evaluation period.

Given the rulings of the WTO DSB, which have consistently rejected the use of different types of zeroing (Vermulst and Ikenson 2007), as well as the ECJ's 2007 ruling against the use of model zeroing[542] it is recommended that the Commission not change this practice.

Conclusions/ recommendations

5.1.2.6 Sampling[543]

Legal basis

According to the ADR:

> "In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the

[540] Likewise, there was only one case over the period 2001-2004, i.e. *Recordable CDRs* (AD439).
[541] OJ L 59/1, 27.02.2007, at recital 67. Also see judgment of the General Court of 13 April 2011 in Case T-167/07, *Far Eastern New Century v Council*.
[542] Case C-351/04 Judgment ECJ 2007-09-27 *Ikea Wholesale*. See more detailed analysis in section 3.1.2.2 and appendix H1.
[543] Sampling is not only done in AD investigations but in the same way also in AS investigations.

time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available"[544]

Thus, according to the two basic Regulations, sampling can be applied to five dimensions: complainants, exporters, importers, types of product, or transactions.

Recommendation

In one respect, practice differs from the provisions of two basic Regulations: sampling is not applied to complainants but to Union producers. As this approach is considered more appropriate than the sampling of complainants it is recommended that the relevant articles in the two basic Regulations[545] be amended by replacing "complainants" with "Union producers".

Practice

Sampling of exporters is by far the most important application of sampling in terms of the effect it has on the interested party (but not in terms of the number of cases in which it is applied; see below in this section). If an exporter is included in the sample, an individual dumping margin will be calculated. For non-sampled exporting producers the weighted average of the dumping margins of sampled exporters will apply.[546] Non-dumping exporters and non-cooperating firms are excluded from calculating the sample average (but not from the sample). Hence, being included in a sample may be to the disadvantage of the exporter if the individual dumping margin is above the weighted average of dumping margins.

In this respect, it should be noted that the ASCM does not foresee sampling of exporters as the ADA does (it provides for sampling only in the context of determining the level support for a complaint). If punitive rates are set for non-cooperation, this can lead to a perception of unfairness in cases where there is a large number of exporters. This issue arose in the recent *Aluminum Extrusions* case in Canada. The Government of China argued in that case that it was unreasonable to require 261 exporters to respond to Requests for Information. By choosing not to sample for this subsidy investigation, the CBSA set up an investigation process, that in the view of the Government of China, ensured the imposition of punitive (i.e., non-cooperative) subsidy rates on the majority of exporters. The Canadian authorities rejected the Government of China's arguments.[547]

Conclusion/ recommendation

As the EU has applied sampling in all cases with a "large" number of companies it is recommended that this practice continue to be consistently applied in the future, although it is not mandatory according to the two basic Regulations.

Sampling methodology

The notice of initiation usually[548] states that sampling is intended, and invites exporting producers, Union producers and importers to make themselves known and provide answers to some basic questions (Table 42), within a period of 15 days.[549]

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544 Article 17(1) ADR; Article 27(1) ASR provides for the same.

545 I.e. Article 17(1) ADR and Article 27(1) ASR.

546 Article 9(6) ADR. Article 15(3) ASR provides for the same, *mutatis mutandis*.

547 *Aluminum Extrusions from China* – CBSA, Statement of Reasons: Final Determination, File No. 4214-22, Case No. AD/1379 and File No. 4218-26, Case No. CV/124, March 3, 2009, at paras. 334-336.

548 In the evaluation period, in only six cases the notice of initiation did not envisage sampling: *Side-by-side refrigerators* (AD493), *Manganese dioxides* (AD520), *Sodium metal* (AD535, AS536), *Ring binder mechanisms* (AD538), and *Cargo Scanning Systems* (AD539).

549 After the end of the evaluation period the Commission changed its practice. For Union producers the basic questions are no longer included in the Notice of Initiation but in the sampling/standing form before initiation. The Notice of Initiation rather announces that a sample of Union producers has provisionally been selected and that details can be found in the file for inspection by interested parties. The reason for this change in practice is

Table 42: Standard questions to interested parties for the selection of the sample

Exporting producers	Importer	Union producers
▪ name, address, e-mail address, telephone and fax numbers and contact person	▪ name, address, e-mail address, telephone and fax numbers and contact person	▪ name, address, e-mail address, telephone and fax numbers and contact person
▪ value and volume of the product under investigation sold for export to the EU in the investigation period ▪ value and volume of the product under investigation sold on the domestic market in the investigation period	▪ value and volume of imports into the EU from the country concerned of the product under investigation in the investigation period	▪ value and volume of the product under investigation sold on the EU market in the investigation period ▪ volume of production of the product under investigation in the investigation period ▪ volume of imports into the EU of the product under investigation in the investigation period
▪ precise activities of the company worldwide with regard to the product under investigation	▪ precise activities of the company with regard to the product under investigation	▪ precise activities of the company worldwide with regard to the product under investigation
▪ names and precise activities of all related companies involved in the production and/or sales of the product under investigation	▪ names and precise activities of all related companies involved in the production and/or sales of the product under investigation	▪ names and precise activities of all related companies involved in the production and/or sales of the product under investigation
▪ any other information which might be relevant for sample selection	▪ any other information which might be relevant for sample selection	▪ any other information which might be relevant for sample selection

Source: Notices of initiation.

Based on the level of responses the Commission then decides if sampling is required. The key criterion for sample selection is the volume of exports to, respectively sales in, the EU. This means that the Commission favours the second option provided for in the two basic Regulations, i.e. it limits the investigation "to the largest representative volume of production, sales or exports", whereas the first option, "using samples which are statistically valid" is not used. This is lamentable from an economist's point of view. When the WTO ADA was developed (on which the provisions on sampling in the two basic Regulations are based), the economics profession worked in terms of a "representative firm" model – industries were assumed to be homogenous in technology and thus in costs. Modern heterogeneous firm theory and empirics shows that firms are highly skewed in terms of all performance factors.[550]

Conclusions/ recommendations

The selection of samples based on the "largest representative volume" is one area where AD practices (globally) have not kept up with the empirical evidence on firms in international trade: variances across firms are not currently considered.

It is recommended that DG Trade commission a research study on the implications of firm-level heterogeneity for the indicators applied in investigations. Sampling based on empirically validated distributions could be expected to have rather significantly different implications for what is "representative" than a selection based on largest volume. In that case, sampling based on largest volume could still be used as it is explicitly allowed by WTO rules (and by the two basic Regulations), but use of true representative sampling would then be favourable. At the same time,

to avoid duplication of work when requesting the same information from Union producers once for standing and once for sampling and thus to streamline the procedure.

[550] The heterogeneous firm trade literature emphasises that firm populations follow the Pareto distribution (i.e., tend to be highly skewed) in terms of measures such as their size, the number of foreign markets they serve, the number of products they sell, etc.

the evaluation team notes that, in view of the current WTO rules, a unilateral change of the sampling methodology would entail risk being challenged before the WTO DSB, as the notion of "samples which are statistically valid" is open to interpretation.

Sampling practice

There is no fixed level of the number of parties which requires sampling to be applied; this will depend both on the complexity of the case and the workload of the Trade Defence Directorate's investigation teams.

Statistical analysis

This information is consistent with an analysis of the use of sampling in the evaluation period which showed that the average number of companies sampled was between six and seven for EU producers and exporters, and four for importers (Table 43). Sampling was applied only to Union producers (in 32% of all cases), exporters (22%) and importers (16%). Sampling of transactions or product types was only used in one case during the evaluation period (a new exporter review).[551]

Table 43: Use of sampling in EU AD/AS investigations, cases initiated 2005-2010

	Union industry	Exporters	Importers
Number of cases in which sampling was used	41	29	21
Share of cases in which sampling was used (% of total number of cases)	32%	22%	16%
Minimum size of sample (number of companies)	3	3	2
Maximum size of sample (number of companies)	14	20	7
Typical number of companies in sample	5	4 and 6	5
Average number of companies in sample	6.7	6.3	4

Total number of cases: 130.
Source: Provisional and definitive duty regulations, termination notices.

Individual examination

Legal basis

According to the two basic Regulations, exporters not selected in the sample can request that an individual dumping (respectively subsidy) calculation be made for them. The Commission will do so provided that the exporter has submitted all necessary information within the standard time limits and the number of exporters requesting individual examination is not "so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time".[552]

Practice

Of the 29 cases in the evaluation period in which sampling of exporters was applied, in 15 completed cases at least one exporter requested individual examination; the total number of requests identified is 47. The majority of these requests (38) was rejected, however, primarily because an individual examination was considered to be too burdensome (in seven cases affecting

551 The case was a new exporter review concerning *Ironing Boards* (AD506/R473) where:
"The applicant requested to limit the dumping calculations to the transactions referring to its three main related parties, selling in the Netherlands, the United Kingdom and Belgium, that represented a major proportion of its sales in the Union. In view of the high total number of related sales parties and the time constraints in concluding the investigation it is considered appropriate to base findings on dumping on the aforesaid main markets of the applicant in the Union" (OJ L 24/1, 28.01.2010, at recital 40).
In two other cases sampling of transactions/product types was used more than ten years ago: *Certain seamless pipes and tubes of iron or non-alloy steel* (AD358) and *Hairbrushes* (AD412); see Van Bael & Bellis (2011: 85) for more details.

552 Article 17(3) ADR/Article 27(3) ASR.

35 exporters). Other reasons for rejecting a request were that the exporter did not produce the product concerned[553], did not export to the EU[554] or did not cooperate.[555]

Conclusions/ recommendations

Modern trade theory recognises firm-level heterogeneity and thus supports providing individual exporter treatment to the extent administratively feasible. The evaluation team recognises that the EU's criteria for rejecting individual exporter examination are in line with WTO rules and that, in the instances where requests for individual exporter treatment were refused, the decision appeared to be justified – e.g., because of the number of requests made or because the exporters had many production locations. Consistent with current practice, it is recommended that, where administratively feasible, individual exporter treatment continue to be provided, if requested.

5.1.2.7 Non-market economies, market economy treatment and individual treatment

Legal basis

The concept of NMEs goes back to GATT Article VI.1.[556] At the same time, WTO rules do not specify in detail how members' AD regimes should address NMEs. The issue is thus one of the areas where WTO members have substantial policy space. A discussion of the approaches to this issue in the peer countries is provided in chapter 4.

EU law distinguishes between two types of NMEs: those where strictly the analogue country method applies and those where the analogue country method applies but where individual exporters can ask for MET. The ADR provides a list of countries under each group:

- Group 1: NME countries without possibility of MET: Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan and Uzbekistan;[557]
- Group 2: NME countries with possibility of MET: Kazakhstan, PR of China, Vietnam and "any non-market economy country which is a member of the WTO at the initiation of the investigation."[558]

Countries currently considered as NMEs

Nevertheless, even at the time of adopting the Regulation the above lists were misleading, as some of the countries listed under group 1 had meanwhile acceded to the WTO and are therefore to be treated under group 2. As of the end of 2010, the composition of the two groups is as follows:

- Group 1: Azerbaijan, Belarus, North Korea, Tajikistan, Turkmenistan and Uzbekistan. None of these countries is a member of the WTO;
- Group 2: Albania (WTO member since 08.09.2000), Armenia (since 05.02.2003), Georgia (since 14.06.2000), Kyrgyzstan (28.12.1998), Moldova (26.07.2001), Mongolia (29.01.1997), PR of China (11.12.2001), Vietnam (11.01.2007), as well as Kazakhstan (not a member of the WTO).

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553 *Fasteners* (AD525).
554 *Polyester Staple Fibres*, Taiwan (AD509).
555 *Stainless steel cold-rolled flat products*, Taiwan (AD527).
556 Note 2 to Art. VI.1 in Annex I of the GATT specifies that
> "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."
557 Footnote to Article 2(7)(a) ADR.
558 Article 2(7)(b) ADR.

Country-wide market economy status

Six of the above countries have applied to be granted Market Economy Status (MES): Armenia, Belarus, China, Kazakhstan, Mongolia and Vietnam. In order to be granted MES, a country must fulfil five conditions which are derived from the list in Article 2(7) ADR:[559]

- low degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly (e.g. public bodies);
- absence of state-induced distortions in the operation of enterprises linked to privatisation and the use of non-market trading or compensation system;
- existence and implementation of a transparent and non-discriminatory company law which ensures adequate corporate governance (application of international accounting standards, protection of shareholders, public availability of accurate company information);
- existence and implementation of a coherent, effective and transparent set of laws which ensure the respect of property rights and the operation of a functioning bankruptcy regime;
- existence of a genuine financial sector which operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision.

Given the often far-reaching and deep reforms required by individual economies to meet market economy criteria, typically a considerable time elapses between the application for such status and the granting of it. China applied in 2003, Kazakhstan, Mongolia and Vietnam applied in 2004, Armenia in 2005, and Belarus in 2009. So far, only two countries, Russia in 2002 and the Ukraine in December 2005, were granted MES.

For some NMEs which have acceded to the WTO, accession protocols establish a date when MES will be granted at the latest. This means that, as far as AD cases are concerned, China will presumptively be considered as a market economy at the latest from 11 December 2016, and Vietnam from 01 January 2019.[560]

Frequency of cases involving NME

Statistical analysis

During the evaluation period, 48% of all 116 AD cases initiated were against NMEs. Over the past decade, the number of cases against NME has increased (Figure 29), largely as a result of cases against China.

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[559] It should be noted that the regulation itself does not address the issue of how to determine the country wide MES. However, detailed information on criteria and procedure is provided in the Commission Staff Working Document on Progress by the People's Republic of China towards Graduation to Market Economy Status, SEC(2008)2503 final, 19.09.2008, available at: http://register.consilium.europa.eu/pdf/en/08/st13/st13409.en08.pdf.

[560] China's accession protocol states that:

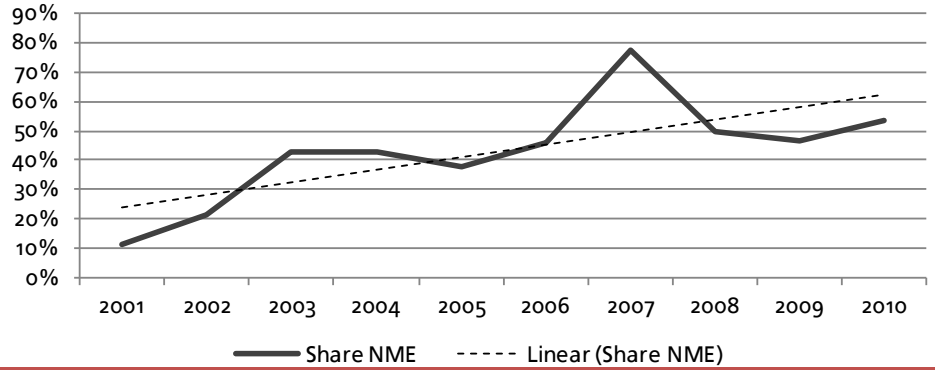
> "The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product" (section 15(a)(ii)).

Section 15(d) furthermore provides that:

> "Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession."

The equivalent provisions are contained in Vietnam's protocol of accession to the WTO. There is currently a discussion going on whether the above provisions indeed constitute the obligation for WTO Members to grant MES to China and Vietnam at the end of the respective transition periods.

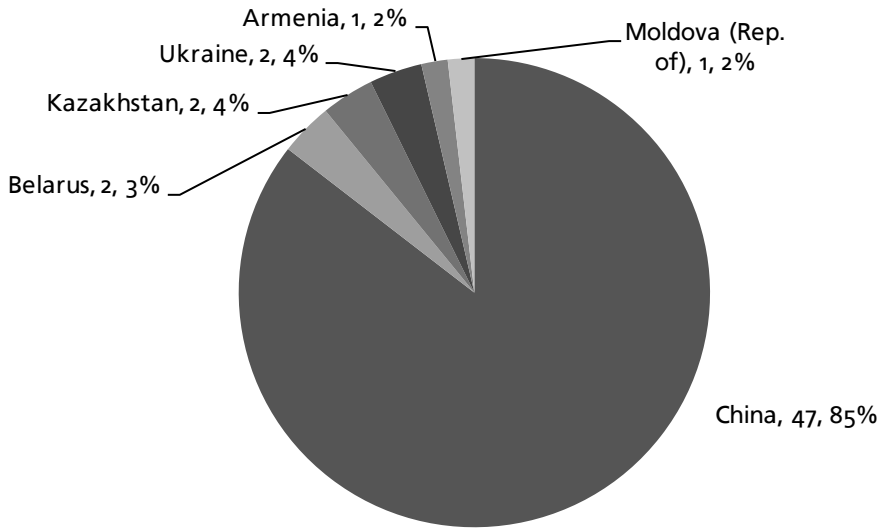
Figure 29: Share of AD cases against NMEs in total AD cases, per year of initiation, 2001-2010



Source: Authors' calculations based on notices of initiation, definitive duty regulations and termination notices.

The vast majority of NME AD cases initiated in the evaluation period, 47 (or 85%), were against China (Figure 30). The concentration on China in the evaluation period was stronger than at the beginning of the decade, not least because the group of NMEs has been reduced after the granting of MES to Russia and the Ukraine.[561]

Figure 30: Cases against NMEs, 2005-2010 (number and % of cases)



Total no. of cases: 56

Source: Authors' calculations based on notices of initiation, definitive duty regulations and termination notices.

Choice of the analogue country

Although WTO rules provide no guidance for the methodology to be applied for the calculation of normal value in NME countries, the EU, like other countries, currently applies the analogue country method. One of the key decisions to be made in NME cases is the selection of a market economy third country, the so-called "analogue country", based on which normal value is calculated. It is obvious that the choice of the analogue country can have a major impact on the determination of the normal value. For example, if a country with a higher domestic price level (or where producer costs are higher) is selected, normal value and, hence, dumping margins will be inflated.

The ADR provides that the

Legal basis

[561] The high share of cases against China is determined by the complaints made by EU industries.

> "appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used."[562]

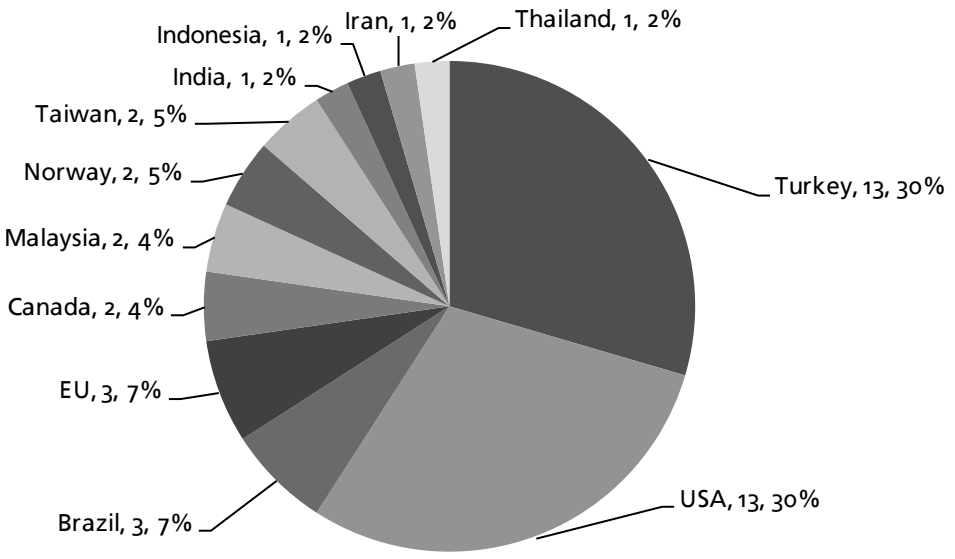
Practice

When submitting a complaint against an NME country, complainants suggest an analogue country. They thus enjoy a "first mover advantage" and it is therefore particularly interesting to see to what extent the Commission follows the initial proposal. In this regard, during the evaluation period in 26 (59%) of 44 NME AD cases for which data could be obtained, the analogue country finally chosen was identical to the one initially proposed in the complaint; it must be stressed, however, that in nine of these cases no alternative analogue country was proposed and there was thus at least tacit agreement among interested parties about the choice of the analogue country.

In 27 cases, interested parties suggested alternative analogue countries during the investigations; in seven of these cases the recommendation was actually taken up and led to a change in the analogue country, corresponding to a 26% probability of "success" of such alternative proposals.

By far the most frequently chosen analogue countries finally chosen are the USA and Turkey (Figure 31). Taken together, they were selected in 60% of all NME cases over the evaluation period.

Figure 31: Analogue countries chosen, 2005-2010 (number and % of country-cases)



Total no. of cases: 44

Source: Authors' calculations based on notices of initiation, definitive duty regulations and termination notices.

Stakeholder views

In the stakeholder consultations, EU producers have stated that they consider the current method of treatment of NME countries, including the choice of the analogue country, as appropriate. Conversely, importers stated that at least in some NME cases the choice of the analogue country was done in such a way as to inflate normal value (i.e. countries with high cost structures were selected), leading to situations where the normal price was so high that almost every producer would be judged to be dumping.

Nevertheless, overall the Commission appears to be guided in its choice of the analogue country primarily by pragmatic concerns. Non-cooperation of analogue country producers is a fairly

[562] Article 2(7)(a) ADR.

frequent problem and often limits the choice considerably; in certain cases even EU data had to be used.[563] Other criteria which have been applied for choosing the analogue country include:[564]

- sufficiently large size of the domestic market and representative volume of domestic sales;
- similarity of production processes and technologies, and the scale of production;
- similarity of product features;
- existence of international competition (i.e. low level of protection) and/or domestic competitive pressure to ensure that domestic prices reflect market forces[565]; and
- comparability of access to raw materials.

Some of these factors have been applied with the explicit desire to avoid choosing an analogue country which would lead to an inflated dumping margin. Others (such as a representative level of domestic sales) reflect the conditions established by the basic Regulation for the determination of normal value.

Conclusions/ recommendations

In sum, a structural bias in the choice of the analogue country cannot be detected. It is nevertheless recommended to establish a clear and publicly available definition and ranking of the above listed criteria to be applied for the choice of the analogue country in order to increase coherence and consistency of practice, and increase transparency of the choice of the analogue country. For example, assuming that cooperation exists from producers in various countries (which would be the very first criterion for the analogue country selection), the following criteria could be applied, by order of priority:

1. The dumping margin can be established based on analogue country domestic sales (i.e. there is a clear preference to use actual sales data over constructed values);
2. Production processes and technologies, and the scale of production are similar to the NME country;
3. Features of products produced by the analogue country producer are similar to the ones producer by NME country exporters;
4. Existence of international competition (i.e. low level of protection) and/or domestic competitive pressure.

Market economy treatment (MET)

Of particular interest in NME cases, not least given the importance of cases involving China, is the possibility for individual exporters in group 2 countries to apply for MET.[566] If an exporter is granted MET by the Commission, its dumping margin will not be determined based on analogue country data but the exporter's actual domestic sales, constructed value or exports to third countries might be used.

Legal basis

For MET to be granted, an exporter must fulfil all of the following five criteria:[567]

- Criterion 1: it must make entrepreneurial decisions (e.g. regarding prices, costs and inputs, output, sales and investment), in response to market signals and without significant State interference, and costs of major inputs substantially reflect market values;

563 E.g. in *Ironing Boards* (China, AD506) the USA was initially proposed. As no producer cooperated, Turkish and Ukrainian producers were approached but neither of these cooperated, so that in the end the calculation was based on EU producer data.

564 This list is based on Van Bael & Bellis (2011: 149-154).

565 It is interesting to note that the degree of domestic competition is not a factor considered for the determination of normal value in market economies, as stated above.

566 The importance of MET is bound to drop considerably at the latest by December 2016 when the use of the analogue country methodology will no longer be applicable for China.

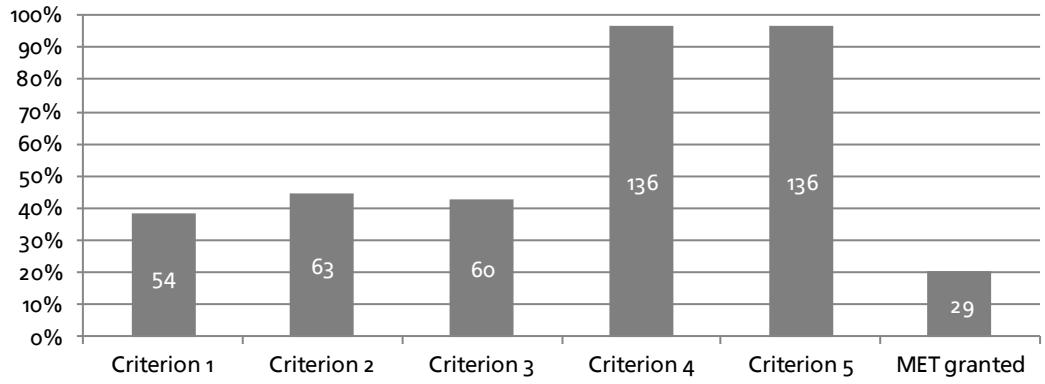
567 See Article 2(7)(c) ADR.

- Criterion 2: it must have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;
- Criterion 3: its production costs and financial situation must not be subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts;
- Criterion 4: it must be subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms; and
- Criterion 5: it must carry out exchange rate conversions at the market rate.

The burden of proof for each of these criteria rests with the applicant, while at the same time, given the often political nature of decisions to be taken and the scope for interpretation, in particular with criterion 1, the Commission has wide discretion in its decisions. However, in this regard the Court of First Instance made an important decision in Case T-498/04 *Zhejiang Xinan Chemical Industrial Group v Council* (which is currently under appeal). The case concerned the AD proceeding with regard to glyphosate originating in China (AD349) which after an expiry/interim review had resulted in the contested Council Regulation (EC) No 1683/2004 of 24 September 2004 imposing definitive duties. The applicant was a Chinese exporter that had been denied MET in the proceeding.

The judgment of the Court of First Instance draws an important distinction between "state control" and "significant state interference". It suggests that state controlled companies should not automatically be denied MET and requires a change in practice in certain cases. It must be demonstrated that the commercial decisions of the producers – even if state controlled – have been distorted by significant state interference. Furthermore, the CFI denied the EU institutions any wide discretion in MET determinations.[568]

Figure 32: Success rate of MET applications, by criterion, 2005 to 2010



Note: Total number of applications received over the period was 163. 22 companies either withdrew the application subsequently or did not cooperate.
Source: Provisional and definitive duty regulations

Practice

It remains to be seen if this judgment changes the Commission's current practice, which has approved only a minority of MET applications (Figure 32 and Table 44): only 29 exporting producers (21%) out of 141 which submitted applications (and subsequently cooperated) over the evaluation period were granted MET. While criteria 4 and 5 were met in almost all cases during the period (and indeed, although being mentioned as criteria, are no longer even discussed

568 Further analysis of the case is presented in section 3.1.2.6 and appendix H1.

in most regulations)[569], the first three criteria constitute significant hurdles for applicants; these are also the criteria where the Commission has the widest discretion.

Table 44: MET applications by country, AD cases initiated 2005-2010

Exporting country	No. of companies whose MET applications were investigated	No. of companies granted MET
Armenia	1	0
China	129	27
Kazakhstan	1	1
Moldova	1	0
Ukraine	1	1
Vietnam	8	0
Total	**141**	**29**

Source: Provisional and definitive duty regulations

Effect of MET on duty level

MET usually leads to the finding of substantially lower dumping margins and lower duties payable – in the evaluation period, the average MET duty rate ranged from zero to 52.9% of the all others duty (Table 45). Put differently, the "MET rebate" on duties ranged from 47.1% to 100%. Exporters therefore have an incentive to apply for MET.

Table 45: Effect of MET on level of duty, cases initiated 2005-2010

Case no.	Year	Number of companies granted MET	Simple average duties of companies granted MET	Duties of cooperating non sampled exporters	All others duty	Average MET duty rate as % of all other duty rate
AD497	2005	7	8.8%	8.4%	28.8%	30.6%
AD502	2005	1	17.0%		63.5%	26.8%
AD505	2006	1	0.0%		189.37 EUR/t	0.0%
AD506	2006	1	0.0%		38.1%	0.0%
AD508	2006	2	2.9%		29.6%	9.8%
AD511	2006	2	12.3%		71.8%	17.1%
AD516	2006	1	15.6%		31.2%	50.0%
AD519	2006	2	12.2%	51.6%	77.6%	15.7%
AD522	2007	2	7.5%		42.7%	17.4%
AD528	2008	2	0.0%	346 EUR/t fuel	549 EUR/t fuel	0.0%
AD544	2009	1	5.6%		79.2%	7.1%
AD547	2009	1	0.0%	5.3%	9.8%	0.0%
AD549	2009	1	7.3%		13.8%	52.9%

Note: The table lists all NME cases in which MET was granted to at least some applicants and both an individual MET and an all others duty was imposed.
Source: Provisional and definitive duty regulations

Relation between subsidies and market economy treatment

Legal analysis

At first sight, there may seem to be a potential overlap between the issues of subsidies and MET. For example, the existence of significant subsidies could be interpreted as a sign of "significant State interference" within the meaning of Article 2(7)c ADR which provides that:

> "decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals

[569] Criteria 4 and 5 were not met by applicants in two cases. In *Footwear with uppers of leather* (AD499), four Chinese exporters having requested MET did not provided sufficient information to prove that they met the two criteria. In Wire rod (AD530) the Commission concluded for the Moldovan exporter:

> "Regarding criterion 4, concerning the legal certainty and stability of operations, it was found that the company does not for the most comply with the Moldovan legal framework. Finally, it was also found that the company operates, inter alia, in a currency not internationally recognised and whose exchange rate is not freely set in response to market signals (criterion 5)" (OJ L 38/3, 07.02.2009, at recital 32)

reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values"

Further, certain continuing subsidies could be considered within the context of the third criterion for MET which provides that:

"the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts"

Hence, depending on the type of the subsidy it would be considered under criterion 1 or 3.

In practice, the Commission addresses subsidies in the MET context only if they are unusually high and distort market signals. For example, in *Fasteners, iron or steel* (AD525) the Commission denied MET to some Chinese exporters because of highly subsidised steel.[570] However, given the lack of a clear-cut definition of how to define "unusually high" or "market distorting" this leaves room for considerable discretion.

In EU case law, the issue of subsidies was considered by the Court of First Instance in the Case T-35/01 *Shanghai Teraoka Electronic Co. Ltd. v Council* where the Court took the view that:

"87 […] Whilst it is true that subsidies are also granted in market economies, they are always a factor which is external to the market and represent State interference which may steer the conduct of undertakings in a direction different from that which would have been dictated by market forces. Even though the amount of the subsidies in question is small in comparison to the applicant's overall turnover in those two years, it does appear to be significant when compared with the very small, occasional profits made on the Chinese market."

However, the WTO ASCM provides for the appropriate remedies to be applied to subsidies in international trade and distinguishes between actionable and non-actionable subsidies and therefore could be argued to preclude other sanctions, such as denial of market economy treatment in AD proceedings. In particular, the WTO ASCM provides that:

"No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement"[571].

Conclusions/ recommendations

The WTO ASCM explicitly states that no specific action against the subsidy of another WTO member can be taken except under the provision of the ASCM. Furthermore, the use of the AD instrument in response to subsidies – for which the instrument has not been designed – also raises concerns regarding the adequacy of the instrument.

It is therefore recommended to address the issue of subsidies on the basis of the WTO ASCM and the EU ASR rather than on the basis of the provisions on dumping and NME status.

Individual treatment

Legal basis

For NMEs, the Commission will normally calculate a country-wide duty, except for exporters having been granted MET and, according to the "individual treatment" (IT) provisions in Article 9(5) ADR, exporting producers that can show that all of the following conditions apply:

a) in case it is wholly or partly foreign owned, the exporter is free to repatriate capital and profits;
b) export prices and quantities, and conditions and terms of sale are freely determined;
c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be

570 OJ L 29/1, 31.01.2009, at recitals 60ff.
571 Article 32.1 ASCM.

demonstrated that the company is nonetheless sufficiently independent from State interference;

d) exchange rate conversions are carried out at the market rate; and
e) state interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

Practice

In practice, exporters that apply for MET also routinely apply for IT as a "second best" option, whereas it is rare for exporters to apply only for IT (only 15 exporters did so during the evaluation period). With regard to the number of applications, China was by far the most important country (Table 46).

Table 46: IT applications by country, AD cases initiated 2005-2010

Exporting country	No. of companies whose IT applications were investigated	No. of companies granted IT
Armenia	1	1
China	113	64
Moldova	1	0
Vietnam	8	0
Total	**123**	**65**

Source: Provisional and definitive duty regulations

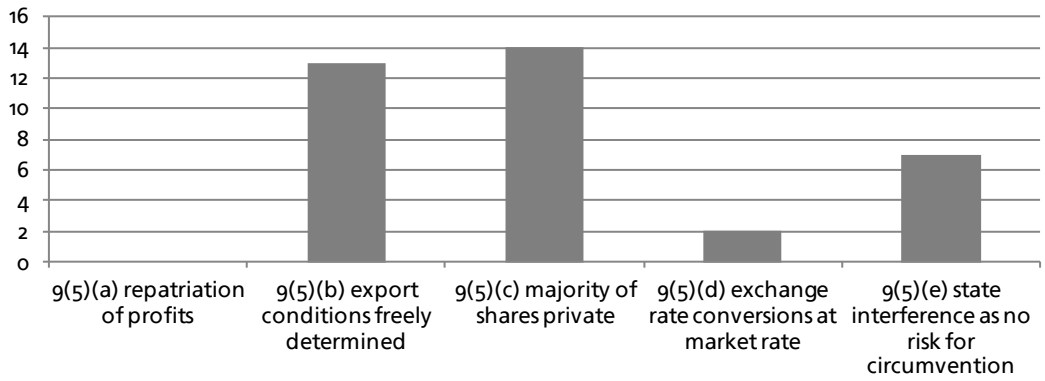
The success rate of applications for IT in the evaluation period was substantially higher than for MET – on average, 53% of all application led to IT, with the probability of success increasing over time (Table 47). Among the criteria which led to IT claims being rejected, state ownership (criterion c) and state interference in export decisions (criterion b) were the most important ones (Figure 33).

Table 47: Success rate of IT applications by country, 2005-2010

	2005	2006	2007	2008	2009	2010	Total
IT applications investigated	25	28	24	18	12	16	123
IT applications granted	3	9	18	14	7	14	63
Success rate	12%	32%	75%	78%	58%	88%	53%

Note: "IT applications investigated" excludes cases of non-cooperation.
Source: Provisional and definitive duty regulations

Figure 33: Reasons for unsuccessful IT applications, 2005 to 2010



Source: Provisional and definitive duty regulations

Effect of IT on duty level

Like MET, IT usually leads to lower duties payable. However, the average "IT rebate" on duties is substantially lower than that of MET – individual duty levels ranged from 32.9% to 100% of the all others duty (Table 48).

Table 48: Effect of IT on level of duty, cases initiated 2005-2010

Case no.	Year	Number of companies granted IT	Lowest duty of a company granted IT	Highest duty of a company granted IT	Simple average duties of companies granted IT	Duties of cooperating non sampled exporters	All others duty	Average IT duty rate as % of all other duty rate
AD491	2005	1			27.1%		47.4%	57.2%
AD502	2005	2	38.8%	41.0%	39.9%		63.5%	62.8%
AD505	2006	1			69.73 EUR/t		189.37 EUR/t	36.8%
AD506	2006	4	18.1%	36.5%	27.3%		38.1%	71.7%
AD516	2006	1			29.0%		31.2%	92.9%
AD519	2006	3	67.4%	77.6%	72.5%	51.6%	77.6%	93.4%
AD521	2007	2	33.8%	36.5%	35.2%		39.7%	88.5%
AD522	2007	5	32.6%	42.7%	37.7%		42.7%	88.2%
AD524	2007	3	361.4 EUR/t	531.2 EUR/t	446.3 EUR/t	499.6 EUR/t	531.2 EUR/t	84.0%
AD525	2007	8	0.0%	79.5%	39.8%	77.5%	85.0%	46.8%
AD528	2008	5	0.0%	367 EUR/t fuel	184 EUR/t fuel	346 EUR/t fuel	549 EUR/t fuel	33.5%
AD529	2008	2	0.0%	31.1%	15.6%		46.2%	33.7%
AD530	2008	1			7.9%		24.0%	32.9%
AD533	2008	1			17.7%	27.2%	39.2%	45.2%
AD534	2008	4	6.4%	24.2%	15.3%		30.0%	51.0%
AD541	2009	3			22.3%		22.3%	100.0%
AD544	2009	1			51.1%		79.2%	64.5%
AD547	2009	2	0.0%	9.8%	4.9%	5.3%	9.8%	50.0%
AD552	2010	2	8.0%	35.1%	21.6%		27.1%	79.5%
AD558	2010	3	48.4%	62.9%	55.7%	57.7%	62.9%	88.5%
AD560	2010	3	26.3%	36.5%	31.4%	30.6%	69.7%	45.1%
AD565	2010	3	48.3%	71.9%	60.1%	56.9%	71.9%	83.6%

Note: The table lists all NME cases in which IT was granted to at least some applicants and both an individual and an all others duty was imposed.
Source: Provisional and definitive duty regulations

Following the WTO Panel and Appellate Body reports regarding "as such" issues in DS397 *Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, China v European Communities*, the EU's IT rules and practice will have to be amended or abolished. A detailed discussion of the legal issues raised in the case and the evaluation team's recommendations are presented in section 3.2.2.3.

Conclusions/ recommendations

On the basis of the foregoing analysis and in addition to the recommendations on details made, there appears to be a need to reconsider the concept of NME treatment in general, and this for the following reasons:

- NME treatment in practice currently affects mainly AD cases against China and, to a limited extent, Vietnam. However, in the view of the evaluation team, according to the WTO Accession Protocols of these two countries China will have to be recognised as a market economy from late 2016 and Vietnam from 2019;
- two of the five criteria for MET listed in the basic Regulation (criteria 4 and 5) in practice have been fulfilled by all applicants. The fifth criterion requires that "exchange rate conversions are carried out at the market rate." Despite the recent public criticism by the USA and IMF on the China exchange rate policy not reflecting fair market values, this seems not to have been an issue so far in EU MET determinations;
- the Court of First Instance has set a much higher threshold for the concept of "significant State interference" (criterion 1) in Case T-498/04 *Zhejiang Xinan Chemical Industrial Group v Council*[572];
- the recent WTO Appellate Body report in DS397 *Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, China v European Communities*, has determined that the IT rules and practice violate WTO rules;
- MET/IT claims and the corresponding investigations are resource and time consuming.

572 This judgment is currently under appeal, so further clarification by the Court of Justice is awaited on this issue.

It is therefore recommended that the EU reassess whether the objectives of the NME system are met or could be obtained through other means and methods. The practices of Australia, which has granted China market economy status and utilises the "particular market situation" provisions to address cases where domestic Chinese prices may be distorted, and Canada, which applies market treatment as the default but has used the latitude in its system to successfully apply non-market treatment where warranted, are worth examining as the EU considers its next steps.

5.1.3 Determination of Subsidisation

In the evaluation period, only four AS investigations were completed against six countries, addressing a total of 44 different support schemes.[573] The findings in the present evaluation regarding the EU's practice in determining subsidisation are thus based on a small number of cases.

Countervailable subsidies are defined in Article 3 and 4 ASR by reference to three criteria, namely as (1) a financial contribution by the government in the country of export or origin (2) which confers a benefit upon the recipient and (3) which is specific. These three aspects are discussed in the following sub-sections.

5.1.3.1 Determination of financial contribution by the government

Legal basis

A "financial contribution by the government" is broadly defined in the ASR[574] and can take various forms, including:

- a direct transfer of funds (for example, grants, loans, equity infusion), potential direct transfers of funds or liabilities (for example, loan guarantees);
- government revenue that is otherwise due is forgone or not collected (for example, fiscal incentives such as tax credits). Excluded are exemptions of exported products from domestic duties and taxes (such as VAT) and proper duty drawback systems;
- goods or services other than general infrastructure provided by the government, or purchases of goods by the government;
- government payments to a funding mechanism,
- government direction to a private body to carry out functions normally undertaken by the government;[575]
- any form of income or price support.

The definitions of "government"[576] and "financial contribution" in the ASR follow almost literally the corresponding definitions in Article 1.1(a) of the WTO ASCM. In practice, the determination of what constitutes "government" or a "public body" is sometimes not straightforward,[577] although this does not seem to have been an issue in the EU during the evaluation period.

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573 *Biodiesel* (AS532) – USA; *Polyethylene terephthalate* (AS546) – Iran, Pakistan, UAE; *Stainless steel bars* (AS556) – India; and *Coated fine paper* (AS557) – China.

574 Article 3(1) ASR.

575 For the factors playing a role in the determination of "direction", see the discussion of *EC – Countervailing Measures on DRAM Chips* (Korea, DS299) in section 3.2.2.1 below.

576 Article 2(b) ASR.

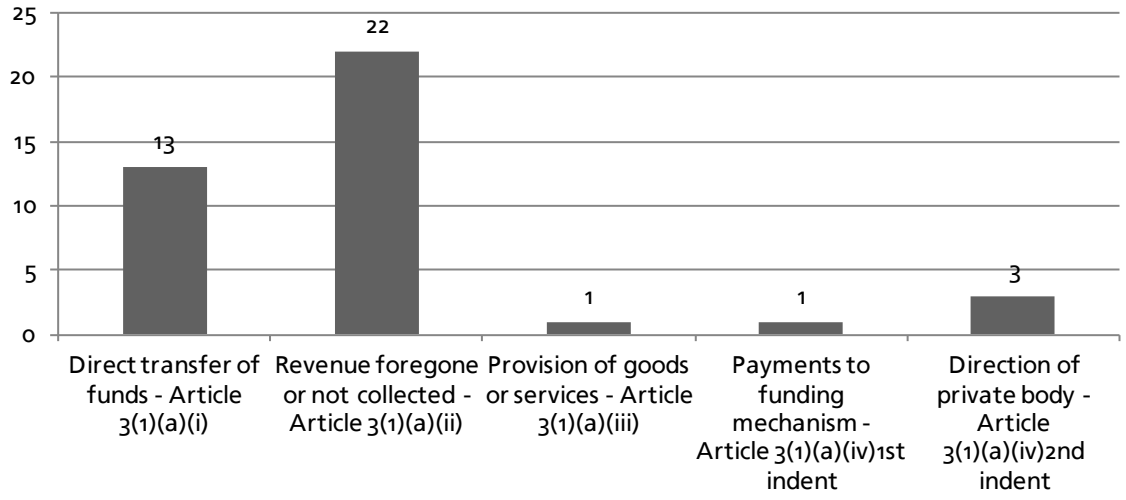
577 In *USA – Anti-Dumping and Countervailing Duties (China*, DS379), the Appellate Body stated that a "public body" is an entity that "possesses, exercises or is vested with governmental authority". The determination of the existence of a "public body" must take into consideration "the core features of the entity concerned, and its relationship with government in the narrow sense." Therefore, "[e]vidence that an entity is, in fact, exercising

Practice

During the evaluation period, of the six types of financial contributions, government revenue that is otherwise forgone or not collected (typically tax exemptions) was the most often found subsidy (Figure 34), followed by direct transfers of funds. Other types of financial contribution are rarely identified, and income or price support has not been identified at all. Regarding the direction of private bodies to provide direct funds (under Article 3(1)(a)(iv), second indent, ASR), in *Stainless steel bars* (AS556) the Commission clarified the meaning of "financial contribution" by stating that:

> "it should be noted that neither Article 3(1)(a)(iv) of the basic Regulation nor the Agreement on Subsidies and Countervailing Measures require a charge on the public accounts, e.g. reimbursement of the commercial banks by the GOI, to establish a subsidy, but only government direction to carry out functions illustrated in points (i), (ii) or (iii) of Article 3(1)(a) of the basic Regulation. The RBI is a public body and falls therefore under the definition of 'government' as set out in Article 2(b) of the basic Regulation."[578]

Figure 34: Types of financial contributions, EU AS cases initiated 2005-2010



Source: Provisional and definitive duty regulations; total number of schemes in which financial contribution was assessed: 40.

Conclusions/ recommendations

The evaluation team has not identified any issues in the Commission's determination of financial contribution. Likewise, stakeholders did not voice any particular views on this issue. Therefore, the Commission's practice in this respect is considered appropriate.

5.1.3.2 Determination of benefit

Legal basis

According to the ASR, the financial contribution by the government must confer a benefit upon the recipient to be considered a subsidy.[579] This requirement of "conferring a benefit" is a literal transposition of the ASCM (Article 1.1(b)).

Practice

In practice, the extent to which a financial contribution entails a benefit for the recipient is not often discussed in regulations. In most cases where support schemes are provided in the form of

governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice." By contrast, "the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority" (Appellate Body report, paras. 317 and 318). Also, an evaluation of whether Chinese SOEs are "public bodies" relying on ownership alone does not meet the investigation standard set forth by the Appellate Body.

578 OJ L 343/57, 29.12.2010, at recital 84.

579 Article 3(2) ASR.

direct transfers of funds or revenue foregone, the benefit for the recipients is fairly obvious, i.e. a reduction in costs.

Among the AS cases investigated during the evaluation period, for three support schemes, no benefit was found despite a financial contribution being made by the Government. In two of these schemes, the benefits were found to accrue to consumers rather than the exporting producers, and one scheme was not in place during the investigation period, hence not providing any benefit in that period.[580]

Conclusions/ recommendations

Apart from the limited extent of discussion in regulations of the determination of benefit, the evaluation team has not identified any issues regarding the determination of benefit. Thus, no recommendation is made regarding the determination of benefit by the Commission.

5.1.3.3 Determination of specificity

Specificity is defined in Articles 4(2)-(4) ASR. A subsidy is considered to be "specific" if:

- it is contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance;
- it is contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods; or
- when access to such subsidy is limited to certain enterprises.

In the latter respect, specificity is not to be found where objective criteria or conditions govern the eligibility for, and the amount of, a subsidy, and the eligibility is automatic if the criteria and conditions are strictly fulfilled. Such "objective criteria or conditions" are understood to mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise. A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority is considered to be specific. However, the setting or changing of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy.

Like the other definitional aspects, the definition of specificity in the ASR follows the corresponding definition in WTO ASCM almost literally: Article 4(2) ASR corresponds to Article 2.1 ASCM, Article 4(3) ASR to Article 2.2 ASCM, and Article 4(4) ASR to Article 3.1 ASCM.

Practice

The most frequent type of specific subsidies found by the Commission were those limited to certain enterprises in line with Article 4(2) ASR. The finding of specificity here ranges from support schemes available only to one company[581], those available on a sector or geographical basis, to those available to a seemingly very wide range of companies. For example, in *PET* (AS546), eligibility for duty free imports of raw materials, packaging materials and capital goods was restricted to companies with a license under the Federal Law No. 1 of 1979 in the UAE. The Commission rejected claims that the scheme was horizontal[582] and not specific because some of the conditions for obtaining a license were not objective.[583]

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580 All of these three support schemes concerned *Biodiesel* (AS532). See OJ L 67/50 (provisional), 12.03.2009, at recitals 84-86, 97 and 134.

581 E.g. *PET* (AS546) – Iran, financing to the sole exporter by the National Petrochemical Company, which was also the main shareholder of the exporter consisted in liquidity injections and other transfers not available to other companies; see OJ L 134/25 (provisional), 01.06.2010, at recitals 45ff.

582 Note that the meaning of "horizontal" in an industrial policy sense is not favouring one industry or activity over another. As practiced under TDI, however, it has no specific industrial policy meaning. For example, if a tax

In *Coated Fine Paper* (AS557), so far the only case against an NME in the understanding of the ADR, the Commission found a range of support schemes to be specific where eligibility was restricted to "encouraged" enterprises or industries. It should be noted, however, that due to lack of cooperation the Commission's findings were based on facts available, which primarily consisted in an interpretation of Chinese laws regulating the various support schemes, finding specificity whenever access to a scheme was restricted to certain enterprises or industries.[584]

Prohibited subsidies in the sense of the WTO ASCM, i.e. those addressed in Article 4(3) ASR were relatively rarely found by the Commission in the evaluation period: 12 subsidy schemes out of 44 were found to be contingent upon export performance, while none was found to be contingent upon the use of domestic over imported goods.[585] The export subsidies identified by the Commission mainly related to tax incentives and similar schemes which were not considered to comply with the requirements for permissible duty drawback schemes.

Conclusions/ recommendations

The evaluation team considers that the Commission's methodology for and practice of determining specificity is appropriate.

5.1.3.4 Calculation of subsidy

Investigation period

Legal basis

The general rules for calculating the subsidy margin are laid down in Articles 5-7 ASR. The basic rule is that the subsidy is calculated in terms of the benefit conferred to the recipient during the investigation period, not the financial contribution. The investigation period for subsidisation

> "shall be the most recent accounting year of the beneficiary, but may be any other period of at least six months prior to the initiation of the investigation for which reliable financial and other relevant data are available"[586].

Practice

In practice, during the evaluation period the investigation period always was one year, in all but one cases ending at the end of the quarter prior to the initiation of the investigation.[587]

Calculation of benefit

Legal basis

The rules for the calculation of the benefit in Article 6 ASR are a literal transposition of Article 14 ASCM. However, they add further rules on how to determine benefit in the case where the government provides goods or services, or purchases goods, in situations where there are no prevailing market terms and conditions in the exporting country.[588]

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break is provided to foreign-invested enterprises it is specific in the TDI sense but is available across all industries and has no obvious implications for industrial strategy. In this sense TD practice is not consistent with the spirit of industrial policy. It goes without saying that TD practice is thoroughly inconsistent with economic theory in ignoring subsidies as appropriate responses to externalities and other market failures, which ought to be highly specific but are not market distorting.

583 OJ L 254/10, 29.09.2010, at recitals 84ff.

584 OJ L 128/18, 14.05.2011.

585 In *PET* (AS546) – Pakistan, one scheme (Tariff protection on purchases of PTA in the domestic market) was considered as a countervailable import substitution subsidy in the provisional duty regulation (OJ L 134/25, 01.06.2010, at recitals 93-105), but as the scheme was terminated by the Government of Pakistan it was excluded from the definitive subsidy margin calculation (OJ L 254/10, 29.09.2010, at recitals 57-62).

586 Article 5 ASR.

587 The one exceptional case was *Purified terephthalic acid and its salts* (AS551), where the investigation period ran from 01 December 2008 to 30 November 2009. No justification was given for the choice of this period. The case was terminated.

588 Article 6(d) ASR.

Practice

These rules could be particularly important when dealing with NMEs in the understanding of the ADR. Thus, in *Coated fine paper* (AS557) from China, the Commission resorted to Article 6(d)(ii) for determining a benchmark for land-use rights, and chose land prices in Taiwan as the benchmark.[589]

In the same case, a similar method was also applied to calculate the benefit of preferential loans in the absence of a market benchmark.[590]

This practice was confirmed in *USA – Anti-Dumping and Countervailing Duties (China, DS379)*, where the Appellate Body held that:

> "an investigating authority may reject in-country private prices if it reaches the conclusion that these are too distorted due to the predominant participation of the government as a supplier in the market, thus rendering the comparison required under Article 14(d) of the SCM Agreement circular. It is, therefore, price distortion that would allow an investigating authority to reject in-country private prices, not the fact that the government is the predominant supplier per se" (Appellate Body report, para. 446).

Another issue that arose during the evaluation period was the WTO dispute *EC – Countervailing Measures on DRAM Chips (Korea*, DS299), in which the Panel expressed disagreement with the Commission's treatment of all financing – regardless of the form which took – as grants. A more detailed analysis of the case and recommendations for EU practice are presented in section 3.2.2.1. It is noted that the DRAMs dispute concerned an extreme case, where the Commission had considered that a government loan was provided in a situation where no market lender or investor would have provided funds, and had therefore taken the view that the total amount of funding had to be considered as a grant. The evaluation team considers that such interpretation is within the Commission's discretionary power. At the same time, such an interpretation would have to be explained in detail in the regulations.

In cases during the evaluation period, in the case of a loan or equity infusion, the Commission determined benefit based on the difference between the government and market terms; a case that would have been comparable to the one which was subject of the DRAMs case could not be identified by the evaluation team.

Conclusions/ recommendations

Given the above observations, the evaluation team has no recommendations to make regarding the calculation of benefit by the Commission.

Calculation of subsidy amount

Legal basis

Finally, the amount of the countervailable subsidies is determined per unit of the subsidised product exported to the Union.[591] According to the ASR, where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount of countervailable subsidy is determined by allocating the value of the total subsidy, as appropriate, over the level of production, sales or exports of the products concerned during the investigation period for subsidisation. Where the subsidy can be linked to the acquisition or future acquisition of fixed assets, the amount of the countervailable subsidy is calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned.

The following elements may be deducted from the total subsidy:

589 OJ L 128/18, 14.05.2011, at recitals 260-263.

590 When establishing the benefit of government loans, the Commission did not use an external benchmark in a strict sense but we adjusted the domestic interest rate in China upwards, based on data from Taiwan.

591 Article 7 ASR.

- any application fee, or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy; and
- export taxes, duties or other charges levied on the export of the product to the Union specifically intended to offset the subsidy.

Practice

The European Commission published detailed guidelines for the calculation of the amount of subsidy in CV duty investigations in 1998.[592] Although these provide useful information, it is not clear if they still reflect current practice.

Provisional and definitive duty regulations provide little information on how subsidy margins are calculated; it is therefore difficult to evaluate the practice against the rules established in the ASR or the guidelines. Nevertheless, in most cases, a number of different support schemes are investigated per country. The practice for this is to determine individually for each support scheme if it constitutes a countervailable subsidy and if so, to calculate the subsidy margin, and then to cumulate the individual subsidy margins for each exporter, depending on whether or not it was a recipient of the different schemes. Although in principle this method is straightforward, no rules for cumulation of benefits from different subsidy schemes have been codified.

In this context, there is also an apparent lack of a definition for negligible benefit of a subsidy as reflected in inconsistent practice during the evaluation period: in *Biodiesel* (AS532), benefits of less than 0.1% were deemed as negligible in several subsidy schemes whereas in *PET* (AS546), a scheme in Pakistan conferring a benefit of 0.01% was not considered negligible and counted in the calculation of the cumulated subsidy margin.

Furthermore, the inconsistency with economic theory of TD practice of distributing lump sum subsidies on a per-unit basis over production should be noted: Subsidies distort export markets only if they are passed-through to export prices, not if they are absorbed by domestic factors of production. Therefore, an economically correct approach for determining the level of CV measures would be to consider only those subsidies which are passed through to the export price. Current WTO rules (and accordingly, also EU rules and practice) are inconsistent in this respect: Whereas pass-through of upstream subsidies is considered,[593] the same principle is not however applied to direct subsidies which TDI authorities may *assume* are 100% passed through to export prices. Accordingly, while the treatment of upstream subsidies takes into account relevant economic theory and empirical evidence, the treatment of direct subsidies does not.

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592 OJ C 394/6, 17.12.1998.

593 The ASCM provides for pass-through analysis in respect of upstream subsidies. This was clarified by the Appellate Body in *USA – Softwood Lumber IV* where the subsidies (which were found to flow to logging companies) could not be assumed to flow through fully to independent lumber mills – the logging companies might retain the subsidy as additional profit. The Appellate Body stated that the phrase "subsid[ies] bestowed [...] indirectly", as used in Article VI:3 of the GATT 1994, implies "that financial contributions by the government to the production of inputs used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the processed product" (para. 337). However, the Appellate Body also clarified that "[i]t is *only the amount by which an indirect subsidy granted to producers of inputs flows through to the processed product*, together with the amount of subsidy bestowed directly on producers of the processed product, that may be offset through the imposition of countervailing duties"(para. 338; emphasis added). Therefore, a pass-through analysis is required in such situations (para. 340).
In the *Continued Dumping and Subsidy Offset Act* litigation at the WTO, the partial equilibrium model adopted by the arbitrator to establish the value of countermeasures included a coefficient for pass-through of the CDSOA subsidy to US firms, based on the literature.

Finally, subsidy margins are considered *de minimis* if they are below 1% (or for developing countries less than 2%).[594] However, this rule has not played any role in practice during the evaluation period, as subsidy margins have exceeded 2% in all cases where subsidies have been calculated.

Conclusions/ recommendations

The evaluation team has identified a number of issues related to the calculation of subsidies and recommends the following:

- In view of the fact that Guidelines for the calculation of the amount of subsidy in CV duty investigations were published more than a decade ago, refer to a now obsolete basic AS regulation, and their applicability is unclear, it is recommended to publish an updated version of the guidelines or, preferably, to integrate them into the policy handbook;
- The Commission's practice to cumulate the benefits of different support schemes that an exporting country grants to an exporter is considered appropriate but is not codified. It is recommended to codify the current practice for cumulation of subsidy margins across different subsidies granted by a country concerned in the ASR, or include them in the guidelines for the calculation of subsidies;
- There is an apparent lack of a definition for negligible benefit of a subsidy has resulted in inconsistent practice during the evaluation period. It is therefore recommended to establish a rule for negligible benefit of individual schemes.

The existence of rules on cumulation and negligibility would help to ensure coherent practice.

5.1.4 Determination of Injury

5.1.4.1 Union industry standing test for complaints and "major proportion" for injury analysis

Legal basis and case law

In the context of the injury analysis, Article 4(1) ADR provides that:

> "For the purposes of this Regulation, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products"[595]

By contrast, the WTO ADA provides in Article 4.1 that:

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

Thus, contrary to the two basic Regulations, the WTO ADA does not contain any cross-reference to Article 5.4 on standing.

Further, in the WTO case *EU – Fasteners (China)* the Panel held that:

> "We recall the provisions of Article 4.1 [ADA], quoted above, which do not define the term 'major proportion'. As the parties have recognized, a 'major' proportion is one that is 'important, serious, or significant'.[596] The parties also agree that the 'major proportion' referred to in Article 4.1 of the AD Agreement may be something less than 50 per cent, and that the lower limit is not determinable in the abstract, but will depend on the facts of the case. This is consistent with the views of the panel in Argentina – Poultry, which concluded:

[594] Article 14(5) ASR.
[595] Also see Article 9(1) ASR.
[596] China, first written submission, para. 253; European Union, first written submission, para. 319.

> 'an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible. Indeed, this approach is entirely consistent with the Spanish version of Article 4.1, which refers to producers representing "una proporción importante" of domestic production. Furthermore, Article 4.1 does not define the "domestic industry" in terms of producers of the major proportion of total domestic production. Instead, Article 4.1 refers to producers of a major proportion of total domestic production. If Article 4.1 had referred to the major proportion, the requirement would clearly have been to define the "domestic industry" as producers constituting 50+ per cent of total domestic production.224 However, the reference to a major proportion suggests that there may be more than one "major proportion" for the purpose of defining "domestic industry". In the event of multiple "major proportions", it is inconceivable that each individual "major proportion" could – or must – exceed 50 per cent. This therefore supports our finding that it is permissible to define the "domestic industry" in terms of domestic producers of an important, serious or significant proportion of total domestic production. For these reasons, we find that Article 4.1 of the AD Agreement does not require Members to define the "domestic industry" in terms of domestic producers representing the majority, or 50+ per cent, of total domestic production."'

The Appellate Body further ruled that for the purpose of injury analysis, the "major proportion" definition must be determined in such a way so as to ensure that the domestic industry defined on that basis is capable of providing ample data that ensures an accurate analysis without a major risk of distortion. 25% of the total production may or may not be sufficient for this purpose.[597]

Conclusion/ recommendation

Based on current WTO interpretation, there is no strict link between the standing test for submitting a complaint and the definition of a major proportion of the Union industry in Article 4. It is therefore recommended to delete the reference to Article 5(4) in Article 4(1) ADR. Likewise, the reference to Article 10(6) in Article 9(1) ASR is recommended to be removed.

5.1.4.2 Determination and definition of product scope and like products

In order to calculate injury, both the scope of the imported product (the product concerned or product under consideration) and the competing product produced in the EU (the like product)[598] need to be clearly defined.

The definition of the product scope has important implications for the likely findings on injury and hence is an important (and often controversial) step in the investigations. It also has implications on the effectiveness of measures. If the definition of the product scope is (too) narrow, protection might be ineffective as similar products or substitutes to the product concerned will not be covered by the measure. Conversely, if the product scope is too wide, the resulting measures will overshoot as they will be applied to an overly broad range of products.

Product concerned

Legal basis

The two basic Regulations, like the WTO ADA and ASCM, provide no explicit guidance on how to determine and define the product concerned.

Practice

In practice, the product concerned is identified by industry in its complaint. Regulations identify the tariff code under which the product enters the Union and provide a basic description of the product and its main use.

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597 For a more detailed analysis of the case see section 3.2.2.3 and appendix H2.

598 See the brief discussion of the like product in section 5.1.1.1.

Since the "product concerned" typically includes a range of products differentiated in various ways, the definition is often refined following initiation. The absence of Union production of specific items that fall under the general definition typically leads to requests for product exclusions. Conversely, domestic industry concerns that the definition excludes closely related products that can be effective substitutes for the product concerned can lead to a widening of the definition. In considering such requests, the Commission applies a wide range of criteria to determine whether a specific product should be included or excluded. Regulations typically consider factors such as the basic technical, physical and/or chemical characteristics as well as the product's main use. In cases where the product characteristics and its main use would lead to different product definitions, priority is given to the former. Additional considerations include the degree of interchangeability, consumer perception and channels of sale, production process, raw materials involved, differences in production costs and prices, CN codes, or quality. Other factors are occasionally applied as well. [599]

The product scope might also be widened to include downstream products. For example, in *Open mesh fabrics of glass fibres* (AD558), after initiation, an exporting producer requested clarification whether fibreglass discs were included in the product definition. The Union industry was consulted and was of the opinion that such discs may be considered as a downstream product and thus are not necessarily covered by the product definition. The Commission in this case provisionally treated fibreglass discs as forming part of the product concerned, pending collection of further information and considerations from interested parties in the remainder of the investigation. On the other hand, as in *Bicycles* (AD287), in an anti-circumvention investigation (R407) the production definition was extended to upstream products (bicycle parts).

Conclusions/ recommendations

Questions of product inclusion or exclusion in defining the product concerned turn on the issue of substitutability in the market, which inevitably involves judgement as well as reference to facts. In general, the Commission's practice is in line with international practice. The Commission applies reasonable criteria for addressing questions of product inclusion/exclusion and provides an explanation in the regulations.

Like product

Legal basis

In the two basic Regulations, the like product is defined as

> "a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[600]

This definition is literally taken from the relevant WTO agreements,[601] and thus no compliance issues with WTO rules should arise.

In principle, the methodology for determining the like product is the same as for the definition of the product under consideration, and hence the remarks on methodology made above apply. In addition, finding an appropriate demarcation of the like product could lead to problems in practice especially in the case of highly heterogeneous products.

Practice

In TD practice, the like product is primarily defined, like the imported product under consideration, based on the "basic physical, technical and chemical characteristics, the end uses or functions, *and finally the user's perception of the product, and not the raw materials or the methods used for*

599 For an extensive discussion, see Van Bael & Bellis (2011: 212-221)
600 Article 1(4) ADR/Article 2(c) ASR.
601 Article 2.6 ADA/Footnote 46 to Article 15.1 ASCM.

their production"[602]. It is noteworthy that the Commission has established here the priority of demand substitutability over supply substitutability, which is in line with the economic rationale. An extensive discussion of the Commission's approach is provided by Van Bael & Bellis (2011: 238-244).[603]

Although there have been a number of EU court cases addressing product definition, the judgments typically address case-specific issues and are therefore difficult to generalise.[604]

Considerations of substitutability, and therefore of market competition with the imported product concerned, drive TDI authorities to wider definitions of like goods. If there is an identical domestic product, the basic definition appears to exclude from the definition goods that "closely resemble" the imported product. Such an interpretation would eliminate the possibility of TDI protection for producers of the "closely resembling" domestic product. Accordingly, where identical products are produced domestically, like goods tend to be defined in such a way as to include both goods that are identical to and that "closely resemble" the imports under consideration.[605]

One observation that can be made based on the international practice reviewed in the present evaluation report is that the variety of circumstances found in TD cases preclude the application of categorical rules such as might be inferred from the Commission's statement concerning production methods in *Coke*. For example, differences in production methods can represent a means of differentiating market segments in industries that feature both mass-produced standard product and custom product but where the two segments do not necessarily compete.[606]

Positions of interested parties and legal conflicts

Diverging views between interested parties on the appropriate definition of the product scope affected by the unfair practice are frequent. In the consultation, EU industry representatives were generally satisfied with the Commission decisions. It was mentioned that in some instances a broad definition of the product scope was used as a substitute to threat of injury cases. In contrast, representatives of importers and users stated that the product scope definition used was too broad, often comprising different products with entirely different characteristics and uses.

Some Member States argued that imprecise and overly broad product classification/definition often resulted in AD duties that were not justified. The example of bicycles from China was given as the most obvious case in which the EU did not take sufficiently into account the fact that there were great quality differences between EU and Chinese made bicycles.

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602 *Coke of coal in pieces with a diameter of more than 80mm* (AD419), OJ L141/9, 15.06.2000 at recital 20, emphasis added.

603 See for a detailed analysis of cases in this respect.

604 See, for example, case T-348/05 *JSC Kirovo-Chepetsky Khimichesky Kombinat v Council*; T-401/06 *Brosmann Footwear v Council*; T-314/06 *Whirlpool Europe v Council*; or T-369/08 *EWRLA and others v Commission*.

605 See the discussion of this issue in Canadian practice in appendix I3, at 43.

606 For example, in the Canadian TD case *Venetian blinds*, the CITT distinguished between mass-produced and custom-produced blinds on the basis of price points and substitutability:

> "…substantial and uncontested evidence on file indicates that price is a defining difference between stock blinds and custom blinds. The Tribunal heard evidence that, beyond a certain price point, the demand for stock blinds tapered off considerably in favour of other window-covering options, most of which are lower in price (including curtains and aluminum or faux-wood blinds), rather than in favour of custom blinds. This leads the Tribunal to accept the view that custom blinds are in a high-end niche market geared to fashion-conscious, somewhat price–insensitive, consumers. On the other hand, consumers of stock blinds are looking for a utilitarian window covering that is priced right, and fashion is not their primary concern."

See the discussion in appendix I3, p. 49, for further discussion and source.

Recent EU cases involved several disputes on the definition of the like product, but in all cases the claims against the EU institutions were dismissed by the Court.[607] Also, in two of the three WTO AD disputes in the evaluation period with the EU as respondent the definition of product under consideration was an issue.[608] Nevertheless, in both of the cases the WTO DSB rejected the arguments brought forward by complainants.

Conclusions/ recommendations

In sum, the evaluation team concludes that the Commission approaches the issue of determining the scope of like goods in a procedurally sound manner. Given the variety of circumstances encountered in TD cases, a wide range of criteria may have to be applied to arrive at reasonable decisions and the set of criteria may vary from case to case as the facts dictate. The criteria applied by the Commission generally reflect international practice, and decisions have been upheld by the EU Courts and the WTO DSB. Regulations on provisional and definitive duties usually discuss the product scope and definition of the like product at length.

5.1.4.3 Investigation period

Legal basis

For the injury investigations the Commission distinguishes between the actual investigation period, which is used to assess dumping, and the reference period (or period considered), which is taken as the baseline for the injury assessment. The two basic Regulations provide that the investigation period shall "cover a period of no less than six months immediately prior to the initiation of the proceeding."[609]

Practice

In practice, usually a period of one year, ending at the end of the month prior to the initiation of the investigation, is chosen as the investigation period.[610] During the evaluation period the Commission deviated from this practice only in one case, *Cargo scanning systems* (AD539), where an investigation period of 18 months was selected. The Commission justified that this longer period was chosen because of the "existence of public procurement/ tendering processes which entail long lead time periods for the materialisation of a transaction and the existence of relatively few transactions."[611]

For the reference period, the Commission has clarified that "this normally covers three or four years prior to initiation, ending in line with the dumping investigation period"[612]. The normal practice during the evaluation period was rather three to five years, however: in 18 original AD investigations out of 56 for which the reference period was provided[613] the period concerned was longer than four years. It is unclear based on which criteria the choice of the starting date for the period concerned is selected.

Conclusions/ recommendations

In principle, it would be desirable to identify the start of the dumping practice and then take the previous two or three years in order to have baseline data against which the performance of the

607 E.g., T-314/06 *Whirlpool Europe v Council,* T-401/06 *Brosmann Footwear v Council.*

608 *DS337 Anti-Dumping Measures on Farmed Salmon from Norway, Norway v European Communities*; and *DS397 Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, China v European Communities*; for details see the analysis of WTO DSB findings in section 3.2 and appendix H2.

609 Article 6(1) ADR. The ASR provides for the investigation period slightly differently: According to Article 11(1) in conjunction with Article 5, the investigation period "shall be the most recent accounting year of the beneficiary, but may be any other period of at least six months prior to the initiation of the investigation for which reliable financial and other relevant data are available."

610 This also means that the investigation period typically differs from the period covered in the complaint.

611 OJ L 332/60 (provisional), 17.12.2009, at recital 9.

612 *Candles, tapers and the like* (AD528); OJ L 119/1, 14.05.2009, at recital 8; also see *Wire Rod* (AD530), OJ L 203/1, 05.08.2009, at recital 7.

613 In termination notices pursuant to withdrawal of the complaint no reference period is usually provided.

Union industry under dumping can be compared. However, this is hardly possible for both practical and conceptual reasons. Therefore, in order to have sufficient data background, it is recommended that the reference period in all cases comprises four full years plus the ongoing year up to the end of the IP. Shorter reference periods should be avoided.

5.1.4.4 Factors considered for injury assessment

The two basic Regulations provide that the determination of injury must be based on positive evidence and involve an objective examination of the following three factors:[614]

- the volume of dumped/subsidised imports;
- the effect of the dumped/subsidised imports on prices in the EU market for like products, and
- the consequent impact of the dumped/subsidised imports on Union producers of the like product.

Economic rationale

This set of criteria flows logically from the fact that the effects of dumping and/or subsidisation work through the price mechanism: the reduced price of the import thus affects the demand for the imported product, impacts on the price realised in the domestic market and therefore affects the sales and revenues of competing domestic producers. Note that, depending on the price responsiveness of demand in the EU market and the competitive response from domestic producers, various possible observed configurations of prices and sales might be observed. If the consumer response to lower prices is to increase demand strongly (i.e., if demand is price-elastic), total sales of the product in question on the domestic market might increase with both the importer and domestic producer expanding sales. Nonetheless, the domestic producer might in this case still suffer revenue losses, if the price effect (the loss in profit per unit stemming from the reduced sales price)is stronger than the volume effect (the increase in sales). For example, if domestic producers match the importers' prices, then consumers would not switch from domestic products to imports, leaving market shares largely unaltered. At the same, time both importers and domestic producers would realise a lower price and thus lower revenues.

Volume of imports

Legal basis

Regarding the volume of dumped imports, the Commission considers both absolute and relative increases in dumped imports. Non-dumped imports as well as imports for which the dumping margin is *de minimis* are excluded from the calculation.[615] Likewise, imports from targeted countries whose volumes are *de minimis* are also excluded according to Article 5(7) ADR.[616]

Practice

Based on information provided in provisional and definitive duty regulations, information on how the Commission assessed the volume of dumped imports could be obtained for 144 AD and six AS cases (each country concerned counting as a separate case). In the overwhelming majority of cases (131 or 91% AD cases and five out of six AS cases), the Commission found both an absolute and relative increase of dumped imports. Obviously, this constitutes the most solid base for a positive injury finding.

614 Article 3(2) ADR/Article 8(1) ASR.

615 At the same time, in practice there have been repeated cases where such imports have been included in the injury assessment. See the analysis of WTO dispute *EC – Salmon (Norway,* DS337) in section 3.2.2.2 and *EC – Fasteners (China*, DS397) in section 3.2.2.3.

616 See section 5.1.4.6 below for more details.

It is thus more interesting to look into those cases where no absolute or relative increase in dumped imports was found in an investigation (Table 49). Of the six cases where an increase in market share but not an absolute increase in import volume was found, four belong to the same investigation – *Cathode ray colour TV picture tubes* (AD503) – and were cumulatively assessed. Here, the volume of imports decreased unambiguously, i.e. dumped imports during the investigation period were lower than in any other period of the reference period. Regarding the market share, an increase compared to the lowest point in the reference period (the period immediately preceding the investigation period) was found, but the market share of dumped imports in the investigation period was still substantially lower than at the beginning of the reference period.[617] This product was of course in steep secular decline being displaced by LCD screens. Both EU complainants ceased production and filed for bankruptcy shortly after the initiation of the investigation, which led to termination as the Commission assigned causality to the collapse in demand for the product, rather than to dumping in isolation.

Table 49: EU TD cases in which dumped/subsidised imports did not increase in both absolute and relative terms, 2005-2010

Product	ID	Country	Year of initiation	Absolute increase in imports	Increase in market share of imports	Case terminated
Cathode-ray colour television picture tubes	AD503	China	2006	No	Yes	Yes
Cathode-ray colour television picture tubes	AD503	Korea (Rep. of)	2006	No	Yes	Yes
Cathode-ray colour television picture tubes	AD503	Malaysia	2006	No	Yes	Yes
Cathode-ray colour television picture tubes	AD503	Thailand	2006	No	Yes	Yes
Welded tubes and pipes of iron or non-alloy steel	AD523	Russia	2007	No (Yes under cumulation)	No (Yes under cumulation)	No
Aluminium Foil	AD534	Brazil	2008	No (Yes under cumulation)	No (Yes under cumulation)	No
Melamine	AD554	China	2010	No	No	No
Stainless steel bars	AS556	India	2010	No	Yes	No
Ceramic tiles	AD560	China	2010	No	Yes	No

Source: Provisional and definitive duty regulations, notices of termination

In three cases, neither an absolute nor relative increase in dumped imports was found regarding individual countries concerned. A further analysis of these cases reveals the following:

- *Welded tubes and pipes of iron or non-alloy steel* (AD523): Although Russia's imports declined both in absolute and relative terms, they were not assessed individually in the investigations but rather cumulated with those of Belarus and China. Cumulated imports from the three countries together increased both in absolute and relative terms;[618]
- *Aluminium Foil* (AD534): Although Brazil's imports declined (or rather stagnated) both in absolute and relative terms, they were not assessed individually in the investigations but cumulated with those of Armenia and China. Cumulated imports from the three countries together increased both in absolute and relative terms;[619]
- *Melamine* (AD554): This is a clear case of contraction of dumped imports both in absolute and relative terms.[620] The absolute decline was clearly driven by the steep decline in demand

617 *Cathode-ray colour television picture tubes, China, Republic of Korea, Malaysia and Thailand* (AD503), see OJ L 316/18 (termination), 16.11. 2006, at recital 79f.
618 OJ L 343/1, 19.12.2008, at Table 2 and 3.
619 OJ L 94/17 (provisional), 08.04.2009, at recitals 95f.
620 OJ L 124/2, 13.05.2011, at recital 37.

for the product during the 2008-2009 global economic slump; the relative decline was attributed by the Commission to "targeted dumping" as Chinese producers withdrew from the EU market when the price fell too low.

In both *Stainless steel bars* (AS556) and *Ceramic tiles* (AD560), imports fell in absolute terms and in market share terms during the global slump in 2008 and 2009 but started to recover in both terms in the respective investigation periods, although failing to reach their previous peak in 2007.

It should be noted that an increase in dumped imports, either absolute or relative, is not a *conditio sine qua non* for a positive injury finding, as the two basic Regulations establish that "none of these factors can give decisive guidance."[621] Indeed, as Table 49 shows, cases where dumped imports have not increased have nevertheless led to definitive measures being taken. However, upon closer examination, the cases where imports did not unambiguously increase involved instances of steep secular or cyclical decline in demand or involved a country-product flow that upon cumulation conformed to the general pattern.

Conclusions/ recommendations

Generally speaking, the short periods covered by investigations do not allow formal evaluation of the separate roles of secular trends in demand, business cycles, and price behaviour of exporters in generating observed import trends. The evaluation team's examination of the exceptional cases in the evaluation period confirmed the rule that the Commission requires an increase in imports in both absolute and relative terms to proceed on a case. This approach is in line with economic considerations and should therefore be maintained.

Effect of dumped/subsidised imports on prices

Legal basis

With regard to the determination of the effect of dumped imports on Union prices the Commission takes into consideration

> "whether there has been significant price undercutting [...] or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree"[622].

While the basic idea behind price undercutting is quite simple, i.e. it being the difference between the price charged by EU producers and the price of the dumped import, the calculation in practice is somewhat more complicated as, just like in the case of comparing normal value and export price, various kinds of adjustments are involved.

Practice

No guidance is provided for the calculation of price undercutting in either WTO agreements or the two basic Regulations. In practice, usually, for each product type, the difference between the weighted average sales price of Union producers to independent customers adjusted to ex-works level and the weighted average CIF price of imports is calculated, with adjustments made for post-importation costs. According to provisional and definitive duty regulations, the adjustments to be made in specific cases are a frequent source of disagreement but it would appear difficult to specify any guidelines for these on top of the already existing ones, as much depends on the peculiarities of cases.

During the evaluation period, the average price undercutting identified by the Commission was 28% for AD cases and 13% for AS cases (Table 50). While there is no clear trend over the period, levels were below average in the last two years.

621 Article 3(3) ADR/Article 8(2) ASR.
622 Article 3(3) ADR/Article 8(2) ASR.

Table 50: Price undercutting margins in EU TD cases initiated 2005-2010

	2005	2006	2007	2008	2009	2010	Average 2005-2010
AD							
Average	30%	13%	26%	95%	18%	18%	**28%**
Maximum	70%	67%	43%	730%	33%	51%	**166%**
Minimum	0%	-12%	14%	-1%	3%	-8%	**-1%**
AS							
Average				25%	2%	13%	**13%**
Maximum				25%	3%	17%	**15%**
Minimum				25%	1%	8%	**11%**

Note: Total number of cases for which data could be obtained was 89 (83 AD and six AS cases).
Source: Provisional and definitive duty regulations, notices of termination.

There is a clear relationship between the level of undercutting identified by the Commission and the outcome of a case. Thus, for terminated cases the average undercutting margin over the period 2005 to 2010 was 12% whereas it was 32% for cases which resulted in the imposition of definitive measures. Nevertheless, a finding of low undercutting does not necessarily lead to the termination of an investigation. Rather, in cases where the undercutting margin is low, the Commission sometimes refers to the fact that observed prices of EU produced goods are already distorted (depressed or suppressed) by dumped imports.[623] Examples are *Frozen strawberries* (AD506), *Ferro-silicon* (AD516) or *Fatty alcohols* (AD563).

Conclusions/ recommendations

In terms of methodology, the Commission considers well-established factors in establishing comparability of prices for determination of price undercutting. Given the multitude of factors that bear on price trends and the heterogeneous nature of goods addressed in TD cases, judgement necessarily enters into the determination in this instance as in most aspects of TDI. The generally moderate margins of price undercutting found by the Commission, which in turn result in generally moderate duties in international comparison, are a good indicator that the Commission applies generally balanced judgements.

Impact of dumped/subsidised imports on Union industry: injury

Legal basis

The third factor in the injury analysis is to measure the impact of dumped (or subsidised) imports on the Union industry. Such injury can be measured by many different indicators. The ADR provides a non-exhaustive list of factors to be taken into account in the injury assessment:[624]

- the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation;
- the magnitude of the actual margin of dumping;
- actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity;
- factors affecting EU prices; and
- actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, or investments.

The formulation of the list of factors in the two basic Regulations is in line with Article 3.4 ADA with two exceptions: the sequence of factors is different – the basic Regulations mention the magnitude of dumping before the injury indicators such as sales etc. – and the basic Regulations

623 Remember that price depression refers to the fact that Union producers, in response to dumping, are forced to sell at prices which are lower than the ones they would have charged dumping being absent, while price suppression refers to the fact that Union producers have been prevented to increase prices because of the dumping practice.

624 Article 3(5) ADR. Article 8(4) ASR lists the same factors, mutatis mutandis, and adds, "in the case of agriculture whether there has been an increased burden on government support programmes."

add the recovery process of an industry from previous dumping or subsidisation. The implications of this (esp. the latter) are not clear. Van Bael & Bellis consider that

> "the wording used in the definition of this factor is open to criticism as it creates the impression that injury caused by factors other than the dumped imports subject to the investigation is somehow imputed to such imports, in contradiction with Article 3.5 of the WTO Anti-Dumping Agreement and Article 3(7) of the Regulation" (2011: Footnote 469 on p. 298).

Indeed, it would seem awkward if the fact that the Union industry is still suffering from *past* dumping or subsidisation was attributed to a *current* dumping practice. It might therefore be preferable to delete the phrase from the two basic Regulations.

According to WTO case law all of the factors listed in Article 3.4 ADA – and hence, all of the factors listed in Article 3(5) ADR/Article 8(4) ASR except for the recovery from past dumping/subsidisation – must be considered in the injury analysis, although a detailed assessment of each factor is not required.

Practice

In practice, a positive finding of injury is usually based on a combination of several factors, with reduced market share, negative effects on employment and reduced profitability being the factors most often mentioned in regulations determining measures (Table 51).[625] Reduced sales are also mentioned quite frequently, while other factors, including a reduced price level, are mentioned as injury factors only in a minority of cases.

It is also interesting to see which injury indicators are most strongly indicative of injury. To assess this issue, the evaluation team calculated the share of terminations in cases where injury indicators have found to be positive. The last column in Table 51 shows these shares. Of all the 80 cases for which data were available, 21% ended in terminations. The termination shares are lower, as expected, when there were positive findings regarding the market share reduction, reduced employment and reduced sales of the Union industry. Unexpectedly though, an above-average number of cases was terminated despite positive findings on reduced Union industry profitability and reduced price level. This further corroborates the above finding that the role of prices as an injury indicator is limited.

Table 51: Summary of selected injury factors and their impact on investigation outcomes, EU AD cases initiated 2005-2010[626]

	Definitive Measure	Case terminated	Total	Share of terminated cases
Reduced market share of Union industry				
No	8	5	13	38%
Yes	55	12	67	18%
Reduced employment of Union industry				
No	9	7	16	44%
Yes	54	10	64	16%
Reduced profitability of Union industry				
No	12		12	**0%**
Yes	51	17	68	**25%**
Reduced sales of Union industry				
No	18	9	27	33%
Yes	45	8	53	15%
Reduced price level of Union industry produced like product				
No	36	5	41	**12%**
Yes	27	12	39	**31%**
Total	**63**	**17**	**80**	**21%**

Source: Provisional and definitive duty regulations, notices of termination.

625 A more detailed case-by-case analysis is presented in Van Bael & Bellis (2011: 301-320).

626 This analysis could not be made for AS cases as no injury analysis was published in the termination notices for any of the AS cases covered by the evaluation.

Conclusions/ recommendations

Apart from this ex post "revealed methodology", no information could be obtained regarding the methodology which the Commission applies for evaluating injury factors. As such, a statement of administrative practice on this matter would be a welcome addition to the Commission's communications.

In the view of the evaluation team, the most reliable indicator of injury due to dumping or subsidisation is a direct linking of lost sales or price suppression/reduction to price undercutting in competing offers by dumped or subsidised imports. How these immediate effects of dumping or subsidisation are reflected in overall domestic industry performance measures such as total employment, profitability, etc. depends on the importance of the like good to the firms that constitute the domestic industry and on the responses that domestic industry takes, including the ability of the industry to shift resources to other production; these indicators therefore signal injury less reliably, although taken together with the direct effects they do provide corroborating circumstantial evidence in support of injury. The evaluation team notes that the EU's "revealed methodology" is not consistent with this perspective as "bottom line" indicators are more consistently cited in injury determinations.

5.1.4.5 Cumulation

Legal basis

If several countries are subject to an investigation, the injury assessment will normally be based on the effects of the cumulated imports from all of these countries. However, this cumulative assessment depends on the following conditions:[627]

- the dumping margin/amount of countervailable subsidies from each country must be above the *de minimis* threshold. This means, in the case of dumping the dumping margin must be 2% or higher, whereas in AS cases, the amount of the countervailable subsidies must be 1% *ad valorem* or higher (2% or higher for developing countries);
- the volume of imports from each country must be non-negligible (i.e. amount to a market share of 1% or more of the EU market);[628] and
- the conditions of competition between imports must be comparable.

The first two of these conditions are straightforward. Regarding the comparability of conditions of competition between imports, the consistent practice of the Commission is to base this on the following factors:

- parallelism of import volumes;
- parallelism of price trends and comparable price levels;
- comparable product characteristics and uses; and
- similar sales channels.

Practice

In practice, the Commission checks all the four factors and, when cumulation is applied, in almost all cases presents a positive finding on each of the factors. However, it is not a requirement for cumulation that all four factors are met. E.g. in *Seamless pipes and tubes, of iron or steel* (AD490), the fact that imports from Romania and the Ukraine followed different volume trends was considered as insufficient for de-cumulation.[629] As this is the only case during the

627 See Article 3(4) ADR/Article 8(3) ASR.

628 The ASR includes a special provision for imports from developing countries, whereby "the volume of subsidised imports shall [...] be considered negligible if it represents less than 4 % of the total imports of the like product in the Community, unless imports from developing countries whose individual shares of total imports represent less than 4 % collectively account for more than 9 % of the total imports of the like product in the Community" (Article 14(4).

629 OJ L 175/4, 29.06.2006, at recital 149.

evaluation period where cumulation was applied without a positive finding for all four factors, no further lessons can be drawn regarding the weighting of factors.

In the evaluation period, in half of the cases against several countries, the Commission found that the conditions for cumulation were not fulfilled for at least one of the countries concerned (Table 52).[630] The factors which led to de-cumulation of 12 countries are as follows:

- in eight country-cases, the dumping margin was *de minimis* or there was no dumping;[631]
- in two cases – *Silico-manganese* (AD513) against the Ukraine, and *Wire rod* (AD530) against Moldova – there was no undercutting (in one of them, Wire rod against Moldova, the injury margin was also found to be *de minimis*; and
- in two cases – *Pentaerythritol* (AD504) against the USA, and *Wire rod* (AD530) against Moldova – it was found that conditions of competition between imports were not comparable. In both of these cases, this finding was explained with differences in pricing behaviour.

Arguments by interested parties regarding differences in quality and product characteristics as well as differences in market shares/import volumes are typically rejected. In the evaluation period, there was only one case – *Wire rod* (AD530) against Moldova – in which the country was de-cumulated after the provisional duty regulation.

Table 52: Overview of cumulation, EU AD cases initiated 2005-2010

Product	Case ID	No. of countries concerned	De-cumulated	Cumulated
Seamless pipes and tubes, of iron or steel	AD.490	4		4
Plastic sacks and bags	AD.497	3	1	2
Footwear (with uppers of leather)	AD.499	2		2
Cathode-ray colour television picture tubes	AD.503	4		4
Pentaerythritol	AD.504	5	2	3
Strawberries (frozen)	AD.506	2		2
Peroxosulphates	AD.511	3		3
Silico-manganese	AD.513	3	1	2
Ferro-silicon	AD.516	5		5
Polyvinyl alcohol (PVA)	AD.517	2	1	1
Welded tubes and pipes of iron or non-alloy steel	AD.523	4	1	3
Wire rod	AD.530	3	2	1
Aluminium Foil	AD.534	3		3
Polyethylene terephthalate (PET)	AD.545	3	2	1
Polyester high tenacity filament yarn	AD.547	3	2	1
Fatty alcohols	AD.563	3		3
Total		**52**	**12**	**40**

Source: Provisional and definitive duty regulations, notices of termination.

Stakeholder views

Overall stakeholders do not appear to give high priority to cumulation. While EU industry representatives expressed their general satisfaction with rules and practice, no comments were brought forward by other stakeholders.

Conclusion and recommendations

Given the above analysis and the views of stakeholders the evaluation team concludes that Commission practice in applying the cumulation during the evaluation period has been sound.

630 In the period 2005-2010, for a total of 12 cases initiated against several countries an injury assessment was undertaken.

631 *Plastic sacks and bags*, Malaysia (AD497); *Pentaerythritol*, Turkey (AD504); *Polyvinyl alcohol (PVA)*, Taiwan (AD517); *Welded tubes and pipes of iron or non-alloy steel*, Bosnia and Herzegovina (AD523); *Polyethylene terephthalate (PET)*, Pakistan and UAE (AD545); *Polyester high tenacity filament yarn*, Korea and Taiwan (AD547).

5.1.4.6 De minimis *thresholds*

If imports from countries concerned are below the levels established in Article 5(7) ADR/Article 10(9) ASR injury shall normally be regarded as negligible and no measures will be imposed.[632]

Negligible imports

Legal basis

The two basic Regulations determine the *de minimis* thresholds for initiating (or terminating) an investigation based on market share, whereas the WTO Agreements stipulated the threshold based on volume of imports. Precisely, the two basic Regulations provide that:

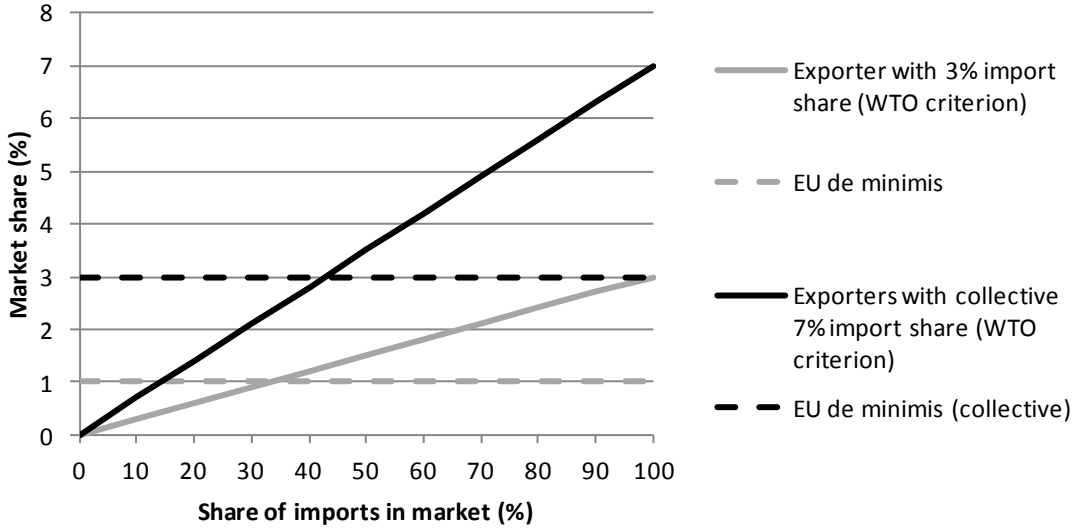
> "[...] Proceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Community consumption."[633]

Article 5.8 of the WTO ADA provides that:

> "An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member."[634]

The two basic Regulations use a 1% market share test (collectively 3%) while the WTO ADA uses a 3% of imports test (collectively 7%). If the total imports exceed 33% market share, the 1% market share test will be stricter than the 3% volume of imports test (Figure 35); conversely, if the total imports have a share of less than 33% in the market the WTO ADA test is stricter. In the case of market shares held by several exporting countries collectively, the EU and WTO rules are equivalent only if the share of total imports in the market is approx. 43%.

Figure 35: Comparison of EU basic ADR and WTO ADA *de minimis* thresholds



632 Article 9(3) ADR/Article 14(4) ASR.

633 Article 5(7) ADR/Article 10(9) ASR. Article 14(3) ASR furthermore specifies that investigations shall be terminated if the volume of imports is negligible, i.e. below the *de minimis* threshold.

634 The ASCM does not provide a definition of negligible imports.

Among stakeholders, it was suggested by some industry respondents that the EU would benefit from using a regional clause: the 1% threshold should not be applied to the EU market as a whole but to specific regions affected by unfair trade. Nevertheless, it appears that this is already possible under the regional industry concept. Stakeholder views

Conversely, some Member States recommended increasing the threshold for negligible imports in order to make sure that only predatory dumping was addressed by TDI. Most Member States, however, considered the *de minimis* thresholds to be appropriate and suggested that any changes should only by modified at the multilateral level. Indeed, since the AD instrument is not targeting predatory dumping (as analysed in detail in chapter 2), it would seem inappropriate to raise the threshold for "negligible imports" substantially.

In practice, imports below the *de minimis* threshold play a limited role; no cases were identified in the evaluation period where cases were terminated because imports from the country concerned were negligible. Practice

In sum, the EU law in certain scenarios would violate the EU's obligations under the WTO ADA. Therefore, it is recommended to align the *de minimis* test in the ADR with the volume of imports test set forth in the WTO ADA. Conclusions/ recommendations

De minimis injury margins

Article 9(4) ADR provides in relevant part that: Legal basis

> "The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry."

With regard to *de minimis* levels, Article 9(3) ADR provides that:

> "For a proceeding initiated pursuant to Article 5(9), injury shall normally be regarded as negligible where the imports concerned represent less than the volumes set out in Article 5(7). For the same proceeding, there shall be immediate termination where it is determined that the margin of dumping is less than 2%, expressed as a percentage of the export price, provided that it is only the investigation that shall be terminated where the margin is below 2% for individual exporters and they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11."

The WTO ADA provides in Article 9.1 that:

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

Therefore, under current rules no *de minimis* levels are specified for the injury margins, and the WTO ADA does not contain any binding rules on this issue.[635] Likewise, trade defence laws of the reviewed peer countries have no provisions on *de minimis* injury margins.

In the evaluation period, in only one case an injury margin calculated by the Commission would have fallen in the range of what might be considered *de minimis* in analogy to dumping margins – Practice

[635] The same applies, *mutatis mutandis*, to the anti-subsidy instrument.

the injury margin in *Silico-manganese* (Ukraine, AD513) was 1.6%, with no undercutting, and the case was terminated as no causal link was found.[636]

Conclusions/ recommendations

Given that a dumping margin below 2% (respectively a subsidy margin below 1%) is considered *de minimis* implying that it may not be worthwhile or effective to impose duties at a level lower than 2% (1% in case of subsidies), it would appear logical to consider the same threshold for imposing duties based on injury margins.

In general, given the impact of investigations, which act as a fixed cost to importers, in "chilling" trade, it follows that modest levels of injury would be already offset by the mere fact of an investigation. Accordingly, the application of *de minimis* thresholds for the injury margin would be in step with the findings in the economic trade literature.

There is currently no explicit legal basis in the two basic Regulations for a *de minimis* threshold for injury margins, but the provisions on lesser duties would appear to also allow for the application of *de minimis* thresholds in practice. It is therefore recommended to apply the test in practice based on the current provisions in the two basic Regulations.

5.1.4.7 Threat of material injury

Legal basis

The two basic Regulations' articles on threat of material injury – Article 3(9) ADR and Article 8(8) ASR – are literal transpositions of Article 3.7 of the WTO ADA/Article 15.7 ASCM. As such, there are no potential legal issues. The factors indicated for the determination of threat of injury are:

(i) a significant rate of increase of dumped/subsidised imports;
(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter, taking into account the availability of other export markets to absorb any additional exports;
(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
(iv) inventories of the product being investigated.

Practice

In practice, threat of material injury is rarely used. The only apparent instance in which the EU imposed measures based on threat of injury in the evaluation period was the 2009 case *Seamless Pipes and Tubes of iron or steel* (AD533); the definitive measures confirmed the finding of threat in the provisional determination.[637] In this case, the Union industry was found to be in a process of recovery from previous dumping, and some signs of injury were identified. The Commission concluded that "although the Community industry had not suffered material injury during the IP, it was in a vulnerable state at the end of it."[638] In the ensuing analysis of threat of injury, the Commission further analysed developments after the IP as well as considered forecasts and concluded that:

> "In the context of a substantially decreasing consumption, [...] Chinese imports constitute a significant threat of injury because of:
>
> (i) their historical volumes increase in absolute and relative terms in the Community market, which underlines a strategy of market penetration, coupled with a stable development after the IP, although in presence of a shrinking demand;

[636] OJ L 317/5, 05.12.2007.
[637] See OJ L 262/19, 06.10.2009, at recital 114.
[638] OJ L 94/48 (provisional), 08.04.2009, at recital 89.

(ii) their potential future increase in absolute and/or relative terms due to the existence of large unused production capacities in the PRC and the likely shrinking of other markets which could free further volumes to be re-directed to Europe; and
(iii) the significant price difference compared to that of the like product in the Community or from other countries, which is likely to both favour a switch towards the Chinese dumped imports and to depress the level of prices in the Community market."[639]

These factors address all of the factors listed in the ADR except for inventories.

International experience

Among the peer countries further factors are used in Canada and the USA. Thus, in Canada an additional factor is whether other countries imposed duties on the product concerned.[640] In the USA, where the investigation authority automatically proceeds to assess whether there is threat of injury in case there is a negative finding on injury, factors for a threat of injury assessment in addition to the four factors listed in the WTO agreements are:[641]

- potential for shifting foreign production from non-subject merchandise to subject merchandise; actual and potential negative effects on development and production;
- other adverse trends indicating the probability that injury by reason of the subject imports is likely.

Stakeholder views

Representatives of Union producers stated in the consultations that the threat of injury standard was too difficult to use in practice, namely on the grounds that one has to prove the imminence of the injury. Some associations with substantial TDI experience did confirm that it is very difficult to fulfil the conditions under this clause.

The difficulty to comply with the threat of injury requirements has induced some EU producers to search for substitutes in order to obtain protection against dumped imports without having to sustain lengthy injury periods. Indeed, in some instances a broad definition of the product scope has sometimes been used. As an example, one association referred to a case in which EU producers of a specific high end product filed a complaint against Chinese producers of a similar (but different) low end product that is no longer produced in the EU. By filing this complaint, EU producers hope that the EU will impose a tariff (on the broad product scope) that will protect them once Chinese companies start producing a competing high end product.

Such a creative use of product scope as a substitute for threat of injury provisions shows that the latter are not considered as a useful instrument by Union producers. Two factors are worth mentioning here: First, Union producers consider that the injury period in material injury cases is too long, i.e. it takes too long until (provisional) measures are imposed. Second, Union producers feel that they cannot resort to the threat of injury tool.

Conclusions/ recommendations

The Commission could consider two responses to these problems: reduce the period until measures enter into force (and hence reduce the injury period) through an earlier imposition of provisional measures, and/or make the threat of injury tool more accessible. The latter could be addressed by providing more information about the precise requirements which must be met in order for threat of material injury to be considered.

Finally, notwithstanding the relative rarity of threat determinations in original investigations, almost 70% of all EU expiry reviews lead to an extension of the measures based on the "likelihood of recurrence" test (see section 5.3.2 below), which involves in reality a threat

639 OJ L 94/48 (provisional), 08.04.2009, at recital 126.
640 See appendix I3.
641 See appendix I8.

assessment, although in the interpretation of the Commission, the standard for finding "likelihood" is less than the standard for finding "threat".[642]

5.1.4.8 Material retardation

In addition to actual material injury and threat of material injury, material retardation of the establishment of a Union industry is the third type of injury recognised by the two basic Regulations,[643] in line with the formulation in the WTO ADA. However, the role of the material retardation argument in TD practice is negligible. During the evaluation period, it was never invoked. To the knowledge of the evaluation team, only in one instance in 1990, *DRAMS*, has the Commission cited retardation as the basis for imposing duties and in that case it found both injury and retardation.[644]

5.1.5 Determination of Causal Link

Legal basis

The determination of the causal link between dumped (or subsidised) imports and injury has two components. While the positive test (attribution analysis) requires showing that dumped or subsidised imports cause injury to the Union industry, the negative test (non-attribution analysis) looks into other factors which could also be responsible for the injury and could possibly break the causal link between dumped/subsidised imports and injury.

While the distinction of the two tests is imperative, the sequence in which the two tests are undertaken is irrelevant.[645]

5.1.5.1 Injury caused by dumped/subsidised imports (attribution analysis)

Legal basis

The ADR establishes that the positive test requires showing

> "that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels [...] are responsible for an impact on the Community industry [...], and that this impact exists to a degree which enables it to be classified as material"[646].

Practice

For the positive test, it is common practice for the Commission to consider both the development of import volumes (both in absolute terms and market share) and price levels (i.e. undercutting and price depression/suppression).

The positive test is done in a qualitative way without use of any formal model. Typically, a "story" is told where the volume of imports from the country or countries concerned is discussed, as well as the development of the price level over time, and based on this discussion a conclusion regarding the causal link is drawn. Issues which would prove causality (rather than correlation) – such as time lags or cause-effect relations – are not formally addressed. Indeed, the Commission stated that

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642 See European Commission. *Europe's Trade Defence Instruments in a changing global economy: A Green Paper for public consultation*; Question 26.

643 Article 3(1) ADR/Article 2(d) ASR.

644 OJ L 1993/1, 25.07.1990, at recital 20.

645 Judgment of the General Court in case T-192/08 *Kazchrome v Council*, 25 October 2011.

646 Article 3(6) ADR. While the first sentence in the quote is equivalent to Article 3.5 of the WTO ADA, the second one, which further qualifies the meaning of "causing" has no correspondence in the ADA. Article 8(5) ASR provides for the same with respect to subsidised imports.

> "it is established and legally recognised practice that [...] a simple coincidence of increasing dumped imports in significant quantities, which undercut prices of the Community industry, and an increasingly precarious situation of the Community industry is a clear indicator of causation"[647]

A causal link is found in most cases if there are positive findings of dumping/subsidisation and injury. This is hardly surprising, given the fact that the factors to be considered for the positive test – volume of dumped imports and effect on prices – are identical to the factors considered in the injury analysis itself (see section 5.1.4.4 above), and hence there is a certain element of tautology between the two stages in the investigation.

During the evaluation period, three investigations involving eight countries were terminated by reason of a finding of no causal link:

- *Cathode-ray colour television picture tubes* (AD503), China, Korea, Malaysia and Thailand: the Commission found that both dumped import volumes and market share declined (the latter after having reached a peak during the reference period, and while there was undercutting and underselling):
  > "the absence of a clear coincidence in time between the deterioration of the situation of the Community industry and the effects of the dumped imports casts serious doubts on the correlation between the development of imports and the situation of the Community industry. Therefore, it cannot be concluded that the dumped imports had played a determining role in the injurious situation of the Community industry"[648];
- *Pentaerythritol* (AD504), China, Russia and the Ukraine: although dumped imports increased both in absolute terms and market share during the period considered, and there was a clear finding of undercutting, the Commission found that injury to the Union industry (in the form of reduced profitability) occurred only later on, i.e. during the investigation period. Because of the lack of parallelism between the dumped imports and injury, the Commission concluded that the causal link between dumped imports and injury was not sufficiently strong so as to be considered as material;[649]
- *Polyvinyl alcohol* (AD517), China: Similar to *Pentaerythritol* the Commission found no material causal link between dumped imports and injury given the decrease in dumped imports, their overall low market share "and a missing clear coincidence in time between the dumped imports and the most injurious situation of the Community industry."[650]

Conclusions/ recommendations

The cases analysed above show that, although there is no formal methodology or model to analyse causation, coincidence in timing is the most important factor assessed in determination of causality. This is in line with practice of other TDI authorities.

Theory and examination of international practice indeed provides support for placing primacy in injury determinations on price developments – this after all is the behavioural factor that underpins injury in any dumping or subsidisation case. The Canadian Import Trade Tribunal has emphasised in its determinations that "price is the necessary nexus if one is to establish that the dumped imports, and not some other factor or combination of factors, caused the injury suffered." Examination for evidence of price leadership by imports and direct evidence of accounts lost due to price would be the strongest circumstantial evidence in building this critical link.

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647 In *Footwear (with uppers of leather)* (AD499), OJ L 275/1, 06.10.2006, at recital 219.
648 OJ L 316/18, 16.11.2006, at recital 110.
649 OJ L 94/55, 04.04.2007 at recitals 120-123.
650 OJ L 75/66, 18.03.2008, at recitals 70-79. Note that provisionally the Commission did find a material causal link and accordingly imposed provisional measures.

5.1.5.2 *Injury caused by other factors (non-attribution analysis)*

Legal basis

According to the two basic Regulations,

> "[k]nown factors other than the dumped [subsidised] imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped [subsidised] imports"[651].

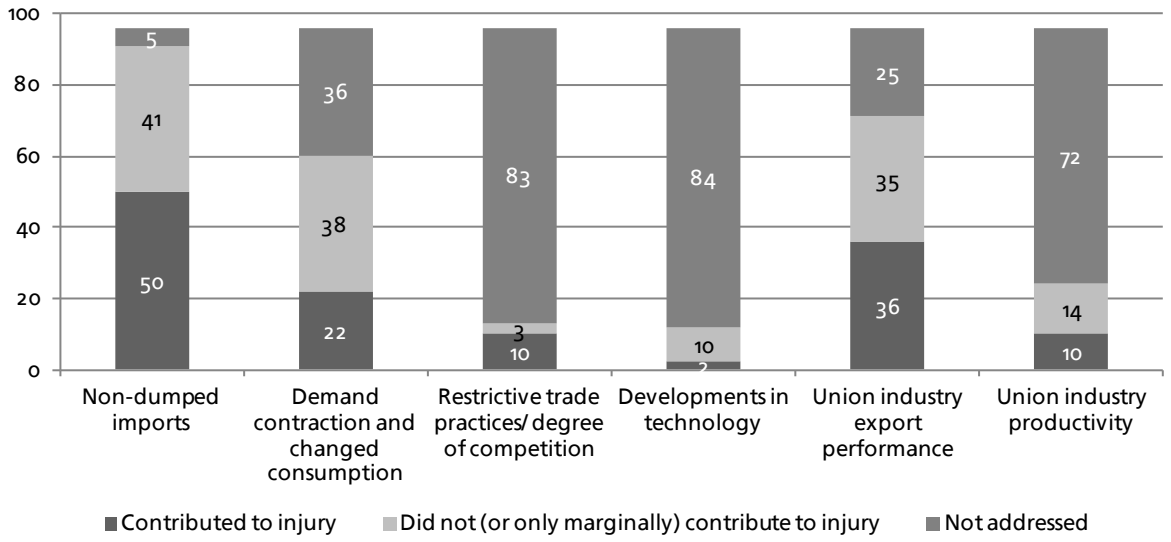
A non-exclusive list of factors to be considered in this context includes:

> "the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry."[652]

Practice

In practice, the Commission does not assess all other known factors in all cases but does so based on the specific circumstances of a case. As Figure 36 shows, the effect of non-dumped imports, the export performance of the Union industry and the effect of demand factors are assessed in a majority of cases. The other three factors mentioned in the two basic Regulations are, in contrast, only addressed in a minority of cases.

Figure 36: Assessment of "other known factors", AD and AS investigations initiated 2005-2010



Total number of investigations for which non-attribution analysis was carried out: 96

Source: Authors' calculation based on provisional and definitive duty regulations

Depending on the case the Commission considers a much wider range of factors, both based on its own observations during investigations and when raised by interested parties. In particular, recent cases almost systematically refer to negative impact of the economic crisis. During the evaluation period, the following further injury factors were addressed in several cases:

- The cost of raw materials is a factor commonly analysed and was found to have contributed to injury in some cases;
- In some cases where the Union industry only constituted a part of all EU producers of the like product, and especially in cases where the other EU producers were against the imposition of measures, the performance of the non-complaining producers was also analysed but was generally found not to have had contributed to injury;

651 Article 3(7) ADR/Article 8(6) ASR.

652 Article 3(7) ADR. Article 8(6) ASR provides for the same list of factors, *mutatis mutandis*.

- Business cycle effects in the product market (as opposed to the global downturn) were addressed in a small number of cases but were not found to have caused injury;
- Exchange rate fluctuations were addressed in a number of cases, but the Commission found that they contributed to injury in just one case.

Of particular interest is, again, a review of the non-attribution analysis in the cases where lack of causation led to termination of the investigation:

- in *Cathode-ray colour television picture tubes* (AD503), the Commission confined itself to the discussion of demand contraction and its effect on injury. Implicitly technological development (the switch from cathode-ray TVs to flat screen TVs) was also discussed, but the other factors were not addressed – the causal link between demand contraction and injury was considered to be sufficiently strong;
- in *Pentaerythritol* (AD504), three of five other factors considered were also found to have contributed to injury – a contraction in demand, imports of other countries and exports of the Union industry below cost. Two other factors, the price of raw materials and production of the product concerned by a non-supporting EU producer were found to not explain injury;
- in *Polyvinyl alcohol* (AD517), four other factors were considered – imports from third countries, productive inefficiency of the Union industry, production of other EU producers, and raw materials prices. Only one of these, the prices of raw materials, was considered to have contributed to injury.

These examples seem to show that, in principle, the Commission stops looking for factors when it has determined that the factors already identified break the causal link between dumped imports and injury. However, the threshold which breaks the causal link between the dumped imports and the injury suffered by the Union industry is determined on a case-by-case basis. It could not be established if and how the effect of different factors would be aggregated – e.g. in *Pentaerythritol*, while it is stated that three of the factors may have contributed to the injury, no ranking between the factors, nor an assessment of the combined causal effect of the factors was made.

Conclusions/ recommendations

The methodology applied for the assessment of individual other injury factors in the non-attribution analysis is similar to the positive test – there is no formal (let alone quantitative) methodology. At the same time, a qualitative methodology is common practice in peer countries and, given the variety and complexity of cases it would indeed seem difficult to conceive of a standard methodology.

In *EC – Countervailing Measures on DRAM Chips* (Korea, DS299) the WTO DSB provided some clarification on the standards to be applied in a non-attribution analysis.[653] Specifically, "a satisfactory explanation of the nature *and extent* of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports"[654] would be required, based on at least "elementary quantitative analysis of the importance of the economic downturn, or a thorough qualitative analysis of the nature and extent of this factor."[655]

As regards coverage of issues, given the variation in industry circumstances from case to case, information from interested parties is particularly important in identifying factors bearing on the non-attribution analysis. Accordingly, the non-dumping/subsidisation factors that might account for, or contribute substantially to, injury may vary considerably from case to case. There is no

653 See the summary and analysis in section 3.2.2.1 below.
654 Panel report in *EC – Countervailing Measures on DRAM Chips (Korea*, DS299), para. 7.405.
655 *Id.*, paras. 7.413, 7.420, 7.427 and 7.434.

requirement that each of the factors listed in the two basic Regulations be assessed. Thus, insofar as the Commission evaluates the factors identified by the interested parties, including factors which are not listed in the basic Regulations, the coverage of the non-attribution analysis is likely to be adequate.

As regards the need for a "thorough qualitative analysis", it is to be noted that most of the listed non-attribution factors are inherently quantitative in nature (including the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, third country trade practices, and the export performance of the Union industry). For these factors, a description of the possible role, the scale and timing of changes (if any) in these factors, and the onset of injury in the Union industry would meet conventional standards of adequacy. Of course, any analysis of scale involves a certain quantitative element. For example, the Commission's analysis of non-attribution in *Cathode ray colour TV picture tubes* (AD503; at recitals 112-113) is largely based on descriptive statistics. However, this analysis remains qualitative in nature since it does not attempt an accounting concerning which portion of the injury sustained by Union industry was due to the technology-driven shift in consumption from cathode ray picture tubes to flat panel LCD televisions.

As regards the application of quantitative analysis, the implications of the WTO Panel's call for an "elementary quantitative analysis" can be illustrated by consideration of the non-attribution analysis in *Side-by-side refrigerators* (AD493; provisional duties regulation at recital 75). In this discussion, the Commission commented on the rise in price of certain raw materials, like steel and polyurethane, procured from US dollar-based suppliers, taking into account an appreciation of the euro. To meet the Panel's criterion that non-attribution analysis consider the *extent* of the impact of other factors, the qualitative description would have to be complemented by an evaluation of (a) the share of production costs of the like goods accounted for by these raw materials, (b) the percentage increase of these prices faced by Union producers given the exchange rate developments, and (c) an explicit accounting of the timing of these developments. In the judgement of the evaluation team, the general criterion for good practice can be stated as provision of the necessary information that an independent body would require to make an informed judgement as to whether the Commission's decision was reasonable.

With regard to the determination of the aggregate effect of other factors on injury, this is inherently quantitative in nature as it requires cumulation of the effects of several factors, which can only be done under a quantitative accounting framework. The evaluation team is not aware of any TD authority having developed such an approach.

5.1.5.3 Weighting of positive and negative test

In all of the cases where lack of causation led to the termination, both the positive test failed to show a material causal link and the negative test showed that there was at least one other factor contributing to injury. Hence it is impossible to determine the weighting between the two tests.

5.1.5.4 General assessment of determination of causal link

Stakeholder views

Most EU industry associations showed satisfaction for the current method which was qualified as sufficient to prove the causal link. These respondents also argued that they would oppose the introduction of a more thorough economic methodology on the grounds that it would only result in more evidence to be provided by the complainant. However, some TDI user associations complained about "a lack of clear and transparent methodology to carry out the economic

analysis and to demonstrate the causal link". These respondents argued that the current system actually favoured political interference into the system as it gave the EU "more leverage to kill a case if politically motivated to do so". It was suggested that the US system had a more thorough approach in showing the causal link. However, as the peer country reports in appendix I show, the approach of the EU in determining causality is not fundamentally different from other WTO Members, including the USA.

Importer and trader representatives stated that in their view in practice there was an automatic finding of causality if both dumping/subsidisation and injury were found, i.e. other factors were never strong enough to break the causal link. While this appears to be true it is also built into the system given the fact that injury factors and factors considered for the positive test substantially overlap.

Some Member States voiced even harsher criticism with respect to the current methodology applied to determine the causal link. It was argued by these Member States that the current system was "no more than a set of descriptive statistics and that causality per se was actually never demonstrated on solid economic grounds".

Other Member States stated that overall the methodology for assessing causality was appropriate but that the Commission, rather than looking for a possible break in the causal link between dumping/subsidisation and injury, should establish a clear positive link between the two.

In the view of the evaluation team, while it is true, as mentioned above, that the Commission has no established methodology for the causality analysis, devising such a measure while doing justice to the specificities of cases appears to be a most challenging exercise, and the evaluation team is not convinced that the benefits of such a methodology would outweigh its costs. It appears that a sound qualitative analysis of cause and effect is appropriate.

Conclusions/ recommendations

Based on the foregoing, the evaluation team considers that the general approach of the Commission for the determination of the causal link is appropriate. To promote coherence and consistency of application, it is recommended that the Commission codify its current approach in the following areas:

- temporal relationships between causal factors and their effects;
- the magnitude of changes in causal factors (such as increase in import volumes or market shares, etc.) required as a minimum for being considered as material in the causal link determination;[656]
- minimum standards for the qualitative analysis of the nature and extent with which each factor listed in Article 3(5)/Article 8(6) ASR impacts on the Union industry's injury;
- the threshold for other factors to break the causal link between dumped/subsidised imports and injury; and
- the ranking and aggregation of factors.

Based on the review of international practice, it is recommended that a particular emphasis on direct evidence of the effect of dumping or subsidisation in terms of lost sales by EU firms be included in the Commission's standard approach:

- examination for evidence of price leadership by imports at a micro, account-by-account level[657]; and

[656] To a certain extent, Canada has defined such thresholds; see the Canada country report in appendix I3.

[657] See Canada country report (appendix I3) at section 3.7. The Canadian authorities place great importance on transactions data and testimony of purchasers of the subject goods that switched to or received offers from

- direct evidence of accounts lost due to price to strengthen the case concerning the nexus between price developments and impact on domestic industry.

5.1.6 Application of Union Interest Test

This section addresses the operational aspects of the EU's application of the Union interest. The policy aspects related to the use of public interest have been analysed in section 4.7 above.

5.1.6.1 Defining the Union interest

Legal basis

According to the two basic Regulations, AD or CV measures may not be applied where the authorities can "clearly conclude" that it is not in the Union interest to apply such measures:

> "A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers [...] the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures"[658].

In order to be able to assess it, a clear-cut definition of what constitutes the Union interest must exist. In the view of the evaluation team, this definition must provide answers to the following questions:

- Which types of effects (e.g. economic, social, environmental) are considered to affect the Union interest?
- Is the Union interest to be understood in terms of economic welfare (and if so, which welfare concept would have to be applied), or as the sum of interests of stakeholders?
- Does the Union interest refer to the EU understood as a single entity, are different interests of Member States compared, are specific regional interests considered?

Types of effects considered in the Union interest test

Legal basis

The two basic Regulations fail to provide an answer to the issue of which effects of measures are to be considered in the Union interest test.

Practice

However, the Union institutions have provided explanations on their practice in some of the regulations. Thus, in *Footwear with uppers of leather* (AD499), it was clarified that:

> "The Community interest analysis is an economic analysis focussing on the economic impact of taking/not taking anti-dumping measures on operators within the Community. It is not a tool by which antidumping investigations can be instrumentalised for general political considerations relating to foreign policy, development policy etc. This is also confirmed by the list of parties which have standing under Article 21 of the basic Regulation. While this list is not exhaustive (in some investigations, suppliers of the raw materials for the product concerned have also made comments and these comments have been taken into account), it follows clearly from the types of parties mentioned that only the economic effects on parties within the Community are at stake in this test."[659]

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imported sources in establishing what they term "the crucial link between dumped imports and injury to the domestic industry."

658 Article 21(1) ADR; also see Article 31(1) ASR.

659 OJ L 275/1, 06.10.2006, at recital 279.

In *Polyester staple fibres* (AD509), the Union industry argued, following the imposition of provisional measures, that the non-imposition of definitive measures would increase emissions of CO_2 because the recycling industry would have to ship plastic wastes outside Europe following the closure of capacities in the EU. However, the Commission rejected to address this claim, arguing that it had been made too late in the proceeding.[660]

In *Biodiesel* (AD531, AS532), one interested party also submitted an environmental policy argument by claiming that measures would be incoherent with international and EU policy decisions to promote bio-fuels production and sales and to decrease dependency on mineral fuels. However, the Commission found that:

> "Article 21 of the basic Regulation requires that special consideration shall be given to the need to eliminate trade distorting effects of injurious dumping and to restore effective competition. Against this background, general considerations on environmental protection and supply of mineral diesel cannot be taken into account in the analysis and at the same time cannot justify unfair trade practices."[661]

In sum, non-economic considerations are not normally addressed in the Union interest test. While they have been considered in a very limited number of cases when raised by interested parties, the Commission has invariably rejected such arguments.

Conclusions/ recommendations

The evaluation team considers that the focus of the Union interest test on economic issues is appropriate. Consideration of non-economic effects entails the risk of making the test arbitrary, subject to political considerations, thereby ultimately increasing the unpredictability of EU TDI. It follows from this recommendation that non-economic considerations should normally be excluded from the test. The team observes however that it is not inconceivable for there to be economic consequences related to environmental or other policy issues that might be raised in a trade defence case; these could of course be included in the public interest evaluation.

Whose interests?

Legal basis

The two basic Regulations establish an open list of stakeholders whose interests will be considered in the Union interest test:

> "A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers."[662]

While it is clear that the interests of the Union industry, users and consumers *must* be considered, in practice the following stakeholders' interests are also considered in the Union interest test:

- the Union industry as a whole, including non-supporting EU producers;
- importers and traders;
- users or retailers;
- consumers; and
- suppliers to the Union industry.

Economic considerations

In the modern context of globalised production, the public interest test is the most appropriate tool to apply in considering the implications of differing strategies of firms in responding to global competition. As discussed in chapter 2, the use of TDI should not arbitrarily tilt the playing field within the EU towards firms that happen to organise their production chains such

660 OJ L 160/30 (termination), 21.06.2007, at recitals 35 & 38.

661 OJ L 67/22 (provisional), 12.03.2009, at recital 158. The provision duty regulation in the anti-subsidy case made the same argument; see OJ L 67/50 (provisional), 12.03.2009, at recital 260.

662 Article 21(1) ADR/Article 31(1) ASR.

that the final stage is in the EU while outsourcing perhaps greater amounts of value-added processing than a firm that retains intermediate goods production in the EU and outsources the final transformation stage.

Furthermore, some issues which may affect various stakeholders' interests are routinely considered, i.e. the potential effect of measures on competition in the EU and on security of supply of the product concerned.

In principle, this could be understood as being consistent with an appropriately specified general equilibrium economic model that provides standard economic welfare impact assessments; however, the two basic Regulations leave open how the various interests are to be evaluated and weighed in the balance.

Importantly, interests of non-EU stakeholders (such as exporters or exporting countries, e.g. when these are developing countries) are not taken into consideration in the Union interest test. Although in a limited number of cases developing country exporters submitted the claim that measures should not be imposed against developing countries, the Commission's response, in line with the provisions of the two basic Regulations, has been to point out the irrelevance of arguments based on the interests of non-EU interested parties or on the developmental status of the subject country.[663]

EU-wide or regional interest?

In principle, the Union interest refers to the interest of the whole EU, in line with the single market concept. Divergent interests in different Member States are not addressed explicitly, but might play an issue in cases where producers and importers or users are located in different Member States. Nevertheless, even in these cases the Union interest test does not consider the potential impact of measures in geographical terms but in terms of the interested parties being affected.

However, in cases where the Union industry has been determined as a regional industry, in application of Article 4(1)(b) ADR/Article 9(1)(b) ASR, the Union interest test will take "special account [...] of the interest of the region."[664] Nevertheless, as the regional industry concept has not been applied in any case during the evaluation period (see section 5.1.1.4 above), a regional focus of the Union interest test was also not used.

The evaluation team observes that the term "special account" would implicitly raise issues of differential weighting of interests if a quantitative approach was to be taken in evaluating the public interest. However, such cases have not occurred during the evaluation period.

Conclusions/ recommendations

5.1.6.2 Sources of information for assessing the Union interest

For the assessment of the Union interest, two main sources of information are available in principle: information submitted by interested parties and information gathered by the Commission on its own initiative from third parties (and including the information available within the Commission).

663 See e.g. *Footwear with uppers of leather* (AD499), *PET* (AD545, AS546).
664 Article 4(3) ADR/Article 9(3) ASR.

Legal basis

According to the two basic Regulations, the Union interest test is to be based on information provided by interested parties. Thus, the Regulations state that:

> "In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organisations may, within the time-limits specified in the notice of initiation of the anti-dumping investigation, make themselves known and provide information to the Commission."[665]

However, such information will be considered only if it is "properly submitted and [to] the extent to which it is representative"[666] and if "it is supported by actual evidence which substantiates its validity."[667]

Practice

In practice, the Commission, although primarily resorting to the contributions of interested parties as listed in the regulation, also addresses contributions from other stakeholders, although it is not clear to what extent such contributions would affect the findings regarding the Union interest. For example, in *Footwear with uppers of leather* (AD499), the regulation stated that:

> "exporting producers do not have standing on Community interest under current rules. Their points have nevertheless been analysed for the sake of argument."[668]

At the same time, the arguments brought forward by the exporters – the negative effects of measures on Vietnam as a developing country on welfare in the EU – were rejected.

In many, but apparently not all, cases the Commission also uses other sources of information in order to determine the likely effect of measures on interested parties.[669] For example, in *Welded tubes and pipes of iron or non-alloy steel* (AD 523), although neither suppliers nor users of the product concerned submitted views, the Commission concluded that the measures would have a positive effect on suppliers and no significant effect on users. Other sources of information are of particular importance with regard to the interests of consumers, as consumer associations hardly ever contribute to the proceedings. Nevertheless, in some cases the Commission has also simply stated that an assessment of a measure's impact on an interested party could not be made due to lack of contributions.[670]

A problem in the implementation of the Union interest test is that interested parties typically only provide comments after provisional measures have been imposed. This is already late in the process, which makes it difficult to undertake a thorough test (given time constraints). Furthermore, in some cases information provided by interested parties at this late stage was rejected by the Commission due to the fact that it could not be verified anymore (as verification visits take place prior to the imposition of provisional measures). Finally, the representativeness of contributions made by interested parties at this relatively late stage is not always guaranteed.

5.1.6.3 Methods applied in determining the Union interest

Important methodological features of the Union interest test are:

- the test is prospective, i.e. it assesses the likely effect of measures in the future;

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665 Article 21(2) ADR/Article 31(2) ASR.
666 Article 21(5) ADR/Article 31(5) ASR.
667 Article 21(7) ADR/Article 31(7) ASR.
668 OJ L 275/1, 06.10.2006, at recital 251.
669 See appendix G4.
670 For example, effect on importers and suppliers in *Cargo scanning systems* (AD539), effect on users and consumers in *Open mesh fabrics of glass fibres* (AD558).

- the test compares two hypothetical situations, i.e., a situation where measures have been imposed with a situation in the absence of measures;
- the Union interest test assesses the likely effect on different stakeholders and determines their interest in line with these effects; and
- as the test is based on an analysis of the different stakeholders' interests, the various particular interests must be aggregated into the "Union interest."

Prospective test

The Union interest test aims at assessing the likely future effect of measures. In order to do this, the Commission usually simply extrapolates recent developments into the future. This is especially evident in the assessment of the measures' effect on the Union industry, which routinely states that in the absence of measures the deterioration is going to continue, whereas the imposition of measures will lead to increases in sales volume and prices and therefore an improved profitability and financial situation.

Comparison of situations with and without measures

The Union interest test compares the future situations with and without measures imposed. It does not distinguish between graduated alternative scenarios, i.e. by assessing the consequences of different levels of measures or different periods of implementation of measures. This approach is derived from the formulation in the two basic Regulations, which define the purpose of the Union interest test as a safety valve against imposing measures which are clearly against the Union interest. A more refined approach aimed at identifying a specific level of measures that would remove the negative impact on the Union overall, and thus inform the construction of the lesser duty, is not foreseen in the two basic Regulations.

Determination of interests

Interests of the different stakeholders are determined, first, based on the stakeholders' own contributions. However, often these expressed interests are analysed further by the Commission with regard to their substance, and the "real interest" of stakeholders is then inferred from the likely effect of measures on these stakeholders.

With regard to the Union industry interest, the Commission systematically discusses the consequences of both imposing and not imposing measures. For other stakeholders, often only the effect of imposing measures is explicitly addressed.

Union industry interest
The expected impact of measures on the Union industry is always addressed in the test.[671] As mentioned above, typically regulations find that the Union industry will increase sales and market share at a higher price, thereby increasing its profitability and improving its financial situation. It is rare that a more modest effect of measures on the Union industry is predicted. For example, in *Footwear with uppers of leather* (AD499) the regulations merely stated that as a result of the measure the Union industry was expected to stabilise, i.e. that measures would avoid further factory closures and job losses. Likewise, in *Stainless steel bars* (AS556) and *Ceramic tiles* (AD560), the expected effect of measures was considered to be the prevention of further distortions and the restoration of fair competition. It has been noted that in more recent cases the regulations

[671] See table 4 in appendix G.

imposing measures have tended to be less detailed regarding the likely impact of measures on the Union industry.

In addition to the impact of the imposition of measures, the Commission also routinely assesses the likely impact of non-imposition of measures on the Union industry. Again, the findings are typically extrapolative in nature, predicting a further deterioration of the Union industry's sales volume, market share and profitability, leading to lower investment, production cuts and job losses.

In the past, the Commission routinely considered the Union industry, understood as the complainants, in the Union interest test, but in a majority of cases also considered the effect of measures on other EU producers of the like good: during the evaluation period, in 33 out of 56 cases in which the Union interest test was discussed the implementing regulation addressed the effect of measures on non-complaining EU producers. The evaluation team could not identify any specific pattern of cases in which effects on non-complaining producer were addressed or not; the practice of assessing the effect of potential measures on the Union production therefore appears have been not fully consistent.

In the vast majority of cases where the impact on both complainants and non-complaining producers was addressed, provisional or definitive duty regulations concluded that the impact of measures on non-complaining EU producers would be identical to the one on the Union industry. In the only two cases in the evaluation period where this was not the case the non-complaining EU producers were not considered as part of the EU production:

- in *Ring binder mechanisms* (AD559), the non-complaining EU producer was also importing the product concerned from the subject country and was hence considered as an importer;
- in *Vinyl acetate* (AD 566), the non-complaining EU producer was controlled by a company in the subject country.

Following a recent change in practice, the Union industry is now defined in relation to all Union producers, therefore considering the effect of measures on all Union producers is a natural consequence of the new definition on Union industry. The lack of consistency mentioned above is therefore expected not to occur in the future.

Conclusions/ recommendations

To summarise, in general the assessment of the Union industry interest consists in a simple extrapolation of the summarised injury determination findings and thus adds limited value to the injury assessment.

Also, the recent redefinition of the Union industry as all Union producers might have to be reflected in the two basic Regulations by replacing the term "domestic industry" in Article 21(1) ADR/Article 31(1) ASR with "Union producers of the like good" and expanding the list of stakeholders in Article 21(2) ADR/Article 31(2) ASR from "complainants" to "Union producers of the like good."

Supplier interests

The interest of suppliers to the Union industry is discussed only in a minority of regulations: in the evaluation period, in 21 out of 56 cases they were addressed.[672]

If the effect of measures on suppliers is addressed, the Commission almost invariably finds it to be positive, typically stating that the measures will help to maintain the suppliers market.

[672] See table 4 in appendix G.

A particularly interesting case regarding the interests of suppliers was *Frozen strawberries* (AD505), as the Commission here invoked an argument which could be considered communitarian, as discussed in section 2.2.7. The definitive duty regulation stated:

> "It is recalled that the estimated number of commercial producers of fresh strawberries in Poland was 96 700 in 2002 out of which around 80 000 were involved in the growing of strawberries for further processing. Although it is possible that this number has decreased as a consequence of consolidation of the sector, it is nevertheless clear that the farming of strawberries is an important economic activity for a large number of farms in Poland. It has been argued that the sector for growing strawberries in Poland is of key importance to a number of regions in the country that are otherwise characterised by high unemployment and that the failure to impose measures would increase these unemployment figures even more. It has also been held that these farmers cannot switch to other more profitable crops since the soil conditions in these areas are mainly suitable for strawberry farming."[673]

While these arguments provide a good example of the added value that the Union interest test can provide to an investigation, the treatment of supplier interests in this degree of detail is exceptional.

User interests

The interests of users of the like good are discussed in almost all cases, and contributions from users are frequent. Typically, users are against the imposition of measures as these tend to increase users' costs. Other frequent arguments made by users against measures are that they tend to increase (unfair) competition on the product's downstream market – i.e. users are afraid of being affected by dumping in their market – and that they have a negative impact on the security of supply and product choice.

In the Commission's assessment, the impact of measures on users is typically seen as "negligible", "not significant" or "limited". Although the Commission sometimes acknowledges the effect on input prices induced by the measures, the standard argument is that the product concerned only accounts for a low share in the users' production costs (or turnover, in the case where users are actually retailers); a "low" share may mean up to 20%.[674] Other frequent arguments are that profit margins are high enough to absorb cost increases and that cost increases can at least partly be passed on to customers.

The only cases where the Commission acknowledged that the imposition of measures could have non-marginal negative effects on users were the ones in which the Union interest test led to (or played an import role in) the termination of investigations, i.e. *CD-Rs* (AD500), *Recordable DVDs* (AD501) and *Polyester Staple Fibres* (AD509), as well as *Compressors* (AD519), where the duration of measures was limited to two years because of public interest considerations:

- In *CD-Rs* (AD500) and *Recordable DVDs* (AD501), the Commission found that measures would have different negative effects on users: in Member States that have levies on DVD sales, costs could not be passed on to consumers and users would therefore face a loss of profitability; in Member States without levies, where costs could be passed on to consumers, users would face reduced sales;
- *Polyester Staple Fibres* (AD509): The case was terminated following the withdrawal of the complaint, which occurred after provisional measures had been imposed. Thus, while the provisional duty regulation had concluded that the imposition of measures was not against the Union interest, the termination notice reassessed the issue and determined that the termination of the proceeding was not against the Union interest.

673 OJ L 100/1, 17.04.2007, at recital 62.

674 In *Citric acid* (AD522); in *Manganese dioxides* (AD520) and *Melamine* (AD554): up to 15%.

The provisional duty regulation[675] had argued that the effect of measures on users was not significant – employment effects could not be compared (the user industry accounted for 20,000 jobs, the Union industry for 1,700), the effect of measures on production costs was estimated at a maximum of 1.5%, and the likelihood of increased imports of downstream goods was seen as limited.
Conversely, the termination notice[676] argued that measures would have a negative effect on users, particularly in the bedding industry, where the measures would result in an increase in production costs of 6-8% (compared to a profit margin of 5%) and an increase in imports of downstream products, leading to substantial job losses (it was noted that employment in the particularly affected bedding industry alone was 7,000).

Finally, in *Compressors* (AD519), the regulation stated that a negative effect was possible without substantiating this information:

> "Given that only one unrelated importer cooperated in this proceeding and given the lack of participation of any other economic operators in the Community or consumer associations, it was considered appropriate to analyse a global, overall potential impact of possible measures on all these parties. Overall, it was concluded that the situation of consumers and economic operators involved in the distribution chain in the Community could be negatively affected by the possible measures."[677]

In view of the treatment of interested parties' interests in other cases, this finding is quite surprising, especially given the fact that it is not substantiated any further.

Importer interests
The treatment of importer interests in regulations is very similar to that of user interests: they are discussed in all cases, with the vast majority of importers being against the imposition of measures, and for basically the same reasons as users, i.e. cost increases and fear of supply shortages.

Likewise, the Commission's findings on importer interests resemble those of the assessment of user interests: although in certain cases the Commission acknowledges that the impact on individual importers might be substantial, in most cases, the finding is that the impact is not significant. The arguments typically given are identical to the ones regarding user interest, with the additional argument added that importers can switch to other sources.

Consumer interests
The effect of measures on consumer interests is addressed in only a minority of regulations – in the evaluation period, in 22 out of 56 cases.[678] In the remaining cases, except for those cases where Union interest considerations led to the termination of measures or the limitation of their duration (see discussion under "User interest" above), the Commission almost always found that the impact of measures on consumers was insignificant. In seven out of 22 cases, the regulation quantified the effect of measures on consumer prices, whereas in the remaining ones it was simply stated that the effects would be limited.

The only case in the evaluation period where the regulation recognised a non-marginal negative effect on consumers is *Frozen strawberries* (AD505), where the Commission stated that a partial pass-on of cost increases could lead to increased prices for consumers; however, no quantified estimate on the scope of this price increase was provided.

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675 OJ L 379/65, 28.12.2006, at recitals 149-165.
676 OJ L 160/30, 21.06.2007, at recitals 12-31.
677 OJ L 81/1, 20.03.2008, at recital 131.
678 See table 4 in appendix G.

Supply security and effects on competition

Supply issues and effects of measures on competition were addressed in roughly half of the cases. In most of these cases, the same arguments are presented.[679] Usually, users or importers (sometimes exporters) argue that measures could lead to a shortage of supply because imports from the subject country would be stopped and EU production would not be able to satisfy demand, either in terms of quantity or quality (e.g., because certain types of the product concerned were not produced in the EU).

The Commission's response in these cases typically rests on the following arguments:

- Measures are not designed to completely cut off imports from the subject country but only to re-establish fair competition, and hence imports are likely to continue;
- EU producers have sufficient spare capacity, or could quickly expand capacities in order to satisfy demand;
- Third country exporters could also supply the EU market.

Thus, in most cases the regulations find that the measures have no negative impact on supply in the EU. In some cases, a positive effect is found, based on the argument that the measures help the survival of the EU industry which contributes substantially to security of supply. E.g., in *Frozen strawberries* (AD505), it was argued that the variety produced in Poland had unique qualities unmatched by any imported variety, and the measure would help ensure the continued supply of that variety.[680]

The only case where the Commission found a clearly negative impact of measures on supply was in *Polyester staple fibres* (AD509), where in the termination notice it was found that

> "the Community industry and other Community producers are not in a position to make the necessary efforts to satisfy the Community demand. Moreover, the investigation carried out after the imposition of provisional measures has shown that Community users are running into serious difficulties when trying to obtain certain types of PSF from third countries not subject to antidumping measures."[681]

Accordingly, it was found that supply of polyester staple fibres could remain problematic. This argument was presented following further investigations subsequent to the imposition of provisional measures. In the provisional duty regulation, it had been argued that the effect of measures on supply would be negligible since imports from subject countries only accounted for 16% of user demand in the EU and users could switch to other suppliers.

Regarding the potential impact of measures on competition in the EU, this is usually discussed in cases where interested parties have raised a claim concerning competition in the EU. Thus, the two typical arguments of interested parties (usually users, importers or exporters) are that measures would lead to a lack of competition – concentration in the EU market, oligopoly or monopoly – or that the Union industry had already engaged in anticompetitive practices. These claims have been rejected by the Commission in all cases.

With regard to the first argument, the Commission has always found that the number of suppliers in the EU and third countries would be high enough to guarantee competition in the EU market with measures in place. In eight cases, the Commission furthermore reversed the argument and stated that in the absence of measures a dominant position of the exporters from

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679 See table 4 in appendix G.

680 A similar argument was made in *Biodiesel* (AS532), *Molybdenum wires* (AD540), *Melamine* (AD554) and *Vinyl acetate* (AD566).

681 OJ L160/30 (termination), 21.06.2007, at recital 20.

the subject country could result.[682] Interestingly, of these, only two featured the core conditions to be considered as cases of potential predatory dumping under the tests applied in section 2.2.2: *Tungsten electrodes* and *Dicyandiamide*. In the remaining cases in which the Commission cited competition concerns, the number of exporters targeted in the investigation was too high as to raise concerns about predatory dumping based on tests applied in the economic analysis conducted in this report (which is consistent with the literature).

With regard to the second argument, domestic competition issues could not be confirmed by DG Competition in any case; however, in *PSC wires and strands* (AD529), where DG Competition was investigating Union producers, the definitive duty regulation stated that AD measures would have to be reviewed, if DG Competition found a cartel to be in place.

Aggregation and weighting of interests

Legal basis

As the Union interest test takes a micro-economic approach, by considering individual stakeholders' interests, the question arises how these interests are to be aggregated into the Union interest. Especially in view of the fact that interests of different stakeholders will typically conflict with one another, the issues of weighting of interests becomes important.

In this regard, the two basic Regulations specify that:

> "the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration."[683]

Furthermore, the EU will refrain from taking measures only if the authorities "can *clearly* conclude" [684] that these measures are not in the interest of the Union. This means that the interests of the Union industry are given more weight than the interests of other stakeholders.

In *Footwear with uppers of leather* (AD499), it was further clarified that:

> "the law accepts that antidumping measures have certain negative effects on those parties which are typically not in favour of such measures. Measures would only be considered as not in the interest of the Community, if they had *disproportionate* effects on the aforementioned parties. [685]

At the same time,

> "the Community interest test is not a cost-benefit analysis in the strict sense. While the various interests are put in balance, they are not weighed against each other in a mathematical equation, not least because of obvious methodological difficulties in quantifying each factor with a reasonable margin of security within the time available, and because there is not just one generally accepted model for a cost-benefit analysis. [686]

Thus, while it is established that the negative effects of measures on stakeholders must be disproportionate in relation to the positive effects on the Union industry, discretion remains regarding what is considered as "disproportionate."

Practice

A review of cases provides little guidance. An explicit discussion of the weighting of conflicting interests hardly ever takes place in regulations. The only indication is that cases where the Union industry holds only a small EU market share and exports subject to the investigation a large

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682 This argument was made in *Lever arch mechanisms* (AD491), *Plastic sacks and bags* (AD497), *Tungsten electrodes* (AD502), *Dicyandiamide* (AD512), *Monosodium glutamate* (AD521), *Citric acid* (AD522), *Candles, tapers and the like* (AD529), and *Ceramic tiles* (AD560).

683 Article 21(1) ADR and, *mutatis mutandis*, Article 31(1) ASR.

684 Article 21(1) ADR (emphasis added) and, *mutatis mutandis*, Article 31(1) ASR.

685 OJ L 275/1, 06.10.2006 at recital 279; emphasis added.

686 OJ L 275/1, 06.10.2006 at recital 279.

market share are the ones where the Commission is most likely to find that measures would be disproportionate – this was discussed both in the *CD-R* and *Recordable DVD* cases, where the Union interest test led to the termination of investigations, and the *Compressors* (AD519) case, where Union interest consideration led to a shorter duration of measures.

In the cases where the Union interest test has led to the termination of investigations without measures, the Commission found that:

> "the imposition of measures would, on the one hand, have substantial negative effects on importers, distributors, retailers and consumers of the product concerned, while on the other hand, the Community industry is unlikely to obtain any significant benefits. It is therefore considered that the imposition of measures would be disproportionate and against the Community interest."[687]

In a situation where the imposition of measures would not result in any benefit for the Union industry, of course any negative effect on other interest groups would be disproportionate, and hence this example provides little insight into the weighting practice.

The conclusions on the Union interest test in most cases which ended with the imposition of definitive duties summarise the various interests and then go on to state that there are no compelling reasons not to impose measures, or that the negative effects are not disproportionate. The only explicit indication provided in regulations during the evaluation period concerning the basis for assessment of the proportionality of the positive and negative effects is that the number of people employed in sectors which are positively and negatively affected by measure cannot be compared.[688]

Finally, a review of how the Commission evaluates the impact of measures on interested parties reveals certain inconsistencies in the evaluation of effects that tend to favour the interests of beneficiaries of measures. For example, while effects on importers or users are often characterised as insignificant because the product concerned only affects a low share of total turnover or production costs, the same argument has not been seen regarding the interests of suppliers.[689] The evaluation team observes that this appearance of bias may be less the result of a biased application of the Union interest test than of an attempt to protect Union interest decisions from criticism: i.e., it is precisely the lack of clear guidance on how to balance and weigh interests, and how to determine disproportionate costs, which leads the Commission to characterise costs of measures as "low" in cases where they are imposed and to characterise them as "high" in cases where measures are not imposed (or are reduced) as a result of Union interest considerations.

Stakeholder views

Stakeholders held different views regarding the methodologies applied in the Union interest test. Critics of the current system held that, at present, there was no real economic methodology used by the Commission to evaluate the impact of measures on users or consumers. The Commission rather relied, it was argued, on descriptive, "soft" analysis based on information received from eligible parties. It was suggested that the Union interest test should also systematically assess the dynamic effects of measures on consumers and downstream products via the use of econometric techniques. In any case, the Commission should not base the Union interest test only on facts put

687 *CD-Rs* (AD500): OJ L 305/15 (termination), 04.11.2006, at recital 116. Also see the termination notices for *Recordable DVDs* (AD501) and *Polyester Staple Fibres* (AD509).

688 In *PET* (AS546), the Commission argued that "the question whether the imposition of measures is against the Union interest as a whole cannot be reduced to a simple question of the number of people employed", OJ L 254/10, 29.09.2010, at recital 134.

689 E.g. in *Side-by-side refrigerators* the fact that the "supplies of raw materials and components to the Community industry with respect to the manufacturing of the like product represented on average around 2 % of these two companies' respective total turnover and 22 direct jobs" was not considered as marginal and given as an argument for the positive effect of measures on suppliers; OJ L 59/12 (provisional), 01.03.2006, at recital 101.

forward by interested parties. Furthermore, it was criticised that the interests of EU producers with global manufacturing, users, traders, retailers, employees and consumers were currently not given adequate weight in the test, i.e., there was a bias in favour of the Union industry in its narrow definition.

An opposing view was held by defenders of the current Union interest test. They argued that the current greater weight accorded to EU producers was justified because they are the only economic actors whose survival was directly put at risk by dumping or subsidised imports and their investments were more significant than those of importers. Hence, barriers to entry and sunk costs were higher. Furthermore, giving the same weight to the interests of consumers as those of producers would seriously put at risk the non-discriminatory application of TDI because consumer products were typically produced by SMEs while raw materials, because of economies of scale, were most often produced by major industrial groups. Therefore, to give increased importance to the possible impact on consumers would in practice make it harder to apply measures in sectors in which SMEs were active. Finally, it was argued that, if increased weight were given to the interests of consumers, this would have to be balanced with an increased weight applied to the interest of all those stakeholders, besides the complaining producers, who would benefit from measures. In particular, it was argued that EU production had positive externalities/spill-over effects which would have to be taken into account; e.g., the dependence of service providers on EU producers. In sum, according to this view the Union interest in its current form already exceeded the standards applied by other WTO Members and ensured that measures were not abused for protectionist objectives.

Conclusions/ recommendations

The evaluation team recommends that the Commission take into consideration out-sourcing strategies (domestic and international) of businesses in its public interest evaluations. In the first instance, following past practice, the Commission could request documentation of EU value added from complainants and from exporters.

The Commission should consider product exclusions where necessary to avoid disruption on the grounds of no injury being caused by products that meet specific requirements of particular importers that are not produced by the domestic industry or that would entail significant qualification costs beyond the higher price of domestic product for domestic product to be able to meet the needs.

A public interest test cannot be construed to be a comprehensive cost-benefit analysis. The analysis in the present evaluation report suggests the following considerations be applied in evaluating the public interest in any individual case:

- Where the Union industry's market share is low, the welfare benefits of TDI are likely to be negative.
- Where concentrated impacts on particular communities can be expected from not applying TDI, the case for TDI is strengthened.
- Where the goods in question are intermediate products used by downstream industries, the larger the share of production costs, the greater the likelihood that TDI could have adverse effects on EU industry as a whole.
- Conversely, where the inputs for the like products produced by the Union industry constitute a large share of the EU upstream industries' output, the welfare effect of TDI is likely to be positive.

Furthermore, the role of interested parties should be clarified: in line with the practice in other parts of the investigations, their main role should be to provide information and comment on the Commission's findings, but the actual analysis of public interest should be reserved for the

Commission.[690] In consequence, this would require collection of information on Union interest issues (e.g. through questionnaires) at the same time as information for the dumping/ subsidisation and injury analysis. Basing the Union interest test on representative information would help the Commission to arrive at more robust findings.[691]

While these suggested changes are likely to enhance the robustness and validity of the Union interest test findings, they would also require additional resources.

5.1.6.4 Effect of the Union interest test

As mentioned above, the Union interest test *formally* has a dualistic nature: according to the two basic Regulations it may lead to the non-imposition of measures or not, but not to the amendment of measures.

Based on this distinction, some stakeholders have argued that the low number of cases stopped based on Union interest considerations shows the lack of relevance of the Union interest test for TD practice. However, based on the statistics, the number of cases terminated based on Union interest considerations is actually not so small: in the evaluation period this happened in six country-cases (*CD-Rs* – China, Hong Kong and Malaysia, and *Recordable DVDs* – China, Hong Kong and Taiwan, see section 5.1.7.2 below), although admittedly these instances concerned two investigations involving similar products and a similarly low market share for EU producers. Furthermore, in two other country-cases (*Polyester Staple Fibres* – Malaysia and Taiwan) the Union interest played an important role in the termination of investigations.

Furthermore, in addition to the formally applied test in line with Article 21 ADR/Article 31 ASR, the Union interest test also influences the design of measures. Thus, both the type and the duration of measures as well as the acceptance of undertakings are ultimately influenced by public interest considerations:

- **Type of measures:** As will be discussed in detail in section 5.1.7.3 below, the standard type of measure is an *ad valorem* duty. If a specific duty or MIP is chosen, this is usually as a result of public interest considerations. For example, in *Melamine* (AD554), an MIP was chosen as the appropriate type of measure because:
  > "it appears to be in the Union interest to change the form of the proposed measures to limit any possible serious impact on the overall users' business which is heavily dependent on melamine supply"[692];
- **Duration of measures:** The standard practice is to impose measures for five years. However, in one case a shorter duration of measures was justified based on public interest considerations. In *Compressors* (AD519), it was first argued that
  > "in view of the high dumping and injury margins, it is considered that, in this particular case, on the basis of the information submitted there is not enough evidence to conclude that the possible imposition of measures would be clearly disproportionate and against the Community interest"[693].

  Nevertheless, measures were limited to two years primarily because of the low market share of the Union industry:
  > Should, however, in spite of the imposition of duties, the situation prevailing prior to the imposition of measures (in particular the 53 % market share of imports from the PRC and the relatively small

690 An alternative (or complementary) measure could be to de-politicise the decision-making process – by reducing the role of Member States in the decision-making process – and thus to enable the Commission to undertake the Union interest test based on technical considerations.

691 In order to establish such an enhanced Union interest test, a third team of case handlers could be created in each case, in addition to the dumping/subsidy and injury teams, to investigate Union interest.

692 OJ L 124/2, 13.05.11, at recital 76.

693 OJ L 81/1, 20.03.2008, at recital 135.

market share of cooperating producers in the Community) remain unchanged, the cost of the possible duty to be borne by consumers and economic operators in the Community (including importers, traders and retailers) might be considered, in the long run, to be greater than the benefit for the Community industry. Therefore, the measures will be imposed for two years, and certain reporting requests will be made to, in particular, Community producers."[694]

- **Acceptance of undertakings:** Since the acceptance of undertakings means that the authorities forego revenues, there must be a particular justification for them. The Union interest – notably the security of supply for industrial users of the product concerned – has been one such justification.

5.1.7 Determination of Measures

5.1.7.1 Calculation of measures

Lesser duty rule[695]

For the calculation of AD duties, the Commission applies the lesser duty rule. The ADR specifies that the Legal basis

> "amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry"[696]

The application of the lesser duty rule is not compulsory according to WTO rules but is recommended. Article 9.1 of the WTO ADA states that "[i]t is desirable that [...] the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."

As per the lesser duty rule, the duty is calculated as the lesser of the dumping/subsidy margin and the injury margin. Written as a formula:

$$Anti\text{-}dumping/countervailing\ duty = min\ (Dumping/subsidy\ margin; Injury\ margin)$$

Calculation of injury margin

Neither the WTO agreements nor the two basic Regulations provide any guidance for the calculation of the injury margin. In view of this, the Commission applies different methodologies. In general terms, the Commission compares, at the same level of trade, the weighted average import price of the dumped products with a "non-injurious price." The difference between these two is then expressed as a percentage of the CIF import value of the dumped product.

While this general approach is always applied, differences in methodology can be observed regarding the calculation of the non-injurious price, which is sometimes interpreted to be the actual sales price (in which case the injury margin is identical to the undercutting margin) but more often calculated based on Union producers' costs plus a reasonable profit margin (price underselling).

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694 OJ L 81/1, 20.03.2008, at recital 136.

695 Here, the evaluation team describes the calculation issues of the lesser duty rule. Effects of the rule as well as stakeholder views are addressed in section 2.3.2.1; finally the more strategic or policy aspects are discussed, in comparative perspective, in section 4.6.

696 Article 9(4) ADR. Article 7(2) ADR establishes the same rule for provisional duties. Also see Article 15(1) and 12(1) ASR for the corresponding rules regarding CV duties.

Underselling

Legal basis

Under the underselling method, the basic consideration is that

> "any measures should allow the Community industry to cover its costs of production and to obtain overall a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, i.e. in the absence of dumped imports, on the sales of the like product in the Community"[697]

Cost is either determined by adjusting the actual sales price to a break-even level, or by resorting to production cost data of the Union industry. The profit margin is usually identified based on the average profit margin of the Union industry before the dumping period, although according to Commission staff interviewed sometimes also the most efficient EU producers are taken as the basis. The Commission practice generally considers "that the profit margin at the beginning of the period considered is the profit margin realised in the absence of dumped imports"[698].

Practice

For cases initiated in the evaluation period, profit margins have varied from 3% to 15% with an average of 6.7% (Table 53). As can be seen the profit margin established for the calculation of underselling often differs from the actual Union industry's profit margin at the beginning of the period considered.

Table 53: Target and actual profit margins, EU AD cases initiated 2005-2010

Target profit margin	Case no. and actual profit margin in first year of period considered
2.5%	AD512 (loss), AD540 (na)
3.0%	AD490 (3%), AD533 (12.1%), AD547 (3%)
3.2%	AD541 (3.1%)
3.9%	AD560 (3.9%)
5.0%	AD491 (loss), AD496 (4.2%), AD508 (3.8%), AD509 (0.4%), AD513 (0.8%), AD514 (12.3%), AD516 (2.3%), AD519 (loss), AD521 (na), AD523 (0.9%), AD525 (2.1%), AD534 (loss), AD549 (0.3%), AD554 (loss), AD559 (na)
5.9%	AD553 (3.2%)
6.0%	AD493 (na), AD497 (6.3%), AD499 (1.6%), AD522 (5%)
6.2%	AD529 (6.2%)
6.5%	AD505 (6.5%), AD528 (6.9%)
6.8%	AD524 (loss)
7.0%	AD506 (6.8%), AD548 (7%)
7.7%	AD563 (na)
8.0%	AD502 (loss), AD552 (loss)
9.9%	AD530 (14.2%)
10.0%	AD520 (10%)
10.5%	AD518 (8.1%)
12.0%	AD511 (20%), AD517 (12%), AD558 (6%)
14.0%	AD507 (29.7%), AD539 (na)
15.0%	AD531 (9.3%)

Source: Provisional and definitive duty regulations, data available for 45 cases.

In most cases where such a difference between actual and target profit margin exists, detailed information is provided in the regulations. For example:

- in *Frozen strawberries* (AD505), the Commission did not take into account the Union industry's profit levels in 2003 which were deemed as "exceptionally high" and rather chose profit levels of 2002.[699] However, in line with the practice as mentioned above, the 6.5% (beginning of the period considered) would have been taken as the profit margin anyway. The Commission's practice in the evaluation period seems to have been shifting between taking the profit margin at the start of the period considered, the average profit margin in years prior to

697 *Tungsten electrodes* (AD502), OJ L 250/10 (provisional), 14.09.2006, at recital 134; this standard phrase is regularly found in regulations.

698 *Peroxosulphates* (AD511), OJ L 265/1, 11.10.2007, at recital 150.

699 OJ L 287/3 (provisional), 18.10.2006, at recital 144.

dumping[700] and the highest "normal" profit margin prior to the investigation period as the basis;[701]

- in *PSC wires and strands* (AD529) provisionally the average profit margin in the first and second year (which was considerably higher) was used, but in the definitive duty regulation only the first year profit margin was applied;[702]
- in *Sweet corn* (AD507), the Commission adjusted the profit margin of 21.2% in the year where no dumping took place downwards as dumping was found only in one market segment, i.e. retailer brands, where the profit margin is lower;[703]
- in *Silico-manganese* (AD513) the profit margin was established at the same level as in an earlier AD investigation;
- in *Dihydromyrcenol* (AD514), the pre-dumping profit margin of 12% was reduced to 5% for the injury margin calculation because "new capacities have been built and, as a result, the overall price level – irrespective of presence of dumped imports – has slightly decreased, whilst the cost of production per unit remained more or less unchanged"[704];
- in *Ferro-silicon* (AD516), instead of the 2.3% margin at the start of the period considered the Commission "found that a profit margin of 5 % of turnover could be regarded as an appropriate minimum which the CI could have expected to obtain in the absence of injurious dumping, based on past performances of the CI and considered reasonable for guaranteeing the industry productive investment on a long-term basis"[705];
- in *Coke (over 80mm)* (AD518), the profit margin was determined provisionally as the average profit margin attained by the Union industry during the first three years of the period considered. However,

  > "the methodology used to determine the injury elimination level was re-examined following comments received. It was considered that the years used as benchmark could indeed be considered unrepresentative in normal circumstances to the extent that 2004 was an exceptionally good year in terms of profits (15 %) because of a significant shortage of Chinese Coke 80+ on the market. This exceptional situation was reflected again in 2005 (16,2 %). On the other hand, in 2003 the Community industry was likely still in the process of recovering from past dumping, reflected in a somewhat lower profit margin (8,1 %). Instead, the target profit of 10,5 % used in the previous investigation was based on three consecutive years (1995 to 1997) at a time before increased market penetration of Chinese imports"[706]

- in *Compressors* (AD519), the Commission considered a profit margin of 5% appropriate in a situation where the production of the like product by the Union industry had not been profitable during the reference period but the profit margin of 5% had been achieved "on other products of the same category";[707]
- in another case where the Union industry was consistently making losses during the pre-investigation period concerned, *Coated fine paper* (AD552), the Commission considered that the target profit of 8% "was found to reflect the high up-front investment needs and risk involved in this capital-intensive industry in the absence of dumped and/or subsidised imports"[708];

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700 This method was applied in *wire rod* (AD530), *Biodiesel* (AD531) and *Open mesh fabrics of glass fibres* (AD558).

701 This methods was used in *Saddles* (AD508) and *Continuous filament glass fibre products* (AD549)

702 OJ L 118/1, 13.05.2009, at recital 73f.

703 OJ L 364/68 (provisional), 20.12.2006, at recital 121.

704 OJ L 196/3 (provisional), 28.07.2007, at recital 93.

705 OJ L 223/1 (provisional), 29.08.2007, at recital 171; a similar argument was used in *Welded tubes and pipes of iron or non-alloy steel* (AD523) and *Citrus fruits* (AD524).

706 OJ L 75/22, 18.03.2008, at recital 68.

707 OJ L 81/1, 20.03.2008, at recital 137. In a similar situation, in *Aluminium foil* (AD534) the Commission justified the choice of a 5% profit margin where the Union industry was actually making losses with the recovery of past dumping, see OJ L 262/1, 06.10.2009, at recital 103f.; also see *Melamine* (AD554), where the profits in the year 2003 were used (the period considered started in 2006) because it was the only year where the Union industry was profitable, see OJ L 298/10, 13.05.2011, at recital 125.

708 OJ L 128/1, 14.05.2011, at recital 158.

- in *Citric acid* (AD522), the Commission provisionally considered a profit margin of 9% appropriate which had been achieved by the more profitable of the two EU producers in 2001, two years before the start of the reference period. Following claims by interested parties, the methodology was then revised and instead the weighted average profit margin of the two EU producers in 2001, of 6%, was used.[709] The profit margins at the start of the period considered ranged from 0 to 10%;
- in *Seamless pipes and tubes, of iron or steel* (AD533), a profit margin of 3% rather than the 12% shown at the start of the reference period was considered as appropriate. This was justified because the case addressed a threat of injury;[710]
- in *Zeolite A powder* (AD553), rather than taking the profit level of the product concerned of 3.2%, the Commission established a target profit of 5.9%, which was "the profit level achieved by the Union industry in the IP *for all its products including the product concerned.*"[711]

Conclusions/ recommendations

The provision of such detailed information is considered good practice; it also helps the Commission in addressing interest parties' comments. At the same time, given the variety of methods applied it would be preferable if criteria for the choice of method were established in order to increase predictability of the outcomes. In this regard, the evaluation team observes that profit rates vary systematically across industries, to a much greater extent across firms, and also over the business cycle. The most straightforward approach to establishing a target profit rate for the injured industry is to use the evolution of profits for a closely comparable group of firms (i.e., a "control group"[712]) over the same period. The observed rate of change in the profit rate in the control group can then be used to project the counterfactual profit rate for the injured firms over the period in which injury is found to have occurred. This approach takes into account the firm and/industry-specific level of profits as well as the variability over the business cycle. Moreover, this approach is consistent with the use of control groups that did not benefit from TD protection to identify the effect of TD measures on protected sectors in firm-level trade analysis.

Choice between underselling and undercutting method

The standard practice of the Commission in the calculation of the injury elimination level is to apply the underselling method. [713] In the evaluation period, undercutting was used to determine the injury elimination level in only one case, *Dicyandiamide* (AD512). In this case, the undercutting (plus profit margin) method was applied because causation showed that other factors than dumped imports played a role, the dumping margin was established based on Union industry production cost, and because of competition and product supply concerns, as there was a global duopoly in the industry, with one supplier in the EU and the other being the Chinese exporter. (Furthermore, the Union industry was always loss-making in the period considered.) As a result of this,

> "[i]t was considered appropriate to focus on the injurious effects directly resulting from the undercutting practices of the Chinese exporting producers and to base the injury elimination level on the amount sufficient to eliminate the actual price undercutting and to add an element of profit

709 OJ L 323/1, 03.12.2008, at recital 87f.
710 OJ L 94/48 (provisional), 08.04.2009, at recital 163.
711 OJ L 298/27 (provisional), 16.11.2010, at recital 115.
712 E.g., all firms, or all non-injured firms, in the relevant 4-digit NACE category in an established database. Definitive measures are usually decided with a considerable lag following the investigation period; however, if complete data for the IP are not usually available, a projection for the remaining portion of the IP could be made based on more current data.
713 During the evaluation period the Commission has rejected to apply the undercutting methodology except in special cases. See, e.g. *Aluminium road wheels* (AD541), OJ L 282/1, 28.10.2010, at recitals 193f.

(between 0 and 5 %) corresponding to the profit margin achieved by the Community industry in 2001 for the product concerned."[714]

The calculation of the injury margin based on the actual sales price of the Union produced like good is possible only if the sales price has not already been affected by dumping. If there is price depression or suppression, then the equation of the observed sales price with the non-injurious price would lead to an underestimation of the injury margin. Conversely, the underselling methodology implicitly assumes that dumping is the only cause for injury if the dumping margin is higher than the injury margin. Although there is some truth in this (other things being equal, the higher the dumping the higher will be the injury), a positive finding on causation leads to the assumption that the injury is fully caused by the dumped imports, even if there are other factors which may have also contributed to injury; thus, the underselling methodology tends to overestimate the injury margin.

Conclusions/ recommendations

The benchmark profit rate, based on the evolution of profits in a comparable control group, as suggested above would ensure that a reasonably objective non-injurious price is established without having to decide whether the observed EU industry price was distorted. This would appear to resolve the dual methodology of undercutting and underselling: If the reported import price plus the calculated margin of dumping/subsidisation is less than the non-injurious price, the full dumping/subsidisation margin is reflected in the duty, i.e. the duty is based on the dumping/subsidy margin. If, however, the reported import price plus the calculated margin of dumping/subsidisation is higher than the Union price, the lesser duty applies based on the benchmark profit rate, i.e. the duty is based on the injury margin.

5.1.7.2 Terminations

Legal basis

The Commission may decide to terminate a case without the imposition of definitive measures, e.g. if a complaint is withdrawn or the investigation shows that measures are not necessary. Termination of a case without measures is made by a Commission decision after consultation of the Member States in the Advisory Committee and if the Council does not object by qualified majority against the termination of the case.[715]

Practice

The share of terminations of AD investigations without measures in the evaluation period was 44%, up from 32% over the period 2001-2004 (Table 54). Almost half of the terminations were due to the withdrawal of the complaint.[716] Contrary to the 1990s, where some investigations were "terminated" implicitly because the Council could not reach a "timely" decision on a proposal by the Commission to impose measures, since 2001 all terminations took place in a formal way, i.e. through notices of termination.

[714] OJ L 296/1, 15.11.2007, at recitals 299-300. At the same time, it is not clear how on this basis, with an undercutting margin of 25-35% plus a profitability margin of 0-5%, an injury margin of 49.1% could result. Furthermore, an "undercutting plus profit margin" appears to closely resemble the underselling method.

[715] Article 9(1)-(3) ADR/Article 14 ASR.

[716] One of the key reasons for complainants to withdraw the complaint is, where the Commission indicates that the investigation is likely to be terminated, the withdrawal of the complaint will help avoid publication of details of the case.

Table 54: Number of terminated AD cases, 2001-2010

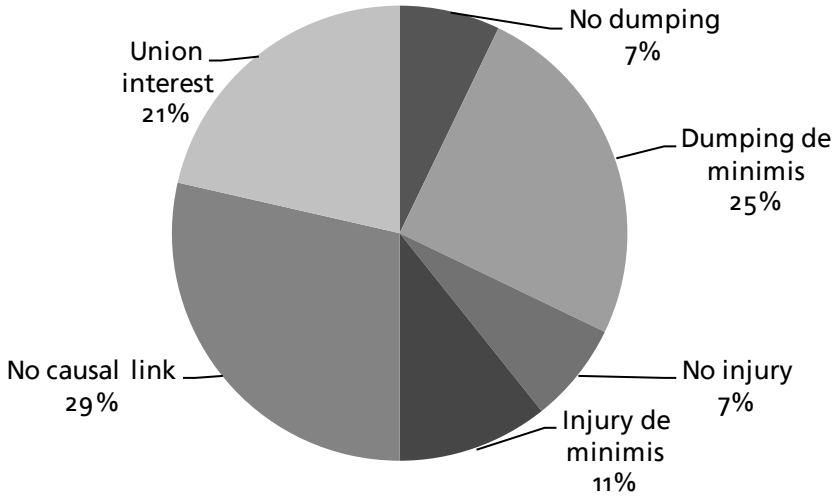
	2001-2004		2005-2010	
Reason for termination	not terminated	terminated	not terminated	terminated
Withdrawal of complaint		8		22
Exports outside product scope		1		
No dumping		5		2
Dumping *de minimis*		4		7
No injury				2
Injury *de minimis*				3
No causal link		3		8
Union interest				6
No data		5		
Total	55	26	65	51
Share of terminated cases		32%		44%

Source: Authors' calculations based on DG Trade TDI statistics.

Figure 37 looks at the reasons which led to termination in those cases where the complaint was not withdrawn. As can be seen, lack of a positive finding of each of the four necessary conditions for imposing measures – dumping, injury, causal link, and Union interest – played a role:

- 32% of terminations were due to a finding of no dumping or *de minimis* dumping margins;[717]
- 18% of terminations were due to a finding of no injury or *de minimis* injury margins;[718]
- in 29% of terminations, no causal link between dumping and injury could be established;[719] and
- in 21% of terminations, measures were not found to be in the Union interest.[720]

Figure 37: Reasons for termination of EU AD cases excluding withdrawn complaints, 2005-2010



Total no. of cases: 28

Source: Authors' calculations based on DG Trade TDI statistics.

[717] *Plastic sacks and bags* (AD497), Malaysia; *Pentaerythritol* (AD504), Turkey; *Polyvinyl alcohol* (AD517), Taiwan; *Welded tubes and pipes of iron or non-alloy steel* (AD523), Bosnia and Herzegovina; *Polyethylene terephthalate* (AD545), Pakistan and UAE; *Polyester high tenacity filament yarn* (AD547), Korea and Taiwan; *Purified terephthalic acid and its salts* (AD550), Thailand.

[718] *Pentaerythritol* (AD504), USA; *Silico-manganese* (AD513), Ukraine (where also no causal link was found); *Wire rod* (AD530), Moldova and Turkey; *Polyethylene terephthalate* (AD545), Iran.

[719] *Cathode-ray colour television picture tubes* (AD503), China, Korea, Malaysia and Thailand; *Pentaerythritol* (AD504), China, Russia and Ukraine; *Polyvinyl alcohol* (AD517), China.

[720] *CDRs* (AD500), China, Hong Kong and Malaysia; *Recordable DVDs* (AD501), China, Hong Kong and Taiwan.

Regarding AS cases, out of 14 investigations initiated in the evaluation period, eight (57%) were terminated. Seven of these were terminated after the complaint had been withdrawn and in one case - *Purified terephthalic acid and its salts* (AS551) – the subsidy was found to be *de minimis*.

Conclusions/ recommendations

These findings stand in contrast to the perception sometimes expressed by stakeholders that once an investigation is initiated, and given the strict screening of complaints, the Commission almost automatically finds that measures are warranted.

Based on the above findings it is concluded that the Commission undertakes investigations open-ended and without a built-in bias towards the imposition of measures.

5.1.7.3 Choice of the type of measure

Legal basis

Neither the basic Regulations nor the WTO agreements prescribe a certain remedial measure to be taken against dumping or subsidised imports. In practice, the EU has applied a variety of AD and CV measures, both duties and undertakings (see the following section for undertakings).

Practice

Among duties, *ad valorem* duties have by far been the most often used type of measure (Table 55). Specific duties and minimum import prices (MIP) have been used rarely and only in cases where the use of *ad valorem* duties was considered to be inappropriate or ineffective by the Commission. Combinations of duties with quantitative measures have not been used in the evaluation period, and requests for such combinations brought forward by interested parties (e.g. in *Citrus Fruits* – AD524) have been rejected.

Table 55: Types of AD/AS duties applied by the EU, cases initiated 2005-2010

Type of duty	2005	2006	2007	2008	2009	2010	Total
Ad valorem	12	18	6	6	7	6	55
Specific			1	3	3		7
Minimum Import Price		2				1	3
Total	**12**	**20**	**7**	**9**	**10**	**4**	**65**

Source: Definitive duty regulations

Specific duties

In the evaluation period, specific duties were applied in seven cases:

- in *Citrus Fruits* (AD524), use of the specific duties was motivated by the application of various practices of exporters applied in order to circumvent already existing safeguards;
- in *Candles, tapers and the like* (AD528) it was "considered appropriate to determine the duties as fixed amounts on the basis of fuel content of the candles" because candles were often imported in sets together with pillars, holders or other items, which would render the use of *ad valorem* duties ineffective;
- in *Biodiesel* (AD531 and AS532), specific duties based on biodiesel content were applied because diesel is imported in different blends with different percentages of biodiesel;
- in *PET* (AS546; counting as three cases due to the fact that measures were imposed against three countries, Iran, Pakistan and UAE), it was considered that "costs and prices of PET are subject to considerable fluctuations in relatively short periods of time" and therefore specific duties would be more appropriate than *ad valorem* duties. Specifically, specific duties were chosen in this case in order to provide a minimum level of protection to the EU industry during times of low prices.

Minimum import prices

In the evaluation period, minimum import prices (MIP) have been used only in cases where the product concerned was homogeneous or consisted of few models only.[721] In some cases where use of MIP was proposed by interested parties, this was rejected by the Commission because of product heterogeneity. E.g., in Ferro-silicon (AD516), the Commission argued that

> "FeSi is imported in a wide range of different types with significantly different price levels. In addition, all cooperating exporters have different duty levels (some based on dumping margins, some on the injury margins) requiring a multitude of different minimum import prices. The imposition of a minimum import price would, in these circumstances, be a highly inefficient measure"[722].

Conversely, the use of MIP has been justified on the ground that this would

> "ensure that the product concerned is not sold at injurious prices, while at the same time it will not unduly increase prices at moments when prices are at sufficiently high levels. A MIP can be expected to bring stability to the market because it will ensure an adequate price level for the Community industry, allowing it to operate under viable economic conditions, and, at the same time, it will constitute a point of reference for importers and users to plan their economic activities sufficiently in advance"[723].

In general, an important problem with MIP is that they can be circumvented fairly easily, and circumvention is very difficult to detect for the EU Member States. For example, a compensation scheme in which exporters and importers agree that the products subject to an MIP will be imported at the MIP level but other products outside the scope of the measure will be imported with compensatory rebates could only be found if the complete accounts of the importer are checked.

Conclusions/ recommendations

The evaluation team considers that the use and justifications provided for the use of specific duties and MIPs are sound.

5.1.7.4 Use of undertakings[724]

Legal basis

An undertaking is an agreement between the authorities and an individual exporter being investigated whereby the latter commits to either cease dumping or to revise its export price.[725] In response, measures are not imposed against an exporter whose undertaking has been accepted by the Commission.

Practice

In the evaluation period, undertakings were offered by exporters in about half (54%) of the AD and AS cases which led to definitive measures (Table 56). However, there seems to be a decreasing tendency: cases initiated in 2009 and 2010 were the only ones in the period where the number of cases without proposals for undertakings was less than 50%. In some cases, importers have also proposed the application of undertakings but this has been rejected by the Commission as only exporters have the right to do so.

The success rate of offers for undertakings is low – for cases initiated over the period 2005 to 2010, in five out of 35 cases (14%), proposed undertakings were accepted. In most cases, difficult monitoring was cited as the reason for not accepting undertakings.

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721 Over the evaluation period, MIP were used in *Farmed Salmon* (AD487), *Frozen Strawberries* (AD505), *Coke (over 80mm)* (AD518), and *Melamine* (AD554).

722 OJ L 55/6, 28.02.2008, at recital 127. Also see *Footwear with uppers of leather* (AD499) and *Ceramic tiles* (AD560).

723 In *Coke (over 80mm)* (AD518); OJ L 244/3 (provisional), 19.09.2007, at recital 112.

724 The policy dimension of accepting undertakings is discussed in section 4.10.

725 Article 8 ADR/Article 13 ASR.

Table 56: Use of undertakings by the EU, cases initiated 2005-2010

	2005	2006	2007	2008	2009	2010	Total 2005-2010
Cases where no undertakings were offered	5	9	1	3	6	6	**30**
Cases where undertakings were offered	7	11	6	6	4	1	**35**
of which: cases where offers were rejected	*6*	*10*	*5*	*5*	*4*	*0*	*30*
of which: cases where offers were accepted	*1*	*1*	*1*	*1*	*0*	*1*	*5*
Total of cases leading to definitive measures	**12**	**20**	**7**	**9**	**10**	**7**	**65**

Source: Definitive duty regulations

Proposals for undertakings can only be made between the imposition of provisional measures and the determination of definitive duties. This imposes strict time limits for putting in place an undertaking. Exceptions to these limits have been made though. In the evaluation period, two cases involved relaxation of the otherwise strict time limits for the preparation and acceptance of undertakings:

- In *Sweet Corn* (AD507),[726] a number of cooperating exporting producers expressed an interest to offer price undertakings but failed to submit undertaking offers within the time limit foreseen in Article 8(2) of the basic Regulation. Nevertheless, the Council, in view of the complexity of the issue for the cooperating Thai exporters, the developing country status of Thailand, and the high level of cooperation demonstrated during the investigation, allowed that, exceptionally, undertakings could be accepted by the Commission beyond the deadline, but within 10 calendar days from entry into force of the Regulation implementing definitive measures. Two Thai producers were able to take advantage of the extension.
- A similar extension was provided for a Russian exporter in the interim review of *Solutions of Urea and Ammonium Nitrates* (R409); in this case the Council found as extenuating circumstances (1) the volatility of the price of the product concerned, which necessitated the development of some form of indexation of minimum prices; and (2) the fact that the exporter subject to the review had no exports to the EU during the evaluation period.[727]

Effect

Given the fact that the contents of undertakings are confidential, it is impossible to assess if they are an effective means against dumped or subsidised imports. Among stakeholders, most EU industry associations are opposed to undertakings for the following reasons:

- Undertakings have not worked in the past;
- They often lead to breaches and violation on the part of foreign exporters;
- They require important monitoring measures both from the EU and from EU industry;
- The conditions of undertakings are confidential and hence EU industry has no way of knowing if they are effective or not.

Stakeholder views

In view of the above issues, many industry representatives feel that the EU accepts undertakings too frequently.

Some Member States stated that both duties and undertakings provided adequate protection but that duties should be preferred. The current Commission practice was considered as appropriate.

Conclusions/ recommendations

Given the fact that the EU's use of undertakings is rather restrictive, even accepting the above arguments put forward by EU producers, the evaluation team considers that the current use of undertakings is appropriate.

726 OJ L 159/14, 20.06.2007, at recitals 59-62.
727 OJ L 75/14 (termination of the partial interim review), 18.03.2008, at recitals 57-58.

5.1.7.5 Retroactive application of measures

Legal basis

Article 10(4) ADR foresees the retroactive application of measures on products which entered the EU market no more than 90 days prior to the date of application of provisional measures if certain conditions are met:[728]

- imports must have been registered in accordance with Article 14(5) ADR (see 5.1.7.6);
- there must be a history of dumping over an extended period, or the importer was aware of, or should have been aware of, the dumping as regards the extent of the dumping and the injury alleged or found; and
- in addition to the level of imports which caused injury during the investigation period, there is a further substantial rise in imports which, in the light of its timing and volume and other circumstances, is likely to seriously undermine the remedial effect of the definitive AD duty to be applied.

Similarly, Article 16(4) ASR provides for the retroactive application of measures if:

> "(a) the imports have been registered in accordance with Article 24(5);
> (b) the importers concerned have been given an opportunity to comment by the Commission;
> (c) there are critical circumstances where for the subsidised product in question injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from countervailable subsidies under the terms of this Regulation; and
> (d) it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports."

Practice

However, these clauses have not been applied in EU TD practice.

Stakeholder views

Among stakeholders consulted, virtually all EU industry associations advocated that measures should be applied retroactively. There is a strong perception among the EU industry that the US system is more effective in this respect. Nevertheless, this perception might be wrong as the US rules on retroactivity are similar to those of the EU – both are rooted in Article 10 of the WTO ADA – and are rarely applied.[729]

Member States that expressed a view on this issue stated that measures should *not* be applied retroactively. Indeed, it appears that the conditions for applying retroactive duties rule out most cases as it is hard to find cases which cumulatively fulfill all three conditions. Furthermore, and more importantly, the added protection to the Union industry appears negligible, as imports will have entered the EU market anyway.

Conclusions/ recommendations

The absence of case history on which to evaluate the benefits and disadvantages of retroactive application of duties prevents an informed judgement as to what might be recommended in terms of practice. International practice also provides little guidance. In general, the limited time frame for retroactive application of duties in the case of massive importations limits the ability of TDI to undo damage that has already been done; TDI essentially provides an opportunity to recoup such losses over the longer, if limited, future time frame in which protection is provided.

5.1.7.6 Registration

Legal analysis

Article 14(5) ADR/Article 24(5) ASR state that the Commission may "direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently

[728] Article 10(5) ADR (as well as Article 16(5) ASR) also foresees the retroactive application of measures in the case of violation of undertakings.

[729] See appendix D7, section 2.2.3.

be applied against those imports from the date of such registration." The same clause further states that "imports may be made subject to registration following a request from the Community industry". However, the language of the basic Regulations leaves it open if registration may *only* be made upon request of the Union industry, or if it may be made by the Commission *ex officio or* upon request by the Union industry. Given the fact that there are situations in which the Commission *ex officio* initiates for example a circumvention investigation, the latter interpretation appears more appropriate. Indeed, in the anti-circumvention investigation in *Fasteners, iron or steel* (AD525, R515), the Commission stated that:

> "this was an anti-circumvention investigation initiated by the Commission *ex officio* on the basis of Article 13(3) in conjunction with the first sentence of Article 14(5) of the basic Regulation. The second sentence of Article 14(5) of the basic Regulation is therefore not relevant for this case. Any other interpretation would remove the *effet utile* of the fact that Article 13(3) of the basic Regulation provides that the Commission can *ex officio* investigate possible circumvention."[730]

Recommendation

In the interest of clarity, it is therefore recommended that Article 14(5) ADR/Article 24(5) ASR be amended by clarifying that "imports may *also* be made subject to registration following a request from the Community industry".

5.1.8 Special and Different Treatment of Developing Countries

Legal basis

Article 14 ASR establishes rules for the special and differential treatment (SDT) of developing countries in AS proceedings:

> "4. For proceedings initiated pursuant to Article 10(11), injury shall normally be regarded as negligible where the market share of the imports is less than the amounts set out in Article 10(9). With regard to investigations concerning imports from developing countries, the volume of subsidised imports shall also be considered negligible if it represents less than 4 % of the total imports of the like product in the Community, unless imports from developing countries whose individual shares of total imports represent less than 4 % collectively account for more than 9 % of the total imports of the like product in the Community.
> 5. The amount of the countervailable subsidies shall be considered to be *de minimis* if such amount is less than 1 % *ad valorem*, except where, as regards investigations concerning imports from developing countries, the *de minimis* threshold shall be 2 % *ad valorem*, provided that it is only the investigation that shall be terminated where the amount of the countervailable subsidies is below the relevant *de minimis* level for individual exporters, which shall remain subject to the proceedings and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Articles 18 and 19."[731]

The ADR does not have similar rules for the SDT of developing countries. This is in line with the WTO ADA, Article 15 of which includes a different provision for AD investigations against exporting developing countries stating that

> "possibilities of constructive remedies provided for by the Agreement shall be explored before applying anti-dumping duties [against products of developing countries] where they would affect the essential interest of developing country Members."

Practice

In the evaluation period, SDT considerations do not appear to have played a role in the determination of measures. In some cases, interested parties from exporting developing countries have attempted to invoke SDT. E.g. in *Footwear with uppers of leather* (AD499) the argument was made that workers in Vietnam and PR of China would suffer from AD measures. The Union institutions responded that "it is the Community's constant practice to take such actions indiscriminately against developing and developed countries, whenever warranted"[732].

730 OJ L 194/6, 26.07.2011, at recital 52.
731 The thresholds for de negligible imports and *de minimis* subsidies follow Article 27.10 ASCM.
732 OJ L 275/1, 06.10.2006, at recital 281.

Indeed, Article 15 ADA does not impose a legal obligation on WTO members, as it only calls upon members to "explore" measures. Compared to the SDT provision of the ASCM (and also the Safeguards Agreement[733]), the provision in the ADA is weak, non-specific and difficult to enforce. Challenges made by developing countries on the implementation of this provision have been rejected by panels. However, in *EC – Bed Linen from India* the panel argued that:

> "the 'exploration' of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interest of a developing country."[734]

For the purpose of applying the article, the panel argued that acceptance of undertakings or application of a lesser duty rate can be considered as "constructive remedies". As such, the EU practice of lesser duties, as enshrined in the two basic Regulations, has a built-in application of constructive remedies.

In view of WTO case law regarding the EU's use of constructive remedies, the evaluation team considers that the current practice is appropriate.

Conclusions/ recommendations

5.2 Procedural Issues

In this section, procedural issues of the EU's AD and AS instruments are analysed. The first two sub-sections address the two main phases of investigations, i.e. the pre-initiation phase up to the initiation of an investigation (sub-section 5.2.1) and the investigation itself (sub-section 5.2.2). The remaining three sub-sections analyse cross-cutting procedural issues: the treatment of transparency and confidentiality during proceedings (sub-section 5.2.3), assistance provided to interested parties during proceedings (sub-section 5.2.4), and finally estimate the cost of proceedings both for the EU institutions and interested parties (sub-section 5.2.5).

5.2.1 Pre-Initiation Phase

The opening of an investigation is subject to a number of substantive and procedural requirements. Thus, a case normally starts with a sufficiently substantiated complaint from or on behalf of the EU industry manufacturing the same or a similar product to the one allegedly being dumped and/or subsidised. In special circumstances the Commission can also initiate an investigation on its own initiative ("*ex officio*") if it has sufficient evidence of dumping or countervailable subsidies, injury and a causal link.

The evaluation of procedural issues of the pre-initiation stage focuses on the following aspects:

- rules regarding the right of complaint;
- the use of *ex officio* investigations by the Commission;
- the extent to which substantive requirement which complainants must meet in their complaints are appropriate;

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733 Article 9.1 of Safeguards Agreement states that "safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent".

734 Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton–Type Bed Linen from India, WT/DS141/R., 2001, para 6.238.

- the resource requirements for the preparation of complaints;
- the procedures for checking complaints; and
- the level of complaints leading to investigations.

The first two of these issues are discussed further in the comparative evaluation in chapter 4, where conclusions and recommendations are presented.

5.2.1.1 Right of complaint

Legal basis

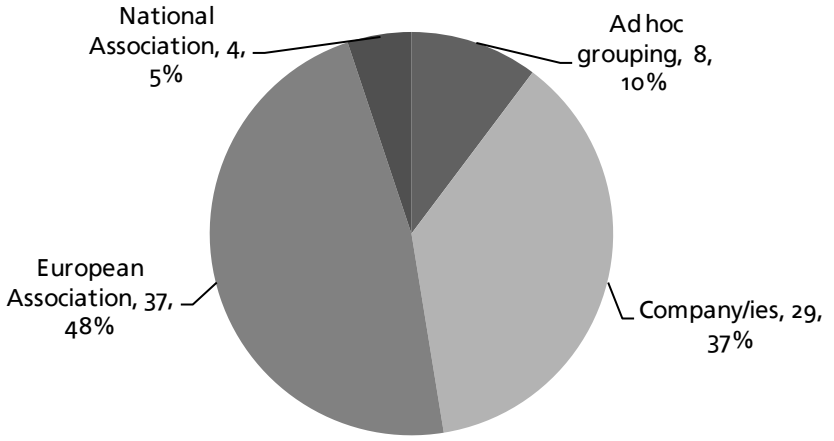
EU rules on the initiation of investigations follow closely the wording of the WTO agreements. They require that, normally, the complaint shall be "by or on behalf of the domestic industry". They further require that the level of support by domestic producers shall at least be 25%. Specifically, Article 5 ADR[735] provides that:

> "1. Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry. […]
>
> 4. […] The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 % of total production of the like product produced by the Community industry. […]
>
> 6. If in special circumstances, it is decided to initiate an investigation without having received a written complaint by or on behalf of the Community industry for the initiation of such investigation, this shall be done on the basis of sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify such initiation."

Practice

In practice, during the evaluation period most complaints were submitted by European associations of producers, followed by individual or groups of companies (Figure 38). Ad hoc groupings of companies[736] and national associations play a relatively limited role.

Figure 38: Complaints by type of complainant, AD and AS investigations initiated 2005-2010



Total no. of cases: 78

Source: Initiation notices.

735 Article 10 ASR provides for the same, *mutatis mutandis*.

736 The distinction between ad hoc grouping of companies and associations is not always clear. For the purpose of the statistics, whenever initiation notices refer to "defence committees", "taskforces" or similar types of organisations, these have been considered as ad hoc groupings.

In other jurisdictions, e.g. the USA, the right of complaint does not only comprise the domestic industry but also extends to employees or their representatives. In the EU, workers or trade unions cannot lodge a complaint against allegedly dumped or subsidised imports.

Stakeholder views

The fact that under the current system trade unions do not have the right to file a complaint does not appear to be a source of major concern for most stakeholders, including the Union producers and trade unions. Also, in the online survey a majority was in favour of keeping the current rule (47% v 31% against; see appendix F, section 7.2.1).

Conclusions/ recommendations

Current EU law and practice regarding the type of complainants and the right to complaint are in line with WTO rules. The mix of complainants shows that AD and AS instruments are accessible to all types of interested parties that have the right to complaint. The evaluation team therefore concludes that the EU procedures and practice are appropriate.

Reference is made, however, to the discussion of strategic policy options regarding the initiation of proceedings in section 4.2 above, where it has been recommended that the right to submit complaints, and have standing, be extended to labour representatives, in order to ensure that access to TDI is also guaranteed in situations where interests between EU producers and their interests diverge (notably in situations of fear of retaliation).

5.2.1.2 *Initiations of investigations* ex officio

Legal basis

According to the two basic Regulations, in special circumstances the Commission can initiate an investigation on its own initiative if it has "sufficient evidence of dumping, injury and a causal link"[737].

Practice

In the evaluation period, the Commission has not initiated any investigations *ex officio* except for circumvention investigations and reviews, which are addressed in section 5.3 below. There is thus no practice to be evaluated. However, the Commission has indicated that it is willing to consider *ex officio* cases against Chinese subsidies[738]. Thus, there are indications that the Commission's policy in this respect might be changing.

Stakeholder views

In the EU stakeholder consultations, most representatives of EU industry stated that the Commission should consider initiating AS cases *ex officio* more frequently, as subsidy practices were difficult to determine for businesses and also there was a greater threat of retaliation. At the same time, some representatives stated that, while desirable, it would be unrealistic to expect *ex officio* initiations to be applied consistently; rather, they would be subject to political objectives of the EU.

Most Member States were of the view that the current practice was appropriate, and that the Commission should primarily initiate investigations *ex officio* in cases of circumvention or absorption. Some Member States suggested that the Commission should initiate more investigations *ex officio* with the aim of shortening the period between the unfair practice and the measure, thereby reducing injury. One Member State also favoured a stronger role of *ex officio* AS investigations for two reasons:

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737 Article 5(6) ADR. Also see, *mutatis mutandis*, Article 10(8) ASR.

738 See e.g. Commissioner De Gucht's speech "Going global: EU trade relations with major trading partners" at BusinessEurope on 08 October 2011; available at http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148266.pdf.

- "The lack of means of the Union industry to launch an anti-subsidy proceeding. The EU industry simply does not have access to the information needed to find out and demonstrate the existence of actionable subsidies granted by a particular country.
- As the anti-subsidy instrument is focused on unlawful practices of Governments, there is a threat of retaliation on the part of the authorities of the Country involved against the EU operators."

Conclusions/ recommendations

As discussed in more detail in section 4.2.4 above, the evaluation team recommends that the EU continues to use *ex officio* initiations of new investigations only in special circumstances where the business interests of some EU firms in the country of export might militate against their joining a specific complaint and thus compromise the ability of the industry to gain standing for a complaint.

5.2.1.3 Requirements for complaints

Legal basis

Complaints must pass two tests in order for an investigation to be initiated: It must be supported by the Union industry (the "standing test") and it must contain sufficient evidence to allow for the initiation of the case.

For a positive finding on standing, two conditions must be met:[739]

- an absolute majority (measured in terms of output of the like good) of EU producers *which express either support for or opposition to the complaint* must support the complaint; and
- EU producers representing at least 25% of the total EU production of the like good must expressly support the complaint.

Regarding the evidence to be provided, according to Article 5(2) ADR/Article 10(2) ASR, a complaint has to provide certain minimum information "as is reasonably available to the complainant" about the complainant, the allegedly dumped, or subsidised, product in question, the evidence of dumping, or existence of countervailable subsidies, and injury to the Union industry.

Appropriateness of the level of evidence and standing

Stakeholder views

Views expressed by stakeholders in the oral consultations about the requirements which a complaint has to meet differ across EU industries. In particular, concentrated sectors do not find that proving support of the EU industry is a problem and consider the requirements justified. On the other hand, fragmented sectors composed of a large number of SMEs (plastic, textile) find this requirement extremely difficult to meet but recognise that the standing requirements cannot be lowered without violating WTO rules.

At the same time, there seems to be a general consensus that evidence to be provided is heavy and often very difficult to gather (market data, invoices from foreign exporters for instance). Associations often revert to external assistance (see section 5.2.4 below) to gather market data at the pre-initiation phase. A majority of industry stakeholders did however recognise that these high requirements were necessary to ensure the transparency and the quality of the process. Finally, EU industry representatives did not report problems linked to the *formal* requirements of drafting a complaint.

Member States which expressed a view on this issue stated that the requirements and criteria for initiating investigations were appropriate.

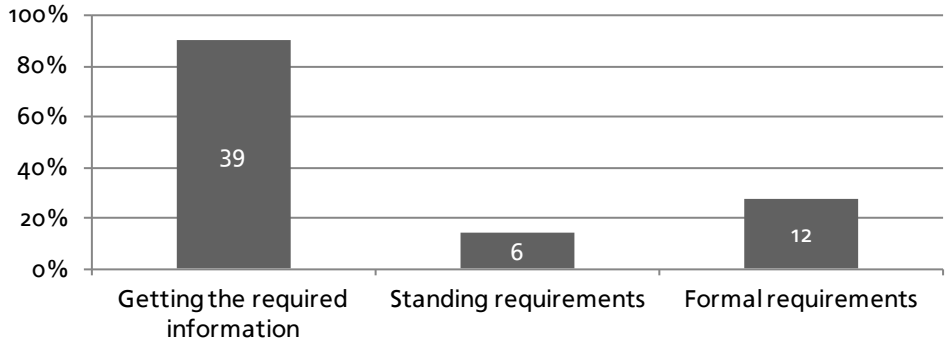
739 Article 5(4) ADR/Article 10(6) ASR.

In the online survey, despite occasional views that the requirements which AD/AS complaints have to meet are too demanding, a clear majority of respondents (64%) considered the complaint requirements appropriate; only 23% found them too demanding. In line with this, 61% of respondents also stated that they had not faced difficulties in meeting the requirements (see appendix F, section 7.2.1).

The most common problem which the complainants face when preparing a complaint is to get access to and collect the required evidence (Figure 39): more than 90% of respondents faced this type of problem. Conversely, formal requirements and meeting the standing threshold (at least 25% of expressed support) were mentioned as problems only by a minority of respondents. This contradicts somewhat the information provided during consultations where industry associations reported growing problems in meeting the standing threshold.

Figure 39: Types of problems in meeting complaint requirements

Which difficulties have you faced? (43 respondents, multiple answers possible)



In the oral consultations, EU industry representatives stated that they do have difficulties meeting some of the requirements, especially:

- Market data: This has often been cited as the most problematic required information to gather. It is reportedly difficult to obtain data on trade flows of the dumped/subsidised product. Respondents claimed that the cost of hiring external consultants to gather market data could be in the 60,000 – 100,000 EUR range;
- Normal value: EU industry is finding it difficult to gather documentary evidence that dumping is taking place. Often, associations have to revert to informal routes to collect invoices from importers or foreign exporters. It was also reported that consultants are often sent on field missions to the target countries in order to gather price (normal value) related information;
- Standing: Gathering sufficient support for a complaint among EU producers is increasingly difficult as more and more companies have outsourced part of their production to non-EU countries.

Some Member States also highlighted the problems which particularly SMEs face in meeting the requirements for complaints. Collecting *prima facie* evidence especially for dumping, language barriers, resource constraints and problems regarding the organisation of the industry were cited as specific barriers. In response, it was suggested that the Commission:

- expand support to SMEs in the field of TDI; and
- prepare specific studies to gather sufficient evidence justifying investigations in cases where complaints have been made by SMEs.

These issues of support are further addressed in section 5.2.4 below.

EU rules on requirements for complaints are in line with WTO rules, that a majority of stakeholders considers requirements to be appropriate, and that requirements are in line with international practice. The evaluation team furthermore considers that the current EU rules strike a reasonable balance between accessibility to TDI and deterrence of weak cases.

Conclusions/ recommendations

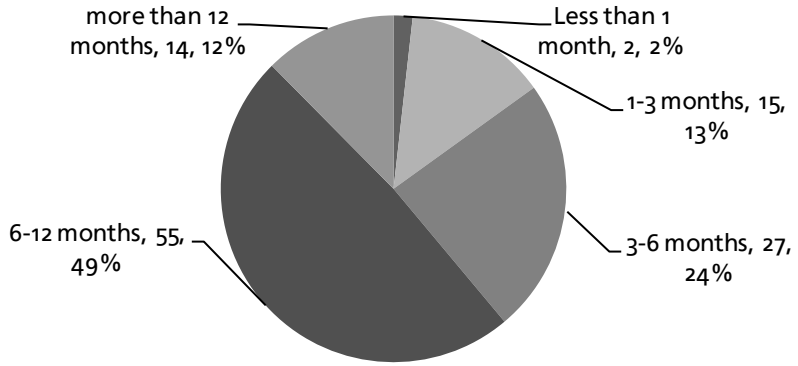
Time required for preparing a complaint

Based on the observations of DG Trade, the duration of preparing a complaint varies between four months and more than two years.

This was confirmed in the stakeholder consultation and by the responses in the online survey: When asked how long it took to prepare and file a complaint, most online survey respondents (49%) reported a period of between six and 12 months (Figure 40). 39% claim to need not more than six months while 12% stated that it took them more than one year.

Figure 40: Duration of preparing a complaint

In your experience, what is the average duration of preparing a complaint? (113 respondents)



The average reported duration for preparing a complaint ranges from six months to more than a year, with six months being quoted in most cases. The duration to file a complaint has become longer recently according to some EU industry associations as the evidence requirements are increasing. Other producer associations have however stated that, although there are fluctuations in the "strictness" of requirements for complaints, there has been no increasing tendency in the recent past.

The evaluation team acknowledges that the time required for the preparation of complaints is relatively long. Seen in isolation, this would not constitute a problem; however it does contribute (assuming that a case is warranted) to the overall period of approximately 2.5 years between injury and the imposition of measures, as discussed in section 5.2.2.1.

The evaluation team recommends that a shortening of the overall period be achieved primarily by a faster imposition of provisional measures. Options to shorten the duration of preparing a complaint seem limited if complaint standards are upheld (as is recommended above). One way could be for the Commission to provide expanded support and data access to (potential) complainants (see section 5.2.4).

Conclusions/ recommendations

Decision (not) to file a complaint

Given the costs involved in resorting to TDI and the uncertainty of protection being granted, EU producers do not take the decision to file a complaint light heartedly. Thus, about half of the

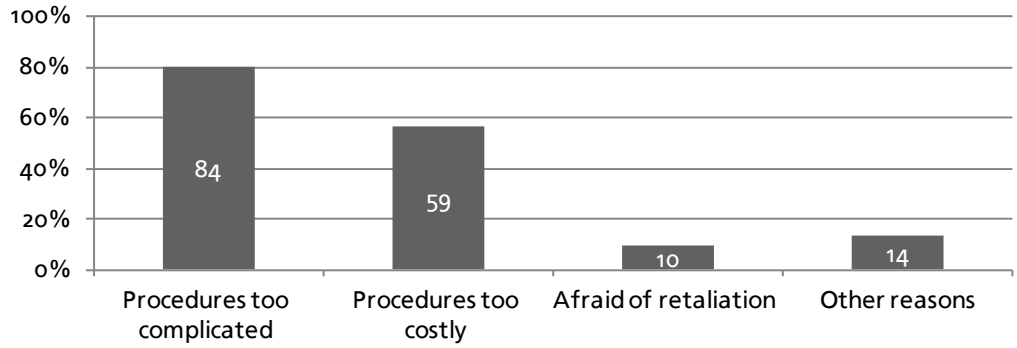
Stakeholder views

respondents (51%) stated that in spite of their conviction that harmful dumped or subsidised imports were entering the EU they refrained from submitting a complaint.

The main reasons for not filing a complaint are summarised in Figure 41. The two most important ones, cited by more than half of the respondents concerned were the complexity of procedures as well as cost considerations. Conversely, fear of retaliation and other factors played only minor roles.

Figure 41: Reasons for not filing a complaint

Why have you refrained from filing an application? (105 respondents, multiple answers possible)



Among the "other reasons" cited for not filing a complaint were the following ones:

- Long time frame until measures are taken makes the effort not worthwhile (5 responses);
- Inability to prove the unfair practice, e.g. due to lack of statistical data or impossibility to collect evidence (4 responses);
- Anticipated low probability of success (2 responses);
- Anticipated low effectiveness of measures (1 response);
- Politicisation of process, including political pressure to refrain from submitting a complaint (1 response);
- Incapacity to meet standing requirements (1 response).

Conclusions/ recommendations

Although a comparatively high share of online survey respondents stated that no complaint had been filed because of complicated and costly procedures, this view was not confirmed in the oral consultations with industry associations. Furthermore, the complexity of procedures is a consequence of WTO rules and the technical nature of TDI. Finally, the cost of procedures in the EU for complainants is not higher than in peer countries (see section 5.2.5). The evaluation team therefore concludes that the only way for the Commission to address the concerns of online survey respondents is through expanded support. This issue is addressed in section 5.2.4 below.

5.2.1.4 Outcome of complaints

Practice

When a complaint is received, the Trade Defence Directorate needs about ten to 15 days to analyse it, whereafter the proposed decision goes to hierarchy and the Advisory Committee. In case the Directorate determines that any part of the complaint is not meeting the requirements it sends a deficiency letter (or holds a meeting), usually granting two to three days to the complainant to provide a clarification. The standing test is often done towards the end of the complaint analysis, i.e. after initial consultation of Member States' views.

Most often complaints are withdrawn if it becomes evident that complainants cannot meet the requirements. If this is done, the complaint is deemed not to have existed. If a complaint is not withdrawn but does not meet the requirements it will be rejected by a Commission decision which is usually sent to the complainant by letter but not made public.

Stakeholder views

According to Union industry and Commission staff interviewed, often the Trade Defence Directorate is contacted by prospective complainants prior to the formal lodging of complaints in order to receive guidance on the process and requirements. Complainants usually lodge complaints after they have asked for the Commission's first impression of the strength of their case. On that basis, it has been reported in a few cases that the Commission has advised a potential complainant to gather more information before filing a complaint. In some other cases, the Commission has advised complainants not to file officially until further evidence could be gathered.

"Success rate" of complaints

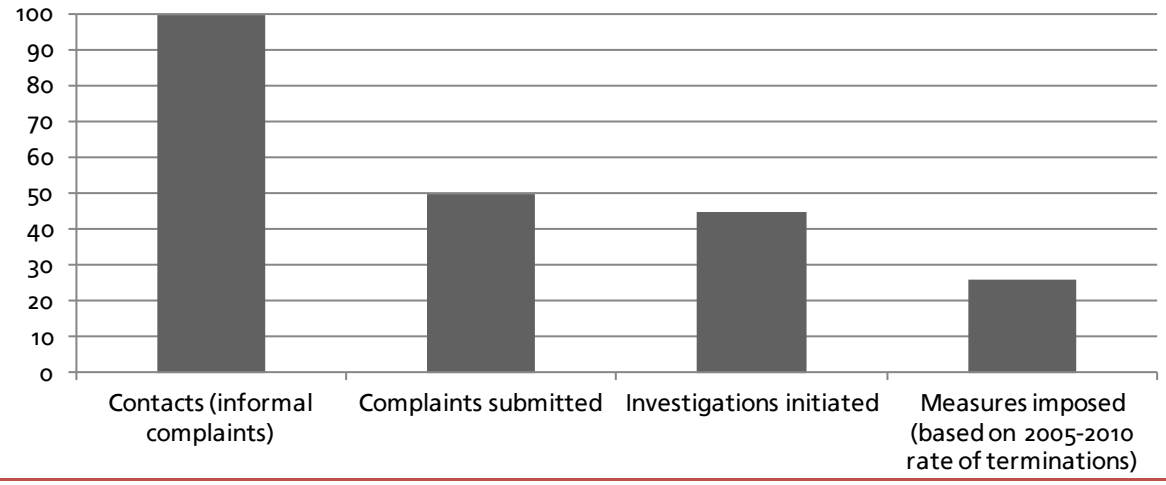
As information about complaints is not made public, the ratio between submitted and "successful" complaints, i.e. those that lead to the initiation of an investigation, can only be estimated. Most stakeholders consulted mentioned a ratio of 50%.

In the online survey, of 43 respondents who answered the question whether at least one of their complaints had been rejected, 11 (26%) answered positively. The reasons given by the Commission for the rejection were reported as follows:

- insufficient analysis of future market circumstances and developments;
- insufficient information;
- incorrect calculations of dumping;
- market share too small and evidence of dumping not clear; and
- insufficient evidence of damage caused by imports to EU producers.

According to DG Trade staff interviewed, of 100 initial contacts made by the EU industry with informal complaints about dumping less than 50 result in the formal submission of a complaint, and of these formally submitted ones approximately 10% are rejected or withdrawn. This would mean a success rate of approximately 45%, when "success rate" is defined as the share of informal complaints leading to investigations (Figure 42). However, when the success rate is defined as the share of informal complaints leading to measures, it drops to 26% (assuming the rate of terminations of AD cases in the period 2005-2010 of 42% as discussed in section 5.1.7.2 above).

Figure 42: Number of initial AD complaints leading to investigations and measures



Source: Authors' interviews with DG Trade staff and calculations based on DG Trade TDI statistics.

These findings are in line with most stakeholders' views that the Commission applies a tough screening on complaints. However, contrary to the perception of many stakeholders, this tough screening does not appear to lead to a view by the Commission that complaints which are good enough for an investigation to be initiated obviously must have enough merit to justify measures. The evaluation team therefore concludes that the Commission methods and practices for checking complaints strike the right balance.

Conclusions/ recommendations

5.2.2 Investigations

The main procedural issues related to original investigations which have been studied by the evaluation team, and which are addressed in the following sub-sections, are:

- the duration of investigations (section 5.2.2.1), which influences the length of time until protection is granted;
- the investigation instruments applied by the Commission, in particular the use of questionnaires, verification visits and oral hearings (section 5.2.2.2); and
- the role and rights of interested parties to participate in the investigation (section 5.2.2.3).

5.2.2.1 Duration of investigations and timeliness of remedies

The maximum duration of AD and AS investigations is prescribed both by the WTO Agreements and the two basic Regulations. According to the latter, the maximum periods are as follows:

Legal basis

- AD investigations shall be completed within 12 months, where possible, and in any case within 15 months from the date of the notice of initiation;[740]
- AS investigations shall be completed within 12 months, where possible, and in any case within 13 months from the date of the notice of initiation;[741]
- provisional measures can be imposed at the earliest 60 days from the date of the notice of initiation, and at the latest nine months after that date.[742]

Length of investigations in practice

In practice, AD/AS measures are typically imposed at the very end of the legally allowed period (Table 57). The average duration until provisional measures are imposed is 8.9 months, while for definitive measures the period required is 14.8 months in AD cases and 12.8 months in AS cases. What is more, the average time required in the period 2005-2010 was longer than in the preceding five-year period. On the positive side, in recent years (unlike in the 1990s) there were no cases where the period allowed for investigations expired without any decision having been taken, i.e. all investigations were completed on time.

Practice

740 Article 5.10 of the WTO ADA states that investigations should normally be concluded within one year and in no case more than 18 months after initiation.

741 Article 11.11 of the WTO ASCM establishes the same time limits as Article 5.10 ADA.

742 Article 7.3 of the WTO ADA and 17.3 ASCM state that provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

Table 57: Duration of EU AD and AS investigations, 2000-2004 and 2005-2010

		2000-2004	2005-2010	2000-2004	2005-2010
		AD		AS	
Provisional investigations	*No. of cases*	*62*	*48*	*4*	*5*
	Average duration	8.8	8.9	8.9	8.9
	Minimum duration	5.8	8.3	8.7	8.9
	Maximum duration	9.0	9.0	9.0	8.9
Definitive investigations	*No. of cases*	*67*	*55*	*6*	*4*
	Average duration	14.6	14.8	12.8	12.8
	Minimum duration	11.8	12.9	12.6	12.8
	Maximum duration	15.0	15.0	13.0	12.9
Termination	*No. of cases*	*37*	*44*	*3*	*6*
	Average duration	12.4	13.2	11.2	10.4
	Minimum duration	8.2	9.8	8.2	8.5
	Maximum duration	15.0	15.0	12.7	11.0

Source: Authors' calculations based on DG Trade's anti-dumping and anti-subsidy measures list.

Stakeholder views

There was consensus among all consulted stakeholders that the duration of investigations at present is too long. For EU industry representatives, protection comes too late, while representatives of importers and users stated that the length of investigations created an unduly long period of legal uncertainty for all interested parties.

In international perspective, as discussed in section 4.8, compared to Australia, Canada, New Zealand and the USA, EU investigations periods are longer, while investigations in China and India can take up to 18 months and in South Africa even longer.[743]

The Commission is aware that the duration of investigations in the EU is long. However, complex consultation processes with Member States appear to limit the scope for speedier adoption of measures and conclusion of investigations.

Timeliness of Remedies

On average, the response time of EU TDI, from the time when actual material injury is suffered to the imposition of provisional duties takes almost 2.5 years:

- injury period: 12 months
- preparation of complaint: average of six months
- review of complaint by Commission: 1.5 months
- investigation until provisional duty: nine months

Stakeholder views

EU industry considers slowness of response to be a problem and some complainants have developed "innovative" means to avoid lengthy periods of injury determination (such as extending the product scope to include those products where injury is expected). Obviously, such means are second best solutions.

Conclusions/ recommendations

Substantially reducing the overall duration of investigations seems infeasible given the procedural requirements of the EU system. Moreover, with increasingly complex production systems cases are likely to be more rather than less complex prospectively than they were historically.

Nevertheless, a realistic option, in the view of the evaluation team, would be for the Commission to focus on threat determination in the initial phase of its investigation and impose provisional measures earlier. Peer country experience, as analysed in section 4.8, could provide guidance.

743 It is noted that a duration of investigations of more than 18 months is inconsistent with WTO rules.

Emphasis also needs to be placed on existing WTO rules that provide for short-term responses in cases of "massive importation" in the form of retroactive provisional duties.

Extension of the maximum period for investigations?

Legal analysis

In the context of implementing the new Comitology regulation, in the Trade Omnibus I proposal the Commission has foreseen the possibility to extend the maximum period for AD investigations to 18 months (and the period until provisional measures to 12 months).[744]

In legal terms, Article 5.10 of the WTO ADA provides that:

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

In relation to this, Article 6(9) ADR provides that:

> "For proceedings initiated pursuant to Article 5(9), an investigation shall, whenever possible, be concluded within one year. In any event, such investigations shall in all cases be concluded within 15 months of initiation, in accordance with the findings made pursuant to Article 8 for undertakings or the findings made pursuant to Article 9 for definitive action."

The WTO ADA thus provides for a maximum duration of 18 months while the basic EU AD Regulation provides for a maximum duration of 15 months. It is therefore possible in view of the WTO obligations of the EU to extend the maximum deadline for concluding investigations from 15 to 18 months.

Nevertheless, the arguments presented above suggest not extending the maximum period of AD investigations. In this context, the evaluation team takes note of the views expressed by the European Parliament's International Trade Committee, which recommends that the maximum duration of an AD investigation be limited to a maximum of 14 months and 15 months in cases where the appeal committee is likely to be called upon.[745] Therefore, the Commission and the Member States should examine to what extent internal processes and consultation times can be shortened so as to make sure that AD investigations can continue to be completed within 15 months.

Duration between the withdrawal of a complaint and termination

Another aspect which has a bearing on the total duration of investigations, and which is of interest in particular for importers and traders, is the time the Commission requires to terminate investigations in those cases where a complaint has been withdrawn. The shorter this time is, the earlier will legal certainty be restored, and disruptions to the market be kept to the minimum.

Legal basis

According to the two basic Regulations, termination of a case following the withdrawal of a complaint is not automatic but "the proceedings may be terminated unless such termination would not be in the Community interest."[746]

Practice

Once the withdrawal of a complaint is received, the Trade Defence Directorate asks for comments from all the interested parties and consults the hierarchy and associated services on the proposed course of action. This is done because in order to terminate the investigation it

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744 *Proposal for a Regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures*, COM(2011) 82 final, Brussels, 07.03.2011.

745 *Draft Report on the proposal for a regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures*, 2011/0039(COD), 28.10.2011, at p. 193f..

746 Article 9(1) ADR/Article 14(1) ASR.

must be shown that it is not against the Union interest to terminate. Finally, the ADC is consulted prior to the final decision being taken to terminate the case.

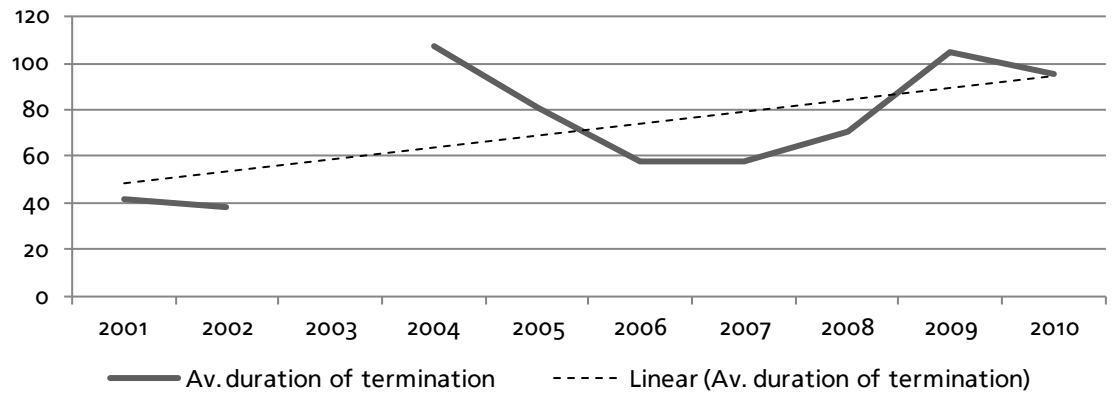
In practice, during the evaluation period, it took between 29 and 128 days for an investigation to be terminated following the withdrawal of a complaint (Table 58). For cases initiated during the evaluation period (Figure 43), the average duration increased substantially from 74 days (cases initiated in 2005) to 95 days (cases initiated in 2010). No reasons for these long periods could be determined by the evaluation team.

Table 58: Average duration to terminate a case following withdrawal of complaint, cases initiated 2001-2010

Up to 1 month	1-2 months	2-3 months	3-4 months	More than 4 months
2 cases: **AD509 (29 days)**, AD453 (30)	7 cases: AD451 (34), AD495 (43), **AD527 (44)**, AD462 (46), **AD562 (55)**, AD448 (57), **AD526 (58)**	4 cases: **AD538 (69), AD566 (69), AD535 (72), AD567 (84), AD492 (85)**	6 cases: **AD537 (98), AD542 (105)**, AD484 (107), **AD555 (107), AD510 (110), AD494 (112)**	2 cases: **AD561 (128), AS564 (128)**

Source: Termination notices; cases in evaluation period are in bold.

Figure 43: Average duration to terminate a case following the withdrawal of a complaint, cases initiated 2001-2010 (number of calendar days between withdrawal of complaint and termination notice)



Total number of cases: 46

Note: None of the cases initiated in 2003 was terminated following a withdrawal of the complaint.
Source: Authors' calculation based on termination notices

Stakeholder views

During the stakeholder consultations, it was stated that the main reason for withdrawing a complaint was when it was likely that an investigation would not result in the imposition of measures. In such a situation, one of the advantages of withdrawing the complaint is that less information about the industry will be disclosed. No stakeholder reported that a complaint was withdrawn because of retaliation threats, although it is possible that such threats do lead to the withdrawal of a complaint.

Conclusions/ recommendations

As was analysed above (section 5.1.7.2), the withdrawal of a complaint is the most frequent reason for investigations to be terminated. In effect, the main reason for withdrawing a complaint appears to be that an investigation would lead to the termination of a proceeding. No case in the evaluation period was identified by the evaluation team where the withdrawal of a complaint did not lead to termination of the investigations. In any event, if and when a complaint is withdrawn in response to pressure it can be assumed that the Commission would know about this.

Therefore, it is recommended that there be a fast track procedure which would allow terminating cases after the withdrawal of a complaint within a period of approx. one month to six weeks. This appears to be sufficiently long as in the evaluation period several investigations were

terminated within 29-45 days. A fast termination reduces the period of legal uncertainty for all interested parties.

5.2.2.2 Investigation instruments

Following the initiation of investigations, two separate teams of case handlers undertake the dumping/subsidy and injury analysis; the latter team is also in charge of the causality analysis and the Union interest test. Within the investigation, two phases can be distinguished. The first one comprises the investigations until preliminary findings have been reached and, potentially, provisional measures are imposed. This phase must be completed within nine months. The second phase, starting with the publication of provisional measures, primarily consists of the finalisation of investigations, the collection of comments from interested parties and the determination of the definitive duties.

Investigations are primarily based on information provided by interested parties (as well as by other parties which do not have full interested party status, such as analogue country producers) in a variety of means. The key instruments for information collection from interested parties are:

- questionnaires;
- verification visits; and
- oral hearings.

This information is complemented or, especially in case of non-cooperation, substituted by information collected by the Commission from other sources.

Questionnaires

Practice

Once an investigation is initiated, questionnaires are sent to the known interested parties:

- EU producers and their associations;
- producers in the exporting countries and their associations;
- EU importers and traders, and their associations;
- other interested parties, such as users of the product; and
- in AS investigations, also the exporting country authorities.

Questionnaires are standardised for each type of interested party and usually consist of a qualitative section (text document) and detailed tables to be completed by the interested party. The questionnaires address all relevant aspects of an investigation. Cooperating firms are obliged to provide detailed information about the products concerned, production, purchase and stocks, sales, distribution system and selling prices, domestic and export sales on a transaction basis, cost of production, profitability, employment, etc. In the case of AS investigations, detailed information is also requested from the exporting country authorities on all the measures of support for the industry in question. The level of detail of the questionnaires varies across interested parties, with exporting producers having to provide the most comprehensive information.

Normally within a period of 37 calendar days[747] (from the notice of initiation or the notification of sample selection), two versions of completed questionnaires must be submitted by cooperating firms, a confidential and a non-confidential one. While the former will be used by the

[747] The 37 days are composed of 30 days given for supply plus one week (7 days) for the dispatch of the questionnaire from the Commission to the party; cf. Article 6(2) ADR/Article 11(2) ASR.

Commission for the investigations, the latter will be put in the non-confidential file and be made available for inspection to interested parties.

Stakeholder views

Representatives of EU producers consulted for the evaluation stated that questionnaires were very detailed and time consuming to fill in. Associations typically provide a substantial degree of assistance to their member companies to fill in the questionnaires, even formal training sessions in some cases. Some associations suggested that questionnaires should be adapted to each investigation according to the product concerned. Nevertheless, this would entail the risk that the coherence of investigations would suffer.

Importers and user representatives stated that the information requirements and complexity of questionnaires, coupled with the short time-limits for responses, impeded any effective participation, which explained the low level of cooperation of importers and users in investigations. Furthermore, in view of the short time limits, it was suggested that the Commission provide questionnaires in several languages. This would also be to the benefit especially of SMEs in non-English speaking Member States. Representatives of fragmented sectors composed of smaller companies (SMEs) argued that the investigation instruments in general required extensive input from the member companies which in itself was difficult to meet for SMEs. It was argued that answering the questionnaire correctly, in particular, could require the full-time input of the sampled company's accountant/financial controller for several weeks.

The issue of providing questionnaires in various languages was also mentioned by some Member States, which also stated that questionnaires should be simplified and tailored to the roles of the different interested parties. It was recognised that this is already ongoing. In fact, for importers, users and SMEs (EU producers and importers), simplified questionnaires have been developed and used in recently launched investigations.

With regard to the issue of providing questionnaires in different languages, according to information provided by the Commission, upon request translated versions of the questionnaire are made available to interested parties if this does not lead to an undue burden to the Commission.

Conclusion/ Recommendation

Translating questionnaires and other investigation documents them into all official EU languages is not recommended, as the provision of data in other languages would in all likelihood have adverse effects on the duration of investigation. The evaluation team therefore supports the current practice of the Commission to provide documents in other languages on an ad hoc basis.

Verifications

Legal basis

Following receipt of the replies to the questionnaires, verification visits are carried out by Commission officials at the premises of the cooperating parties.[748] Verification visits to exporting producers may take place provided that the exporter agrees *and* the exporting country government has been informed and not objected to such visits. The main purpose of these visits is to verify whether the information given in the questionnaires is reliable. In AS investigations, the exporting country government is also visited to discuss the relevant subsidies.

Practice

Prior to the verification visit the Commission sends the firms concerned (and in the case of AS investigations, the relevant authorities) a pre-verification letter that advises what type of information will be verified and which additional information needs to be provided during the

[748] Article 16 ADR/Article 26 ASR.

visit. The visit itself usually lasts two to three days and is made by two or three Commission officials. The Commission does not disclose the verification findings to the visited party nor a list of pending issues at the end or after the verification. The only list agreed at the end of each verification is that of exhibits collected during the verification, i.e. there is an agreement on the documents copied and collected by the investigators on-the-spot.

A verification visit is the last opportunity for the interested party to submit new facts. Once the verification visit is completed, no new facts are accepted as there would be no way for the Commission to verify them. New documents can be accepted if they can be reconciled with the information collected and verified on spot. The evaluation team considers that this strict approach is justified, especially in the context of the new comitology rules which are likely to reduce the time available for investigations.

Stakeholder views

In general, representatives of EU producers found verification visits to be very thorough, detailed, and handled in a professional manner by DG Trade services, while representatives of importers often perceived case handlers to be biased against importers.

Comparison with US practice

Compared to the US practice, verifications in the EU are much shorter and thus less resource consuming but also less thorough. While the preparation of the visit – i.e. the sending of the verification letter to the visited interested party – is comparable, the actual visit in the US system usually takes two weeks.[749] This is also reflected in the resource requirements of the TD system, as compared in section 5.2.5.

Disclosure of verification findings is also handled differently by the US authorities. At the end of a verification visit, Commerce issues a Verification Report, which is co-signed by the investigators and the company visited. The purpose of the verification report is to create a factual record of what was done at verification and the results, i.e., whether the information in the response was verified, or whether discrepancies were found. The report is intended to be purely factual; it does not contain an analysis of the information verified or draw any conclusions.

Legal disputes

Regarding the disclosure of verification findings, in one EU court case, the Court of First Instance ruled that the Commission had made a manifest error of assessment by not confronting the exporting company during the verification with the contradictions between their statements and some of the documents provided and the conclusions drawn by the Commission on the issue of the by-products.[750]

In addition in the WTO case *DS312 Anti-Dumping Duties on Imports of Certain Paper from Indonesia, Indonesia v Korea* the Panel stated that the disclosure of the verification results must contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully. This followed because the purpose of the disclosure requirement under Article 6.7 ADA is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results.[751]

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749 Verification of the export price and normal value questionnaires normally takes one week. If there is also a cost questionnaire response, verification of that response normally takes an additional week. Also, where US sales are made through an affiliate in the USA, Commerce will conduct a sales verification in the USA, which normally takes approximately one week. For more details, see appendix I8.

750 Case T-413/03 Judgment CFI 2006-07-13 *Shandong Reipu Biochemicals v Council*; for a more detailed analysis of the case see section 3.1.2.1 below.

751 For a further analysis of the case see appendix H2.

Based on the above it is recommended that the Commission investigators be pro-active during verification visits in confronting companies with contradictions between their replies and the Commission's findings during the verification. Ideally, a verification report in line with the US practice would be agreed on at the end of the visit. However, given the considerably shorter time frame of EU verification visits this might not be possible.

Conclusions/ recommendations

Oral representations

Hearings take place only upon request by interested parties. The two basic Regulations foresee three types of hearings:

Legal basis

- Oral hearings in which interested parties discuss issues pertaining to the case with Commission staff;[752]
- Adversarial meetings, where interested parties may "meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered";[753] and
- Hearings in the context of the Union interest test.[754]

Most stakeholders consulted for this study found oral presentations extremely useful in order to exchange views on specific issues with DG Trade, clarify potential misunderstandings, and possibly influence the choice of the type of remedial measures to be imposed. Views on adversarial meetings were more mixed, with several stakeholders interviewed stating that these would not add value to an investigation.

Stakeholder views

There is no formal procedure for hearings of interested parties. Furthermore, hearings are not public, nor made public. Usually, they take place as meetings between the requesting party and Commission staff handling the case. Information about the number of hearings having taken place in the evaluation period is not available although based on information provided by stakeholders hearings appear to be frequent.

Practice

The number of adversarial meetings appears to be much lower. In the evaluation period, only one regulation referred to an adversarial meeting having taken place, attended by all interested parties, but without providing any further information.[755] Nor is it clear if regulations would mention routinely the fact that adversarial meetings took place during an investigation.

Based on information provided by Commission staff, in the past (and including in the evaluation period) there was no consistent practice regarding whether or not minutes of hearings were prepared, with the exception of hearings organised by the Hearing Officer, in which minutes are taken and put on non-confidential file. [756] At the same time, the different practices across units are expected to be abolished as part of the TQM project, which has introduced the requirement that minutes are to be prepared and put on the non-confidential file. Since April 2009, case-handlers are required to prepare notes about information obtained orally from interested parties either on the phone or in hearings, and put a non-confidential version of these notes in the non-confidential file.

752 Article 6(5) ADR/Article 11(5) ASR.
753 Article 6(6) ADR/Article 11(6) ASR.
754 Article 21(3) ADR/Article 31(3) ASR.
755 *Fasteners, iron or steel* (AD525), OJ L 29/1, 31.01.2009, at recital 9.
756 This is, e.g., also the practice in China, where records of words are maintained during the hearing, and the chairperson, the recorder, the interested parties attending the hearing should sign or seal the records of words on the spot. In case the interested parties refuse to do so, the chairperson of the hearing should make remarks on the records of words of the hearing indicating such situation; see appendix I4.

Confirmation of oral information in writing

Legal analysis

Article 6(6) ADR provides that:

> "Opportunities shall, on request, be provided for the importers, exporters, representatives of the government of the exporting country and the complainants, which have made themselves known in accordance with Article 5(10), to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Oral information provided under this paragraph shall be taken into account in so far as it is subsequently confirmed in writing."[757]

On the same issue, the WTO ADA provides in relevant part:

> "6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.
>
> 6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2."[758]

Recommendation

While the two basic Regulations would seem to limit the issue of confirmation in writing of oral information to the oral information provided in adversarial meetings under that paragraph, the WTO ADA and ASCM seem to refer to a *general right* of interested parties to present other information orally and the need to subsequently reproduce it in writing. Therefore, it is recommended to align the text of the ADR and ASR more closely and literally to the text of the WTO ADA and ASCM.

Interpretation and treatment of non-cooperation

Legal basis

According to the two basic Regulations, in cases of non-cooperation, i.e. where an interested party "refuses access to, or otherwise does not provide necessary information within the time-limits provided [...], or significantly impedes the investigation"[759], or where misleading or false information has been provided, the Commission may arrive at its findings on the basis of facts available, which may include independent sources of information (such as official statistics, published price lists), or information provided by other interested parties, including the evidence provided in the complaint.

On the other hand, certain limitations in the quality of information provided, such as failure to provide computerised data where this would have caused unreasonable cost to the firm, is not to be considered non-cooperation, and such information shall be considered by the Commission. In this regard, the Court of First Instance clarified that;

> "where a party has failed to lodge a reply to the questionnaire, but has supplied information in the context of another document, it cannot be accused of lack of cooperation if, first, any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding; secondly, the information is submitted in good time; thirdly, it is verifiable; and, fourthly, the party has acted to the best of its ability"[760]

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757 Article 11(6) ASR provides for the same.

758 Article 12.2 ASCM establishes equivalent rules for oral information.

759 Article 18(1) ADR/Article 28(1) ASR.

760 Judgment of the CFI, 2009-03-10, in Case T-249/06 *Interpipe Niko Tube v Council*, at para. 91.

Initiation notices routinely inform interested parties of the consequences of non-cooperation, notably that findings may be based on facts available, and may be less favourable to a party than if it had cooperated.

Consequences of non-cooperation for interested parties – use of facts available

In the case of non-cooperation, the Commission is likely to base its findings on information available which is least favourable for the party concerned. As a result, the collection of data used in the analysis, in particular with regard to non-cooperating firms is an often disputed issue. In this regard, Annex 2 of the WTO ADA[761] provides in relevant part:

> "7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

These provisions are reproduced in Article 18 ADR/Article 28 ASR:

> "5. If determinations, including those regarding normal value, are based on the provisions of paragraph 1, including the information supplied in the complaint, it shall, where practicable and with due regard to the time-limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation. Such information may include relevant data pertaining to the world market or other representative markets, where appropriate.
>
> 6. If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than if it had cooperated."[762]

These rules require that where possible the facts available are checked with independent sources. Examples mentioned are published price lists, official import statistics and customs returns. In addition PRODCOM data could be used; other sources of information are the annual accounts of non-cooperating companies which normally are to be deposited and available to the public if they have a legal personality; independent market surveys, etc.

Practice

In practice, Eurostat data are the most frequent source used by the Commission. Another common practice is to base the finding for non-cooperating companies on the transactions with the highest dumping and injury margins made by cooperating exporters.

During the evaluation period the most frequent type of non-cooperation was the failure to provide information within the time-limits provided. Only in few cases did companies refuse to allow verification visits[763] or provided false or misleading information. This last type of non-cooperation occurred, according to provisional and definitive duty regulations, in seven investigations. In all cases, exporters were concerned. In three cases, misleading information was provided in the context of MET/IT claims and led to the rejection of MET/IT.[764] In three cases, the exporters provided false and misleading information on domestic sales quantities and prices;

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761 Note that the ASCM does not have a corresponding annex on "best information available".

762 Also see Article 28 ASR.

763 See, e.g. *Ferro-silicon* (AD516), OJ L 223/1, 29.08.2007, at recital 10.

764 *Saddles* (AD508), see OJ L 160/1, 21.06.2007, at recitals 9-10; *Fasteners, iron or steel* (AD525), see OJ L 29/1, 31.01.2009, at recital 62; *PSC wires and strands* (AD529), see OJ L 118/1, 13.05.2009, at recitals 22-23.

the Commission therefore determined dumping margins based on facts available.[765] Finally, in one case, *Peroxosulphates* (AD511), the exporter claimed an adjustment for transport costs incurred on its domestic market. However, as the company could not properly substantiate its claim and the documents submitted were partially misleading, the Commission applied Article 18 and resorted to facts available, but only for the adjustment for transport costs in the dumping margin calculation.[766]

Conclusions/ recommendations

Based on the above analysis, it is concluded that the Commission's interpretation of cases of non-cooperation in the evaluation period was appropriate. It should be noted, however, that the EU takes a relatively lenient stance regarding the provision of false information, as it is not treated as an obstruction of the investigations and sanctioned, as is the case in Canada or the USA, where injury investigating authorities have subpoena power. There is thus no strong incentive in the EU for interested parties to cooperate.

The establishment of stronger sanctioning mechanisms (such as fines) for the provision of false information by any interested party is recommended. This should be addressed jointly with the introduction of expanded investigation powers (i.e. obligation to cooperate) as recommended in section 4.3 above.

5.2.2.3 Role of interested parties in the investigation

Legal basis and analysis

Apart from the Commission, a number of interested parties participate in TD proceedings, including EU producers, exporters and foreign producers, importers and traders, users of the product under investigation, etc. The two basic Regulations do not provide a consolidated definition of the term "interested party." Nevertheless, various articles of the two basic Regulations mention certain stakeholders which are considered as interested parties.

In this respect, Article 6(5) ADR currently contains an open-ended notion of interested parties:

> "The interested parties which have made themselves known in accordance with Article 5(10) shall be heard if they have, within the period prescribed in the notice published in the Official Journal of the European Union, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard."[767]

However, Article 6(7) ADR limits access to the file to only certain named categories of parties:

> "The complainants, importers and exporters and their representative associations, users and consumer organisations, which have made themselves known in accordance with Article 5(10), as well as the representatives of the exporting country may, upon written request, inspect all information made available by any party to an investigation, as distinct from internal documents prepared by the authorities of the Community or its Member States, which is relevant to the presentation of their cases and not confidential within the meaning of Article 19, and that it is used in the investigation. Such parties may respond to such information and their comments shall be taken into consideration, wherever they are sufficiently substantiated in the response."[768]

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765 *Plastic sacks and bags* (AD497), see OJ L 270/4, 29.09.2006, at recital 62; *Polyester staple fibres* (AD509), see OJ L 379/65 (provisional), 28.12.2006, at recitals 50-60; *Monosodium glutamate* (AD521), see OJ L 144/5 (provisional), 04.06.2008, at recitals 15-18.

766 OJ L 97/6 (provisional), 12.04.2007, at recital 103.

767 Also see Article 11(5) ASR.

768 Article 11(7) ASR is slightly different and refers to "complainants, the government of the country of origin and/or export, importers and exporters and their representative associations, users and consumer organisations, which have made themselves known in accordance with the second subparagraph of Article 10(12)."

Article 20 ADR on disclosure also limits the right to disclosure to certain named categories of parties:

> "1. The complainants, importers and exporters and their representative associations, and representatives of the exporting country, may request disclosure of the details underlying the essential facts and considerations on the basis of which provisional measures have been imposed. Requests for such disclosure shall be made in writing immediately following the imposition of provisional measures, and the disclosure shall be made in writing as soon as possible thereafter.
>
> 2. The parties mentioned in paragraph 1 may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures."[769]

By comparison, the WTO ADA provides with regard to the rights of interested parties that:

> "6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. […]
>
> 6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."[770]

Recommendation

It is recommended that the provisions in the two basic Regulations – Article 6(7) and Article 20 ADR, respectively Article 11(7) and Article 30 ASR – be made open-ended to allow "all interested parties" (as following from Article 6(5) ADR/11(5) ASR) access to the file and ample opportunity to defend their interests as required in Article 6.2 ADA and disclosure as required by Article 6.9 ADA. This change in the two basic Regulations would align the legal texts with practice.

Practice

Stakeholders are only considered as an interested party in a case if they make themselves known within 15 days from the publication of the initiation notice for the case. Within the same period, interested parties can also request a hearing and ask for access to the non-confidential files which will help them defend their case.

The degree of participation of interested parties in the Union interest test varies according to the type of stakeholder. By definition, EU producers (notably complainants) cooperate in every case. Exporters, importers/traders also typically participate, notably through the completion of questionnaires and in verification visits, although in most cases there is a certain degree of non-cooperation.

Stakeholder views

In the consultations, many stakeholders mentioned that importers and traders do not play an active role in investigations. One could therefore be tempted to conclude that they are not substantially affected by TDI (indeed, the Commission often considers a low level of cooperation as an indication that an interested party is not negatively affected by a measure). However, representatives of importers and traders pointed out that their passive role can largely be explained by perceived shortcomings of investigation instruments, i.e. primarily:

- Short deadlines for providing information;
- The fact that questionnaires are available in English only;
- The fact that questionnaires are too complex and ask for data which importers do not have.

769 Also see Article 30 ASR.
770 Also see Article 12.8 ASCM.

The evaluation team noted that these criticisms are being addressed by the Commission. Questionnaires have been simplified and are provided, on a case specific basis, in other languages (see section 5.2.4 below). Finally, the deadlines for providing information are the same for all interested parties.

In the online consultation, a two thirds majority of respondents stated that the Commission adequately considered interested parties' views in the investigations, i.e. that:

- stakeholders are given adequate opportunity to be heard (in written and oral form);
- non-cooperation has negative consequences; and
- interested parties are consulted in determining the type of measures to be taken (duties – *ad valorem*, specific, variable – or undertakings).

Only importers were divided over each of these three questions (Table 59), in line with the comments provided in the oral consultations.

Table 59: Perceived role of stakeholders in investigations, by role of respondent in TDI

	Yes	No	Don't know	No. of responses
Adequate opportunity for stakeholders to be heard?	**65%**	**26%**	**9%**	**112**
Complainant	68%	22%	10%	73
Importer	44%	44%	11%	9
User	57%	43%	0%	7
Supplier	80%	20%	0%	5
Negative consequences of non-cooperation?	**65%**	**25%**	**9%**	**110**
Complainant	68%	22%	10%	72
Importer	44%	44%	11%	9
User	57%	43%	0%	7
Supplier	80%	20%	0%	5
Interested parties consulted in determination of measures?	**65%**	**26%**	**9%**	**108**
Complainant	68%	23%	10%	71
Importer	44%	44%	11%	9
User	40%	60%	0%	5
Supplier	67%	33%	0%	3

Source: Online consultation.[771]

Conclusions/ recommendations

In the view of the evaluation team, the Commission provides adequate opportunity to interested parties to participate in investigations. It is commendable that the Commission's practice regarding the right of stakeholders to contribute to investigations, as described in section 5.1.6.2 above, goes beyond the legal requirements as stated in the two basic Regulations. As stated above, it is recommended to align the legal texts with the Commission's practice.

Participation of interested parties in the Union interest test

Legal analysis

In the context of the Union interest test, Article 21(2) ADR and Article 31(2) ASR state that the following stakeholders may provide inputs:

> "complainants, importers and their representative associations, representative users and representative consumer organisations"[772]

However, with regard to consumer organisations, initiation notices provide a further restriction. They consistently state that:

[771] As the online survey was restricted to EU firms, no information about the role of exporters or foreign producers was obtained.

[772] Article 21(2) ADR/Article 31(2) ASR.

"In order to participate in the investigation, the representative consumer organisations have to demonstrate, within the same deadline, that there is an objective link between their activities and the product under investigation."[773]

On the issue of interested parties, the WTO ADA provides in relevant part:

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

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

(ii) the government of the exporting Member; and

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

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

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality."[774]

As can be seen, the WTO ADA does not explicitly refer to the public interest test when mentioning interested parties. Article 6.12 deals specifically with the role of industrial users and consumer organisations in the context of dumping, injury and causality aspects of the investigation. However, the WTO ADA states in general terms in Article 6.2 that "throughout the anti-dumping investigation all interested parties shall have the full opportunity for the defence of their interests." Obviously, it is not in an exporter's interest to have duties imposed. In consequence, since in the EU the public interest criterion is one of the conditions for imposing duties, exporters have an interest to comment on the public interest.

Also, Article 6.11 ADA defines, in mandatory terms, exporters or foreign producers and their associations as well as the government of the exporting Member as "interested parties." As such, they must be given the opportunity to defend their interests and therefore cannot be excluded from defending their interests as part of the Union interest test.

Practice

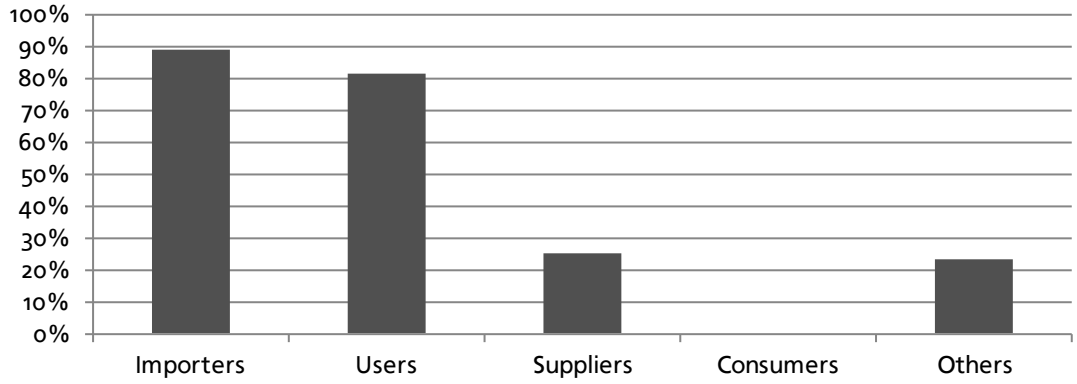
In practice, EU producers (notably complainants) cooperate in every case. Importers/traders and users/retailers also cooperate in the vast majority of cases (Figure 44), although the number of cooperating companies in each of these categories is often low. Suppliers to the Union industry only cooperate in about one quarter of all cases, as do other interested parties and stakeholders (mostly exporters but also non-complaining EU producers, etc. [775]). Consumer associations did not cooperate in a single case in the evaluation period.

[773] E.g. OJ C 343/24, 17.12.2010, at p. 28.

[774] Also see Articles 12.9 and 12.10 ASCM.

[775] E.g. non complaining EU producers in: *Seamless pipes and tubes, of iron or steel* (AD490); *Side-by-side refrigerators* (AD493 – EU producers of white goods not producing the like good); Exporters in: *Footwear with uppers of leather* (AD499); *Tungsten electrodes* (AD502); *Ironing boards* (AD506); *Saddles* (AD508); *Peroxosulphates* (AD511); *Dicyandiamide* (AD512); *Dihydromyrcenol* (AD514); *Coke +80mm* (AD518); *Welded tubes and pipes of iron or non-alloy steel* (AD523); *PET* (AD545, AS546).

Figure 44: Contributions of interested parties to Union interest, cases initiated 2005-2010



Number of cases: 55

Source: Provisional and definitive duty regulations.

Recommendation

It is recommended to make the list in Article 21 ADR/Article 31 ASR open-ended to allow all interested parties (all parties who may be affected by the result of the proceeding as mentioned in Article 6(5) ADR/Article 11(5) ASR[776]) to provide their comments on the matter of Union interest. It cannot be *a priori* excluded that other parties than those currently listed may have comments to make on this matter.

With regard to rights of stakeholders under the Union interest test, Article 21(4) ADR provides that:

> "The parties which have acted in conformity with paragraph 2 may provide comments on the application of any provisional duties imposed. Such comments shall be received within one month of the application of such measures if they are to be taken into account and they, or appropriate summaries thereof, shall be made available to other parties who shall be entitled to respond to such comments."[777]

These provisions in combination with the provisions of Article 20 on disclosure suggest that the parties entitled to comment on the issue of Union interest cannot request final disclosure and do not have an opportunity to comment on final disclosure.

Conclusions/ recommendations

It seems appropriate to allow all interested parties the same rights of defence to provide comments both after the provisional determination and after final disclosure. A corresponding amendment to the basic Regulations is recommended.

5.2.3 Transparency and Confidentiality of Proceedings

Regarding the transparency of investigations, two dimensions need to be distinguished. First, a necessary condition is that the rules which guide investigations must be transparent. Second, the application of these rules must be undertaken in a transparent manner. The following sub-section addresses the former while the remaining sub-sections discuss the transparency of proceedings and the role of the Hearing Officer. Furthermore, certain decisions regarding the transparency of

776 Note that this would mean that, theoretically, individual EU citizens can be interested parties. The two basic Regulations already provide for this by leaving the option of stakeholders to make themselves known. However, in the practice over the last decades, citizens have shown very little interest to participate in EU dumping proceedings, and is not expected that this would occur in the future.

777 Also see Article 31(4) ASR.

TDI are rather policy decision – e.g. whether or not to grant access to confidential files – and have been discussed in section 4.3 above in more detail.

5.2.3.1 Transparency of rules

The only publicly available documents establishing the rules for EU TDI are the two basic Regulations as well as some basic guidelines and support documents provided for stakeholders. Interested parties and other stakeholders (including the evaluation team) therefore have to study the body of case law and past practice – not often easily observable in regulations – and infer what the rules are, or rely on textbooks.

More detailed guidelines for investigations are provided in the policy notes which however so far have been confidential. Yet several of these policy notes have found their way to some interested parties.[778] A consequence is that stakeholders with good sources enjoy a procedural advantage over stakeholders which lack such access. In short, the lack of transparency of rules creates an uneven playing field for stakeholders.

Stakeholder views

The lack of transparency of rules applied by the Commission in investigations was also raised as one of the core problematic issues by stakeholders coming from all "camps" (EU producers, importers, Member States). In this context, the dispersion of rules across numerous confidential "policy notes" and Clarification Papers which, as was argued by some consulted stakeholders, are inconsistently applied by the Commission itself, adds to the lack of transparency and predictability of results. In this context, the proposal was made that the Commission should compile its policy notes as well as recent case practice into one coherent manual which should be published on the website and continuously be updated.

The Commission has recognised the problem and in fact, as mentioned above, plans to publish in the course of 2012 on DG Trade's website a public version of the policy handbook which is currently being developed. Furthermore, the publication of questionnaires on the website is also planned. These will definitely constitute major improvements, assuming that the "external version" of the handbook provides sufficient detail.

Recommendation

It is recommended that differences between the internal and public versions of the policy handbook be kept to the minimum. For example, when the internal handbook refers to certain practices or methods applied in specific actual cases, these could still be included in the public version in non-confidential format. Also, as methods evolve, the policy handbook should be updated so as to make sure that it always reflects current practice.

5.2.3.2 Transparency and confidentiality of proceedings

In the two basic Regulations, the key instruments to ensure transparency, while respecting confidentiality, are:

- notifications and publication of regulations;

[778] Indeed, some clarification papers have found their way to the internet. E.g. a simple search on Google led the evaluation team to a 2000 clarification paper on cumulation (http://archives.1wise.es/ec-dumping-cumulation.pdf) and a 2006 clarification paper on the community interest test (http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Policy%2520and%2520Representation/Submissions/Trade%2520and%2520Export/Attachment_A_EC_Dumping_Note_on_Community_Interest.pdf).

- disclosure to interested parties of the details underlying the essential facts and consideration on the basis of which measures are (intended to be) imposed; and
- access for interested parties to non-confidential information provided by other interested parties and requirement for interested parties to provide non-confidential summaries of confidential information.

Changes since last evaluation

Lack of transparency in investigations was a major issue in the previous evaluation study (Stevenson 2005). Since then, a number of changes have taken place:

- the trade defence website has been improved and extended, it now provides easy access to all ongoing and recent TD cases as well as introductions to the different instruments and how they work. At the same time, the coverage of the case database is still not complete (older cases are missing), and access to official documents which are not directly related to original investigations or reviews (such as certain Commission notices) is not provided;
- the quality of non-confidential versions of documents, including complaints, has been improved; and
- more and better explanations of provisional and definitive duty regulations are being provided to interested parties.

Furthermore, within the TQM programme, transparency and rights of defence are another focus area. Within this area, the improved website and disclosure documents have been important first steps. The workflow management system (SHERPA), which is used to keep track of investigation progress and to ensure that deadlines are met, has been linked to the DG Trade website, thus ensuring that website information on deadlines in ongoing investigations is always kept up-to-date. An important project to facilitate access to non-confidential files is linked to the introduction of an electronic filing system (SHERLOCK).

Finally, the position of a Hearing Officer has been created to ensure procedural rights of interested parties and enhance transparency (see section 5.2.3.3 below).

General stakeholder views on transparency and confidentiality

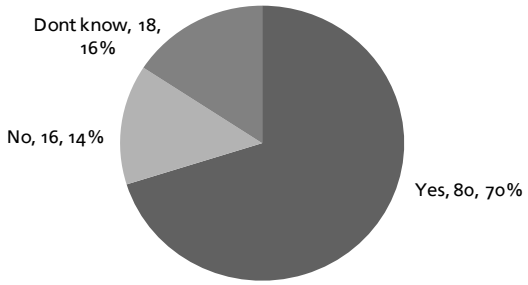
As with many issues, stakeholders tended to have diverging views on the degree of transparency of the EU's trade defence investigations. Thus, there was a general consensus among EU producer representatives that investigations were carried out with great transparency by the Commission. The often reported view was that the lack of transparency with TDI did not occur at the investigations stage, but later on at the political level during decision-making, i.e. in the Advisory Committee. Conversely, virtually all representatives of importers (as well as some users) stated that lack of transparency continued to constitute one of the major weaknesses of the EU TD system. Although acknowledging that over the past two years certain improvements had been made they stated that the Commission still fails to explain how it arrives at key findings (on dumping margins, injury margins, etc.), and that often key information required to defend interests (such as total Union production, imports) is not revealed by the Commission because of alleged confidentiality concerns. As a result, in the absence of any possibility to check the Commission's work interested parties typically have to trust that the investigations are being undertaken correctly and impartially. At the same time, importers argued that based on the information which is made available to them often mistakes can be found, which leads to a lack of trust in the Commission's findings.

This mixed view is also reflected in the results of the online survey. Here, 70% of respondents also agreed that the Commission's investigation process is transparent (Figure 45). Minorities of importers (20%) and complainants (8%) disagreed.

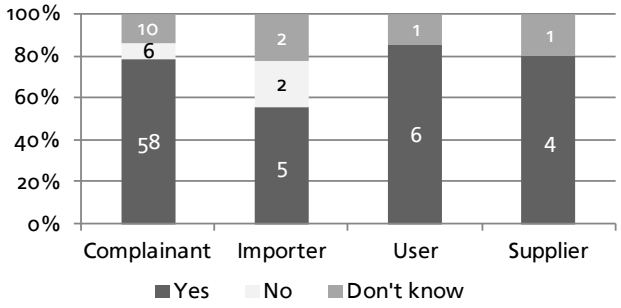
Figure 45: Transparency of EU AD/AS investigations

Is the process for investigations transparent (e.g., are case documents and notices available on a timely basis; are they easy to access, etc.)? (114 respondents)

a) overall



b) by type of respondent

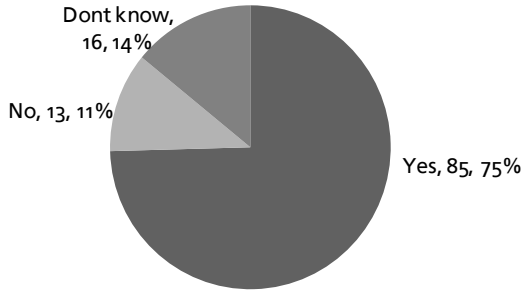


Furthermore, three quarters of respondents agreed that confidentiality was adequately protected during the Commission's investigations (Figure 46). Among importers, a majority did not have any view on this issue but among those who did a clear majority also agreed that business confidential information was adequately protected.

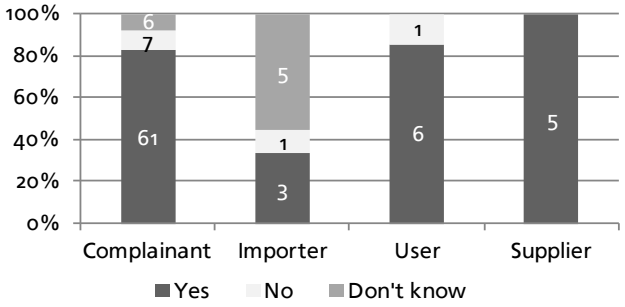
Figure 46: Confidentiality of EU AD/AS investigations

Do you consider that rules and practice for divulgation of information adequately protect confidential information? (114 respondents)

a) overall



b) by type of respondent



Some Member States stated that both the details of investigations and the consultations in the Advisory Committee lacked transparency. It was acknowledged that transparency had improved recently but more should still be done. On the other hand, some other Member States asserted that the Commission needed a certain degree of discretionary power which was resulting from limitations to transparency.

In the following paragraphs, three instruments of the transparency regime are evaluated, i.e. publications, disclosures and non-confidential files. Furthermore, transparency of decision-making in the Advisory Committee is addressed briefly.

Publications

Legal basis

In the EU TD system, publications (as well as Court judgments) constitute the only information which is available to the general public. All publications related to proceedings are made in the *Official Journal*. The following publications are made:

- notices of initiation of a proceeding (including initiation of reviews and reinvestigations);[779]
- regulations imposing provisional duties;[780]

[779] Article 5(9) and 5(10) ADR/Article 10(11) and 10(12) ASR.
[780] Article 14(2) ADR/Article 24(2) ASR.

- regulations imposing definitive duties (including where a review results in the amendment of measures);[781]
- regulations accepting undertakings;[782]
- decisions terminating investigations or proceedings (including termination of reviews);[783]
- notices of impending and actual expiry of a measure;[784]
- notices announcing expiry or maintenance of the measures following an expiry review.[785]

Practice regarding notices

In practice, notices are mostly standardised documents. There are thus no comments to be made on substance. However, some stakeholders made comments regarding the timing of the publication of notices announcing the expiry of measures, arguing that these were often made only on the day before the expiry. Indeed, during the evaluation period, 13 of 47 expiry notices identified (28%) were published one day or less before the expiry, in some instances even only after the date of expiry;[786] another 40% were published two to five days before the date of expiry.

Recommendation

In order to increase legal certainty, it is recommended that notices announcing the actual expiry be published as early as possible, i.e. immediately after the period for lodging a review request has ended (three months before the end of the period of application of the measure).

Practice regarding regulations

Regulations imposing provisional or definitive duties and/or accepting undertakings, and termination notices (as long as these are not in response to the withdrawal of a complaint), by necessity differ across cases, as they are largely case specific, having to provide:

> "the names of the exporters, if possible, or of the countries involved, a description of the product and a summary of the material facts and considerations relevant to the dumping and injury determinations"[787]

In comparing the regulations published during the evaluation period, the following issues have been noted. First, there is a certain lack of coherence and consistency in the structure of regulations. Table 60 compares the structures of provisional and definitive duty regulations of two randomly chosen recent AD cases. As can be seen, both the sequence and terminology of headings, as well as the numbering style and the degree of detail vary both across cases and between provisional and definitive duty regulation. Although different structures as such are not problematic, they are indicators for a lack of uniform approach applied across cases, and regulations using a less detailed structure run the risk of not addressing certain aspects which need to be addressed. Thus, in a number of WTO cases the EU institutions were found to not have addressed all factors in the non-attribution analysis.[788] This could have been avoided easily if regulations had been based on a very detailed template which includes all issues to be addressed mandatorily.

Second, sometimes definitive duty regulations which follow provisional duty regulations are written as "stand-alone" documents, i.e. they address all necessary aspects in their own right

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781 *Ibid.*

782 *Ibid.*

783 *Ibid.* and, for anti-absorption reinvestigations, Article 12(4) ADR (the ASR does not contain rules on anti-absorption investigations).

784 Article 11(2) ADR/Article 18(4) ASR.

785 Article 11(5) ADR. The ASR does not address this type of notice explicitly, although it is considered to be covered by the general provisions of Article 24(2) ASR.

786 E.g., *Para-cresol* (AD457), see OJ C 264/15, 17.10.2008, with a date of expiry of measures of 21.09.2008; *Compressors* (AD519), see OJ C 73/39, 23.03.2010 with a date of expiry of measures of 21.03.2010.

787 Article 14(2) ADR and, *mutatis mutandis*, Article 24(2) ASR.

788 E.g. in *EC – Countervailing Measures on DRAM Chips (Korea)* or *EC – Salmon (Norway)*; see sections 3.2.2.1 and 0 above.

(often repeating information of the provision duty regulation), while others largely refer to the provisional duty regulations.[789] It is understood that the standard practice is for the definitive duty regulations to be short, confirming, amending or rejecting findings in the provisional duty regulation. Only in more complex or controversial cases, where many arguments are raised by interested parties, the definitive duty regulation restates findings of the provisional duty regulation. This practice is considered appropriate by the evaluation team.

Conclusions/ recommendations

In order to increase consistency and reduce the risk of not addressing mandatory items it is recommended that a detailed template for regulations be developed the use of which is mandatory. The same recommendation would also apply to the final disclosure document, which typically is close to identical to the corresponding definitive duty regulation.

Furthermore, it has been noted that publications were followed by corrigenda in approximately 17% of cases in the evaluation period.[790] These corrigenda mainly refer to a variety of, often minor, issues, including corrections of the names of interested parties, changes in product codes, or clarifications of the text. Also, interested parties occasionally make comments regarding calculation errors which then have to be corrected. Accordingly, it is recommended that as part of the TQM exercise mechanisms for a more thorough quality control of publications be implemented. A first step would be the use of detailed templates, against which provisional and definitive duty regulations would be checked. A separate reading of regulations prior to publication focussing only on clerical and basic factual issues could also help avoid errors and subsequent corrigenda.

Although publication requirements are generally comprehensive, one type of reviews is not published, i.e. refund reviews. Although it is understood that refund reviews may raise particular concerns of confidentiality, publication of a non-confidential version should pose no major problems. It is therefore recommended that notices regarding refund reviews be published in the *Official Journal* in the same manner as other reviews.

Table 60: Comparison of structure of two randomly chosen provisional and definitive duty regulations

Ceramic tiles, China (AD560)	Open mesh fabrics of glass fibres, China (AD558)
Provisional duty regulation	**Provisional duty regulation**
A. PROCEDURE	**A. PROCEDURE**
1. Initiation	**1. Initiation**
2. Parties concerned by the proceeding	**2. Parties concerned by the proceeding**
2.1. Sampling of Chinese exporting producers	
2.2. Sampling of Union producers	
2.3. Sampling for importers	
2.4. Questionnaires replies and verifications	
3. Investigation period	**3. Investigation period**
B. PRODUCT CONCERNED AND THE LIKE PRODUCT	**B. PRODUCT CONCERNED AND THE LIKE PRODUCT**
1. Product concerned	**1. Product concerned**

[789] An example of the former type is the definitive duty regulation in *Ceramic tiles* (AD560), OJ L 238/1, 15.09.2011, whereas the definitive duty regulation in *Open mesh fabrics of glass fibres* (AD558), OJ L 204/1, 09.08.2011, is an example of the latter type.

[790] Only counting publications (notices and regulations) related to the 78 original investigations initiated 2005-2010 and excluding corrigenda made only to non-English versions of publications. The 13 cases with corrigenda were: *Lever arch mechanisms* (AD491; OJ L 135/17, 23.05.2006), *Plastic sacks and bags* (AD497; OJ L 233/7, 05.09.2007), *Frozen strawberries* (AD505; OJ L 10/12, 17.01.2007), *Ironing boards* (AD506; OJ C 52/24, 02.03.2006), *Sweet corn* (AD507; OJ L 252/7, 27.09.2007), *Compressors* (AD519; OJ L 97/27, 16.04.2009 and OJ L 166/79, 27.06.2009), *Welded tubes and pipes of iron or non-alloy steel* (AD523; OJ C 294/21, 06.12.2007), *Citrus fruits* (AD524; OJ L 258/74, 26.09.2008), *Wire rod* (AD530; OJ C 145/14, 11.06.2008), *Aluminium road wheels* (AD541; OJ L 237/30, 08.09.2010), *Stainless steel bars* (AS556; OJ L 23/53, 27.01.2011), *Ceramic tiles* (AD560; OJ L 143/48, 31.05.2011), and *Fatty alcohols* (AD563; OJ L 158/54, 16.06.2011).

2. Like product	**2. Like product**
C. DUMPING	**C. DUMPING**
	1. General methodology
1. Market Economy Treatment (MET)	**2. Market Economy Treatment (MET)**
2. Individual Treatment ('IT')	**3. Individual Treatment (IT)**
	4. Individual Examination
3. Normal value	**5. Normal value**
(a) Choice of the analogue country	(a) Choice of the analogue country
(b) Determination of normal value	(b) Determination of normal value
(c) Export prices for the exporting producers	(c) Export price for the exporting producers granted IT
(d) Comparison	(d) Comparison
4. Dumping margins	**6. Dumping margins**
(a) For the cooperating sampled exporting producers granted IT	(a) For cooperating sampled exporting producers granted IT
(b) For all other cooperating exporting producers	(b) For all other exporting producers
(c) All other (non-cooperating) exporting producers	
D. INJURY	**D. INJURY**
1. Union production and Union industry	**1. Union production**
2. Union consumption	**2. Union consumption**
3. Imports from China	**3. Imports from country concerned [China]**
3.1. Volume, market share and prices of imports of the product concerned	(a) Volume, price and market share of dumped imports of the product concerned
3.2. Price undercutting	(b) Effect of dumped imports on prices
4. Imports from third countries other than China	
5. Situation of the Union industry	**4. Situation of the Union industry**
5.1. General	(a) Preliminary remarks
5.2. Macroeconomic indicators	(b) Injury indicators
5.2.1. Production, production capacity and capacity utilisation	
5.2.2. Sales volumes and market share	
5.2.3. Employment and productivity	
5.2.4. Magnitude of the dumping margin	c) Magnitude of dumping
5.3. Microeconomic indicators	
5.3.1. General remark	
5.3.2. Stocks	
5.3.3. Sales prices	
5.3.4. Profitability, cash flow, return on investment, ability to raise capital, investments and wages	
5.3.5. Cost of production	
6. Conclusion on injury	**5. Conclusion on injury**
E. CAUSATION	**E. CAUSATION**
1. Introduction	**1. Introduction**
2. Impact of the imports from China	**2. Effect of the dumped imports**
3. Effects of other factors	**3. Effects of other factors**
3.1. Impact of imports from third countries other than China	(a) Export performance of the Union industry
4. Impact of the high fragmentation of the Union industry	(b) Imports from third countries
	(c) Impact of crisis in the construction industry
4.1. Impact of the economic crisis	
4.2. Claims with regard to self-inflicted injury	
5. Export performance for the Union industry	
6. Conclusion on causation	**4. Conclusion on causation**
F. UNION INTEREST	**F. UNION INTEREST**
	1. General remarks
1. Interest of the Union industry	**2. Interest of the Union industry**
2. Interest of importers	**3. Interest of importers**
3. Interest of users	**4. Interest of users and consumers**
4. Interest of final consumers	
5. Conclusion on Union interest	**5. Conclusion on Union interest**

G. PROVISIONAL ANTI-DUMPING MEASURES	**G. PROPOSAL FOR PROVISIONAL ANTI-DUMPING MEASURES**
1. Injury elimination level	**1. Injury elimination level**
2. Provisional measures	**2. Provisional measures**
H. FINAL PROVISION	**H. DISCLOSURE**
Definitive duty regulation	**Definitive duty regulation**
A. PROCEDURE	**A. PROCEDURE**
1. Provisional measures	**1. Provisional measures**
2. Subsequent procedure	**2. Subsequent procedure**
3. Parties concerned by the proceeding	
4. Rights of parties	
5. Scope of investigation. Inclusion of imports from Turkey	
B. PRODUCT CONCERNED AND THE LIKE PRODUCT	**B. PRODUCT CONCERNED AND THE LIKE PRODUCT**
	1. Product concerned
	2. Like product
C. DUMPING	**C. DUMPING**
1. Market Economy Treatment (MET)	**1. Market Economy Treatment (MET)**
2. Individual Treatment ('IT')	**2. Individual Examination ('IE')**
3. Individual Examination ('IE')	**3. Individual Treatment ('IT')**
4. Normal value	**4. Normal value**
4.1. Choice of the analogue country	(a) Choice of the analogue country
4.2. Determination of normal value	(b) Determination of normal value
4.3. Export price	(c) Export price for the exporting producers granted IT
4.4. Comparison	(d) Comparison
	5. Dumping margins
4.5. Dumping margins for cooperating sampled exporters	(a) For cooperating exporting producers granted IT
4.6. Dumping margins for all other cooperating exporting producers	(b) For all other exporting producers
4.7. Dumping margin for company claiming individual examination	
4.8. Dumping margins for all other non-cooperating exporting producers	
4.9. Submissions concerning the list of cooperating exporters	
4.10. Post-IP events	
D. INJURY	**D. INJURY**
1. The Union production and the Union industry	**1. Union production**
1.1. Union Consumption	**2. Union consumption**
2. Imports from China	**3. Imports from country concerned [China]**
3. Price undercutting	
4. Imports from third countries other than China	
5. Situation of the Union industry	**4. Situation of the Union industry**
5.1. Macroeconomic indicators	
5.1.1. Production, capacity and capacity utilisation	
5.1.2. Sales volumes and market share	
5.1.3. Employment and productivity	
5.1.4. Magnitude of dumping margin	
5.2. Microeconomic indicators	
5.2.1. Stocks	
5.2.2. Sales prices	
5.2.3. Profitability, cash flow, return on investments and wages	
5.2.4. Cost of production	
6. Conclusion on injury	**5. Conclusion on injury**
E. CAUSATION	**E. CAUSATION**

1. Impact of the imports from China	**1. Effect of the dumped imports**
2. Lack of competition between tiles produced in the Union and the dumped tiles imported from China	
3. Effects of other factors	**2. Effects of other factors**
3.1. Impact of imports from other third countries	
3.2. Impact of decrease in consumption	
3.3. Impact of the economic crisis	
3.4. Impact of the Union industry's failure to restructure	
3.5. Effect of the Union industry's performance on export markets	
4. Conclusion on causation	**4. Conclusion on causation**
F. UNION INTEREST	**F. UNION INTEREST**
1. Interest of the Union industry	**1. Interest of the Union industry**
2. Interest of importers	**2. Interest of importers**
3. Interest of users	**3. Interest of users and consumers**
4. Interest of final consumers	
5. Conclusion on Union interest	**4. Conclusion on Union interest**
G. DEFINITIVE MEASURES	**G. DEFINITIVE MEASURES**
1. Injury elimination level	**1. Injury elimination level**
1.1. Disclosure	
1.2. Injury margin	
2. Custom declaration	**2. Definitive measures**
3. Definitive collection of provisional duty	**3. Definitive collection of provisional duty**
4. Form of measures	

Disclosure

Legal basis

According to the two basic Regulations, interested parties[791] are provided, upon written request, with the "essential facts and considerations on the basis of which"[792] provisional measures have been imposed (provisional disclosure) or definitive measures are intended to be imposed, or investigations are intended to be terminated (definitive disclosure).[793]

Procedure

Disclosure is thus being provided at two stages: *after* the imposition of provisional measures and *before* the imposition of definitive measures (or termination without measures). While the timing of provisional disclosure has not been a problem in the reporting period, in certain cases problems have occurred with regard to final disclosure. In this regard, the two basic Regulations provide:

> "Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter."[794]

Practice

This can be problematic where, based on comments by interested parties to the initial final disclosure, changes are made to the findings and proposed regulation. The Commission's practice in these cases has been to re-disclose but sometimes not respecting the 10-day response time, which has been the issue in some court cases. The judgments have mostly confirmed the Commission's practice, stating that the granting of a period shorter than the prescribed 10-day

791 On the definition of interested parties, see section 5.2.2.3 above.

792 It should be noted that the formulation in the two basic Regulations slightly differs from the WTO agreements. Thus, the WTO agreements refer to "essential facts under consideration" (Article 6.9 ADA/Article 12.8 ASCM; emphasis added) whereas the two basic EU Regulations refer to "essential facts and considerations." As this is considered as a policy decision, the issue is addressed in more detail in section 4.3.

793 Article 20(1) and 20(2) ADR/Article 30(1) and 30(2) ASR.

794 Article 20(5) ADR/Article 30(5) ASR.

period would only constitute a violation of the basic Regulation if such a shorter period was actually capable of affecting its rights of defence.[795] However, in two cases the courts did conclude that the failure to respect the 10-day period violated rights of defence.[796]

The situation that Commission findings are amended following final disclosure might arise more frequently in future under the new Comitology's future examination procedure. Following the Comitology Regulation, a proposed regulation to impose definitive TD measures would, after final disclosure to interested parties (with a 10-day commenting period), be discussed in the examination committee. Following a vote with a simple negative majority, the examination committee would enter into consultations and refer the matter to the appeal committee. During the consultations stage, the examination committee could propose an amendment to the Commission proposal which, if accepted, would lead to a redrafted proposal. This would then, after interservice consultations, be re-disclosed to interested parties (with another commenting period). Interested parties' comments would then be incorporated in the draft proposal, and revised proposal then be sent the draft to the appeal committee. In theory, Member States could propose further amendments at the appeal stage which, if incorporated by the Commission, would lead to another cycle of interservice consultations and re-disclosure, after which the Commission could resubmit the proposed regulation to the appeal committee for a vote.

In response to these possible delays, the Commission's Trade Omnibus I proposes to change Article 20(5) ADR/Article 30(5) ASR as follows:

> "Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter. A shorter period can be set whenever a final disclosure has already been made."[797]

Conclusions/ recommendations

In the opinion of the evaluation team, it is inappropriate to recommend a course of action that exposes the Commission to legal liability. Accordingly in light of recent court decisions that have gone against the Commission on grounds of having failed to re-disclose, it is recommended that re-disclosure be provided for to ensure that rights of defence are respected.

The evaluation team recognises the timing problems that re-disclosure poses under the new Comitology rules and notes that the Commission's proposal foresees re-disclosure.

Quality of disclosure documents

Although stakeholders often reported that the degree of information provided in disclosure documents improved during the evaluation period, there was still a shared feeling that the Commission does not disclose enough information about technical details in order to allow interested parties to form an opinion on core issues of the investigation (i.e. dumping/subsidisation, injury, causal link and Union interest). The transparency of injury findings appears to be especially limited, because in contrast to the dumping calculations, where

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795 See, as analysed in detail in appendix H1, case T-410/06 Judgment GC 2010-03-04 *Foshan City Nanhai Golden Step Industrial v Council*; case T-409/06 Judgment GC 2010-03-04 *Sun Sang Kong Yuen Shoes Factory v Council*; joined cases T-408/06 Judgment GC 2010-03-04 *Zhejiang Aokang Shoes v Council,* T-407/06 Judgment GC 2010-03-04 *Wenzhou Taima Shoes v Council*, and Case T-314/06 Judgment GC 2010-09-13 *Whirlpool Europe v Council.*

796 See, as analysed in detail in appendix H1, case T-206/07 Judgment CFI 2008-01-29 *Foshan Shunde Yongjian v Council* and the appeal case C-141/08 Judgment ECJ 2009-10-01 *Foshan Shunde Yongjian v Council*. The second case is the recent (08.11.2011) judgment of the General Court in case T- 274/07, *Zhejiang Harmonic Hardware Product v Council.*

797 Proposal for a Regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures, COM(2011) 82 final, Brussels, 07.03.2011, at section 19 point 15(b) [proposed change to Article 30(5) ASR] and section 24 point 14(b) [proposed change to Article 20(5) ADR].

each exporter gets disclosure of the Commission's findings with regard to its own data, for injury only aggregated data are provided.

Conclusions/ recommendations

In order to increase transparency of the proceedings, it is recommended that the Commission should study whether the quality of disclosure documents could be further improved, methods of analysis be explained better, and more information be provided in them. At the same time, interested parties should also be aware that they can request more disclosure on specific points and request a hearing. The Hearing Officer could play an important role in organising and chairing these hearings.

Provision of access to non-confidential information

In the EU, access to information related to TD cases, other than the information contained in the publications, is restricted to interested parties. These do not have access to the complete files, which include confidential information, but only to a non-confidential version.[798]

Procedure

In the evaluation period, there was a certain lack of coherence of how the Commission allowed access to non-confidential information. E.g., the non-confidential versions of complaints could be sent to interested parties, or could be inspected (and copied) in the Commission premises only. It is understood that the practice has now been changed as part of the TQM project, specifically the introduction of an electronic filing system (SHERLOCK), which is now applied almost systematically to new cases. The new system has led to the non-confidential file being provided on DVD for the new cases. In a next stage, it is planned to provide web access to the non-confidential file for interested parties.

Conclusions/ recommendations

The evaluation team considers that the granting of access to the non-confidential file through the internet would constitute a major improvement and thus recommends its timely implementation, assuming that security issues are addressed.

Policy recommendations regarding the provision of access to information are presented in section 4.4.3 above.

Quality of non-confidential file

Stakeholder views

Although most stakeholders agreed that the quality of non-confidential versions of documents, including complaints has improved recently, some criticism persists. This criticism refers to a number of issues:

- there were a number of problems with low quality of non-confidential files being provided on CD-ROMs (empty or incomplete files etc.);
- an excessive extent of information was classified as "confidential" in complaints (incl. the names of complainants or the total production output of complainants) which prevents opposing interests from defending cases;
- there was a lack of analysis by the Commission of which information is business confidential. Some stakeholders have stated that the Commission in general has too broad an understanding of what is confidential and often accepts the wishes of the complainant.

While the first of these criticisms should be addressed when access to the non-confidential files is provided over the internet, the other items of criticism are more difficult to address. Firstly,

[798] In Canada and the USA, system have been devised to provide access to the full file to intermediaries (typically trade lawyers). These systems are discussed and compared with the EU practice, in section 4.3.

regarding the third criticism, Commission staff have stated that, while the starting point of which information is to be considered as confidential is always the interested party that has provided the information (not necessarily the complainant), the Commission assesses whether the understanding of confidential information is reasonable, and acts accordingly.

Secondly, there is obviously some discretion involved in how much and which information is confidential. In this context, the issue of confidential treatment of the identity of complainants was addressed in the WTO case *EC – Fasteners (China)*. In this dispute, the Panel ruled that:

> "7.452 We recall that in this dispute the core of the disagreement between the parties is whether 'potential commercial retaliation' constitutes good cause to justify confidential treatment of the identity of the complainants and the supporters of the complaint. On its face, we see nothing in Article 6.5 that would exclude potential commercial retaliation from constituting good cause for the confidential treatment of any information, including the identity of the complainants. China does not contest the factual assertion that some of the customers of the complainants and the supporters of the application also bought the subject product from Chinese producers. The complaining EU producers asserted that they feared commercial retaliation. We understand this assertion to imply that if such customers found out that these producers had requested the initiation of an anti-dumping investigation on fasteners from China, this might have the effect of raising prices on such fasteners, and thus raising the costs of these customers. China has not proffered any evidence, or even argued, that this assertion was unfounded, unreasonable, or untrue. China merely argues that the potential retaliation was 'hypothetical', something that 'could' happen, but that there was no evidence that it 'would' happen. We recall that in elucidating what may constitute information that is by nature confidential, Article 6.5 refers to, inter alia, situations where the disclosure of the information 'would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information'. We can certainly see that 'potential commercial retaliation' from the complainants' customers who, in addition to buying the subject product from the complainants, also purchase imports from the country subject to the complaint, might have a 'significantly adverse effect' upon the complainants."[799]

Conclusions/ recommendations

Since the WTO Panel (as well as the Appellate Body) upheld the confidential treatment of the identity of the complainants under current rules, there appears to be no need for any codification or legislative changes on this issue. At the same time, it is recommended that a list be established and published of which type of information would normally be considered as non-confidential (examples of such information are the identity of complainants, audited accounts, market data or indices). Thereafter, if items on the list were considered as confidential in a specific proceeding, a justification would need to be provided.

Transparency of decision-making

Stakeholders (both EU producers, importers and Member States) stated that the decision-making stage, i.e. decisions made in the Advisory Committee, lacked transparency. The evaluation concurs with this view.[800] Indeed, the Advisory Committee is not listed in the register of committees, nor are members, meeting agendas or minutes made public. On the other hand, many interested parties do have access to such information as a result of lobbying and through informal contacts.

Conclusions/ recommendations

As with the lack of transparency in rules, a consequence of the lack in transparency of the Advisory Committee operations is that stakeholders with good sources enjoy a procedural

[799] Panel ruling on Fasteners of 03 December 2010 in *DS397 Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, China v European Communities.*

[800] The lack of any records accessible to the evaluation team has prevented an evaluation of decision-making in the Advisory Committee. Only anecdotal evidence was collected but as it could not be verified it has been disregarded.

advantage over stakeholders which lack such access; an uneven playing field is created for stakeholders.

It is therefore recommended that information about the Advisory Committee and its operations be published. It should be included in the register of committees, and members, meeting agendas and non-confidential versions of minutes be made public. The evaluation team does not consider that the justification for keeping members' names confidential (in order to prevent lobbying) is valid, because, as mentioned, many interested parties already get access to such information anyway.

In the view of the evaluation team, a more efficient way of reducing the effectiveness of lobbying might be to introduce secret voting in the Advisory Committee. This would also address concerns, voiced by certain stakeholders, that Member States might also be subjected to threats of retaliation by exporters and exporting countries, and their voting behaviour be influenced.

5.2.3.3 Hearing Officer

Legal basis

The Hearing Officer position was created at the start of 2007 as an independent voice within DG Trade in order to ensure procedural rights of interested parties, enhance transparency and contribute to coherent and consistent application of the Union law. The Hearing Officer role was strengthened in 2009/2010. At the same time, formal Terms of Reference of the Hearing Officer (through a Commission Decision), which have been under discussion since 2008, have not yet been adopted.

Practice

Despite the lack of Terms of Reference for the Hearing Officer, his services are accessible to interested parties and stakeholders in general. Information about the Hearing Officer, the services provided and means of contact is made available through the website of DG Trade as well as in the Notices of Initiation.

Since the creation of the Hearing Officer position in 2007, the number of requests for intervention has increased steadily (Table 61).

Table 61: Interventions of the Hearing Officer, 2007-2010

	2007	2008	2009	2010
No. of interventions	n.a.	19	30	55
No. of proceedings concerned	10	11	24	29
No. of hearings held	n.a.	16	14	24

Exporters and importers request interventions of the Hearing Officer most often, whereas the Union industry does so relatively rarely. In terms of the subjects of interventions, these cover all procedural stages and issues. A substantial number of requests relates to:

- access to and quality of the non-confidential files; and
- the timing and content of disclosures.

This shows that transparency is an issue which is still considered as a problem by many interested parties.

In 2010, the Hearing Officer undertook a survey among users in order to get their feedback about the position. The results of the survey showed that the position and work of the Hearing

Officer is well appreciated by the vast majority of users, and requests for an extension of his mandate where widespread. [801]

Stakeholder views

The high degree of satisfaction with the Hearing Officer was confirmed in the stakeholder consultations. Importers and users considered the position of the Hearing Officer to be a helpful addition to the system. The impartial support provided was commended, and a strengthening of the role suggested by some associations. EU producer associations also stated that the Hearing Officer position has been helpful in making the TDI more transparent. However, it should be noted that some producer associations did not have a specific view on the issue of the Hearing Officer as they had never made recourse to him.[802]

Conclusions/ recommendations

Based on the above considerations the evaluation team considers that the Hearing Officer constitutes a very useful following instance to ensure rights of interested parties in TDI proceedings. In order to further strengthen the role of the Hearing Officer the following is recommended:

- the Terms of Reference for the Hearing Officer should be adopted as soon as possible in order to establish a firm and commonly known legal basis for his work;
- knowledge about the Hearing Officer and his work should be divulged among (potential) users of TDI. Draft information leaflets have already been prepared and should be completed and distributed as soon as possible.

5.2.4 Support to the Union Industry and other Interested Parties regarding TDI Proceedings

Support by the Commission can be related to TD proceedings and measures by third countries against EU exporters, or related to EU proceedings. While the former accounts for the majority of EU support[803], this evaluation focuses on the support provided to stakeholders with regard to EU proceedings.

Given the complexity and technical nature of TDI proceedings, most interested parties resort to external assistance, including from the Commission. In order to provide effective support, the Commission needs to determine what type of support needs to be provided, to whom support needs to be provided and through which instruments:

- With regard to the type of support, the Commission provides general support related to the concepts, instruments and procedures of EU TDI, as well as assistance in the context of particular cases.
- Regarding the target audience of support, while general support is aimed at a wide audience, case specific support is provided to interested parties. In this regard, the evaluation showed that (potential) complainants especially from fragmented industries and SMEs have greater assistance needs than large companies or concentrated industries, due to the difficulties they face in gathering market information and data, and collective action problems. Furthermore, for fairness reasons, support needs to be provided in an unbiased way to all interested parties.

801 The survey results are available at http://trade.ec.europa.eu/doclib/html/146300.htm.

802 This latter point was also confirmed by the online survey results which showed that approx. 14% of respondents had resorted to the Hearing Officer; see appendix F, section 7.2.3.

803 See DG Trade's website on this for more information: http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/actions-against-eu-exporters/.

- The main instruments of support which the Commission provides are the DG Trade website on trade defence, the SME helpdesk, the Hearing Officer as well as assistance provided by case handlers.

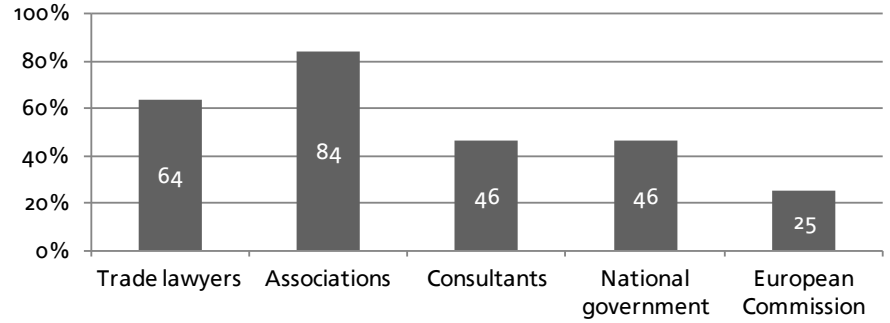
Views of EU companies – online survey

The overwhelming majority of stakeholders resorts to external assistance in TD cases (Figure 47): of the 110 respondents, 100 (91%) relied on at least one type of assistance, but on average 2.7 different types of assistance are used. The first and foremost source of support are associations, which are used by more than 80% of respondents, followed by trade lawyers (64%), consultants and national government (46% each). Only a quarter of respondents stated that they would seek assistance from the Commission. [804]

Regarding the provider of assistance, an interesting pattern can be detected: respondents either tend to resort to commercial assistance (trade lawyers and consultants) or non-commercial support (associations, government and the Commission), whereas mixtures of commercial and non-commercial support are relatively rare.

Figure 47: Providers of support, number of responses

Whom do you resort to for assistance? (100 respondents)

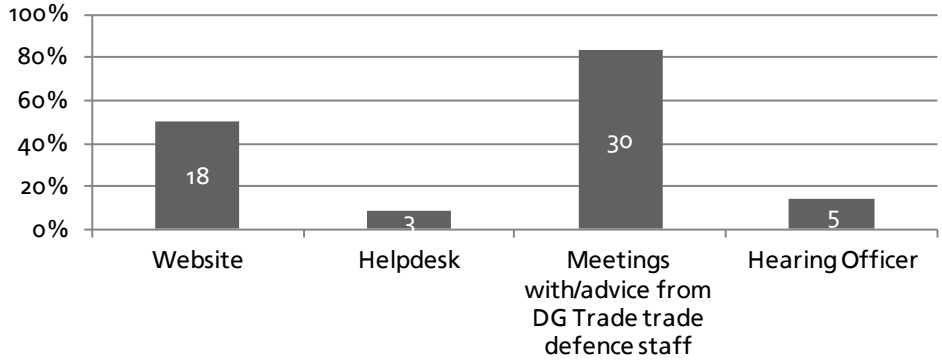


Source: Online survey.

Regarding the type of Commission support used, by far the most important type of support is provided by DG Trade's trade defence staff, used by more than 80% of respondents (Figure 48). 50% of respondents used DG Trade's website. Only a minority resorted to the Hearing Officer or the Helpdesk.

Figure 48: Types of European Commission support used, number of responses

Which measures of support by the European Commission have you used? (36 respondents)



Source: Online survey.

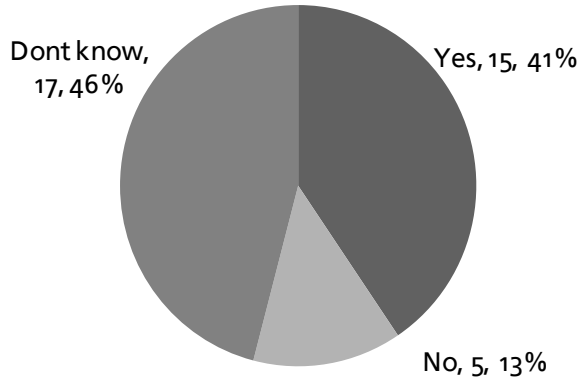
[804] It should be noted that in another question of the online survey specifically asking if survey participants had resorted to support provided by the Commission, 39 respondents stated that they had. This is somewhat at odds with the above result where only 25 (25%) respondents stated that they would resort to the Commission for assistance. At any rate, the Commission is not one of the key providers of support for TDI.

Most respondents were satisfied with the quality of Commission support: 90% rated the quality of Commission support as excellent or good, and no respondent thought it was worse than average (Figure 49b).

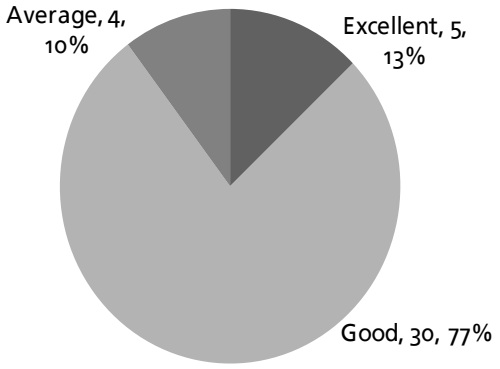
When asked if the type of support provided by the Commission met the needs of less experienced users of TDI, in particular SMEs, most respondents were unsure (Figure 49a). Of those who had a view, a clear majority considered that the Commission's support was well targeted to the needs of these groups.

Figure 49: Degree of satisfaction with Commission support, number & percent of responses

a) Do you consider that support meets the needs of SMEs and/or less experienced users of trade defence instruments? (37 respondents)



b) How do you rate the quality of European Commission support? (41 respondents)



Source: Online survey.

Stakeholder consultations

The results of the online survey were largely confirmed in the interviews with stakeholders. Thus, the EU industry is generally satisfied with the level of support provided by the Commission, although experienced associations generally do not rely much on EC support to prepare their complaints. Recent improvements to the DG Trade website were acknowledged by most parties. More critical views on this topic can be summarised as follows:

- some respondents would like the EU to provide access to customs data at the most disaggregated TARIC code level (10-digit disaggregated import statistics) as this would make the preparation of complaints/ reviews easier. It was reported that the current statistics available on the EUROSTAT website are not disaggregated enough in order to prove surges in import figures. It was claimed by the respondent that the US system was more transparent in disclosing trade related statistics to the public;
- there is general consensus that TDI tend to favour concentrated sectors that are organised into large sector associations. On the other hand, fragmented sectors composed of a large SME base are somewhat disadvantaged by the system. Therefore the general view is that improvement to current Commission support should be targeted to SMEs or less experienced TDI users;
- some industry associations were not aware of any TDI helpdesk or any particular support being provided by the Commission.

Representatives of importers and users complained that for them little support is available at present. They specifically suggested:

- Support to SMEs (most importers are SMEs) should be expanded;
- Guidelines for importers, similar to the guides for drafting complaints already available, should be developed. Importer associations added that the development of such guides was also called for as a matter of applied fairness, as specific guides existed for Union producers for preparing complaints. Accordingly, guidelines to importers and users on how to

participate in investigations would restore to a certain extent the level playing field among interested parties and hence increase the level of legitimacy of TDI.

Most Member States considered the assistance provided by the Commission as focussed and appropriate. Some Member States suggested an expansion of EU support to SMEs (as already agreed in the SME action plan for TDI, as discussed below in this section), including the preparation of studies collecting evidence of dumping and injury in SME sectors. One specific recommendation, made by several Member States, suggested reducing language barriers in the system, e.g. by making available at least key information on the website available in all official languages and by ensuring that Trade Defence staff covered all official languages. In addition, one Member State mentioned that many companies complained about the lack of support of the Helpdesk, and suggested that the Commission makes more and better support available, especially for SMEs. Finally, one Member State suggested that national experts should be invited to participate in Commission staff training in order to enhance Member States' understanding of the technical issues involved in TDI. The evaluation team understands that this has been the practice subject to availability of places in trainings.

Evaluation team analysis

The results of the survey and consultations generally confirm the findings of the recent Study of the difficulties encountered by SMEs in Trade Defence Investigations and possible solutions (Gide Loyrette Nouel 2010). As a result, the recommendations made in that study, as far as they concern the EU TD system (and not third country TDI, which are outside the scope of this evaluation and hence have been disregarded), are also supported by this evaluation study:

- Raising awareness of TDI in general, e.g. through regional workshops, increased involvement of Member States, an improved functioning of the SME helpdesk, publication of the Hearing Officer reports, etc.);
- Providing information and explanations in specific TD cases (e.g.: through the SME helpdesk, access to non-confidential file, enhanced support by Member States, support the creation of ad hoc associations, etc.)
- Facilitating SME participation in investigations by (a) simplifying aspects of the investigation (e.g. simplified questionnaires, acceptance of macro/micro data on a sampled basis in complaints, sampling at initiation and during the proceeding) or (b) assisting SMEs in the context of a specific investigation (e.g. explaining technical and procedural aspects, even through actual visits, on how the SME could reconcile its own data with the specific requirements of the TDI proceedings);

Indeed, one of the weakest components in the Commission's TDI support function appears to be the SME helpdesk. Only a small minority of stakeholders was even aware of it. This finding – also made by the recent SME study[805] – does not support the Commission's description of the helpdesk, which states that:

> "The Trade Defence Helpdesk for SMEs was set up in view of the complexity of TDI proceedings, especially for SME's, because of their small size and their fragmentation. Its role is to address specific SME questions and problems regarding TDIs, both of a general nature or case-specific. A part of the TDI website is dedicated to SMEs, and refers to the Trade Defence Helpdesk contact points. This TDI website was completely revised, making it more accessible and user-friendly, especially for SMEs. In 2009 these contact points received many requests for information, which were all immediately addressed. These requests concerned both the procedures and content of TDI proceedings." (European Commission 2010: 19)

[805] "In addition, it was also found that the SME Helpdesk, in its current set-up, does not seem to be a truly separate unit with a clear mandate to provide support for SMEs, but rather an additional administrative layer whose added value is not immediately clear. SMEs that have contacted the Helpdesk have reported that it operates more as a call-centre through which companies are transferred to a case-handler of the Trade Defence Unit who is not, however, specifically trained or dedicated to working with and for SMEs within the context of a truly separate and functional SME Helpdesk" (Gide Loyrette Nouel 2010: 15).

In May 2011, the Council Working Party on Trade Questions adopted an action plan to implement most of the recommendations in a first phase (although without indicating a time frame), while postponing the "remaining topics which may be more contentious and where convergence may need further discussion".[806]

The action paper is commended, and it is recommended that a more specific action plan, specifying deadlines for the implementation of individual recommendations, as well as further discussion of the "more contentious" issues be developed.

Furthermore, a number of complementary recommendations seem to be in order:

- Support should not only be focused on SMEs but also on other infrequent or inexperienced interested parties, including suppliers, users and importers. A guide on how TD investigations work and how interested parties can participate in the proceedings should be developed. Likewise, a general helpdesk, in addition to the existing "special purpose" helpdesks (for SMEs, on enlargement trade defence issues) should be established – potentially the "information contact point" could assume this role;
- Availability of support should be made more prominent on the trade defence website by adding a section on "support" which would provide information on the types of support services being offered by the Commission (and possibly Member States). The section should directly be accessible from the trade defence front page (e.g. at the same level as the Hearing Officer section) and should contain a page on how to get in touch with the helpdesk;
- Basic information about TDI should be made available on the trade defence website in all official languages, along with a link to the general helpdesk page.

5.2.5 Cost of investigations

AD/AS investigations require considerable human and financial resources from both the EU institutions and interested parties. These resource requirements are an important indicator for the evaluation of the efficiency of EU TDI.

Estimating these costs is difficult as institutions and stakeholders do not record costs for cases. Therefore, the findings of the evaluation team can only be considered as very rough "rules of thumb".

Costs of EU institutions

Among the EU institutions, the Commission devotes by far the most resources to cases. Directorate H of DG Trade has a staff of approx. 170, of which about 65 case handlers (incl. Heads of Section). According to information provided by DG Trade staff, on average, four case handlers work on a case, with three cases being handled per team simultaneously. Thus, a rough estimate of the (direct) total manpower required per case would be 4 persons / 3 * 16 months = 20 person-months. Cash costs for verification visits and meetings, purchase of data and studies, travel costs for Member State delegates to Advisory Committee meetings, etc. would need to be added.

[806] Working Party on Trade Questions (2011). Paper on Actions to Address the Difficulties Encountered by SMEs Involved in Trade Defence Instruments. Brussels. Avalaible at: http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148004.pdf.

Member States also have notable costs, which stem from the preparation and participation of government representatives in Advisory Committee meetings (once a month), review of Commission documents and proposals, and support to national associations and companies. Assuming that the average time spent per case is two person-weeks per Member State the total human resource requirement would be 27 * 0.5 = 13.5 person-months.

Finally, the Council, the Commission's legal service and other EU institutions are also involved in cases; their costs are considered to be comparatively minor, though.

The total average human resource cost of a case for EU institutions would thus be in the range of 30-40 person months.

EU costs appear relatively low when compared to peer countries, especially when taking into account the level of detail of investigations. Table 62 provides a very rough comparison of human resource requirements for investigations, by simply dividing the number of staff of the investigating authority by the average number of investigations initiated per year during the evaluation period. The results range from an astonishing 0.4 staff per investigation in India to 23.6 in the USA, with 7.7 in the EU.

Table 62: Comparison of human resource requirements for TD investigations

	Number of AD + AS new investigations 2005-2010	Av. number of new investigations per year, 2005-2010	Number of investigating authority employees	Calculated number of staff per investigation
India	238	39.7	15	0.4
European Union	133	22.2	170	7.7
USA	122	20.3	480	23.6
China	81	13.5	105	7.8
Australia	46	7.7	31	4.0
South Africa	39	6.5	20	3.1
Canada	29	4.8	80 (injury only)	16.6

More detailed information could only be obtained for South Africa and the USA:

- In South Africa the average resource requirement per case is estimated at two investigating officers (almost full-time), plus inputs from senior manager and Commissioners, amounting to a total man-power requirement of approx. 36 person-months.
- In the USA, in 2007 the USITC charged 73 work years of direct costs to CVD and AD investigations, and 37 years of indirect costs (USITC 2007). Thus on average the USITC expended about 2.3 work years (27 person-months) of direct costs and 1.2 work years (14 person-months) of indirect costs (e.g., IT support, facilities) per investigation. The USITC's Office of Investigations, which provides two investigators and a financial analyst for each investigation, estimated its hours as approximately 700 hours per preliminary investigation and 1,600 hours per final investigation.

These values are in the same range as the ones calculated above for the EU (30-40 person-months).

Costs for interested parties

As part of the consultations and the online survey, stakeholders were asked to provide estimates of their costs related to TDI.

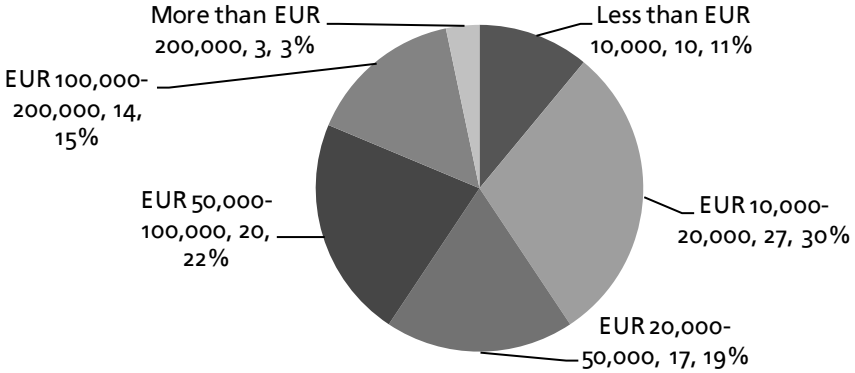
Based on the responses provided, one can state that resorting to the EU TD system creates substantial costs (Figure 50). For the preparation of a complaint alone, the estimated average cost

is approx. EUR 60,000. However, costs vary from "less than EUR 10,000" (11% of answers) to "more than EUR 200,000" (3%). Nevertheless, more than 70% of respondents spend between EUR 10,000 and EUR 100,000.

These costs are still lower than the costs of mounting a case in the USA or in Canada. In the USA (see appendix I8), the cost for a petitioner to have counsel prepare a petition and participate in the investigations at Commerce and the ITC can easily cost more than USD 1-1.5 million (EUR 0.7-1.1 million); substantially more than the cost reported by EU stakeholders. In Canada, the cost to file a petition ranges from CAD 100,000 to CAD 500,000 (EUR 72,000 to 360,000) in most cases, with the occasional large case running as high as CAD 1 million (EUR 720,000).

Figure 50: Cost of preparing a complaint

Based on your experience, what is the average monetary cost (for external advice, collecting information, etc.) of preparing a complaint? (number and % of responses; 91 respondents)



Regarding the total cost of a TD case, 55 respondents of the survey provided a figure for their most expensive case so far. These figures range from EUR 10,000 to EUR 1 million, with an average of EUR 217,000.

These results from the online survey are corroborated by the consultation of industry associations:

- Some associations handle 100% of the filing themselves. Typically, internal staff of such associations reported to spend a substantial amount of time preparing the complaint. Figures vary from one person half time to two persons full time over a duration of 6 months;
- Additionally, some associations hire external consultants to gather documentary evidence (market data and normal value related). The following costs for external consultants during the pre-initiation phase have reported: EUR 60,000; EUR 100,000;
- Other (larger) associations outsource the entire task to law firms, which has an important impact on the financial costs of preparing the complaint (EUR 200,000 in some cases).

The consultations have shown that substantial resources are devoted by certain associations on trade defence. In some cases, the mere existence of the association can be traced back to a specific dumping case.

While most associations recognise that the cost of preparing a complaint is very high, they still believe it is negligible compared to the potential benefits that could result from duties being imposed.

Given the complexity of many TD cases as well as the technicality of procedures required, AD and AS investigations can be resource intensive. If insufficient resources are accorded to the trade defence authorities, either cases will largely reflect the views of the complainants (as

Conclusions/ recommendations

presented in the complaint), thereby potentially resulting in overprotection, or the number of cases which can be handled will be reduced (i.e. not all justified cases can be opened), thereby resulting in underprotection.

The evaluation has shown that resource requirements of the EU system are comparable with those of TD systems in other countries. It has also shown that EU stakeholders consider the costs of the system as appropriate. In sum, therefore, the evaluation team considers that the resource requirements for EU TDI are moderate for both institutions and interested parties, especially when the scope of the investigations (i.e. Union interest test, lesser duty rule) and the necessarily complex decision-making structures of the EU (i.e. the involvement of both the Commission and Member States) are being taken into account.

With regard to the cost of preparing a complaint, from one perspective this may be considered a discipline that deters weak complaints and thus overuse of the system. At the same time, given the difference in resources available to large versus small firms, it is likely that this discipline against overuse deters mainly smaller firms, while large companies dealing with multi-billion dollar trade flows may find that the market share gains from even the "harassment" factor pay for the legal costs many times over. The proceeds from market gains from harassment thus fund continuous litigation. In response, providing support to disadvantaged potential complainants – i.e. fragmented sectors (of SMEs) producing heterogeneous goods – along the lines described in section 5.2.4 above would help to "balance" the use of TDI.

5.3 Review Mechanisms and Procedures

Definitive measures can be amended in various situations, and accordingly different types of reviews exist:

- **Expiry reviews**[807] assess if an extension of the measure is needed beyond the current period of implementation;
- **Interim reviews**[808] assess whether and to what extent circumstances with regard to subsidy/dumping and/or injury have changed, and measures need to be amended (or repealed) accordingly. Depending on whether review addresses all or only selected aspects of an investigation, full and partial interim reviews are distinguished;
- **New exporter reviews**[809] can be undertaken upon request from new exporters in order to determine if a duty lower than the residual duty (or no duty at all) should be applicable to them;
- **Anti-absorption reinvestigations**[810] can be initiated if, after the investigation period or following the imposition of measures, prices further decline or the post-duty import price in the EU does not increase;
- **Anti-circumvention investigations**[811] can be undertaken if there is *prima facie* evidence that measures are circumvented, e.g. through relocation of production, changing the products in such a way that they are no longer covered by the measure, etc.;
- **Refunds**[812] can be requested by importers of products subject to AD or CV duties and will be granted if it is shown that the dumping margin or the amount of countervailable subsidies, on the basis of which duties were paid, has been either eliminated or reduced to a level which

807 Article 11(2) ADR/Article 18 ASR.
808 Article 11(3) ADR/Article 19 ASR.
809 Article 11(4) ADR/Article 20 ASR.
810 Article 12 ADR/Article 19(3) ASR.
811 Article 13 ADR/Article 23 ASR.
812 Article 11(8) ADR/Article 21 ASR.

is below the level of the duty in force. Refunds thus adjust the level of the measure in force *ex post*. Refund investigations are not currently treated by the basic Regulations in the same way as other reviews or investigations (and are not subject to the same requirements regarding transparency). However, the substantial requirements are comparable to those of other types of investigations;

- **Suspensions:**[813] Measures can be suspended for a certain period in the Union interest.

Frequency of reviews and amendments to measures

Table 63 provides a summary of the number of reviews initiated during the evaluation period of this evaluation. During this period, 220 reviews were initiated, i.e. substantially more than the 130 original investigations. The most frequent type of reviews were interim reviews (107, of which 97 partial) and expiry reviews (79), whereas other types of reviews were relatively infrequent. There was no clear trend over time.

Table 63: Number of reviews initiated, 2005-2010 (country-cases)

	2005	2006	2007	2008	2009	2010	Total
Interim review	5	4	1				10
Partial interim review	20	13	23	14	14	13	97
New exporter review	3	1	2	1	6	2	15
Expiry review	23	12	11	7	11	15	79
Anti-absorption reinvestigation	1	2					3
Anti-circumvention investigation	4	2	4	1	1	4	16
Total	**56**	**34**	**41**	**23**	**32**	**34**	**220**
Refund applications	*12*	*19*	*8*	*25*	*39*	*n.a.*	*103*

Source: Authors' calculations based on appendix G; for refund applications: Annual Reports from the Commission to the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard Activities, 2005-2009.

The number of refund applications in the evaluation period was even higher and sharply increased since 2007 (Table 63). Finally, only four suspensions of measures occurred during the evaluation period.

Table 64: Number of AD and AS reviews initiated 2005-2010, by initiator (country cases)

	Commis-sion	Expor-ter	Impor-ter	Member States	Union industry			User associa-tion	Total
					Ad hoc grouping	Association	Producers		
AD	**40**	**50**	**4**	**1**	**11**	**67**	**22**	**1**	**196**
Interim review	6				1	2	1		10
Partial interim review	29	37	4	1	1	6	2	1	81
New exporter review		13							13
Expiry review					8	52	15		75
Anti-absorption reinvestigation						1	2		3
Anti-circumvention investigation	5				1	6	2		14
AS	**10**	**6**	**0**	**0**	**0**	**4**	**4**	**0**	**24**
Partial interim review	10	4				1	1		16
New exporter review		2							2
Expiry review						1	3		4
Anti-circumvention investigation						2			2
Total	**50**	**56**	**4**	**1**	**11**	**71**	**26**	**1**	**220**

Source: Authors' calculations based on appendix G.

Almost 50% of all reviews (108 out of 220) were initiated based on requests by, or on behalf of, the Union industry (Table 64). Requests by exporters (25%) as well as investigations initiated by the Commission itself (23%) also occurred relatively often, whereas importers and users hardly

813 Article 14(4) ADR/Article 24(4) ASR.

ever requested the initiation of a review. It should be noted, however, that some of the reviews formally initiated *ex officio* by the Commission were actually triggered by information provided by exporting country governments or interested parties.

A more detailed analysis of each of the different types of reviews is presented in sub-sections 5.3.2 to 5.3.8. They are preceded by section 5.3.1 which addresses some general issues related to reviews.

5.3.1 General Issues Related to Reviews

Methodology to be applied in review and refund investigations

For all types of review and refund investigations, Article 11(9) ADR/Article 22(6) ASR establish that, provided that circumstances have not changed, the Commission shall apply the same methodology as in the original investigation. A change in methodology by the Commission has been the subject of Case T-221/05 (*Huvis v Council*) and has been discussed in section 3.1.2.3 above.

Exclusion of exporters with *de minimis* dumping/subsidy margin from reviews – the *Beef & Rice* recommendations

In 2005, the WTO DSB ruled on a complaint submitted by the USA against Mexico in *Definitive Anti-Dumping Measures on Beef and Rice* (DS295). In particular, one claim in the dispute referred to a provision in Mexico's trade defence law which made exporters for which the original investigation showed a margin of dumping or subsidisation below *de minimis* subject to administrative reviews. The Panel found this provision to be inconsistent with WTO rules, and the Appellate Body confirmed the Panel's finding:

> "the Panel was correct in finding that Article 5.8 of the *Anti-Dumping Agreement* requires an investigating authority to terminate the investigation 'in respect of' an exporter found not to have a margin above *de minimis*, and that the exporter consequently must be excluded from the definitive anti-dumping measure. An investigating authority does not, of course, impose duties – including duties at zero per cent – on exporters excluded from the definitive anti-dumping measure. We therefore agree with the Panel that the 'logical consequence' of this approach is that such exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the 'duty *paid*' and 'the need for the *continued imposition* of the duty'. Were an investigating authority to undertake a review of exporters that were excluded from the anti-dumping measure by virtue of their *de minimis* margins, those exporters effectively would be made subject to the anti-dumping measure, inconsistent with Article 5.8."[814]

This ruling might also affect the EU's two basic Regulations. Currently, Article 9(3) ADR provides:

> "For the same proceeding, there shall be immediate termination where it is determined that the margin of dumping is less than 2 %, expressed as a percentage of the export price, provided that it is only the investigation that shall be terminated where the margin is below 2 % for individual exporters and they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11."[815]

Recommendation

Article 9(3) ADR/Article 14(5) ASR use the wording "may be reinvestigated" and is thus not mandatory and therefore not an "as such violation" of the WTO ruling on *Beef & Rice*. In order

[814] Appellate Body report, at para. 305; see more details about the case in section 1.1.1 of appendix H2.

[815] Likewise, Article 14(5) ASR states that individual exporter shall remain subject to the proceedings where the amount of subsidies is *de minimis*.

to ensure that EU TD practice is in line with the WTO ruling it would however be preferable to delete the wording "provided that it is only the investigation that shall be terminated where the margin is below 2 % for individual exporters and they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11" from Article 9(3) ADR as well as the corresponding provision in Article 14(5) ASR.

5.3.2 Expiry reviews

Legal basis

An expiry review can be requested by or on behalf of the EU industry no later than three months before the measure expires, or be initiated by the Commission on its own initiative.[816] The initiation of an expiry review requires that the request

> "contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Such likelihood may, for example, be indicated by evidence of continued dumping and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious dumping"[817]

Methods

The continuation of measures requires that the Commission concludes that there has been either continuation of dumping/subsidisation and injury (the retrospective analysis) or that the repeal of the duties would be "likely" to result in a recurrence of dumping/subsidisation and injury (the prospective analysis). No methodology for these two tests is provided in the two basic Regulations.

Practice

However, it is the standing practice of the Commission to undertake the four tests separately:

- assessment of the continuation of dumping/subsidisation in the review investigation period (i.e. while measures are in place);
- assessment of the likelihood of recurrence of dumping/subsidisation should measures be repealed;
- in case that either of the two previous tests yields a positive result, assessment of the continuation of injury; and
- assessment of the likelihood of recurrence of injury should measures be repealed.

An assessment of causation is not undertaken in expiry reviews. This is in line with WTO case law. In *USA – Anti-Dumping Measures on Oil Country Tubular Goods from Mexico* (DS282) the Panel and Appellate Body found that there is no obligation to establish the existence of a causal link between dumping and injury in an expiry review.

The continuation of dumping/subsidisation analysis follows the same methodology as applied in original investigations. For the assessment of the likelihood of recurrence, the Commission typically assesses the following factors:

- level of export prices of the product when exported to third countries: If this is lower than the price of the product when exported to the EU, the normal conclusion is that there is a likelihood of recurrence of dumping and/or an increased in exports to the EU leading to the recurrence of injury;
- the equivalent reasoning as for export prices to third countries applies to the level of export prices of the product compared to domestic market prices;

816 Article 11(2) ADR/Article 18(1) ASR.
817 Article 11(2) ADR; also see Article 18(1) ASR, *mutatis mutandis*.

- existence of spare capacities and stocks in the country concerned: If there are significant spare capacities, either because of low utilisation of existing production capacity or investments in new capacity, or if there are significant stocks of the product concerned, the Commission will normally conclude that there is the likelihood of recurrence of dumping and/or an increase in exports to the EU leading to the recurrence of injury;
- attractiveness of the EU market and capacity of third country markets to absorb exports from country concerned: the attractiveness of the EU market as an export destination (large market, especially for geographically close exporters) is usually compared to the likelihood of continued exports to third country markets in order to assess the likelihood that such exports would be diverted to the EU after the potential repeal of measures. In this context, issues that have been considered are the existence of distribution networks and related companies both in third countries and the EU and the imposition of TD measures against the exporting country by third countries.

Often, in AD cases the same factors are considered in both the assessment of recurrence of dumping *and* injury. One would therefore expect a high likelihood that findings on dumping and injury are correlated. In practice, this is difficult to observe as typically continuation and recurrence of dumping is investigated first, and if neither is found, then the review and measure is terminated without an assessment of injury. Thus, the only expiry reviews in the evaluation period where continuation of dumping was found but no continuation or likelihood of recurrence of injury were for *Urea* (from Russia, AD 202, R 394; and from Belarus, Croatia, Libya and the Ukraine, AD 435, R 412). In these cases, measures were terminated because the EU industry had recovered (i.e. there was no continuation of injury), future increases of dumped imports were not expected, and export prices to third countries were high (i.e. there was no likelihood of recurrence of injury).

Recommendation

The evaluation team considers that the Commission's approach for the tests of continuation and likelihood of recurrence of dumping/subsidisation and injury are appropriate. An analysis of causation would be desirable, as the current methodology, by assuming the existence of a causal link if both dumping/subsidisation and injury are found, has a built-in bias towards the continuation of measures. However, the evaluation team also notes that the absence of a causation analysis in expiry reviews has been validated by WTO case law.

Use of expiry reviews

Like a complaint in an original investigation, a request for an expiry review is treated confidentially by the Commission. Therefore, data on the rate of, and reasons for, rejections of such requests are not available.

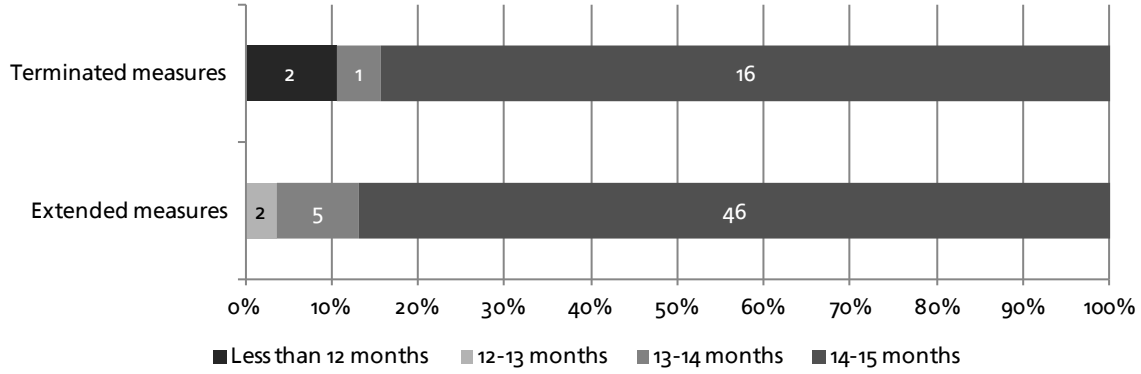
For the *ex officio* initiation of an expiry review, the two basic Regulations do not establish the requirement of sufficient *prima facie* evidence. However, in the evaluation period, none of the 79 expiry reviews was initiated by the Commission *ex officio*.

If an expiry review is initiated, the measures will remain in force during the period of investigation, which shall normally be concluded within 12 months but must not exceed 15 months.[818]

[818] Article 11(5) ADR/Article 22(1) ASR. The WTO agreements also foresee a maximum "normal" duration of 12 months but no absolute limit (Article 11.4 ADA/Article 21.4 ASCM). The extension of measures until the end of the expiry review is in line with Article 11.3 ADA/Article 21.3 ASCM which state that the "duty may remain in force pending the outcome of such a review."

In practice, during the evaluation period two expiry reviews (leading to the termination of measures) were completed in 12 months (Figure 51). The remaining 70 expiry reviews took longer than 12 months, the vast majority (62) longer than 14 months.

Figure 51: Duration of expiry reviews initiated 2005-2010 (number of cases)



Note: 19 expiry reviews were terminated and 53 led to the extension of measures.
Source: Authors' calculations based on appendix D.

Recommendation

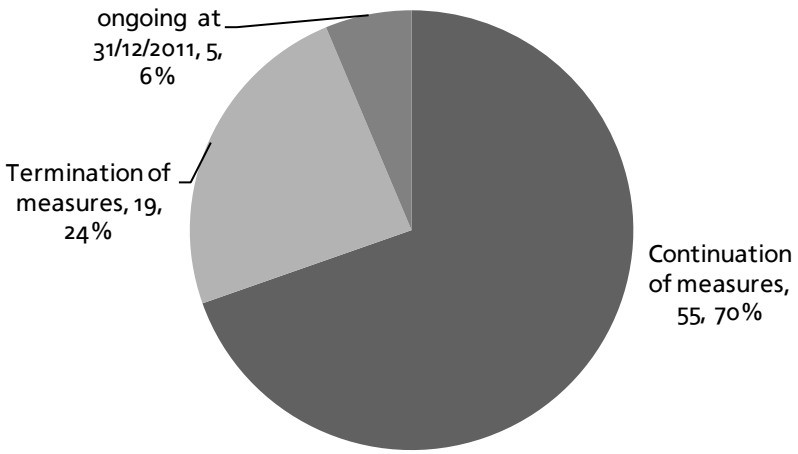
Given the fact that expiry reviews do not require the same scope of analysis as original investigations (e.g. no calculation of injury margins, application of lesser duty rule, etc.) it is recommended that the Commission should strive to complete expiry reviews within the "normal" period, i.e. 12 months.

Outcome of expiry reviews

An expiry review can have only two possible outcomes, i.e. either the repeal or continuation of the measures in force. The review cannot lead to a change in the level or form of the duties; these can only be changed by an interim review.

Of the 79 expiry reviews initiated during the evaluation period, 55 (70%) resulted in an extension of the measures in force, while 19 (24%) led to the termination of measures (Figure 52). When compared with the success rate of original investigations (56%), the probability the expiry review will result in an extension of measures is thus higher.

Figure 52: Outcome of expiry reviews initiated 2005-2010 (number and % of cases)



Number of reviews: 79
Source: Authors' calculations based on appendix D.

Duration of extension

Case review

If measures are maintained, they will normally remain in force for another five years (from the date of the completion of the expiry review). However, in a number of cases – 15% of all extensions – during the evaluation period, measures were extended for shorter periods:

- In *Ethanolamines* (AD302), measures were extended by two years in 2006 (R373), because of an expected reduction of overcapacity in the USA, investments of a US exporter in the EU as well as the uncertainty of the effects of oil price changes on Union industry profitability.[819] In the following expiry review (R460), measures were again extended by two years, with a very similar justification – the expected reduction of overcapacity in the USA as well as, investments of a US exporter in EU were repeated, and the uncertainty of the effect of the economic crisis on the global and EU ethanolamine markets was mentioned;[820]
- A similar situation can be observed in *Ammonium nitrate* (AD421), where measures were extended by two years in 2007 (R387), because the Ukraine's obtaining MES would likely lead to different findings on dumping and an increased price in the Ukraine of a major input for ammonium nitrate production, gas, would likely lead to higher export prices[821]. The gas price argument was again used as the main argument in the following expiry review (R472) for extending the measures for an additional two years;[822]
- The AD measures in *Lamps (integrated electronic compact fluorescent)* (AD431, R397) were extended for one year only, due to Union interest considerations:

  > "the overall balance of the relevant interests lies in discontinuing the measures. However, in light of the considerations noted above regarding the interests of the producer supporting continuation, when weighing them against the interests at stake and in particular those of the other producers in the Community, it is in the short term interest of the Community to continue the measures for a further adjustment period. It is therefore appropriate that the measures be maintained only for one year before they lapse. After this the likely negative effects on consumers and other operators would be disproportionate to the benefits which Community manufacturers would derive from the measures"[823]
- In *Footwear (with uppers of leather)* (AD499, R459), AD measures against China and Vietnam were extended for 15 months because the Commission considered that one part of the Union industry was in a successful process of restructuring which was expected to completed after 15 months;[824]
- In *Synthetic fibre ropes* (AD365, R488), the extension of three years was justified with the long duration of the measures in force which had already been extended once, and the very limited quantities of actual imports from the country concerned, India. Following comments from the Union industry, the Commission further clarified that the Union industry had already partly recovered and should further do so within a period of three years.[825]

Finally, in the recent expiry review in *Bicycles* (AD287, R503), the Commission originally intended to extend measures by three years only, given the complexity of the protection scheme which combines duties with a high level of exemptions from anti-circumvention measures for EU assemblers using Chinese bicycle parts. Following comments by the Union industry, the Commission however revised its position, and measures were extended by five years. At the same time, the Commission indicated that it would further study the scheme of protection (notably the exemption scheme) in place and potentially open a full interim review.[826]

819 OJ L 294/2, 25.10.2006, at recital 116.
820 OJ L 17/1, 22.01.2010, at recital 117.
821 OJ L 106/1, 24.04.2007, at recital 107.
822 OJ L150/24, 16.06.2010, at recital 98.
823 OJ L 272/1, 17.10.2007, at recital 116.
824 OJ L 352/1, 30.12.2009, at recitals 519-521.
825 OJ L 338/10, 22.12.2010, at recitals 98-100.
826 OJ L 261/2, 06.10.2011, at recitals 136-142.

Stakeholder views

Among the stakeholders, views diverged concerning EU practice in respect of expiry of measures. EU industry associations are generally satisfied with the duration of measures. Duration is considered "normal" and in line with the WTO requirements. Furthermore, some industry representatives argued that a period of five years was required to allow EU producers to make the necessary investments to become more efficient and counter the effects of dumping even after the lifting of measures. Some industry respondents complained that recently expiry reviews have led to the continuation of the measures for only two or three years instead of five.

Conversely, importers complained that measures, once imposed, tended to be extended for excessively long periods without due justification, and hence constituted protectionist devices. According to their view, there was also no justification for the fact that duties were imposed, as a standard, for the maximum five year period.

Some Member States stated that the normal duration of five years was appropriate but that shorter periods should be foreseen in instances where the market situation or the Union interest required so. Others stated that a

> "reduced duration of measures cumulated with diminished level of actual duties imposed could lead to inefficient trade defence remedies, that would not adequately safeguard legitimate rights of the EU producers. A shorter duration of measure is not a predictable tool for EU investors and producers since a business plan cannot be reasonably implemented under such conditions. Moreover, a shorter duration of measures would impose additional administrative burden on the EU economic operators."

Finally, in the online survey the most often cited factor for ineffective measures was an insufficient duration of measures (48% of respondents[827]).

Ultimately, the main safeguard against an excessive duration of measures is the provision for interim reviews. As long as TDI authorities are prepared to revisit cases based on changed circumstances, there is no reason to presume that particular measures are in place for too short or too long a time.

Conclusions/ recommendations

Based on the case review, it is difficult to determine which criteria are applied for deciding on the duration of the extension of measures. The arguments provided do not seem to follow the same logic and indeed appear to be *ad hoc* (or *post hoc*) justifications. Especially in the cases where consecutive expiry reviews led to the extension of measures for a limited amount of time, based on very similar arguments, the validity of arguments seems questionable. To counter this, the Commission could raise the threshold level in consecutive expiry reviews for a positive finding of likelihood of recurrence of dumping/subsidisation or injury that must be demonstrated to warrant extension of measures.

Also, in line with the Commission's practice in original investigations, it could be envisaged to extend measures – in those cases where continuation or likelihood of recurrence of dumping/subsidisation and injury are found – by five years as a general rule (except for Union interest considerations) and balance this with a more active use of interim reviews (e.g. by reducing the threshold of evidence required for the initiation of an interim review). This would avoid the problem of having to make more refined prospective arguments – such as expected price changes, expected changes in exporting country spare capacity, or the anticipated time of EU industry restructuring – to justify an extension of measures by less than five years.

[827] It should be pointed out that this level might be distorted by the fact than many respondents from the bicycle industry were concerned about the duration of the extension of measures on bicycles from China, which was a major discussion issue at the time of the survey, in the context of the then on-going expiry review for these measures.

Repeal of measures

As mentioned above, 19 expiry reviews undertaken in the evaluation period led to the repeal of measures. In three of these cases, the request was withdrawn and in one additional case it was determined that standing thresholds were not met. Of the remaining 15 cases in which a full investigation was made, in nine it was considered that there was no likelihood of recurrence of dumping, and in six no likelihood of recurrence of injury. The reasons stated in cases where measures were repealed were:

- In *Antibiotics* (AS372, R499), the market share of subsidised imports from India was very low (less than 1%). In spite of the negligibility of imports the Commission undertook a complete analysis of the continuation and likelihood of recurrence of injury, both of which led to negative findings: the level of capacity utilisation was high, export prices to third countries were, although lower than export prices to the EU, not considered to be a source of material injury, and growth of demand in the captive market would also ensure that material injury was likely to recur.[828]
- In *Welded tubes and pipes of iron or non-alloy steel from Turkey* (AD443, R439), no continuation of dumping was found. In addition, despite the EU being a very attractive market, the existence of substantial spare capacity in Turkey and limited absorption capacity of third country markets, the Commission concluded that there was no likelihood of recurrence of dumping, because price strategies of Turkish exporters had resulted in prices above the normal value.[829]
- In *Urea* (AD435, R412), the Commission found that there was a likelihood of recurrence of dumping from the four countries concerned. However, it also considered that exports to third country markets, where price levels were comparable to those in the EU, would prevent an increase of dumped exports to the EU. Therefore, no likelihood of recurrence of injury was found.[830]
- In *Steel ropes and cables* (AD429, R399) although continuation of dumping was found during the review investigation period, the Commission concluded that there was no likelihood of recurrence of dumping from Thailand and Turkey in significant quantities, given the high level of capacity utilisation and the volume and price level of exports to third country markets.[831]

Conclusions/ recommendations

In sum, the most important factors when deciding to repeal measures seem to have been the exporters' prices when the product was exported to other export markets – in virtually all cases where measures were repealed, these prices were at comparable levels with export prices to the EU and the conclusion was that significant exports to the EU at dumped prices would be unlikely.

The evaluation team considers this to be an appropriate practice and has no recommendations to make.

Duties paid during expiry review

One issue that has been raised by stakeholders concerns AD/CV duties paid during an expiry review which ends with the termination of measures. In these cases, there does not seem to be a justification for the extended imposition of measures beyond the five year period, and the suggestion that such duties be refunded is considered to be justified. Under exceptional

828 OJ L 206/1, 11.08.2011.

829 OJ L 343/1, 19.12.2008. Also see the expiry review in *Polyester staple fibres* (AD427, R386) where imports during the review investigation period had been low

830 OJ L 75/33, 18.03.2008. A similar argument had been made in an earlier expiry review in *Urea* from Russia (AD202, R394), see OJ L 198/4, 31.07.2007.

831 OJ L 285/1, 31.10.2007.

circumstances, the EU has however provided for the refund of duties paid during the expiry review period.[832]

Recommendation

It is recommended that AD/CV duties paid during an expiry review which leads to the repeal of measures is refunded for the period which extends beyond the normal duration of measures.

5.3.3 Interim reviews

Legal basis

According to the two basic Regulations, the purpose of an interim review is to assess if:

> "the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury"[833]

The methodology applied in interim reviews for the determination of dumping/subsidisation and injury is in principle the same as in an expiry review. First, a retrospective analysis of the issue(s) within the scope of the review is undertaken. This is followed by the (more important) prospective analysis the purpose of which is to determine the likelihood with which dumping/subsidisation and/or injury are likely to recur if the measure is amended.

A problem for the analysis is that the effect of measures has to be considered. Thus, the finding of no continuation of dumping[834] or injury might be a consequence of the measures in force. The Commission therefore also has to assess what would happen if the measures were lifted (or amended), i.e. whether this would lead to a recurrence of dumping or injury. In doing so, the Commission first determines the underlying reasons for the disappearance of dumping or injury and then investigates if these changes are of a "lasting nature".

The two basic Regulations do not explicitly refer to the requirement of a "lasting nature" and therefore, the Commission's methodology has to be inferred from practice. Based on this, it appears that the lasting nature test is carried out in the same way as the likelihood of recurrence test in the context of an expiry review. This means that the Commission first retrospectively assesses the factors under review during the review investigation period (i.e. the level of dumping or subsidisation, or injury) and then determines prospectively the likely effect of an amendment of the measure on the factor in future.

Conclusions/ recommendations

Given the importance of the lasting nature analysis for the outcome of interim review investigations it would be desirable to codify it in the two basic Regulations. Such codification could be equivalent to the formulation of the likelihood of recurrence analysis. At the same time, it must be acknowledged that codification carries a legal risk: because it is not explicitly referred to in Article 11.2 of the WTO ADA, codifying it in the basic Regulation could render it prone to "as such" challenges under the WTO DSU.

A perhaps more important issue arises from the fact that the lasting nature analysis in reviews has no equivalent in the original investigations – i.e. if dumping during an original investigation period was temporary, measures will still be imposed. This creates a certain imbalance to the

832 E.g. in *Magnesia bricks* (AD483, R511), where following a reassessment of the Union industry assessment it was determined that the request for review was not supported by the necessary quorum; see OJ L 166/1, 25.06.2011.

833 Article 11(3) ADR; also see Article 19(2) ASR, *mutatis mutandis*.

834 For subsidies, the situation is simpler as the change or revocation of a subsidy and its effects on prices can be assessed objectively.

disadvantage of exporters. On the other hand, the TDI regime provides for other tools to address temporary changes (such as suspension of duties or refunds).

Interim reviews of product scope

A review of the product scope does not appear to fall within the purpose of interim reviews as stated in Article 11(3) ADR/Article 19(2) ASR. Indeed, the Court of First Instance held in *JSC Kirovo-Chepetsky Khimichesky Kombinat v Council* that an interim review was not an appropriate procedure to extend the scope of the product definition (see section 3.1.2.4 above), and referred to anti-circumvention or a new Article 5 investigations as the proper instruments. The judgment has led to the Commission being careful in subsequent interim reviews into product scope. For example, in *Castings* (AD477, R448), it was stated:

> "(10) Several interested parties claimed that a product scope review would not be the appropriate investigation to tackle the above issue, but that the Commission would have to initiate either a new anti-dumping investigation pursuant to Article 5 of the basic Regulation or an anticircumvention review pursuant to Article 13 of the basic Regulation.
> (11) Given that the purpose of the investigation is primarily to examine the scope of the original investigation and to adapt, if necessary, the operative part accordingly, a review of the product scope based on Article 11(3) of the basic Regulation is in this particular case the appropriate procedure. A new investigation pursuant to Article 5 of the basic Regulation and an anti-circumvention investigation pursuant to Article 13 of the basic Regulation each address different circumstances. The former may, inter alia, be used to launch an investigation into a product which was not investigated in the original investigation (for example by using a different product definition or originating in countries not subject to measures). The latter may be used as the basis for an investigation of whether there is circumvention with regard to a product subject to measures. These two types of investigation are therefore not appropriate in the present circumstances."[835]

Conclusions/ recommendations

Thus, the purpose of the review was not to assess whether or not measures were still necessary or at an appropriate level, but rather to *clarify* the product scope. Since this is a different purpose and requires a different methodology – no assessment of dumping/subsidisation, nor of injury – it is recommended that such clarifications of the product scope should not be undertaken in the form of a review.

Furthermore, since the WTO ADA only foresees interim and expiry reviews and product scope reviews therefore could not be introduced as a separate review type, investigations into the product scope should be undertaken, depending on the objective of the investigations:

- as anti-circumvention investigations where the requirements of Article 13(1) ADR/Article 23(3)(a) ASR (slight modification in order to circumvent measures) are fulfilled;
- as new original investigations where there is *prima facie* evidence that products similar to those subject to measures are being dumped/subsidised. The "similar" products would then be investigated legally independently from the original case; and
- as interim reviews where the measures on a class of the goods in question are no longer warranted due to changed circumstances.

Practice

Interim reviews are the only type of review that can be requested by all interested parties,[836] and indeed have been requested by all types of interested parties (Table 64 above) – most often by the Commission itself (45 out of 108 AD and AS full and partial interim reviews, or 41%) and exporters (38%). The Union industry relatively rarely resorts to interim reviews (15%).

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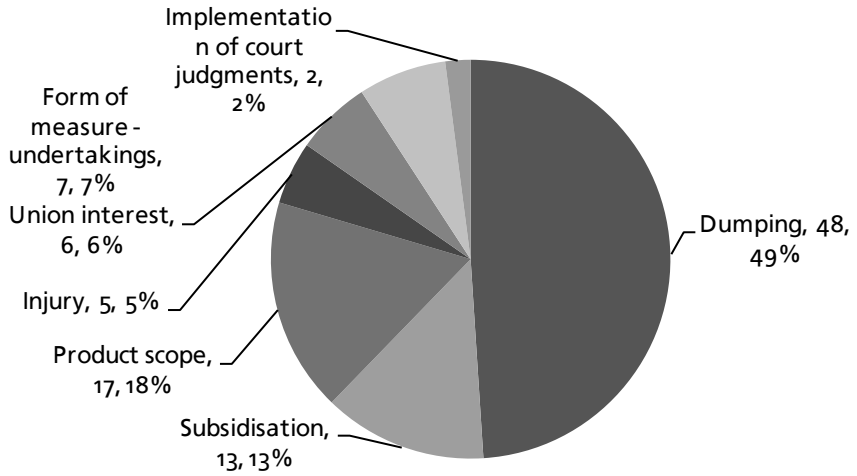
[835] OJ L 151/6, 16.06.2009.

[836] The two basic Regulations limit the right to request for interim reviews to the Commission, Member States, any exporter, importer, Community producers and in AS cases, the Country of origin or export (Article 11(3) ADR/Article 19(1) ASR). In practice however, a request made by users in *Silicon metal* (AD245, R467) has also led to a partial interim review; see OJ C 51/17, 04.03.2009.

The number of full interim reviews was relatively limited, and the last full interim review was initiated in 2007 (Table 63 above). Partial interim reviews, in contrast, are undertaken regularly.

Most partial interim reviews concern the level of dumping respectively subsidisation (Figure 53). Thus, of the 37 partial AD interim reviews initiated upon a request from exporters, 33 were restricted to dumping, and 13 of the 16 partial AS interim reviews were restricted to subsidisation. Investigations into the product scope (19%), into whether the continuation of measures was in the Union interest (7%), and into injury (6%) accounted for minor shares of partial interim reviews in the evaluation period.

Figure 53: Scope of partial interim reviews, reviews initiated 2005-2010 (number and % of cases)



Source: Authors' calculations based on appendix G.

Outcome of interim reviews

Table 65 presents an overview of the outcomes of interim reviews initiated during the period 2005-2010. In 32%, reviews did not lead to any change in measures (i.e. reviews were terminated). More often, in 39%, measures were amended, and in 24% measures were repealed or terminated – mostly in cases where the interim review was carried out simultaneously with an expiry review. Three review investigations were terminated without a finding because measures expired, and the two reviews implementing EU court judgments led to the re-imposition of measures respectively the termination of measures in one case each.

Table 65: Outcome of interim reviews initiated 2005-2010, by initiator

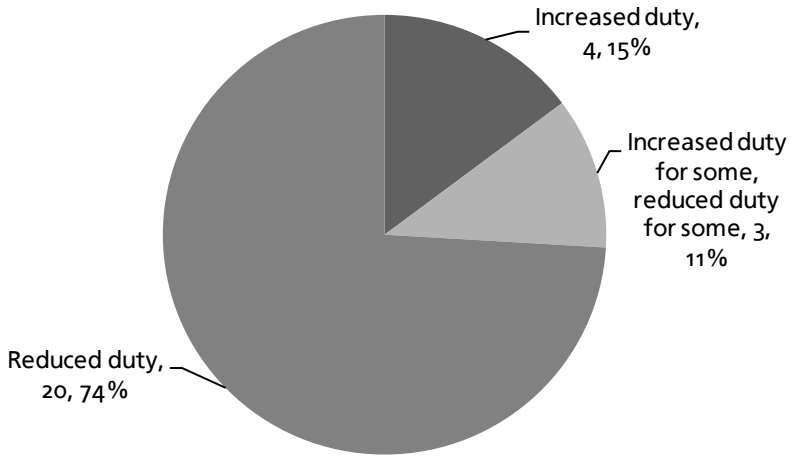
	Commission	Exporter	Importer	Member States	Union industry	User association	Total
Continuation of measures without change	16	13	1		3		33
Amendment of measures	15	15	1		8	1	40
Repeal/termination of measures	10	8	2	1	3		24
Re-imposition of measures	1						1
No re-imposition of measure	1						1
Expiry of measure		2			1		3
Total	43	38	4	1	15	1	102

Source: Authors' calculations based on appendix G.

In 27 partial interim reviews which were not terminated, the level of dumping or subsidisation was under consideration; only in these cases the level of duty was considered to be amended. As Figure 54 shows, in 20 of those reviews (74%) the outcome was a reduction in duties, and only in

four reviews an increase. At the same time, the majority of the reviews was initiated by exporters and hence the reduction in the duty level must be considered a case of success. Indeed, of the 27 partial interim reviews, only four could be considered unsuccessful from the point of view of the applicant. These were *Polyethylene terephthalate* (AD432, R355 – India, and AD425, R380a - Taiwan), where requests by Union producers for partial interim reviews led to reduced duties, as well as *Sweet corn* (AD507, AD507a) and *Ironing boards* (AD506, R465), where requests by exporters led to increased duty levels.

Figure 54: Changes in the level of measures following partial interim reviews, reviews initiated 2005-2010 (number and % of cases)



Number of cases: 27

Source: Authors' calculations based on appendix G.

Combined interim and expiry reviews

In certain instances interim and expiry reviews can overlap or take place simultaneously. For these situations, the two basic Regulations establish the following two rules.

Interim review at the end of period of application of measures

First, where an interim review is going on at the end of the period of application of measures, it shall also encompass the issues covered by an expiry review.[837] However, the precise formulation in the two basic Regulations in this respect differs. Under Article 11(7) ADR, the interim review "shall also cover the circumstances set out in paragraph 2 [on the expiry review]", but the provisions of Article 11(2) ADR will not be applied to the interim review. Hence, the measures would lapse at the end of their period of application, as only Article 11(2) ADR extends the measures until the review is concluded.

Conversely, Article 22(5) ASR provides that where an interim review is "in progress at the end of the period of application of measures as defined in Article 18 [on expiry reviews], the measures shall also be investigated under the provisions of Article 18." This would amount to an automatic initiation of an expiry review in cases where an interim review is going on at the end of the period of application.

Practice

During the evaluation period, there was no case where an interim review of a CV measure was going on at the end of interim review, and there were two AD cases where partial interim reviews were going on at the end of the period of application of measures. In neither of these cases was the scope of the interim review expanded to encompass the issues covered by an expiry review,

[837] Article 11(7) ADR/Article 22(5) ASR.

but measures expired and the partial interim reviews were terminated. For example, in *Polyester staple fibres* (AD420), two partial interim reviews (R476 and R490) were going on at the time of expiry of the measure in March 2010 and were terminated on the date of expiry of the measure as no request for expiry review had been submitted.[838]

Conclusions/ recommendations

Rules on AD and AS interim reviews which are going on at the date of expiry of measures diverge: while the ASR rules in Article 22(5) appear to imply an automatic *ex officio* expiry review in cases where an interim review is going on at the end of the period of application, and measures continue to be in force, AD measures would lapse according to Article 11(7) ADR. It would therefore seem recommendable to harmonise the ADR and ASR by either aligning Article 11(7) ADR with the wording of Article 22(5) ASR, or vice versa.

In more general terms, the added value of Article 11(7) ADR/Article 22(5) ASR is not obvious. If the Union industry does not request an expiry review there does not appear to be any reason why measures should not lapse as foreseen, simply because an interim review is going on at the same time. Current practice of the Commission to terminate the reviews on the date of expiry of measures seems to be the preferable option, and it is therefore recommended to delete Article 11(7) ADR/Article 22(5) ASR.

Initiation of an expiry review during an interim review

Legal basis

Second, Article 11(5) ADR/Article 22(1) ASR stipulate that when an interim review is already going on when an expiry review is initiated, it must be completed at the same time as the expiry review.

Practice

In practice, this may lead to a substantial extension of the duration of the interim review beyond the maximum of 15 months as established in the two basic Regulations. For example, in *Ammonium nitrate* (AD330), a partial interim review initiated in November 2005 (R382) was extended, following the initiation of an expiry review (R422) in April 2007, to the completion of the latter in July 2008.[839] This would seem to contradict the provision that "reviews pursuant to paragraphs 2 and 3 [ASR: Articles 18 and 19] shall in all cases be concluded within 15 months of initiation"[840].

Interestingly, another partial interim review in *Ammonium nitrate*, which had been initiated in December 2006 (R410), i.e. also before the expiry review (R422), was terminated within the 15 months period in March 2008, i.e. before the conclusion of the expiry review.[841]

Conclusions/ recommendations

The requirement for completing both reviews at the same time leads to several problems. First, it remains unclear on which date they should both be completed – on the completion of the interim review (which would mean that there could be very little time for the expiry review investigation) or, as the current wording in the two basic Regulations suggests, on the completion of the expiry review (which would mean delaying the completion of the interim review beyond the 15 month limit). More importantly, the rationale for jointly completing different reviews which were initiated at different times is not clear.

Furthermore, the practical importance of the rule appears to be very limited – in the evaluation period the only case identified was the one described above. Conversely, there was a number of

838 OJ C 55/12, 05.03.2010. The same occurred in Potassium chloride (AD275), where partial interim reviews (R520 and R527) were terminated in July 2011 with expiry of the measure; see OJ C 206/18, 12.07.2011

839 See OJ L 185/1, 12.07.2008.

840 Article 11(5) ADR/Article 22(1) ASR.

841 OJ L 75/1, 18.03.2008.

cases where an expiry review was going on when an interim was initiated (the two basic Regulations do not address this situation).

In sum, therefore, it is recommended to delete the provisions in the two basic Regulations which require the completion of expiry and interim reviews on the same date, i.e.

- In Article 11(5) ADR delete the sentence
  "If a review carried out pursuant to paragraph 2 is initiated while a review under paragraph 3 is ongoing in the same proceeding, the review pursuant to paragraph 3 shall be concluded at the same time as the review pursuant to paragraph 2."
- In Article 22(1) ASR: delete then sentence
  "If a review carried out pursuant to Article 18 is initiated while a review under Article 19 is ongoing in the same proceedings, the review pursuant to Article 19 shall be concluded at the same time as foreseen above for the review pursuant to Article 18."

5.3.4 New exporter reviews

Legal basis

When new exporters from the country against which measures are in place start to export to the EU after the investigation period, they will be subject to the residual country wide duty, which is typically higher than individual duties applied to cooperating exporters. However, new exporters may request a review, the aim of which will be to determine an individual duty (or no duty at all) for the new exporter, under the following conditions:

- the new exporter is not related to any of the exporters subject to the measures on the product; and
- the new exporter has actually exported to the Union following the investigation period (or has entered into an irrevocable contractual obligation to export a significant quantity to the EU). [842]

Once a new exporter review has been initiated under the AD regime, the measures in place will be repealed for the new exporter during the period of investigation. At the same time, imports from the new exporter will be subject to registration so that duties can be collected retroactively, pending the outcome of the review.

Conclusion and recommendation

Article 20 ASR is less specific and only provides for the existence and purpose of new exporter reviews. In particular, it fails to state the conditions which new exporters must meet, and it also fails to provide for registration of imports and repeal of the duty in force with regard to the new exporter concerned. As a result, a new exporter has to pay the residual duty while the review investigation is ongoing; which constitutes a different treatment than for an AD new exporter review. Therefore, it is recommended that Article 20 ASR is aligned with the provisions in Article 11(4) ADR.

In the evaluation period, 15 new exporter reviews were undertaken. Of these, six did not lead to changes in measures, i.e. residual duties continued to apply to the new exporters. In seven cases, applicants received an individual duty which in all cases was lower than the residual duty; on average, the duty was 50% lower than the residual duty. In one case, the exporter was exempted

[842] Art. 11(4) ADR. However, it is not required that the foreign producer or exporter has exported a *representative volume*; see WTO case DS295, *Mexico – Anti-Dumping Measures on Rice (United States)*.

from the application measures.[843] Finally, in one case the review was terminated as the measures expired.[844]

Among the six unsuccessful reviews, three terminations were caused by the withdrawal of the request respectively cooperation, while in the other three no individual dumping margin could be calculated: in two cases no MET/IT was granted, and in the last case the new exporter had not exported to the EU.

New exporter reviews are "accelerated" with a maximum duration of nine months. In practice, during the evaluation period the duration has ranged from approx. six months to nine months, with an average of 8.5 months. Thus, all reviews were completed within the deadline.

Calculation of export prices for new exporters

For the determination of export prices for new exporters, it has to be decided whether or not the AD duty in force should be deducted from the export price.

Legal analysis

Article 11(4) ADR provides in relevant part that:

> "The review shall be initiated where a new exporter or producer can show that it is not related to any of the exporters or producers in the exporting country which are subject to the anti-dumping measures on the product, and that it has actually exported to the Community following the investigation period, or where it can demonstrate that it has entered into an irrevocable contractual obligation to export a significant quantity to the Community.'
>
> "A review for a new exporter shall be initiated, and carried out on an accelerated basis, after consultation of the Advisory Committee and after Community producers have been given an opportunity to comment. The Commission regulation initiating a review shall repeal the duty in force with regard to the new exporter concerned by amending the Regulation which has imposed such duty, and by making imports subject to registration in accordance with Article 14(5) in order to ensure that, should the review result in a determination of dumping in respect of such an exporter, anti- dumping duties can be levied retroactively to the date of the initiation of the review.

Article 11(10) ADR provides in relevant part that:

> "In any investigation carried our pursuant to this Article, the Commission shall examine the reliability of export prices in accordance with Article 2. However, where it is decided to construct the export price in accordance with Article 2(9), it shall calculate it with no deduction for the amount of anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community."

The corresponding provision in the WTO ADA Article 9.3.3 provides that:

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

It is clear that Article 11(10) ADR and Article 9.3.3 of the WTO ADA do not envisage the specific situation of a newcomer review when there is no reference to a prior determination to assess whether the duty is duly reflected in resale prices under the ADR or – under the broader terms of the WTO ADA – whether there is a change in normal value, any change in costs

[843] In this case – *Pet film* (AS395, R492) – the new exporter from Israel was subject to anti-circumvention measures but the investigation showed that it had not been involved in circumvention activities; see OJ L 242/6, 15.09.2010.

[844] *Magnesia bricks* (AD483, R509), see OJ L 166/1, 25.06.2011.

incurred between importation and resale, or any movement in the resale price which is duly reflected in subsequent selling prices.

In this respect, it should be noted that under the ADA two scenarios of newcomer reviews are possible: Firstly, a newcomer who already actually exported to the EU after the original investigation period and thus presumably already had to pay the residual duty effectively before the newcomer review was initiated and the duty was suspended (and thus may request a refund). Secondly, a newcomer who has entered into an irrevocable obligation to export a significant quantity to the EU but has not actually exported to the EU yet and thus did not have to pay any residual duty and the duty further being suspended when the review is initiated.

Conclusions/ recommendations

In order not to provide radically different treatment between newcomers depending upon whether their review was initiated before or after actual exports took place and the absence of any prior reference to assess whether there was a change in resale prices, it seems indeed appropriate not to deduct the AD duties paid in establishing the export price for newcomers who actually exported before the review was initiated.

While codification of this practice is an option, it seems not to be a necessary implementation measure for the WTO ADA, which is silent on this specific issue.

New exporter reviews in case of sampling

If the original investigation involved sampling, the provisions in the ADR for a new exporter review are not applicable.[845] The ASR does not have a corresponding provision.

The provision in the ADR has led to certain problems in the equal treatment of newcomers in cases where sampling was applied. These issues in the evaluation period were initially addressed, as they were raised by new exporter, through amendments of the definitive duty regulations. Thus, in *Bed linen* (AD464), in amendment to the definitive duty regulation, it was stated that:

> "In order to ensure equal treatment between any new exporters and the cooperating companies not included in the sample, mentioned in the Annex to this Regulation, it is considered that provision should be made for the weighted average duty imposed on the latter companies to be applied to any new exporters which would otherwise be entitled to a review pursuant to Article 11(4) of the basic Regulation."[846]

Accordingly, the definitive duty regulation was amended to include that newcomers may request a new exporter review and be subjected to the weighted average duty applicable to cooperating companies not selected in the sample, rather than the residual duty. The criteria that a newcomer has to fulfil are that:

- it did not export to the EU the product concerned during the IP on which the measures are based;
- it is not related to any of the exporters or producers subject to the measures; and
- it has actually exported to the EU the product concerned after the IP on which the measures are based, or it has entered into an irrevocable contractual obligation to export a significant quantity to the EU. [847]

More recently, the Commission has expressly foreseen such treatment for newcomers directly in definitive duty regulations.[848]

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845 Article 11(4) last sentence ADR.

846 OJ L 121/14, 06.05.2006, at recital 70.

847 See, e.g., OJ L 121/14, 06.05.2006, Article 1(3). For NMEs, an equivalent treatment has been foreseen for those companies which can be granted MET or IT; see *Castings* (AD477), OJ L 47/3, 17.02.2006, Article 1(1).

In these cases, hence, no dumping margin calculation is undertaken for the new exporters. The decision about whether to grant the weighted average of the sample is based only on the three above criteria.

Recommendations

As the treatment analysed above has occurred in a number of cases during the evaluation period, it is recommended that the two basic Regulations are amended in order to give a proper legal basis to the current practice. Thus, the last sentence of Article 11(4) ADR should be replaced by a provision which specifies the above criteria as well as the fact that upon meeting them they will be subjected to the duty applied on non-sampled cooperating exporters.

It is also recommended that a corresponding paragraph be added at the end of Article 20 ASR.

5.3.5 Anti-absorption reinvestigations

The purpose of anti-absorption investigations is to help adjust the level of measures in cases where after the end of the investigation period (including after the imposition of measures), export prices have further decreased or the resale price on the EU market has not, or not sufficiently, moved. This would lead to an insufficient level of the measure as determined based on the original investigation period. An anti-absorption reinvestigation provides an early, "accelerated" and simplified alternative to an interim review of the level of dumping or subsidisation:

- Early, because an interested party (normally the Union industry) can request an anti-absorption reinvestigation immediately after the imposition of measures, whereas it must wait at least 12 months before a request for interim review can be submitted;
- Accelerated, as the maximum duration of an anti-absorption reinvestigation is "normally" six months but in any case nine months, compared to 15 for an interim review;
- Simplified, because an anti-absorption reinvestigation at least initially focuses on the export price, assuming that the normal value has not changed. Only if exporters provide substantiated information that normal value has changed, the revised dumping margin would take into account both the changed export price and normal value.

Practice

In practice, anti-absorption reinvestigations are rare: Only three were carried out in the evaluation period, all of which were initiated upon initiative of the Union industry, and none was initiated after 2006. Of the three reinvestigations, two were terminated without changes to the existing measures[849] while one – *Polyester filament apparel fabrics* (AD481, R413) – led to higher duties for non-cooperating exporters because for them, given that the level of non-cooperation was high, an absorption margin of 18.6% had been determined based on facts available (Eurostat import statistics). For cooperating exporters, no decrease in export prices or EU price level was found and hence no anti-absorption duty was imposed.[850]

All three reinvestigations addressed changes in export prices and resale prices in the EU only, excluding potential changes in normal value. Yet, their duration ranged from slightly less than eight months to slightly less than nine months. Given the fact that the reinvestigations were "simple" cases, their duration appears long. Furthermore, although requests for reinvestigation

848 E.g. *Fasteners, iron or steel* (AD525), OJ L 29/1, 31.01.2009, Article 2.

849 In *Sodium cyclamate* (AD467, R367), no decrease in export price in the new IP, and although the resale price of sodium cyclamate in the EU decreased by 10% this was explained by an appreciation of the EUR against the USD (OJ L 342/98, 24.12.2005). In *Hand pallet trucks and their essential parts* (AD474, R390), both the export price and the resale price in the EU had increased during the new IP (OJ L 341/46, 07.12.2006).

850 OJ L 246/1, 21.09.2007.

can be submitted immediately after the imposition of measures, the applicant must submit sufficient investigation that prices have decreased, which requires time. Two of the three reinvestigations in the evaluation period were initiated more than one year after the imposition of measures.

Conclusions/ recommendations

Taken together, these factors show that anti-absorption reinvestigations in practice are neither very early nor accelerated, which may explain why they hardly have been used by the Union industry. At the same time, the evaluation does not consider anti-absorption reinvestigations to be a key instrument within the TDI "toolbox", as its purpose can also be achieved by interim reviews. As a result, no recommendations regarding potential improvements of anti-absorption reinvestigations are deemed necessary.

5.3.6 Anti-circumvention investigations

The effectiveness of AD or CV measures may be jeopardised by various practices aimed at circumventing them in order to avoid their payment.[851] Among circumvention practices, the following ones are specifically addressed in the two basic Regulations:[852]

- slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics;
- consignment of the product subject to measures via third countries (transhipments), including falsification of customs declarations regarding the country of origin;
- channelling of exports through exporters which are subject to lower duties (or no duties at all); and
- export of the product in parts to the EU or elsewhere and subsequent assembly.

Legal basis

In order to counter these activities, Article 13 ADR/Article 23 ASR foresee anti-circumvention investigations which may result, if circumvention is indeed found, in one or more of the following measures being taken:

- extension of measures to imports from third countries, of the like product, whether slightly modified or not;
- extension of measures to imports of the slightly modified like product from the country subject to measures, or parts thereof;
- extension of duties not exceeding the residual duty imposed in accordance with Article 9(5) ADR/Article 15(2) ASR to imports from companies benefiting from individual duties in the countries subject to measures.

Methodology

The methodology applied in anti-circumvention investigation by necessity differs somewhat from other investigations. The typical steps undertaken in an investigation are:

1. determine changes in the pattern of trade (depending on the investigated type of circumvention);
2. determine if these changes stemmed from a practice, process or work for which there was insufficient due cause or economic justification other than the imposition of the duty;
3. determine if there was evidence of injury or that the remedial effects of the duty were being undermined in terms of the prices and/or quantities of the like product;

851 See the definition of circumvention in Article 13(1) ADR/Article 23(3) ASR.
852 Article 13(1) ADR/Article 23(3) ASR.

4. determine if there was evidence of dumping/subsidisation in relation to the normal values previously established for the like product.

Practice

During the evaluation period, 16 anti-circumvention investigations were undertaken, of which two related to CV measures (with parallel AD measures in force).[853] Although many stakeholders stated that circumvention was a growing problem[854] there was no clear trend in the number of investigations over the evaluation period (Table 66). 11 investigations were initiated upon request by the Union industry, and the remaining five by the Commission *ex officio*.

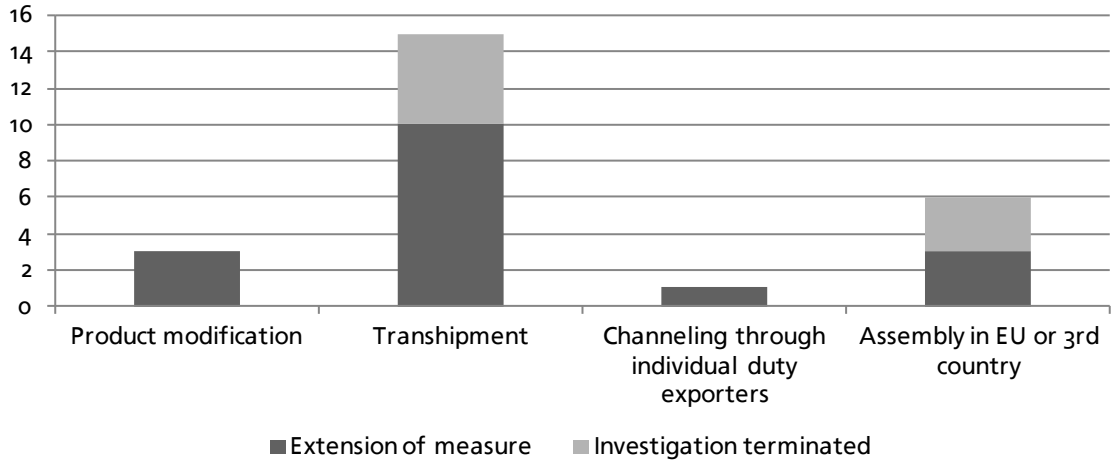
Table 66: Number of anti-circumvention investigations initiated, 2005-2010

	2005	2006	2007	2008	2009	2010	Total
AD	4	2	3	1	1	3	14
AS	0	0	1	0	0	1	2
Total	4	2	4	1	1	4	16

Source: Appendix D.

When looking at the types of circumvention addressed in anti-circumvention investigations, transhipment through third countries was by far the most important one, followed by assembly in the EU or third countries (Figure 55). Circumvention through slight modification of the product and channelling of exports through exporters benefitting from a (lower) individual duty are rare types.

Figure 55: Type of circumvention investigated in, and outcome of, anti-circumvention investigations initiated 2005-2010 (number of circumventions)



Note: The total number of alleged circumventions (25) is higher than the number of circumvention investigations (16) as in some cases several investigations were alleged, e.g. transhipment via more than one third country, or transhipment and assembly in one third country.
Source: Authors' calculations based on appendix D.

Figure 55 also provides some information about the outcome of anti-circumvention investigations: all cases where product modification or channelling through an exporter with an individual duty was alleged, measures were extended (in product scope affected by the measures, respectively to the exporter concerned). For transhipments, the success rate was 66% and for alleged assembly operations 50%.

Stakeholder views

853 *Graphite electrode systems* (AS470, R417) and *Biodiesel* (AS532, R507).

854 The vast majority of EU industry associations consulted by the evaluation team stated that the circumvention of measures was a growing problem (be it through under-invoicing, providing false certificates of origin, modification of products to change the customs classification, etc.); see appendix F.

The vast majority of EU industry associations stated that the circumvention of measures is a growing problem (be it through under-invoicing, providing allegedly false certificates of origin, modification of products to change the customs classification, etc.). The EU's anti-circumvention practice was considered as useful but only effective to a certain extent, especially in cases where exporters' circumvention activities were backed by the exporting country government. EU industry suggestions include:

- Since EU industry would not have the capacity to monitor circumvention or absorption, the Commission should set up a mechanism to monitor the effectiveness of trade remedy measures in force, and should initiate investigations *ex officio* whenever it considers that duties are being absorbed or circumvented. Doing so should be less controversial than initial investigations for the EC as there are fewer grounds for political interference in anti-circumvention investigations (these are dealing with enforcing measures that have already been decided upon);
- DG Trade should not only focus on transhipment but also monitor misclassification of goods more closely, and it should cooperate more closely with the European Anti-Fraud Office (OLAF);
- Help industry track imports by disclosing TARIC[855] code figures.

Importers agreed that measures are often circumvented and thereby rendered ineffective. They argued that often production was shifted to countries not affected by measures and that the measures often led to "rogue traders" taking over trade at the expense of established importers, thus introducing more serious distortions than the dumping practice itself. In response to these problems, some importers welcome anti-circumvention actions but criticise that these are too slow and often circumvented again, creating an ever increasing demand for further anti-circumvention measures.

Some Member States were not convinced of the effectiveness of AD/CV measures due to frequent use of circumvention, retaliation and relocation of production. Other stated that circumvention has always been a part of TD systems and that the EU's tools to address circumvention were appropriate.

Conclusions/ recommendations

The diversity of views held by stakeholders points to a weakness of monitoring systems for measures in place and the corresponding necessity to improve monitoring. This is recommended to be implemented in two ways: the Commission itself, in cooperation with Member States and OLAF, should evaluate and improve existing monitoring systems. One way of doing so could be through a more extensive exchange of information e.g. about the contents of undertakings.[856] At the same time, EU industries should be supported in monitoring measures themselves, e.g. by providing access to TARIC code figures.

On the other hand, a recommendation made by some stakeholders, i.e. to penalise circumvention in a stronger way, is not supported by the evaluation team. No clear indications could be found during the evaluation that circumvention has been an increasing problem, and hence it must be considered that anti-circumvention measures in their current form are effective, the demand for stronger anti-circumvention measures appears premature. It would have to be reconsidered, however, if following the implementation of more thorough monitoring mechanisms it was

[855] TARIC is an online database comprising all EU measures relating to tariff, commercial and agricultural legislation. See http://ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/customs_tariff/index_en.htm.

[856] During the consultations, customs representatives mentioned that effective monitoring of undertakings is made very difficult in the absence of information about the undertakings.

found that circumvention was significantly more prevalent than is apparent based on the number of anti-circumvention cases.

Exemptions from extension of measures

Legal basis

Especially in cases of transhipments through third countries, or assembly in third countries or the EU, genuine producers and legitimate assembly operations are also affected by the extension of measures. In order to remedy this, exporters in third countries and importers can request being exempted from the extended measures, under certain conditions: importers and third country exporters must show that they are not related to producers subject to measures, and exporters must also show that they are not engaged in circumvention practices.[857]

Practice

In practice, exemptions play an important role in some cases. In *Bicycles* (AD287), where anti-circumvention measures have been in place since 1997, approx. 250 EU companies have been exempted from measures. Furthermore, during anti-circumvention investigations cooperating exporters in third countries typically request, and are being granted, exemptions.[858] In practice, the fact of not being engaged in circumvention is the more important test, and indeed some third country exporters have been exempted from measures although they were related to producers subject to measures.[859] In any case, the granting of exemptions is subject to special monitoring measures, such as the requirement of the presentation to the customs authorities of the Member States of a valid commercial invoice.

Conclusions/ recommendations

The EU institutions' practice regarding exemptions from the extension of measures as analysed above is considered appropriate. However, as it is not in line with the provisions in the two basic Regulations, it is recommended to amend Article 13(4) ADR and Article 23(4) ASR by removing the condition of not being related and adding the condition for importers that they must not have been engaged in circumvention of measures.

5.3.7 Refund reviews

Refund reviews are the only instrument within the EU TD system which adjusts definitive measures retroactively. They are used fairly frequently with a clear increase in the number of refund applications since 2007 (Table 67). The Commission has published a *Commission Notice Concerning the Reimbursement of Anti-Dumping Duties*[860] in order to assist and inform potential applicants about the process and assist in the submission of applications. Despite this, the success rate over the evaluation period was low until 2009 but substantially increased in 2010. On average, during the period 2005–2010 approximately one in three applications has resulted in a partial or full refund of duties paid, with more applications being withdrawn rather than being rejected.[861]

857 Article 13(4) ADR/Article 23(4)-(7) ASR.

858 E.g. *Fasteners, iron or steel* (AD525, R515), where 18 Malaysian exporters requested, of which eight were granted, exemption; or *Steel ropes and cables* (AD384, R482), where of 14 Korean exporters 11 were granted exemption from the extension of measures.

859 E.g. in *Fasteners, iron or steel* (AD525, R515), see OJ 194/6, 26.07.2011, at recital 62-64.

860 OJ C 127/10, 29.05.2002; also available from the DG Trade website at http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/refunds/.

861 As no systematic information is available on refunds other than the figures provided in the Annual Reports, it is impossible to reconcile the number of refund applications (132 in the evaluation period) with the number of closed refund investigations (86).

Table 67: Refund applications and outcomes, 2005-2010 (number of cases)

	2005	2006	2007	2008	2009	2010	Total
New refund applications	12	19	8	25	39	29	132
Successful applications	0	4	0	0	5	23	32
Refunds granted fully	0	1	0	0	0	0	1
Refunds granted partially	0	3	0	0	5	23	31
Unsuccessful applications	5	9	5	9	9	17	54
Refunds rejected	4	2	3	3	2	5	19
Applications withdrawn	1	7	2	6	7	12	35

Source: Annual Reports from the Commission to the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard Activities, 2005-2009; information provided by DG Trade (for 2010).

This outcome can in part be explained by the extensive information requirements which are required in a refund review. In particular, exporting producers which are concerned by the refund application have to cooperate in the refund investigations, but often have little incentive to do so. Finally, a refund investigation does not only concern the transactions of the applying importer but all EU imports of the product concerned from the exporter. Thus, the scope of the refund investigations is comparable to a partial interim review focussing on the concerned exporter's dumping, except that it is retrospective rather than prospective.

Conclusions/ recommendations

Given the close similarity of refund reviews with other types of reviews in substantive terms, they should be treated equivalently in procedural terms. At present, refund reviews do not meet the same standards of transparency as other types of reviews – neither the initiation nor the outcome is published. Therefore the recommendation made in section 5.2.3.2 above is reiterated that notices regarding refund reviews be published in the *Official Journal* in the same manner as other reviews.[862]

5.3.8 Suspension of measures

Legal basis

The two basic Regulations provide that:

> "In the Community interest, measures imposed pursuant to this Regulation may, after consultation of the Advisory Committee, be suspended by a decision of the Commission for a period of nine months. The suspension may be extended for a further period, not exceeding one year, if the Council so decides, acting on a proposal from the Commission. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. Measures may only be suspended where market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension, and provided that the Community industry has been given an opportunity to comment and these comments have been taken into account. Measures may, at any time and after consultation, be reinstated if the reason for suspension is no longer applicable."[863]

Practice

In practice, suspensions rarely occur; only four suspensions were identified during the evaluation period:

- In *Seamless pipes and tubes, of iron or non-alloy steel* (AD358; AD394), imports from Croatia and the Ukraine decreased to very low levels following the lifting of AD measures on the same goods from Romania and Russia. Therefore, in February 2005 the Commission chose to suspend the measures only partially for nine months by reducing the duties to the level of the original definitive duties (23% for Croatia, 38.5% for Romania), which had been increased following a review investigation (to 38.8% for Croatia and 51.9%/64.1% for the Ukraine). The Commission justified the partial suspension by stating that:

862 The evaluation team notes that the Commission has been working on improved transparency of refund investigations.

863 Article 14(4) ADR/Article 24(4) ASR.

> "a full suspension of measures against imports from Croatia and Ukraine could also lead to similar import trends from these two countries as are currently experienced with regard to imports from Russia and Romania and would, therefore, in all likelihood lead to injury of the Community industry"[864]

As imports did not increase following the partial suspension, the suspension was extended by one more year.[865]

- In *Ferro-molybdenum* (AD436), based on information on changed circumstances on the EU market provided by users, the Commission found that dumped imports from China had decreased, while market prices in the EU had increased in response to a temporary shortage in production capacity. As the situation of the Union industry had also improved (increased output, market share and profitability), the measures were suspended for nine months in October 2006[866], which was extended until the end of an interim review leading to the repeal of measures.[867]
- In *Silico-manganese* (AD513), on the same day when definitive measures were imposed in December 2007, the Commission also decided to suspend measures for a period of nine months because EU prices had increased substantially (by 69%) after the investigation period, while the market share of dumped imports from China and Kazakhstan had decreased slightly, while the situation of the Union industry, notably profitability, had improved significantly. It was therefore concluded that

  > "the imposition of measures in question was expected to have some negative, although limited, effects for users in the form of cost increases arising out of the possible need to arrange new or alternative supplies. Considering the temporary change in market conditions and that consequently the Community industry is currently not suffering injury, any negative effect on users could be removed by suspending the measures. Consequently, it can be concluded that the suspension is in the overall Community interest."[868]

  As the situation on the EU market did not change following the suspension, the suspension was extended by one more year.[869]

Contrary to interim reviews, which require that changes are of a lasting nature, the suspension of measures addresses temporary changes. It is not clear, however, based on which considerations the Commission would choose between the initiation of an interim review and the suspension of measures.

Conclusions/ recommendations

Rights of defence concerning suspension

It would appear that the provisions in Article 14(4) ADR/Article 24(4) ASR only allow the Union industry to comment and exercise their rights of defence but not the other interested parties as mandatorily defined in Article 6.11 of the WTO ADA/Article 12.9 ASCM to include also foreign exporters/ producers and their associations and the government of the exporting country. These parties should also throughout the investigation be provided with a full opportunity to defend their interests. Further, if "other interested parties" are recognised they should also be provided with a full opportunity to defend their interests.

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864 OJ L 46/46, 17.02.2005, at recital 7.
865 OJ L 300/1, 17.11.2005.
866 OJ L 293/15, 24.10.2006.
867 *Glyphosate* (AD349) was a very similar case where the Commission found, following information provided by users and distributors, a strong EU price increase and improved situation of the Union industry, and accordingly suspended measures for nine months in May 2009 (OJ L 120/20, 15.05.2009), later extending the suspension by another year (OJ L 40/1, 13.02.2010). Measures terminated in December 2010.
868 OJ L 317/79, 05.12.2007, at recital 9.
869 OJ L 237/1, 04.09.2008.

A corresponding amendment to the two basic Regulations is recommended. Indeed, it is already the current practice of the Commission to give other interested parties the opportunity to contribute.

Recommendation

5.4 Implementation of Judgments

The decisions of the Union institutions on TDI are subject to legal review before the General Court and the Court of Justice. The most frequent type of court cases are actions for annulment of decisions (see section 3.1 below).

For the purposes of this evaluation, the implications of judgments against the EU institutions are most interesting. In these cases, the contested measure/regulation will be annulled insofar as it concerns the applicant. Furthermore, if the judgment only concerns a certain aspect of the measure, the uncontested parts will remain valid.

In implementing Court judgments, the Commission's recent practice in most cases is to (1) provide for repayment or remission of duties collected under the annulled regulation; (2) exclude exports falling under the annulment and (3) partially reopen the investigation in order to remedy the contested parts of the measure.[870] Previously, the practice seems to have been to simply reimburse duties and repeal measures for the applicant.[871]

In the evaluation period, the number of judgments annulling measures and, hence, the number of reopening of proceedings, was very limited (see section 3.1 below). The outcome of these reopened investigations was as follows:

- In the implementation of the CFI judgment in Case T-221/05 *Huvis v Council (Polyester staple fibres* (AD420), the Commission recalculated the dumping margin based on the original methodology, without formally reopening the investigations, leading to lower duties not only for the exporter involved in the court case but all but one named exporters in the case;[872]
- In the implementation of the ECJ judgment in Case T-206/07 *Foshan Shunde Yongjian Housewares & Hardware v Council*, the measures were reimposed at the same level as the original definitive duty;[873]
- In the implementation of the GC judgment in Case T-143/06 *MTZ Polyfilms v Council*, the partial reopening was terminated and the exporter remained without measure.[874]

The current practice of the institutions in implementing Court judgments is considered appropriate, as the reopening of an investigation in order to remedy the contested parts of a regulation ensures compliance with the Court judgment while not providing an undue advantage

Conclusions/ recommendations

[870] See, e.g., *Ironing boards* (AD506, R506a), notice of initiation, OJ C 308/44, 18.12.2009 (implementation of ECJ judgment in Case T-206/07 *Foshan Shunde Yongjian Housewares & Hardware v Council*); *PET films* (AD432, R355a), notice of initiation, OJ C 131/3, 20.05.2010 (implementation of GC judgment in *Case T-143/06 MTZ Polyfilms v Council*).

[871] See *Para-cresol* (AD457), Notice concerning anti-dumping measures on imports of para-cresol originating in the Peoples Republic of China, OJ C 296/30, 06.12.2006, (implementation of CFI judgment in Case T-413/03 *Shandong Reipu Biochemicals v Council*); *Silicon* (AD461), Notice concerning anti-dumping measures on imports of silicon originating in Russia, OJ C 188/5, 11.08.2007 (implementation of CFI judgment in Case T-107/04 *Aluminium Silicon Mill products v Council*); and *Ammonium nitrate* (AD330, R387), Notice concerning anti-dumping measures on imports of ammonium nitrate originating in Russia, OJ C 229/30, 23.09.2009 (implementation of CFI judgments in Case T-348/05 *JSC Kirovo-Chepetsky Khimichesky Kombinat v Council*).

[872] OJ L 125/1, 21.05.2009.

[873] OJ L 242/1, 15.09.2010.

[874] OJ L 211/1, 18.08.2011.

for an applicant which might occur if the measure was simply repealed. The codification of this practice in the two basic Regulations should be considered.

5.5 Conclusions of the Evaluation of EU Trade Defence Policy and Practice

In this chapter, the evaluation team has assessed the EU's TD practice during the evaluation period, distinguishing between substantive issues and procedural issues of (new) investigations, reviews, and the implementation of judgments regarding EU TDI.

5.5.1 Conclusions and Implications with respect to Substantive Issues

For the vast majority of substantive issues, the evaluation team concludes that methodologies and practices are sound. However, a caveat to be mentioned is that, due to the absence of a manual, and relatively short explanations in provisional or definitive duty regulations describing methodologies and practices, methodologies had to be inferred. As such, a statement of administrative practice on this matter would be a welcome addition to the Commission's communications. The evaluation team notes that the Commission is already working on a policy handbook which is planned to be available in a public version during the course of 2012. It is recommended that differences between the internal and public versions of the policy handbook be kept to the minimum. For example, when the internal handbook refers to certain practices or methods applied in specific actual cases, these could still be included in the public version in non-confidential format. Also, as methods evolve, the policy handbook should be updated so as to make sure that it always reflects current practice.

In addition to the general validation of methodologies and practices, the evaluation team has made the following observations.

An important issue as a result of the global changing context is the definition of the Union industry. In this regard, it is recommended that the Commission issue a statement of administrative practice setting out criteria for including or excluding EU producers from the Union industry definition in light of the globalisation of production chains. A number of criteria are proposed in this section, drawing from existing practice in the EU and in peer countries. Furthermore, with regard to responding to the threat of retaliation by exporting countries, which may affect not only EU producers which are related to exporters of the product concerned but any EU producers which have any stake in the exporting country, including export interests to that country, it is recommended that the definition of related EU producers be widened to include firms whose business interests in the country of export are such as to constitute grounds for believing their behaviour in the investigation would be different from non-related producers.

Regarding the impact of volatility in exchange rates in dumping calculations, the dual requirements of the WTO ADA to use the prevailing market rate and to ignore fluctuations are somewhat difficult to reconcile in any WTO member's TD practice. At the same time, since there is no guidance as to how to interpret the relevant measures of the ADA, the EU has considerable latitude. The use of calendar month averages cannot, however, easily be squared with the dual requirements and cannot be recommended, except in the absence of quoted daily rates, in which case the calendar month averages would constitute the best information available as a substitute for the daily rate. One straightforward option would be to adopt the US system or a variant

thereof (e.g., the fluctuation band might be defined in terms of one standard deviation of movement around a stationary or trending mean rate rather than an arbitrary percentage, and fluctuations could be ignored by replacing values that are greater than one standard deviation from the mean by the mean plus one standard deviation, rather than by the mean). An alternative would be to include in regulations a standard statistical analysis of the behaviour of the exchange rate in the period of investigation and to characterise it as stationary, trending or featuring a discontinuity, which could be interpreted as a "sustained movement". The development of a case history of reasonable practice would then permit the distillation of a method.

The selection of samples based on the "largest representative volume" is one area where AD practices have not kept up with the empirical evidence on firms in international trade: variances across firms are not currently considered. It is recommended that DG Trade commission a research study on the implications of firm-level heterogeneity for the indicators applied in investigations. Sampling based on empirically validated distributions could be expected to have rather significantly different implications for what is "representative" than a selection based on largest volume. In that case, sampling based on largest volume could still be used as it is explicitly allowed by WTO rules (and by the two basic Regulations), but use of true representative sampling would then be favourable. At the same time, the evaluation team notes that, in view of the current WTO rules, a unilateral change of the sampling methodology would entail risk being challenged before the WTO DSB, as the notion of "samples which are statistically valid" is open to interpretation.

In the context of the NME concept, there appears to be a need to reconsider the concept in general, for the following reasons:

- NME treatment in practice currently affects mainly AD cases against China and, to a limited extent, Vietnam. However, according to the WTO accession protocols of these two countries China will presumptively have to be recognised as a market economy from late 2016 and Vietnam from 2019;[875]
- two of the five criteria for MET listed in the basic Regulation (criteria 4 and 5) in practice have been fulfilled by all applicants. The fifth criterion requires that "exchange rate conversions are carried out at the market rate." Despite the recent public criticism by the USA and IMF on the China exchange rate policy not reflecting fair market values, this seems not to have been an issue so far in EU MET determinations;
- the Court of First Instance has set a much higher threshold for the concept of "significant State interference" (criterion 1) in Case T-498/04 *Zhejiang Xinan Chemical Industrial Group v Council* (note, though, that this case is currently under appeal);
- the recent WTO Appellate Body report in DS397 *Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, China v European Communities*, has determined that the IT rules and practice violate WTO rules;
- MET/IT claims and the corresponding investigations are resource and time consuming.

It is therefore recommended that the EU reassess whether the objectives of the NME system are met or could be obtained through other means and methods. The practices of Australia, which has granted China market economy status and utilises the "particular market situation" provisions to address cases where domestic Chinese prices may be distorted, and Canada, which applies market treatment as the default but has used the latitude in its system to successfully apply non-market treatment where warranted, are worth examining as the EU considers its next steps. At the same time, the experience of other WTO members should be reviewed in more detail than has been possible in the context of this evaluation study.

[875] Note, however, the discussion referred to in footnote 560.

In relation to the calculation of subsidies, the evaluation team recommends the following:

- In view of the fact that Guidelines for the calculation of the amount of subsidy in CV duty investigations were published more than a decade ago, refer to a now obsolete basic AS regulation, and their applicability is unclear, it is recommended to publish an updated version of the guidelines or, preferably, to integrate them into the policy handbook;
- The Commission's practice to cumulate the benefits of different support schemes that an exporting country grants to an exporter is considered appropriate but is not codified. It is recommended to codify the current practice for cumulation of subsidy margins across different subsidies granted by a country concerned in the ASR, or include them in the guidelines for the calculation of subsidies;
- There is an apparent lack of a definition for negligible benefit of a subsidy, which has resulted in inconsistent practice during the evaluation period. It is therefore recommended to establish a rule for negligible benefit of individual schemes.

Regarding the factors considered for the injury assessment, in the view of the evaluation team, the most reliable indicator of injury due to dumping or subsidisation is a direct linking of lost sales or price suppression/reduction to price undercutting in competing offers by dumped or subsidised imports. How these immediate effects of dumping or subsidisation are reflected in overall domestic industry performance measures such as total employment, profitability, etc. depends on the importance of the like good to the firms that constitute the domestic industry and on the responses that domestic industry takes, including the ability of the industry to shift resources to other production; these indicators therefore signal injury less reliably, although taken together with the direct effects they do provide corroborating circumstantial evidence in support of injury. The evaluation team notes that the EU's "revealed methodology" is not consistent with this perspective as "bottom line" indicators are more consistently cited in injury determinations.

Concerning the application of *de minimis* rules, the evaluation team noted that the EU law on negligible imports in certain scenarios would violate the EU's obligations under the WTO ADA. Therefore, it is recommended to align the *de minimis* test in the ADR with the volume of imports test set forth in the WTO ADA. Also, it is recommended to apply a *de minimis* threshold for injury margins in analogy to the one used for dumping/subsidy margins. This would be in step with the findings in the economic trade literature.

A number of observations have been made regarding the causation analysis. The evaluation team considers that the general approach of the Commission for the determination of the causal link is appropriate. To promote coherence and consistency of application, it is recommended that the Commission codify its current approach in the following areas:

- temporal relationships between causal factors and their effects;
- the magnitude of changes in causal factors (such as increase in import volumes or market shares, etc.) required as a minimum for being considered as material in the causal link determination;
- minimum standards for the qualitative analysis of the nature and extent with which each "other" factor listed in Article 3(5)/Article 8(6) ASR impacts on the Union industry's injury. Some more in-depth considerations regarding the non-attribution analysis have also been made;
- the threshold for other factors to break the causal link between dumping and injury; and
- the ranking and aggregation of factors.

Further, based on the review of international practice, it is recommended that a particular emphasis on direct evidence of the effect of dumping or subsidisation in terms of lost sales by EU firms be included in the Commission's standard approach:

- examination for evidence of price leadership by imports at a micro, account-by-account level; and
- direct evidence of accounts lost due to price to strengthen the case concerning the nexus between price developments and impact on domestic industry.

As described in the comparative evaluation, the Union interest is considered as one of the strengths of the EU TD system. The analysis in this chapter suggests the following considerations be applied in evaluating the Union interest in any individual case:

- Where the Union industry's market share is low, the welfare benefits of TDI are likely to be negative.
- Where concentrated impacts on particular communities can be expected from not applying TDI, the case for TDI is strengthened.
- Where the goods in question are intermediate products used by downstream industries, the larger the share of production costs, the greater the likelihood that TDI could have adverse effects on EU industry as a whole.
- Conversely, where the inputs for the like products produced by the Union industry constitute a large share of the EU upstream industries' output, the welfare effect of TDI is likely to be positive.

Furthermore, the role of interested parties should be clarified: in line with the practice in other parts of the investigations, their main role should be to provide information and comment on the Commission's findings, but the actual analysis of public interest should be reserved for the Commission. In consequence, this would require collection of information on Union interest issues (e.g. through questionnaires) at the same time as information for the dumping/ subsidisation and injury analysis. Basing the Union interest test on representative information would help the Commission to arrive at more robust findings. While these suggested changes are likely to enhance the robustness and validity of the Union interest test findings, they would also require additional resources.

Finally, regarding the calculation of the non-injurious price in the context of determining the level of measures, the evaluation team notes that a variety of methods are applied to determine target profits for the determination of the non-injurious price. It would be preferable if criteria for the choice of method were established in order to increase predictability of the outcomes. In this regard, the evaluation team observes that profit rates vary systematically across industries, to a much greater extent across firms, and also over the business cycle. The most straightforward approach to establishing a target profit rate for the injured industry is to use the evolution of profits for a control group over the same period. The observed rate of change in the profit rate in the control group (e.g., all firms, or all non-injured firms, in the relevant 4-digit NACE category in an established database) can then be used to project the counterfactual profit rate for the injured firms over the period in which injury is found to have occurred. This approach takes into account the firm and/industry-specific level of profits as well as the variability over the business cycle.

5.5.2 Conclusions and Implications with respect to EU Trade Defence Procedures

In addition to the evaluation of substantive issues of the EU's TD practice, TDI procedures have also been analysed. The evaluation team concludes that the standard of the Commission's investigations is generally high. At the same time certain scope for improvement has been identified in the following areas:

- shortening the duration of proceedings;
- transparency of proceedings;
- clarifying the role of interested parties and ensuring rights of defence; and
- support provided to interested parties.

Duration of proceedings

With regard to the duration of proceedings, the evaluation team acknowledges that the time required for the preparation of complaints is relatively long. Seen in isolation, this would not constitute a problem; however it does contribute to the overall period of approximately 2.5 years between injury and the imposition of measures. At the same, options to shorten the duration of preparing a complaint seem limited if complaint standards are upheld (which is recommended). One way could be for the Commission to provide expanded support and data access to (potential) complainants. Nevertheless, the evaluation team recommends that a shortening of the overall period be achieved primarily by a faster imposition of provisional measures, as recommended in chapter 4.

Another issue regarding the duration of proceedings is the time required to terminate cases when a complaint is withdrawn. The withdrawal of a complaint is the most frequent reason for investigations to be terminated, and in the evaluation period each investigation was terminated after the withdrawal of a complaint. Therefore, it is recommended that there be a fast track procedure which would allow terminating cases after the withdrawal of a complaint within a period of approx. one month to six weeks.[876] A fast termination reduces the period of legal uncertainty for all interested parties.

Transparency of proceedings

Limitations in transparency in investigations were a major issue in the previous evaluation study. The present study shows that a number of improvements have been implemented. The evaluation team has made some recommendations to build on these improvements. It is also noted that some of these recommendations are already in the process of being implemented.

- In order to increase legal certainty, it is recommended that notices announcing the expiry of measure be published as early as possible, i.e. immediately after the period for lodging a review request has ended (three months before the end of the period of application of the measure).

- In order to increase transparency of the proceedings, it is recommended that the Commission should study whether the quality of disclosure documents could be further improved, methods of analysis be explained better, and more information be provided in them.

- In order to increase the consistency of regulations and further reduce the level of errors leading to corrigenda, it is recommended that mechanisms for a more thorough quality control of publications be implemented. A first step would be the use of detailed templates, against which provisional and definitive duty regulations would be checked. A separate reading of regulations prior to publication focussing only on clerical and basic factual issues could also help avoid errors and subsequent corrigenda.

[876] The main reason for withdrawing a complaint appears to be that an investigation would lead to the termination of a proceeding. In any event, if and when a complaint is withdrawn in response to pressure it can be assumed that the Commission would know about this; in such cases of the withdrawal of a complaint the Commission could still assess if a continuation of the investigation was called for based on Union interest considerations.

- The evaluation team considers that the granting of access to the non-confidential file through the internet would constitute a major improvement and thus recommends its timely implementation, assuming that security issues are addressed.

- Since the WTO Panel (as well as the Appellate Body) upheld the confidential treatment of the identity of the complainants under current rules, there appears to be no need for any codification or legislative changes on this issue. At the same time, it is recommended that a list be established and published of which type of information would normally be considered as non-confidential (examples of such information are the identity of complainants, audited accounts, market data or indices).

- A consequence of the lack in transparency of the Advisory Committee operations is that stakeholders with good sources enjoy a procedural advantage over stakeholders which lack such access; an uneven playing field is created for stakeholders. It is therefore recommended that information about the Advisory Committee and its operations be published. It should be included in the register of committees, and members, meeting agendas and non-confidential versions of minutes be made public. The evaluation team does not consider that the justification for keeping members' names confidential (in order to prevent lobbying) is valid, because, as mentioned, many interested parties already get access to such information anyway. In the view of the evaluation team, a more efficient way of reducing the effectiveness of lobbying might be to introduce secret voting in the Advisory Committee. This would also address concerns, voiced by certain stakeholders, that Member States might also be subjected to threats of retaliation by exporters and exporting countries, and their voting behaviour be influenced.

Clarifying the role of interested parties and ensuring rights of defence

It is recommended that the Commission investigators be pro-active during verification visits in confronting companies with contradictions between their replies and the Commission's findings during the verification. Ideally, a verification report in line with the US practice would be agreed on at the end of the visit. However, given the considerably shorter time frame of EU verification visits this might not be possible.

While the two basic Regulations would seem to limit the issue of confirmation in writing of oral information to the oral information provided in adversarial meetings under that paragraph, the WTO ADA and ASCM seem to refer to a general right of interested parties to present other information orally and the need to subsequently reproduce it in writing. Therefore, it is recommended to align the text of the ADR and ASR more closely and literally to the text of the WTO ADA and ASCM.

It is concluded that the Commission's interpretation of cases of non-cooperation in the evaluation period was appropriate. It should be noted, however, that the EU takes a relatively lenient stance regarding the provision of false information, as it is not treated as an obstruction of the investigations and sanctioned, as is the case in Canada or the USA, where injury investigating authorities have subpoena power. There is thus no strong disincentive for interested parties against non-cooperation. The establishment of stronger sanctioning mechanisms (such as fines) for the provision of false information is recommended. This should be addressed jointly with the introduction of expanded investigation powers (i.e. obligation to cooperate) as recommended in chapter 4.

Regarding the definition of interested parties, the evaluation notes that current practice of the Commission exceeds the requirements established in the two basic Regulations. It is therefore recommended to align the two basic Regulations with practice by making the provisions – Articles 6(7), 20 and 21 ADR, respectively Articles 11(7), 30 and 31 ASR – open-ended to allow "all interested parties" (as following from Article 6(5) ADR/11(5) ASR) access to the file and ample opportunity to defend their interests.

Disclosure and rights of defence: In light of recent court decisions that have gone against the Commission on grounds of having failed to re-disclose, it is recommended that re-disclosure be provided for to ensure that rights of defence are respected.

The evaluation team considers that the Hearing Officer constitutes a very useful following instance to ensure rights of interested parties in TDI proceedings. In order to further strengthen the role of the Hearing Officer the following is recommended:

- the Terms of Reference for the Hearing Officer should be adopted as soon as possible in order to establish a firm and commonly known legal basis for his work;
- knowledge about the Hearing Officer and his work should be divulged among (potential) users of TDI. Draft information leaflets have already been prepared and should be completed and distributed as soon as possible.

Support to Interested Parties

The results of the present evaluation study regarding support provided by the Commission generally confirm the findings of the recent Study of the difficulties encountered by SMEs in Trade Defence Investigations and possible solutions (Gide Loyrette Nouel 2010). As a result, the recommendations made in that study, as far as they concern the EU TD system, are also supported by this evaluation study. It is noted that the Council Working Party on Trade Questions adopted an action plan in May 2011 to implement most of the SME study recommendations in a first phase (although without indicating a time frame), while postponing the "remaining topics which may be more contentious and where convergence may need further discussion". The action paper is commended, and it is recommended that a more specific action plan, specifying deadlines for the implementation of individual recommendations, as well as further discussion of the "more contentious" issues be developed.

Complementary recommendations are:

- Support should not only be focused on SMEs but also other infrequent or inexperienced interested parties, including suppliers, users and importers. A guide on how TD investigations work and how interested parties can participate in the proceedings should be developed. Likewise, a general helpdesk, in addition to the existing "special purpose" helpdesks (for SMEs, on enlargement trade defence issues) should be established – potentially the "information contact point" could assume this role;
- Availability of support should be made more prominent on the trade defence website by adding a section on "support" which would provide information on the types of support services being offered by the Commission (and possibly Member States). The section should directly be accessible from the trade defence front page (e.g. at the same level as the Hearing Officer section) and should contain a page on how to get in touch with the helpdesk;
- Basic information about TDI should be made available on the trade defence website in all official languages, along with a link to the general helpdesk page.

5.5.3 Conclusions and Implications with respect to Reviews

Expiry reviews

The evaluation team considers that the Commission's approach for the tests of continuation and likelihood of recurrence of dumping/subsidisation and injury are appropriate. An analysis of causation would be desirable, as the current methodology, by assuming the existence of a causal link if both dumping/subsidisation and injury are found, has a built-in bias towards the continuation of measures. However, the evaluation team also notes that the absence of a causation analysis in expiry reviews has been validated by WTO case law.

With regard to the duration of expiry reviews, given the fact that expiry reviews do not require the same scope of analysis as original investigations (e.g. no calculation of injury margins, application of lesser duty rule, etc.) it is recommended that the Commission should strive to complete expiry reviews within the "normal" period, i.e. 12 months.

Based on a review of the expiry reviews undertaken in the evaluation period, it is difficult to determine which criteria are applied for deciding on the duration of the extension of measures. The arguments provided do not seem to follow the same logic and indeed appear to be *ad hoc* (or *post hoc*) justifications. Especially in the cases where consecutive expiry reviews led to the extension of measures for a limited amount of time, based on very similar arguments, the validity of arguments seems questionable. In line with the Commission's practice in original investigations, it could be envisaged to extend measures – provided that continuation or likelihood of recurrence of dumping/subsidisation and injury are present – by five years as a general rule (except for Union interest considerations) and balance this with a more active use of interim reviews (e.g. by reducing the threshold of evidence required for the initiation of an interim review). This would avoid the problem of having to make more refined prospective arguments – such as expected price changes, expected changes in exporting country spare capacity, or the anticipated time of EU industry restructuring – to justify an extension of measures by less than five years.

One issue that has been raised by stakeholders concerns AD/CV duties paid during an expiry review which ends with the termination of measures. In these cases, there does not seem to be a justification for the extended imposition of measures beyond the five year period, and the suggestion that such duties be refunded is considered to be justified. Under exceptional circumstances, the EU has however provided for the refund of duties paid during the expiry review period. It is recommended that AD/CV duties paid during an expiry review which leads to the repeal of measures is refunded for the period which extends beyond the normal duration of measures.

Finally, an issue that is relevant for all types of reviews is the codification the WTO ruling on *Beef & Rice.* First, it is noted that Article 9(3) ADR/Article 14(5) ASR use the wording "may be reinvestigated" which does not constitute an "as such violation" of the WTO ruling. In order to ensure that EU TD practice is in line with the WTO ruling it would however be preferable to delete the wording "provided that it is only the investigation that shall be terminated where the margin is below 2 % for individual exporters and they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11" from Article 9(3) ADR as well as the corresponding provision in Article 14(5) ASR.

Interim reviews

Given the importance of the lasting nature analysis for the outcome of interim review investigations it would be desirable to codify it in the two basic Regulations. Such codification could be equivalent to the formulation of the likelihood of recurrence analysis. At the same time, it must be acknowledged that codification carries a legal risk: because it is not explicitly referred to in 11(2) of the WTO ADA, codifying it in the basic Regulation could render it prone to "as such" challenges under the WTO DSU. A perhaps more important issue arises from the fact that the lasting nature analysis in reviews has no equivalent in the original investigations – i.e. if dumping during an original investigation period was temporary, measures will still be imposed. This creates a certain imbalance to the disadvantage of exporters. On the other hand, the TDI regime provides for other tools to address temporary changes (such as suspension of duties or refunds).

Rules on AD and AS interim reviews which are going on at the date of expiry of measures diverge: while the ASR rules in Article 22(5) appear to imply an automatic *ex officio* expiry review in cases where an interim review is going on at the end of the period of application of measures, and measures continue to be in force, AD measures would lapse according to Article 11(7) ADR. It would therefore seem recommendable to harmonise the ADR and ASR by either aligning Article 11(7) ADR with the wording of Article 22(5) ASR, or vice versa. In more general terms, the added value of Article 11(7) ADR/Article 22(5) ASR is not obvious. If the Union industry does not request an expiry review there does not appear to be any reason why measures should not lapse as foreseen, simply because an interim review is going on at the same time. Current practice of the Commission to terminate the reviews on the date of expiry of measures seems to be the preferable option, and it is therefore recommended to delete Article 11(7) ADR/Article 22(5) ASR.

Also, according to the two basic Regulations, when an interim review is already going on when an expiry review is initiated, it must be completed at the same time as the expiry review. This requirement leads to several problems. First, it remains unclear on which date they should both be completed – on the completion of the interim review (which would mean that there could be very little time for the expiry review investigation) or, as the current wording in the two basic Regulations suggests, on the completion of the expiry review (which would mean delaying the completion of the interim review beyond the 15 month limit). More importantly, the rationale for jointly completing different reviews which were initiated at different times is not clear. Furthermore, the practical importance of the rule appears to be very limited – in the evaluation period the only case identified was the one described above. Conversely, there was a number of cases where an expiry review was going on when an interim was initiated (the two basic Regulations do not address this situation). In sum, therefore, it is recommended to delete the provisions in the two basic Regulations which require the completion of expiry and interim reviews on the same date.

New exporter reviews

According to the ADR, once a new exporter review has been initiated, the measures in place will be repealed for the new exporter during the period of investigation. At the same time, imports from the new exporter will be subject to registration so that duties can be collected retroactively, pending the outcome of the review. Article 20 ASR is less specific and only provides for the existence and purpose of new exporter reviews. In particular, it fails to state the conditions which new exporters must meet, and it also fails to provide for registration of imports and repeal of the duty in force with regard to the new exporter concerned. As a result, a new exporter has to pay

the residual duty while the review investigation is ongoing; which constitutes a different treatment than for an AD new exporter review. Therefore, it is recommended that Article 20 ASR is aligned with the provisions in Article 11(4) ADR.

In order not to provide different treatment between newcomers depending upon whether their review was initiated before or after actual exports took place and the absence of any prior reference to assess whether there was a change in resale prices, it seems indeed appropriate not to deduct the AD duties paid in establishing the export price for newcomers who actually exported before the review was initiated. While codification of this practice is an option, it seems not to be a necessary implementation measure for the WTO ADA, which is silent on this specific issue.

Finally, if the original investigation involved sampling, the provisions in the ADR for a new exporter review are not applicable. However, the Commission's practice in these cases is that newcomers may request a new exporter review and be subjected to the weighted average duty applicable to cooperating companies not selected in the sample, rather than the residual duty, provided they fulfil the stated criteria. It is recommended that the two basic Regulations are amended in order to give a proper legal basis to the current practice.

Anti-circumvention

The diversity of views held by stakeholders points to a weakness of monitoring systems for measures in place and the corresponding necessity to improve monitoring. This is recommended to be implemented in two ways: the Commission itself, in cooperation with Member States and OLAF, should evaluate and improve existing monitoring systems. One way of doing so could be through a more extensive exchange of information e.g. about the contents of undertakings. At the same time, EU industries should be supported in monitoring measures themselves, e.g. by providing access to TARIC code figures. On the other hand, a recommendation made by some stakeholders, i.e. to penalise circumvention in a stronger way, is not supported by the evaluation team. No clear indications could be found during the evaluation that circumvention has been an increasing problem, and hence it must be considered that anti-circumvention measures in their current form are effective, the demand for stronger anti-circumvention measures appears premature. It would have to be reconsidered, however, if following the implementation of more thorough monitoring mechanisms it was found that circumvention was significantly more prevalent than is apparent based on the number of anti-circumvention cases.

Refund reviews

Given the close similarity of refund reviews with other types of reviews in substantive terms, it should also be treated equivalently in procedural terms. This particularly relates to the guarantee of rights of defence. These are at present not ensured, simply because no information about refund investigations – neither the initiation nor the outcome is published. Therefore, it is recommended that notices regarding refund reviews be published in the *Official Journal* in the same manner as other reviews.

6 EVALUATION SUMMARY AND RECOMMENDATIONS

In the preceding chapters, the EU's trade defence policy and practice was reviewed in detail in light of the economic, legal and international comparative analyses. This chapter first assesses, in section 6.1, EU policy and practice against the specific evaluation questions established for the evaluation report in section 1.4.2. Second, it summarises and integrates the specific policy conclusions and recommendations flowing from this review (section 6.2).

6.1 Evaluation of EU TDI Policy

6.1.1 Contribution to Increased Competitiveness and Welfare

EQ1: To what extent do TDI as applied by the European Commission contribute to DG Trade's mission, i.e. increase competitiveness and welfare?

The two main judgement criteria for this evaluation question are the net economic cost or benefit in terms of competitiveness as well as the net impact on welfare. These issues have been analysed in depth in chapter 2. To answer the first evaluation question, the findings regarding the impacts of TDI on economic welfare and competitiveness are first briefly reviewed in theoretical terms: the welfare effects in a conventional static sense in section 6.1.1.1; the dynamic efficiency impacts in section 6.1.1.2; and the systemic effects in section 6.1.1.3. Since the immediately observed impacts of TDI are indistinguishable from ordinary trade protection, assessment of the welfare and competitiveness effects of TDI depends crucially on whether or not the pricing practices of foreign firms or the subsidies provided by foreign governments that are targeted are indeed anti-competitive or market-distorting, or entail excessive adjustment costs. Since TD measures do not include motive tests, the *de facto* purpose for which the EU used TDI in the evaluation period is inferred from the pattern of its use. The results are summarised in section 6.1.1.4. The level of protection afforded by the EU to protected industries in the evaluation period is reviewed in section 6.1.1.5 while the competitiveness impacts of TDI on EU protected sectors in cases initiated in the review period are summarised in section 6.1.1.6. Finally, the impact of TDI on the overall competitiveness of the EU economy, as practiced in the evaluation period, is reviewed in section 6.1.1.7 in view of the emergence of globally fragmented production systems. Section 6.1.1.8 sums up the evidence.

6.1.1.1 Welfare impacts as conventionally analysed

Conventional theoretical measures of welfare impacts are based on surplus analysis in a market equilibrium context. Domestic economic welfare is equal to the sum of consumer and producer surplus, less net government revenue. In the economic literature, a consumer surplus standard in the domestic economy of the country that is importing dumped or subsidised goods has largely predominated (usually in the form of a refined version of consumer surplus, namely equivalent variation). Given this standard, the literature cannot fail but find welfare costs from TDI.

Broadening the perspective to consider welfare impacts from a global perspective, it can be shown that the negative global welfare impacts from application of TDI are, excluding for the moment dynamic effects, much smaller than the impacts in the country applying the measure. The lower prices in the destination market that result from exporters' decisions to price discriminate or from the pass-through of a foreign government subsidy generate consumer

welfare gains in the destination market (and tariff revenues, if a tariff normally applies) that typically substantially exceed the domestic producer welfare losses. However, these gains represent transfers from the exporting countries. Globally, the welfare effects largely net out. This is consistent with the general conclusion regarding price discrimination in a domestic market context; dumping or subsidisation can be seen as generally benign and essentially neutral from a global welfare perspective. By the same token, where there is injury to domestic producers and to domestic factor incomes due to international factor market rigidities, countering dumping or subsidisation with TDI redirects the welfare transfers to the destination country implicit in dumped or subsidised prices from consumers to governments, at some benefit to domestic producers and domestic workers; the latter benefits will in some instances outweigh any losses of domestic consumer welfare; the global welfare effects however remain small reflecting the fact that the main impact of TDI is to reallocate welfare gains and losses across the trading system.

Taking into account trade diversion and trade deflection serves to emphasise that the main impact of TDI is a reshuffling of global trade and production to a very modest extent with limited negative impacts on overall welfare.

To the extent that TDI can be considered a correction to a genuinely harmful practice, the global welfare perspective is reversed: in this instance, treating the pre-dumping or pre-subsidy state as the equilibrium can result in a globally negative welfare impact from dumping or subsidisation and the impact of TDI as a correction is therefore globally welfare improving. Moreover, if the welfare impact in the EU is assessed not against the low prices that are observed during the period of dumping or subsidisation but against the longer-term higher prices that would follow the reduction of EU capacity due to the injury, the welfare impact in the EU would likely be seen to be positive.

6.1.1.2 Dynamic impacts

The dynamic behavioural effects on firms in the shadow of TDI are heterogeneous with some aspects of firms' behaviour consistent with taking advantage of protection, other aspects consistent with preparing for the imminent removal of protection, and still other aspects reflecting the uncertainty element introduced by the contingent nature of TDI protection. In particular:

- Protected firms take advantage of protection to increase mark-ups.
- Protected firms are less likely to exit the industry, slowing the pace of reallocation of market share to higher productivity firms, as per the core heterogeneous firm trade theory. At the same time, protected firms also undertake investments which serve to improve their productivity on average, although this reflects gains among lower-productivity firms and some decline in productivity of high productivity firms.
- In the face of competition from low-wage countries, firms in high-wage countries shift production to goods that do not compete head-to-head with low-wage imports; since firms' response to TDI is partly conditioned by the anticipated termination of protection, it is likely that they also move in this direction during the period of protection.
- The uncertainty associated with the contingent nature of TDI protection adds to the fixed costs that firms face in their decision of whether to take advantage of international markets, either as exporters or to source intermediate inputs.

The mixed nature of these effects can be reconciled by recognising that firms respond to both features of TDI – the fact that TDI provides trade protection and the fact that it is temporary, implying the rational expectation of a future loss of protection. The fact that firms undertake productivity-enhancing investment in the shadow of TDI protection is more plausibly explained

by anticipation of future withdrawal of protection than by hope of capitalising on a temporary expansion of the domestic market (an expansion that could be quite modest given the potential for trade diversion effects that result in a shift of import sourcing to non-named countries).

As regards the reallocation of market share to low-productivity firms, the analysis in this evaluation report draws a distinction of considerable importance for dynamic analysis that has not yet been addressed in the currently available studies on TDI. The literature on capital investment documents that young firms investing heavily in new technology and still gaining experience with the new technology are less profitable than mature firms that are investing less but are extracting returns from their prior investments and "experience" capital. Whether TDI is predominantly preventing an efficiency-enhancing reallocation of market shares from (statically) low productivity firms (e.g., old firms with old technology on the exit ramp) to (statically) high productivity firms and thus generating dynamic welfare costs, or is providing a window for young firms investing intensively to gain experience and thus generating dynamic welfare benefits, is unclear on a priori grounds. By the same token, the welfare costs associated with short-run postponement of exit by (some) low productivity firms that actually are candidates for exit may be offset by the welfare gains from the renewal of the industry by the enhanced growth of (other) low productivity firms, possibly young and heavily investing firms, that use the breathing space to gear up for the future removal of protection.

As regards the dynamic effects of TDI, the analysis suggests that the market-share reallocation to lower productivity firms identified in the literature needs to be re-examined in terms of the age and investment rates of those firms and the strategic behaviour of industries. An independent firm-level analysis to examine this question could not be undertaken within the time and resource constraints of the present project. Accordingly, only a provisional conclusion is possible here, namely that TDI deployed to protect industries that feature many young firms and in which the pace of process innovation is rapid will likely have more positive welfare effects than otherwise.

The importance of the temporary nature of TDI, which provides protection immediately but promises trade liberalisation upon expiry, is also highlighted as it implies a heterogeneous response of firms to TDI protection, with firms responding to the trade liberalisation implied by the sunset clause as well as to the interim protection. TDI is not ordinary protection; it is both contingent and temporary. Emphasis on these features both in policy communication and practice improves the likelihood that TDI will be welfare enhancing.

6.1.1.3 Systemic impacts

TDI also has several systemic effects that need to be weighed in the balance in considering its overall impact. These include the uncertainty about its impact in a world of globally distributed value chains (conclusions and recommendations in respect of which are dealt with below), the welfare costs associated with the write-off of assets associated with the sunk costs of market entry when firms re-arrange their global market presence because of often prohibitive TDI duties, the "chilling" effect that TDI in general has on firms' participation in international markets, both as importers of intermediate inputs and as exporters, with deleterious effects for their longer-term productivity and innovation performance, and the possibility that TDI may at times enhance the scope for anti-competitive collusive practices by domestic firms.

Given the uncertain welfare and dynamic efficiency effects, the presence of negative systemic effects, together with the administrative costs of applying TDI, generate an onus on actual TDI use to generate net significant benefits through judicious application.

6.1.1.4 How the EU uses TDI: Welfare and Competitiveness Implications

TDI have been argued to fulfil various roles:

- As an international trade analogue for domestic competition policy.
- As a macroeconomic buffer.
- As a tool of industrial policy.
- As a retaliatory mechanism to protect domestic exporter interests.
- As the policy tool of choice to deliver insurance against excessive trade pressures.
- As protection for vulnerable communities from disruptive change emanating from the trading system.

Most of these motivations can be read, at least in some cases, into the EU's use of TDI in the evaluation period. At least one case in the evaluation period and possibly several others appear to be plausible instances where the stated policy rationale of countering anti-competitive practices of foreign firms could be invoked. There is also some weak evidence that the EU used TDI to buffer cyclical downturns; that the EU's discretion in applying TD measures is more likely to be exercised in cases where complaining industries have stronger revealed comparative advantage, suggesting the influence of industrial policy considerations; and that the EU's use of TDI was at least justified if not necessarily motivated by communitarian welfare considerations in at least a handful of cases. While there is evidence for apparent isolated cases of retaliation against the EU for using TDI, the evidence does not suggest that the EU's use of TDI in the evaluation period involved strategic retaliation. In other words, while there is at least anecdotal evidence that the EU was the victim of retaliation, there was no evidence that the EU itself initiated TD cases to retaliate against trading partners.

The most important role of the EU's TDI appears to have been in fulfilment of its insurance role in enabling the EU to make major liberalising commitments such as the integration of the major emerging markets into the global division of labour. This perspective on TDI provides a coherent explanation of government policies that drive towards a more liberalised trading regime with the simultaneous occasional recourse to protection and is consistent with the documented linkages to TDI in liberalisation agreements and with the broad pattern of use of TDI. The fact that trade defence is the instrument of choice to give effect to this insurance role, rather than the formally proposed instruments (safeguards or Article 28 renegotiation of commitments), appears to reflect the design of the instruments but does not for the most part detract from the force of the argument.

By the same token, this conclusion also emphasises that contingent protection under the WTO rules is not well framed, leaving it poorly understood and thus open to widespread criticism, susceptible to inefficient application by administering authorities, and open to potential abuse by rent-seeking industries. While there are relevant policy implications for the EU's use of TDI, the main message concerns the need for WTO reforms in this area that (a) encompass TDI, safeguards (including special safeguards such as negotiated in the context of China's accession to the WTO), and the Article XXVIII renegotiation provisions; and (b) revisit, critically, the effectiveness of substitution of poorly framed legal instruments for the diplomatic measures in use in the pre-WTO era to deal with excessive adjustment pressure flowing from rapid change in the trading system.

6.1.1.5 The Level of Protection Provided by the EU's use of TDI

The frequency of resort to TDI by the EU can be characterised as very restrained (or alternatively as reflecting high costs of access to the system), given that the underlying conditions that allow

the implementation of TDI are likely to be ubiquitous in the global economy. The 78 investigations launched in the evaluation period represent a small fraction of the potential number of TD cases, and the trade flows affected by implemented measures represent only a small fraction of EU imports (about 0.6%). By these measures, the overall commercial significance of TDI is limited.

The level of protection that the EU provides is moderate in international comparison. AD duties applied by the EU in the evaluation period, as reported in the World Bank's global dataset, ranged from 5.4% to 90.6% with a simple average of about 33%. AS duties for which data were provided ranged from 4.3% to 53.1% with a simple average of 22.7%. By comparison, the EU's average applied MFN duty in 2011 was 6.4%. Comparing the EU and US duties on a same-sector basis shows that the US duties were three times as high as those of the EU on average. The lesser duty rule contributed to moderate the impact of EU TDI: lesser duties were applied in 26 of the 47 or 55% of the AD cases for which information is available. The average reduction in the evaluation period was about 9.3 percentage points, resulting in duties 28% lower than they otherwise would have been.

As of 31 December 2010, the average duration of measures in force was 6.8 years, 36% longer than the five-year period envisaged by the sunset provisions in EU TDI law; moreover 19% of the measures were in place for 10 to 15 years and another 9% of measures were in place for 15 or more years. Accordingly almost one-third of in-force measures have acquired an institutionalised protective character that suggests negative welfare and efficiency effects.

From the perspective of industry, the utility of the TD system is reduced by the fact that procedures take time to have effect (on average, the elapsed time from onset of injury to implementation of measures amounts to almost 2.5 years), by the cost burden on complainants, the growing threat of retaliation, and a perceived growing problem of circumvention of measures.

However, the available evidence from firm-level studies shows that price-cost mark-ups in protected sectors rise from below the level of control sectors to above the level of control sectors in the shadow of protection and that profitability of firms rises significantly. The overall conclusion is that EU TDI is effective in providing protection and that the protection is moderately greater than necessary to offset injury, notwithstanding the application of the lesser duty rule.

6.1.1.6 Competitiveness impacts on protected sectors

The analysis conducted in the present evaluation suggests that TDI protection tends to be provided mainly on behalf of sectors experiencing declining revealed comparative advantage. While the evidence suggests that TDI reduce imports in protected sectors and allow firms to enjoy stronger returns, the evidence also points to reduced exports. On balance, there is no significant evidence that TDI helps protected industries to reverse the declines in international competitiveness that may have triggered the application for protection in the first place.

6.1.1.7 Competitiveness impacts on the EU economy

The use of TDI is increasingly problematic with the trend towards a fragmented global or "made in the world" production system. Actual TD measures, which disproportionately tend to target industrial inputs, risk causing inadvertent damage to a country's own upstream and downstream production interests; moreover, the risk factor that TD measures might at some point be

imposed creates uncertainty that can affect firms' preparedness to enter into longer-term contracts and even their decision to engage international markets as exporters or importers of intermediate goods, to their detriment in terms of productivity and innovation performance.

While the measurement of global value chains is in its early days, some general perspectives can be provided on the basis of available survey data.

- Over two-fifths of EU firms' international sourcing is on an intra-EU basis, a reflection of the opportunities for external sourcing offered by the large, heterogeneous EU internal market.
- About four-fifths in total is directed to the combination of EU countries, non-EU European countries, Canada and the USA; in international sourcing, north-north trade dominates.
- Much of the sourcing involves business services, not goods.
- Much of the sourcing is on an intra-firm basis: close to 70% of all enterprises surveyed that outsourced internationally did so within their enterprise group. By the same token, these trade flows are not contestable in the market and so changes in the volume or pricing of flows do not affect sales by domestic firms competing in these sectors and so would not tend to trigger complaints.

Accordingly, the EU's use of TDI, which predominantly affects arm's length, north-south trade in goods, represents a relatively minor factor in the evolution of global value chains in which EU firms participate, notwithstanding that over half of the EU's exports and imports consist of intermediate goods and services. However, insofar as firms that are engaged in international sourcing, which empirical evidence suggests tend to be large, highly productive firms, with some market power, are impacted by TDI, it is reasonable to conclude that in most cases these firms will have the resources to evaluate the implications and to defend their interests or to absorb cost increases from TDI duties on inputs into their own products, where these comprise only a small share of the their total intermediate inputs.

Based on the above general considerations, there are good reasons to believe that, if TDI were likely to disrupt value chains in which EU firms participate, the TDI authorities would hear about it and would be able to address the concerns in the context of a public interest inquiry. Several cases in the evaluation period raised value chain issues allowing the Commission to directly evaluate the implications. In two cases, however, both involving highly fragmented domestic industries and many importers, problems were encountered. TDI inadvertently disrupted supplier relationships in one case where switching is not costless due to the need to ensure regulatory and quality compliance of inputs. In another, TDI impacted on several EU firms that had off-shored the final assembly stage of their production chain while retaining the majority of the value-added in the EU. The latter case highlights an important basic design flaw in TDI when used in the modern era: it systematically favours firms that might outsource their intermediate inputs over firms that outsource the final stage of manufacturing, without regard to the EU value-added in the two business strategies.

6.1.1.8 Summary of Welfare and Competitiveness Impacts of TDI

Taking into account these various considerations, the EU's TD practice as instantiated in specific cases in the evaluation period, and considered in isolation of TDI's systemic policy role, was largely neutral in a global welfare analysis, moderately negative in a domestic EU static analysis with the domestic welfare costs mitigated to differing degrees across individual cases when valid competition policy or communitarian welfare impacts are taken into account. The dynamic efficiency effects remain unclear and require further study. The systemic effects are generally negative; accordingly strong welfare or efficiency gains are required when TDI is used to

compensate. While the EU's use of TDI is not generally consistent with its stated rationale, the *de facto* role of TDI in an essential insurance policy role, in place of ineffective instruments designed for that purpose arguably provide the gains that square these accounts.

The level of protection afforded to successful petitioners is moderately more than adequate to offset injury, notwithstanding the operation of the lesser duty rule and concerns about leakage of protection due to circumvention. In other respects, however, the slow and costly nature of the system makes it less attractive a tool for EU industry.

The participation of EU firms in global production networks is structured such that TDI is not likely to be an important factor; however, in some cases TDI use can, and indeed in some cases in the evaluation period (*Polyester staple fibres* and *Footwear with uppers of leather*, as discussed in section 2.3.4) did, lead to problems.

On balance, in a larger policy framework, in which it is recognised that trade liberalisation is facilitated by contingent protection in the realistic context where governments lack full knowledge of future impacts of liberalisation and in which appropriate insurance markets do not exist, the EU's TDI use in the evaluation period can be shown to be welfare enhancing (and by extension competitiveness-enhancing, given the importance of an open trading regime to domestic competitiveness). At the same time, it is not appropriately designed for the actual function it fulfils; moreover, basic design features make it increasingly inappropriate for the emerging world of globally fragmented production systems.

6.1.2 Implications for EU TDI Policy and Practice of Recent Developments in the International Environment

EQ2: To what extent does the use of TDI adequately respond to the international environment and its recent developments?

The judgement criteria for the second evaluation question are:

- Is the range of factors that can induce dumping and/or subsidisation taken into account in deciding whether the effects are positive or negative;
- Is strategic behaviour of foreign firms and governments and transient impacts related to global volatility countered appropriately;
- Is EU firms' participation in global value chains taken into account in applying TDI;
- Is the dynamism of the EU market enhanced by improved market conditions; and
- Is the risk of retaliation addressed by measured and judicious use of TDI.

The economic analysis suggests that the underlying conditions that allow the implementation of TDI by the Commission are likely to be ubiquitous in the global economy. In particular:

- Firms that export tend to be larger and more profitable and likely to have some degree of market power. Since demand conditions in the highly open EU internal market are likely to be more competitive than in most partner countries, conventional supply-demand analysis suggests exporters will often set prices lower in the EU market than in the less competitive home market. Moreover, given significant costs of market entry and considerable volatility in the global economy in terms of demand and real exchange rate fluctuations, exporters are likely to remain in export markets which are temporarily unprofitable ("hysteresis") and are often likely to adopt "local market pricing" or "pricing to market" strategies to maintain their market share under volatile conditions. Empirical analysis suggests only about 50 to 60% of

real exchange rate changes are passed through to local economies and that the "law of one price" generally does not hold in the short and medium terms.

- Externalities, increasing returns, missing markets and other forms of "market failure" are ubiquitous; by the same token, government interventions in the form of specific assistance to particular activities, firms or industries aimed at addressing these market failures are equally widely to be found. Government subsidies to address these problems can be countervailed whether passed-through to prices or not (although upstream subsidies are subject to a pass-through test).
- Import surges are commonplace at the fine level of industry definition employed in TDI. Over the period 2001-2010, there were on average about 250 or so "surges" per year at the 6-digit level of trade, in terms of import growth of 50% or more in one year into the EU, and over 75 cases a year of import growth of 100% or greater. Limiting the counts to trade flows which reached at least EUR 1 million at any time during the period cuts these figures only by half. During the evaluation period (2005-2010), some 893 import flows into the EU at this level of aggregation in product categories that reached at least EUR 1 million during the period and that exceeded 50% growth on a year-over-year basis were recorded.
- The industrial organisation literature demonstrates that there is constant "churn" in the composition of an industry, with firm "death" or exit being a common feature. Some firms or plants are always on the "exit ramp" with it being only a matter of time as to when exit actually takes place.

In short, firm pricing practices and government policy interventions that are liable to trigger TDI are commonplace, import surges are frequent, and firms are constantly exiting providing evidence for injury.

Within this broad landscape of firm-level and governmental behaviour are undoubtedly some instances of aggressive predatory or longer-term rent-shifting intent by either foreign exporters or foreign governments; however, the absence of a motive test for dumping and a pass-through test for direct subsidies means that TD practice does not examine this question, notwithstanding that the welfare and efficiency effects depend crucially on the nature of the practices being countered. The injury test may work to limit application of TD measures to actually harmful cases but there is no guarantee, given the difficulty of establishing causality.

As discussed in the comment on evaluation question 1, the construction of TDI was not designed for a global value chains world. What matters for the EU in a value-chain world is its share (and quality) of the value-added in a product, not whether the final stage of production is in the EU; TDI is designed to protect the last stage of value creation, not the whole chain. EU firms that choose to outsource intermediates can be protected by TDI against EU firms that outsource the final stage of transformation, even though the latter may add more value to the EU economy. TDI has no metrics at the moment to address this.

However, while the measurement of global value chains is in its early days, the available information suggests that the vast majority of EU firms' global value chain operations is unlikely to be affected by TDI. That being said, in some instances in the evaluation period, TDI did impact negatively in this regard. Importantly, the public interest test provides the EU with the necessary flexibility to address value chain issues.

The impact of TDI on the dynamic efficiency of industries is unclear. The analysis suggests that the market-share reallocation to lower productivity firms identified in the literature needs to be re-examined in terms of the age and investment rates of those firms and the strategic behaviour of industries. The importance of the temporary nature of TDI, which provides protection

immediately but promises trade liberalisation upon expiry, is also highlighted as it implies a heterogeneous response of firms to TDI protection, with firms responding to the trade liberalisation implied by the sunset clause as well as to the interim protection. The long-term protection provided by EU TDI in about one-third of all cases with in-force measures suggests EU TDI use is sub-optimal from this perspective.

The risk of retaliation has been actuated on at least a few occasions. Firms have at times asked for anonymity in their participation for fear of retaliation. And the expansion of international production sharing puts firms increasingly at risk of being held hostage by their investments abroad. All these considerations point to TDI being an increasingly less useful tool to deal with trade pressures. For the EU, the concentration of TD measures against China, which has made overt use of retaliation, means that it is not skirting but courting retaliation. The elimination of the flexible diplomatic measures in the Uruguay Round, in favour of the transparent but rigid legal instruments, may be seen at the present time, in the present context, to have been an unfortunate over-reach.

In short, TDI is not well-designed for the *de facto* role that it serves today. It requires skilful use by the Commission, with expanded use of the public interest test to address the likely growing value chain issues, in order for it to serve the EU economy well in the coming years.

6.1.3 Impact of EU TDI on EU Producer Profits

EQ3: To what extent do TDI restore profits of EU producers competing with dumped or subsidised imports from third countries?

This evaluation question further investigates the impact of TDI on EU producers. It is therefore closely linked to the first evaluation question on the impact of TDI on competitiveness. Nevertheless, whereas the first question refers to competitiveness at the macroeconomic level, evaluation question 3 refers to the firm-level. The judgement criterion accordingly was: what were the short- and long-term effects of AD and AS instruments on EU producers' competitiveness, growth and jobs, as measured by the market share, profits, investment (incl. new firm entry), new product introductions into export markets, and employment in Union industries affected by dumped or subsidised imports?

The firm-level evidence on mark-ups of firms in the shadow of TDI protection is limited. The available evidence suggests the following:

- industries applying for protection had below average mark-ups prior to protection;
- protection allowed them to increase mark-ups;
- the increase more than compensated for the under-performance in the pre-protection period compared to peer industries; and
- the higher mark-ups persisted after protection was terminated.

Additional firm-level evidence suggests that firm exit rates are reduced in protected industries relative to comparable industries that did not receive protection.

The combined evidence suggests that protection administered is on the whole moderately greater than required to offset injury, notwithstanding the application of the lesser duty rule.

6.1.4 Impact of TDI on Restoration of Competition in the EU

EQ4: To what extent do TDI restore competitive conditions in the EU market which are distorted by anti-competitive behaviour, i.e. subsidised or dumped imports

This evaluation question pre-supposes that the pricing practices of firms and the industrial interventions of foreign governments are anticompetitive in nature. As discussed, the absence of a motive test for firm behaviour and the absence of a pass-through analysis for government support leave in doubt the nature of the practices countered.

In any event, it is not necessary in an international trade context for a pricing practice that is benign domestically to cause welfare costs when applied internationally. It has long been recognised by economists that the "predatory" label for practices that might generate negative welfare impacts in a trade context was too extreme.

As a practical matter, only a relatively small number of cases were identified in the evaluation period where anticompetitive behaviour seemed plausible based on industry characteristics. Accordingly, for the most part, TDI as practiced by the EU does not work to restore competitive conditions in the EU market that have been distorted by anti-competitive behaviour.

A second lens through which this issue can be viewed is to ask whether TDI restores pre-dumping/pre-subsidy trade conditions. A qualitative evaluation of the effect of TDI on trade flows would suggest that measures are often highly disruptive, leading to major redirection of trade flows with collateral impacts (trade diversion and deflection) on a network of global markets that are linked in one way or another to the bilateral flow directly affected. Accordingly, conditions cannot be typically said to be "restored"; a new trade structure emerges.

The new trade structure that emerges in the shadow of TDI and that persists following expiry of TDI appears to be consistent with improved profitability of EU firms on average. However, this average masks a high degree of heterogeneity of experience of individual sectors. In some cases, for example, measures are rescinded because the protected firms have exited the industry. In other cases, mark-ups are increased beyond levels witnessed in other industries. And in some instances, anticompetitive collusive behaviour on the part of the protected EU industry has been observed.

Accordingly, seen as a competition policy instrument, TDI cannot be described as effective.

6.1.5 Appropriateness of EU Policy Decisions Regarding TDI

EQ5: Do European Union policy decisions regarding TDI contribute to the achievement of TDI objectives?

The main policy decision at the European Union level in respect of TDI is to implement trade defence laws consistent with WTO obligations. As discussed below, this is a critical feature of the overall evaluation of the effect of TDI.

Once implemented, these laws do allow for self-initiated investigations by the European Commission and thus for "policy activism"; however, cases are rarely if ever self-initiated. Accordingly, the main determinant of application of EU trade defence laws is whether domestic industry makes a complaint.

The actual findings in an investigation (i.e., whether there is dumping, subsidisation and injury that can be attributed to the dumping and/or subsidisation) are largely fact-driven; the main policy element is the extent to which marginal complaints are encouraged or discouraged in the interaction between the European Commission and the applicants and the extent to which judgement applied is lenient or strict towards finding injury or causality. Because applications for TDI are kept confidential prior to an initiation of an investigation in order not to disrupt markets, there is no systematic comparative evidence on the extent to which the European Commission encourages or discourages marginal cases compared to other jurisdictions. For the same reason, given the unobserved selection effect at the initiation phase, there is no systematic evidence concerning the extent to which injury and causality are found relative to the full universe of cases where industry initiates a complaint process.

Finally, the decision to implement measures, including the application of the Union interest test and the lesser duty rule, are important policy decisions that impact on the Commission's mission.

In terms of systematic evidence concerning the effectiveness of EU decision-making, the study demonstrates that industries that seek protection feature considerable dispersion in terms of their evolving pattern of comparative advantage/disadvantage. However, industries that succeed in receiving protection tend to have stronger performance and thus greater future prospects. Thus there does appear to be some *prima facie* support for the conclusion that the decisions of the EU overall contribute to the EU policy objectives.

However, the fact that trade defence laws are not well designed for the modern globalising economy means that individual decisions may have inadvertently hurt EU interests as noted above.

6.1.6 Efficiency of TDI Implementation

EQ6: To what extent are anti-dumping and anti-subsidy investigations undertaken efficiently?

The assessment of the efficiency of EU TD investigations is based on the following judgement criteria and indicators:

- Duration of investigations, as measured by the time required to take provisional and definitive measures where dumping/subsidisation and injury are found;
- Cost of investigations, as measured by the resource requirements both for the Commission in administering the system and for interested parties in using the system and complying with investigations;
- Consistency and coherence of investigations, as measured by the consistency of methods and decisions applied over time, provided that conditions are comparable (coherence);
- Transparency of investigations, as measured by both the transparency of procedures and of the application of rules;
- Acceptance of measures, as measured by the number of court cases and disputes at WTO DSB.

6.1.6.1 Duration of investigations

By law, EU AD and AS investigations must be completed within 15 months, respectively 13 months, at a maximum. In practice, definitive measures are almost always imposed at the very

end of the legally allowed period: The average duration from initiation until provisional measures are imposed is 8.9 months; for definitive measures the duration is 14.8 months in AD cases and 12.8 months in AS cases. Furthermore, the average time required in the period 2005-2010 was longer than in the preceding five-year period.

The EU clearly belongs in the group of WTO members that are guided by the deadlines for investigations established in the WTO agreements. What is more, it takes substantially longer to impose provisional measures than in any of the peer countries except for China.

There was consensus among all consulted stakeholders that the duration of investigations at present is too long. Also, in international perspective, EU AD and AS investigations periods are substantially longer than in Australia, Canada and New Zealand, all of which normally complete investigations, and impose definitive measures, in seven months or less.

Although it is clear that EU TD practice does not provide as quick relief to the domestic industry as other economies' systems where such relief is vindicated, there are some mitigating considerations. First, the complexity of EU investigations is higher due to the regular application of the lesser duty rule and the Union interest test. Second, decision making procedures in the EU are more complex, given the involvement of 27 Member States. Therefore, a direct comparison of the investigation durations would not be entirely fair. On the other hand, the major part of the difference in duration lies not in the more complex final phase of the EU process but in the period from initiation to the decision on provisional duties; in Canada, for example, the decision on provisional measures is required by law to be reached in 90 days, 135 days in complex cases, whereas in the EU it can run from 60 days to nine months, and the evidence shows that it normally takes almost the full nine months.[877]

6.1.6.2 Cost of investigations

The cost of implementing TDI for the Union institutions are reasonable when compared to peer countries, especially when taking into account the level of detail of investigations. Based on comparisons of human resource requirements for investigations, the number of staff in the Trade Defence Directorate of DG Trade per number of investigations initiated per year is approximately 12. This compares to figures among the group of peer countries ranging from less than one staff per investigation in India to 24 in the USA, the most directly comparable peer country in terms of size and complexity of the economy, income levels, and caseload.

The costs of EU TDI proceedings for interested parties are also average by international comparison. The average cost for preparing and lodging a complaint is approx. EUR 60,000, although it may range to more than EUR 200,000. Total average costs for the participation in a TDI proceeding was reported to be slightly above EUR 200,000. These costs are lower than available estimates for other comparable countries: in Canada, costs for participating in an investigation reportedly range from EUR 72,000 to 360,000, or in the USA, where the cost of an investigation for a complainant can easily be in the range of EUR 0.7-1.1 million.

In sum, therefore, the evaluation team considers that the resource requirements for EU TDI are moderate for both institutions and interested parties, especially when the scope of the investigations (i.e. Union interest test, lesser duty rule) and the necessarily complex decision-

[877] Of course, the staff per case is higher in Canada than in teh EU (see secion 5.2.5). However, New Zealand and Australia complete the negotiations in a similar period with lower staff per case.

making structures of the EU (i.e. the involvement of both the Commission and Member States) are taken into account.

6.1.6.3 Consistency and coherence of investigations

An overall evaluation of the consistency and coherence of AD and AS investigations is complicated by a number of factors. First, investigations involve many steps, each of which requires different types of analyses and methodologies. Second, cases are highly diverse in terms of the number of interested parties (Union producers, exporters, importers, downstream users), the range of products that are addressed in the investigation, the complexity of the products, the characteristics of the industry (including increasingly the global business strategies of firms), and the economic context in which the complaints are put forward (including secular trends affecting the industry, business cycles, exchange rate volatility, technological disruptions and so forth). Third, and perhaps most importantly, there are no heuristic models to integrate the inherently heterogeneous information generated in the course of an investigation into a decision – TDI authorities necessarily exercise judgement, including regarding choice of methodologies and procedures.

Keeping this *caveat* in mind, the general conclusion from the detailed assessment presented in chapter 5 is that the Commission has usefully established normal practice for most if not all of the aspects of AD and AS investigations that generally lend themselves to standardisation. However, the standard rules were not always applied, and where they were not, the facts and reasoning underpinning the decision were not always provided, detracting from the transparency of the EU process and opening it up to criticism of politicisation and protectionism. A number of such areas were identified in the analysis of the individual aspects of EU TD practice; examples include the construction of export prices and the definition of the target profit margin in the duty calculation.

This state of affairs can partly be explained by the fact that, until recently, different case handlers indeed applied slightly different methods based on their own personal experiences and research tools. However, a further, and eminently rectifiable, factor is the lack of a consolidated statement of administrative practice and/or a handbook for case handlers. To be sure, there is a vast number of "policy notes" on various aspects of investigations; however, their dispersed nature as well as uncertainties about their status (e.g. whether they are still applicable or have been superseded by subsequent practice) compromise their effectiveness as guidelines for investigators.

Finally, internal quality control of investigation outputs could be improved: clerical mistakes have been found in a number of cases.

One consequence of the less-than-optimal degree of coherence and consistency is reduced predictability about likely investigation outcomes and thus an increased degree of legal uncertainty amongst all interested parties.[878] This, coupled with the comparatively long duration of investigations, negatively impacts on the legitimacy of the instruments as such.

According to interviews with DG Trade staff, the above-mentioned factors that detract from the consistency and coherence are recognised and are being addressed. Since 2008, DG Trade has been implementing a Total Quality Management (TQM) programme in order to address, *inter alia*, the above identified shortcomings. Indeed, consistency of analysis is one of the four areas of the

[878] To be sure, a certain lack of predictability is inherent in TD cases, but it should be kept to the minimum.

programme. As part of this exercise, since 2010, 21 projects were (or are still in the process of being) implemented. Important components of the TQM programme related to coherence and consistency are:

- Development of standardised questionnaires for different interested parties;
- Development of automated dumping margin calculation, in a system called OASYS, based on the standardised questionnaires; and
- Improved internal quality control of investigations, with validation teams checking calculations and consistency teams checking the coherence of findings.

Last but not least, a consultant has been contracted to harmonise and consolidate the various policy notes, with the aim of developing a coherent policy handbook for case handlers, which is expected to be completed in the course of 2012. This important initiative is commended.

6.1.6.4 Transparency

The analysis in this evaluation report showed that, despite notable improvements achieved during the evaluation period, a certain lack of transparency both of the rules which guide investigations and of the application of these rules in investigations persists.

With regard to the transparency of rules, the lack of publicly available guidelines for the Commission' investigations is the key problem. However, the evaluation team notes that the Commission plans to publish in the course of 2012 on DG Trade's website a public version of the policy handbook which is currently being developed. Furthermore, the publication of questionnaires on the website is also planned. These will definitely constitute major improvements, assuming that the publicly available version of the handbook provides sufficient detail.

Regarding the transparency of proceedings, the evaluation team notes that there are inevitable constraints on transparency imposed by the imperative of protecting the business confidential information that constitutes the main raw material for decision-making. A priori, it is difficult to assess if the advantages of providing access to confidential files outweigh the risk of leakage of confidential information, as they will depend on the specific conditions under which such access is provided.

The evaluation team has analysed systems currently in place in Canada and the USA and concludes that these merit further in-depth analysis for potential adjustment and application in the EU. Furthermore, the evaluation team notes that an administrative protective order system such as the one in the USA is not the only instrument to provide access to confidential files. Another option could be to provide access to confidential information to the courts. Finally, as already envisaged by the Commission, the Hearing Officer could check, upon request by interested parties, that confidential information has been taken into account correctly by the Commission in the investigations.

6.1.6.5 Acceptance of measures

The acceptance of and compliance with investigation outcomes by stakeholders are indicators for the legitimacy of EU TDI decisions. Hence, the number of EU court cases against AD/AS decisions and the number of WTO disputes on AD/AS issues with the EU as respondent have been taken as indicators.

Over the evaluation period 35 EU court cases related to AD and AS instruments were decided (i.e. on average six cases per year). This is only a fraction of the number of TDI court cases in the USA, which has a similar number of AD and CV measures.

However, the number of cases decided per year has been steadily increasing over the period 2005 to 2010 (with the exception of a drop in 2007). What is more, cases have tended to become more complex and cover more legal issues. Hence, the total number of main legal issues addressed in the 35 cases reviewed amount to 82, i.e. an average of 2.3 per case. This ratio has increased from 1.0 in 2005 to 3.1 in 2010. The vast majority of cases is due to claims by exporters and importers; taken together they account for 89% of the cases.

The "success rate" of EU institutions in EU court cases, i.e. the share of claims dismissed by the European Courts, stands at 80.5% over the six-year period (66 out of 82 claims), with an increasing trend over time; in 2010 Court decisions, all claims were dismissed (i.e. the success rate was 100%). This figure shows that compliance of the EU institutions with the basic Regulations is very high and that the interpretation of the Regulations by the Commission during investigations and determination of measures is usually confirmed by the Courts to be in compliance with the spirit of the law.

In order to measure compliance of EU AD/AS decisions with WTO rules, the share of the EU as a respondent in WTO AD/AS disputes over the period 1995 to 2010 was compared with the EU's share in the global use of the two instruments.

For both instruments, EU involvement in disputes was lower than its share in measures (AD: 9.5% vs. 11.1%; AS: 12.6% vs. 17.5%), which indicates a better-than-average compliance with WTO AD rules. Nevertheless, in the most recent 5-year period (2005-2010) this long-term performance has been reversed both for the AD and AS instruments. This could merely reflect an increasingly adversarial international environment to the EU's trade policies. It might, however, also reflect an EU trend towards less compliance with WTO rules on AD and CV measures. In order to get some further insight on this question, the evaluation team analysed the issues addressed in those three WTO AD/AS disputes in which DSB reports were issued in the evaluation and the EU was a respondent. The three cases, brought forward by China, South Korea and Norway, addressed some 43 issues. For these, the EU's success rate (i.e. the share of complaints being rejected by the WTO DSB) was just over 50%. This is considerably lower than the success rate in EU court cases.

Overall, the degree of compliance of the EU's TD practice with the basic Regulations and WTO rules is satisfactory; the number of cases is comparatively low, and the EU's success rate high. At the same time, performance trends during the evaluation period (increased number of cases, rising number of issues disputed, and only an average success rate in WTO disputes) show that a certain degree of alertness is warranted.

It is understood that the Commission is well aware of these trends, and part of the objectives of the TQM programme is to ensure that TD practice is in line with the provisions of the basic Regulations and WTO rules. As was pointed out by a DG Trade staff member, the avoidance of court cases helps to save costs and to increase the efficiency of the system.

6.1.6.6 Summary

Summarising the judgement criteria and indicators selected for evaluation question 6, the evaluation team considers that AD and AS investigations are undertaken relatively efficiently,

although certain weaknesses exist. These are the length of investigations as well as the less-than-optimal degree of coherence, consistency and transparency.

The evaluation team observes that the Commission has already taken measures to address most of these issues, mostly as part of the TQM programme. The implementation of TQM projects is on-going, and their completion and outcomes remain to be seen. The recommendations made in the present evaluation report seek to reinforce the already existing processes of change in these regards.

6.1.7 Efficiency of TDI-Related Support to EU Stakeholders

EQ7: Is efficient and effective support provided to the interested parties in relation to TDI?

The summary assessment of the EU's support to interested parties is based on the following judgement criteria and indicators:

- Active use of support by Union industry without artificially increasing the number of complaints;
- Availability of support to, and use by, non-complaining interested parties;
- Financial, resource and time costs of support;
- Use of TDI by SMEs; and
- "Success rate" of complaints made by SMEs.

Given the complexity of TDI proceedings, most interested parties resort to assistance from a variety of sources, including associations, trade lawyers, consultants, Member States and the Commission. The main instruments of support provided by the Commission are assistance provided by case handlers during proceedings, the DG Trade website on trade defence, the Hearing Officer and the helpdesk.

Of those respondents who have used external assistance in TD cases, only one in four used support provided by the Commission. However, this rate refers to EU firms, whose main role is to complete questionnaires; they rather resort to their associations. Interested parties directly involved in proceedings virtually always use some type of support provided by the Commission. By far the most important type of support is provided by DG Trade's trade defence staff, used by more than 80% of respondents. 50% of respondents used DG Trade's website. Only a minority resorted to the Hearing Officer (although this Officer's role has rapidly grown in importance) or the helpdesk.

Most respondents were satisfied with the quality of Commission support: 90% rated the quality of Commission support as excellent or good. However, only a minority of respondents thought that assistance was well targeted to the needs SMEs and other interested parties with limited experience in TDI.

In sum, the evaluation team concludes that Union industry as well as non-complaining interested parties actively use support provided by the Commission. No indication could be found that such support inflates the number of complaints. The Commission's costs for the provision of support were impossible to assess because most support is being provided not by the dedicated helpdesk but case handlers in the context of investigations.

No effect of the SME helpdesk on the use of TDI by SMEs could be found. So far, the helpdesk has not developed a clear profile and there is a clear lack of visibility.

In sum, in response to the evaluation question posed above, the evaluation team concludes that effective and efficient support is provided to those interested parties that are already knowledgeable about the system. To the contrary, support provided to inexperienced stakeholders has been limited. Keeping in mind that access to the AD/AS instrument is skewed in favour of concentrated and well organised industries, this finding raises some concerns about the equitable nature of TDI.

The conclusions of the evaluation team generally confirm the findings of the recent Study of the difficulties encountered by SMEs in Trade Defence Investigations and possible solutions (Gide Loyrette Nouel 2010), in response to which the Council Working Party on Trade Questions adopted an action plan to support SMEs.[879]

6.2 Main Recommendations

This section presents the evaluation team's major recommendations. These are grouped into five different categories. First, in view of the recent changes in global production structures, the evaluation team considers that certain changes to the characterisation of TDI's role as a policy instrument are appropriate (section 6.2.1); at the same time, most of the policy reforms implied by these issues would need to be addressed at the multilateral level, not by the EU unilaterally. Second and third, certain changes in EU trade defence policy (section 6.2.2) and practice (section 6.2.3) are recommended. Fourth, primarily based on EU court decisions and WTO disputes, but also the review of EU TD practice, a number of amendments to the two basic Regulations are proposed (section 6.2.4). Last but not least, the evaluation team has noted that the Commission is already in the process of change with regard to a number of issues also addressed in this report. The last group of recommendations aims at supporting and furthering these processes of change (section 6.2.5).

6.2.1 The Relevance of TDI

6.2.1.1 The Need for a Multilateral Approach

The evaluation team reached major conclusions in respect of the rationale for and the relevance of TDI. These conclusions relate to the nature of TDI and not to their implementation by the EU. As a result, most recommendations following from these conclusions would not have to be addressed by the EU (or any other WTO member) unilaterally but in the context of multilateral discussions and approaches, as unilateral approaches might introduce distortions into the international trading system and lead to unintended negative consequences.
The evaluation team is aware of the fact that the likelihood of a multilateral agreement on these issues (or even an agreement about the need to discuss these issues) is limited; nevertheless such discussion is considered desirable in order to ensure that TDI remain a relevant trade policy instrument in the medium and longer term.

The issues identified for such a multilateral approach include:

- The ***de facto* role of the AD instrument in particular as a substitute for grey area measures and safeguards**: The main benefits that can be attributed to TDI as practiced have been ascribed in the present evaluation report to its stand-in role for deficient trade

[879] Working Party on Trade Questions (2011). Paper on Actions to Address the Difficulties Encountered by SMEs Involved in Trade Defence Instruments. Brussels. Avalaible at: http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148004.pdf.

liberalisation insurance instruments (see section 2.2.6). While TD measures do address competition or level playing field concerns, the majority of TD measures do not protect EU producers against unfair trade practices as such but rather against import surges. It is important to recognise in this context that the Uruguay Round reforms, which abolished informal diplomatic tools to manage the kind of pressures posed by the integration of major emerging markets into the global division of labour, failed to replace them with effective formal tools. An improved safeguards instrument (or a new instrument) would be required which, given the analysis here, should be framed in insurance terms with no connotation of "unfairness" concerning the disruptive changes caused by trade liberalisation.

- The **treatment of NME countries**: Differences in treatment of NMEs across WTO members' AD systems introduce inconsistencies in the international trading system which should be avoided. A harmonisation of NME concepts at the multilateral level would therefore be desirable. Conceptual changes are likely to be required not least in response to the changes in status of China and Vietnam, two economies with significant NME characteristics which are often concerned by TD proceedings, in 2016 and 2019, respectively. In this context, the evaluation showed that flexible systems that do not rely on lists of countries established by regulation have not apparently impaired the application of NME status to countries/sectors where such treatment is warranted. These considerations suggest that a flexible system of NME treatment such as practiced in some peer countries could be more appropriate than the current system applied by the EU, in particular with regard to the lists of NMEs and the granting of country-wide MES. The practices of Australia, which has granted China MES and utilises the "particular market situation" provisions to address cases where domestic Chinese prices may be distorted, and Canada, which applies market treatment as the default but has used the latitude in its system to successfully apply non-market treatment where warranted, are worth examining as the EU considers its next steps.

- The **application and calculation of lesser duties**: The WTO ADA recognises the possibility that a lesser duty might suffice to remove injury but is silent on why that would be the case or how TDI authorities might evaluate this. Current international practice varies and is largely not grounded in economic theory (see section 4.6). The EU's consistent application of the lesser duty rule is however consonant with an understanding of TDI as a remedial instrument, and must therefore be considered best international practice. Still, the evidence adduced in this evaluation report concerning the higher profitability of EU firms in protected sectors than in comparable non-protected sectors indicates a trade deterrent effect of TDI that is stronger than required to simply offset injury, even with the application of lesser duties as presently calculated. Given the high proportion of cases which target industrial inputs, the further implication is that, even with the lesser duty rule, the costs imposed on downstream industries, including firms participating in global value chains, are somewhat greater than necessary (see section 2.3.4). Based on these findings it would be desirable if the WTO members, first, made the application of the lesser duty rule compulsory internationally and, second, agreed on certain minimum standards for the calculation of lesser duties.

- The **alignment of TDI with patterns of trade in global value chains**: TD measures, as presently designed, systematically favour domestic firms that outsource their intermediate inputs over firms that outsource the final stage of manufacturing, without regard to the domestic value-added in the two business strategies. In other words, TD measures are designed to protect the last stage of value creation, not the domestic contribution to the overall value of the good. Goods are increasingly "made in the world", but TDI has no metrics at the moment to address this. While in the EU the public interest test provides the

necessary flexibility to address value chain issues, a better – and internationally shared – conceptual integration of global value chain issues in TDI would be desirable.

- **Reflecting heterogeneous firm theory and empirics in TDI rules**: When the WTO ADA was developed the economics profession worked in terms of a "representative firm" model – in theory, industries were assumed to be homogenous in technology and thus in costs. Heterogeneous firm trade theory and empirics show that firms are highly skewed in terms of all performance factors. This is one area where TD practices have not kept up with the empirical evidence on firms in international trade. For example, the practice, in cases where sampling is used, of selecting the largest firms of the population, may distort the investigation findings if the characteristics of large firms are different from SMEs. While the economic impacts of TD measures have been addressed in a growing number of studies using firm-level data, a systematic assessment of the implications of firm heterogeneity for TDI rules and procedures (e.g., sampling methodologies), has not, to the knowledge of the evaluation team, been done. This is a major undertaking that should be done at the multilateral level.

- Finally, **policy coherence between industrial policy and trade defence**: Economic theory indicates that, if subsidies are structured to address local market failures, they are not market distorting. However, in current TD practice, all direct subsidies are assumed to pass-through entirely to export prices and thus to distort markets. Given the widespread reconsideration of industrial policies to address market failures and economic development needs, not only in developing but also developed countries, there is potential for increased frictions with trade defence. The evaluation team notes that one way to establish the basis for policy coherence between industrial policy and trade defence, and thus ultimately to buttress the legitimacy of TDI, would be to introduce a pass-through analysis into subsidy investigations. That the trade effects of a direct subsidy depend on whether the subsidy is passed through into export prices has been explicitly recognised in WTO dispute settlement proceedings (e.g., US-FSC and US-CDSOA). Moreover, the WTO ASCM already provides for pass-through analysis in respect of upstream subsidies. Accordingly, this step would introduce greater internal consistency of WTO rules while also providing for more discriminating application of TDI.

6.2.1.2 Development of an intervention logic for EU TDI

An officially-accepted intervention logic for the EU's use of AD and AS instruments does not currently exist. However, in communications materials, TDI is justified by the absence of a competition policy regime in the multilateral trading system and the divergence of conditions under which international trade takes place from the conditions prevailing in intra-EU commerce, where the "four freedoms" are ensured by the EU economic regulatory framework. The mission statement sets the overall objective for TDI policy to contribute to the competitiveness of EU industry and to the welfare of EU consumers.

Recommendation 1	See report section(s)
In order to provide better guidance for the implementation of EU TDI and in order to facilitate future evaluation of TDI, it is recommended that DG Trade's mission statement be complemented by an officially accepted intervention logic. The ideas presented below may serve as an input for the development of such intervention logic.	Section 1.4.1: Development of Intervention Logic

As summarised in section 6.1.1, the analysis in this evaluation report suggests that only in a limited number of instances would pricing practices of foreign firms targeted by TDI trigger responses by domestic competition authorities if used by domestic firms in internal commerce.

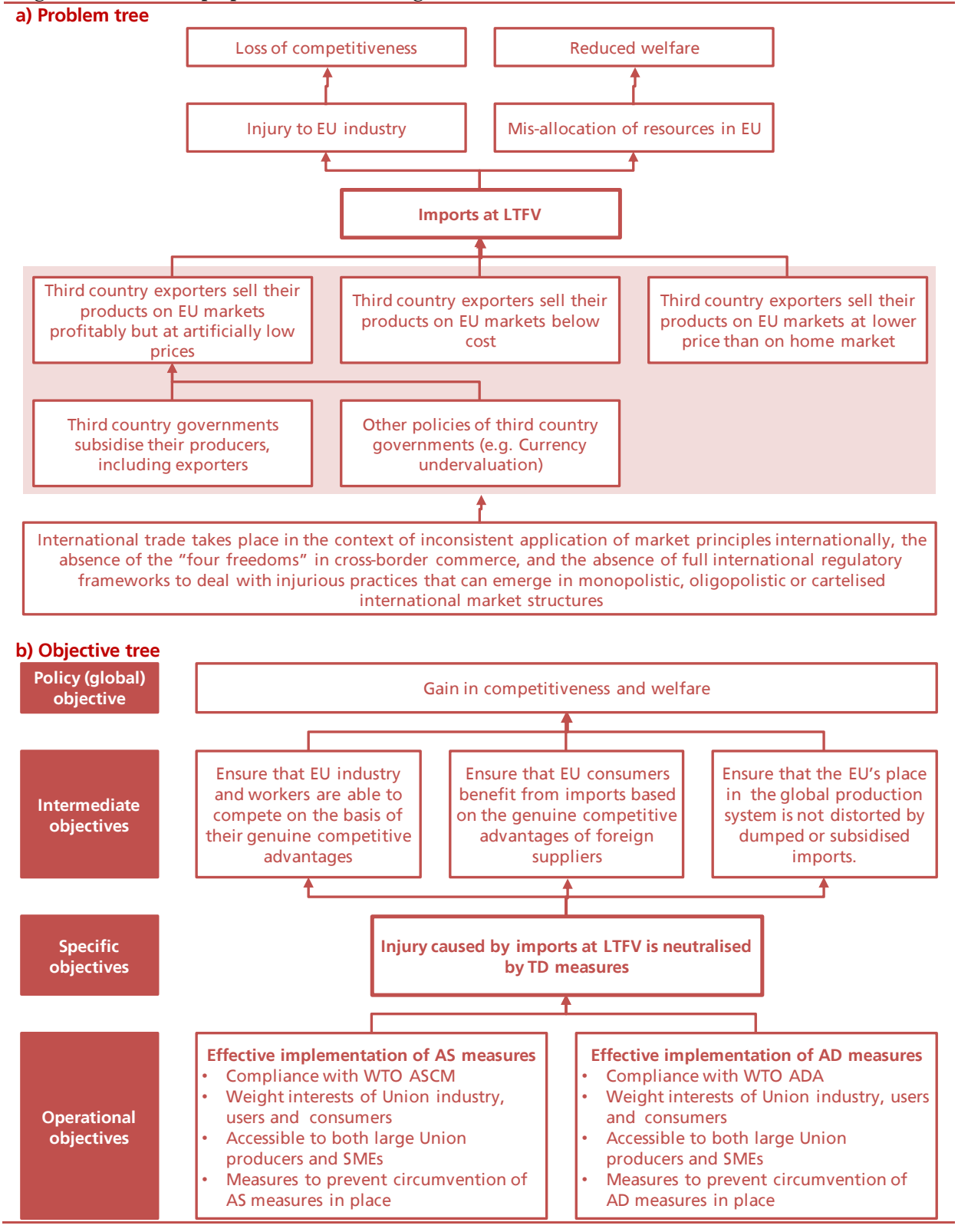
Accordingly, while TDI does indeed on occasion stand-in for an absent international competition policy, placing the *main* emphasis of the intervention logic on this role of TDI is not warranted. Moreover, as the analysis also points out, the competition policy criterion of predation sets too high a bar for the application of TD measures. Given imperfectly competitive international markets and costly adjustments in factor markets, dumping and subsidisation can give rise to a shifting of benefits and costs, and a misallocation of resources. Accordingly, it is recommended that the emphasis be placed on the fact that the conditions under which international trade takes place differ from those in an internal market where the four freedoms of the EU internal market prevail.

The intervention logic could be framed as follows:

- International trade takes place under conditions that differ from those prevailing in intra-EU commerce, where the "four freedoms" are ensured by the EU economic regulatory framework.
- Given the conditions that prevail in international trade, pricing practices of foreign firms or subsidies conferred by foreign governments that result in import sales at "less than fair value" can shift benefits and costs, result in a misallocation of resources that might not occur in domestic commerce, and threaten competition.
- The welfare- and efficiency-enhancing expansion of trade under the negotiated rules-based system is in part enabled by the availability of TD measures to offset such practices where they cause injury to domestic industry.
- The EU applies these instruments where such injurious practices occur and where it is in the public interest to do so.

This formulation is consistent with the economic literature, which has established the rent-shifting and cost-externalising effects of dumping and subsidisation, as well as the resource misallocation effects of price discriminatory practices, but does not support the characterisation of TDI as being, in the main, the international trade analogue of domestic market competition policy. It is also consistent with the negotiating history, which clearly shows that liberalisation has historically been dependent on the availability of contingent protection. Its general (implicit) claim to welfare and efficiency enhancement is based on the expansion of trade that TDI enable; this claim does not rely on, but can be strongly supported by, the economic analysis of the insurance aspect of TDI. The claim to net benefits from particular applications of trade defence rests appropriately on the public interest test. A problem tree and an objective tree consistent with this logic are provided in Figure 56.

Figure 56: EU TDI – proposed intervention logic



6.2.2 Recommendations on EU Trade Defence Policy

6.2.2.1 Initiation of investigations and treatment of non-cooperation

Global economic developments in recent years have raised doubts that current rules for and practice of the initiation of proceedings continue to be effective. In particular, the emergence of global production patterns has resulted in differences of interests among domestic producers, depending on the business strategy chosen. A similar divergence of interests regarding dumped or subsidised imports may occur in the relationship between EU producers and their employees. Finally, increasing international exposure makes EU firms susceptible to retaliation and threats thereof. In the view of the evaluation team, reforms are required to ensure continued effective access to TD for EU industry where it is warranted.

Recommendation 2	See report section(s)
It is recommended that the Commission use its capacity to initiate new investigations *ex officio* in circumstances where the business interests of some EU firms in the country of export might militate against their joining a specific complaint and thus compromise the ability of the industry to gain standing for a complaint. Examples of such circumstances include: ▪ There is a history of firms requesting anonymity in respect of TDI actions in respect of the country concerned. ▪ There is prima facie evidence of tit-for-tat retaliatory behaviour by the country concerned (e.g., a pattern of launching of reciprocal investigations immediately following decisions to apply measures against that country either in the same product group or on an equivalent amount of exports). ▪ The producer has significant investments in the country concerned or exports a significant portion of its production to that country. ▪ The structure of the industry and circumstances of the case do not allow the retaliation threat to be addressed by maintaining the identity of the complainant confidential, an approach the Commission has successfully used in the past. It is also recommended that the right to submit complaints, and have standing, be extended to labour representatives, in order to ensure that access to TDI is also guaranteed in situations where interests between EU producers and their interests diverge (notably in situations of fear of retaliation).	4.2 Policy choices regarding the initiation of proceedings

A logical consequence of recommending that labour submit complaints is that options for compelling interested parties to cooperate need to be considered. Furthermore, obligatory cooperation in investigations would also enable EU companies to better handle pressure which may be exerted by allegedly dumping exporters or subsidising governments. At the same time, ensuring that interested parties (both those based in the EU and exporters) provide accurate information is important.

Recommendation 3	See report section(s)
In order to ensure that investigations initiated in line with the previous recommendations can be based on sufficiently detailed and accurate information, it is recommended that DG Trade be provided with instruments to ensure the cooperation of interested parties (both those based in the EU and exporters) in TD investigations. These instruments should be comparable to those which DG Competition has as part of its investigating powers. In this regard, sanctioning	4.3 Obligation to cooperate 5.2.2.2 Investigation instruments

mechanisms (such as fines) for the provision of false information should also be introduced.	

6.2.2.2 Changes in the Union interest test

The growing complexity of the trading environment due to fragmentation of production across borders raises new challenges for applying TDI. In the longer run, these changes may necessitate fundamental reforms to TD practice at the multilateral level, as outlined above. For the immediate future, the EU is well positioned to address these issues due to the routine application of the Union interest test.

Recommendation 4	See report section(s)
The evaluation team recommends that the Commission take into consideration out-sourcing strategies (domestic and international) of businesses in its public interest evaluations. In the first instance, following past practice, the Commission could request documentation of EU value added from complainants and from exporters. It is also recommended that, in addition to the assessment of potential effects of measures as currently undertaken, the following considerations be applied in evaluating the Union interest in any individual case: ▪ Where the Union industry's market share is low, the welfare impacts of TDI are likely to be negative. ▪ Where concentrated impacts on particular communities can be expected from not applying TDI, the welfare case for TDI is strengthened. ▪ Where the goods in question are intermediate products used by downstream industries, the larger the share of production costs, the greater the likelihood that TDI could have adverse effects on EU industry as a whole. ▪ Conversely, where the inputs for the like products produced by the Union industry constitute a large share of the EU upstream industries' output, the welfare case for TDI is strengthened. ▪ The Commission could also consider excluding those product types which are not produced by the EU industry from the product definition. Furthermore, the role of interested parties should be clarified: in line with the practice in other parts of the investigations, their main role should be to provide information and comment on the Commission's findings, but the actual analysis of public interest should be reserved for the Commission. In consequence, this would require collection of information on Union interest issues (e.g. through questionnaires) at the same time as information for the dumping/ subsidisation and injury analysis. Basing the Union interest test on representative information would help the Commission to arrive at more robust findings. While these suggested changes are likely to enhance the robustness and validity of the Union interest test findings, they would also require additional resources.	2.1.3.4 Systemic Effects: TDI and Fragmented Production Systems 6.1.1.7 Competitiveness impacts on the EU economy in the evaluation period 5.1.6.3 Methods applied in determining the Union interest

6.2.2.3 Shortening the process for provisional determinations

The response time of EU TD measures comparatively long. In cases of actual material injury (rather than threat of injury), it takes approximately 2.5 years until provisional duties are put in place. Nine months of this overall period are required for the investigation until provisional duty. This constitutes the major part of the difference in duration of the time it takes to put measures in place between the EU and a number of peer countries. Canada, Australia, the USA and India all decide whether to impose provisional measures within five months or earlier. Australian practice demonstrates that is possible to reach timely yet reasonably accurate provisional duty determinations. In the evaluation period, Australia applied provisional measures in half the time of the EU but had about the same "error rates" as the EU (both in terms of providing protection where it eventually proved unwarranted and in failing to provide early protection where it ultimately was found to have been warranted). This appears to reflect the fact that Australia managed to undertake verification on a very timely basis. The Australian authorities have committed to further shorten the period to the imposition of provisional duties by taking decisions prior to verification if necessary.

Hence, although substantially reducing the overall duration of investigations seems infeasible given the procedural requirements of the EU system, a realistic option, in the view of the evaluation team, would be for the Commission to focus on threat determination in the initial phase of its investigation and impose provisional measures earlier. Emphasis also needs to be placed on existing WTO rules that provide for short-term responses in cases of "massive importation" in the form of retroactive provisional duties.

Recommendation 5	See report section(s)
It is recommended that the Commission address stakeholders' concerns regarding the length of the period until protection is granted by shortening the investigation up to the imposition of provisional measures, including by taking decisions on provisional duties prior to verifications. The evaluation team recognises that this would be contingent on the ability to impose disciplines (including the use of sanctions) to ensure full and accurate reporting by interested parties (including exporters) prior to verification processes (see recommendation 3 above). It is also noted that an earlier imposition of provisional measures would reduce the overall duration of an investigation due to the limited time during which provisional measures may remain in place. Accordingly, this recommendation may require additional resources which allow speedier investigations.	4.8 Duration of Investigations and Use of Provisional Measures 5.2.2.1 Duration of investigations

6.2.2.4 Provision of access to confidential information

The evaluation team has concluded that further improvement in the transparency of proceedings is recommendable, with the provision of access to confidential information being a key element. The EU approach of appointing a Hearing Officer is one that addresses transparency concerns without raising the cost of accessing the TD system for EU industry, especially small and medium-sized firms. At the same time, the team recognises that the full possibilities of the Hearing Officer model that has only recently been introduced by the EU have not yet been fully explored.

Recommendation 6	See report section(s)
The evaluation team recommends that the Commission actively promote the role of the Hearing Officer within the stakeholder community to ensure that the potential effectiveness of the model is demonstrated in practice. The introduction of a system to provide access to confidential information is not recommended at this stage. However, it is recommended that a review be undertaken once some experience has been gained with the Hearing Officer's role of verifying that confidential information has been duly considered in an investigation.	4.4 Transparency and confidentiality 5.2.3 Transparency and Confidentiality of Proceedings

6.2.2.5 Duration of measures and dynamic impacts of TDI

Given the highly particular nature of TD cases, there can be no objective foundation for generalisations concerning the appropriate duration of measures. In subsidy cases, it is conceivable that measures would remain in place indefinitely if the subsidy found to be injurious remains in place and if changed circumstances in the domestic industry do not warrant revisiting the question of injury.

However, dumping normally is firm-level behaviour and the strategic behaviour of firms cannot be anticipated. Product life-cycle considerations suggest that measures should probably be in place for shorter duration for products that are subject to rapid obsolescence; conversely, the market structure for basic products may persist.

Nevertheless, cases of dumping which are facilitated, or made possible, by government policies supporting the exporter rather follow the logic of subsidies. Hence, dumping (and, in response, AD measures) in such cases could remain in place as long as the government policy enabling it remains in force.

Finally, to the extent that trade defence plays the *de facto* role of addressing transient pressures in the trade system associated with trade liberalisation and/or the integration of major new trading partners into the international division of labour, the present evaluation report highlights the importance of the temporary nature of TDI. The evidence considered in the report suggests that there is a heterogeneous response of firms to TDI protection, with some firms responding to the trade liberalisation implied by the sunset clause by taking advantage of the temporary protection to invest in productivity improvements, while others may be characterised as investing in extending protection. Clearly, from a dynamic efficiency perspective, the former behaviour leads to much better outcomes for the EU.

EU performance in terms of limiting the length of term of measures stands up well in international comparison. In the EU, approximately 52% of measures are revoked during the initial five-year period or expire at the end of it without an expiry review. An additional 14% are terminated following the expiry review; i.e. two thirds of measures are in place for one five year term. Conversely, 17% of measures are in place for ten and more years. Most of these are in the chemical sector (fertilisers, organic chemicals and salts) where the presence of strategic, government-enabled dumping is likely. The evaluation team therefore concluded that TDI protection in EU practice is usually temporary, with adequate justification for most long-standing measures.

Modest policy adjustments could ensure further that the duration of measures corresponds to the practice addressed; thereby strengthening incentives for firms in protected sectors to prepare for

the trade liberalisation implied by the expiry of TDI, rather than counting on the extension of protection.

Recommendation 7	See report section(s)
It is recommended that the Commission reduce the threshold for *prima facie* evidence for changed circumstances regarding dumping/subsidisation or injury to be submitted in requests for interim reviews by interested parties.[880] In expiry reviews, the Commission could raise the threshold level for a positive finding of likelihood of recurrence of dumping/subsidisation or injury that must be demonstrated to warrant extension of measures. Also, it could be envisaged to extend measures, given a positive finding of continuation or likelihood of recurrence of dumping/subsidisation and injury, by five years as a general rule (except for Union interest considerations) and balance this with a more active use of (full) interim reviews.	2.3.2.2 Duration of measures 4.11 Policy of Reviews and the Duration of Measures 5.3 Review mechanisms and procedures

6.2.3 Recommendations Regarding the Practice of TDI

Consolidated Statement of Administrative Practice

This recommendation, based on analysis of EU practice, has already been acted on: a handbook is to be prepared in 2012. Aligning practice with the handbook should be given high priority.

Recommendation 8	See report section(s)
It is recommended that the Commission describe its practices in the following areas in its forthcoming handbook on administrative practice: ▪ the criteria for including or excluding EU producers in the **Union industry** where these are also importers or are related to exporters/importers from the Union industry (for examples of criteria see section 5.1.1.3); ▪ the usual practice regarding **exchange rates** (section 5.1.2.3); ▪ the rationale for the decision on whether or not **sampling** is required and number of firms to be included in the sample, and for the sampling methodology (section 5.1.2.6); ▪ the criteria for the **choice of the analogue country** in NME cases (for examples of criteria see section 4.5 and 5.1.2.7); ▪ the **threshold for negligible benefit of individual subsidy schemes** in a country concerned (section 5.1.3.4); ▪ the **reference period** for the injury analysis (which in the view of the evaluation should comprise four full years plus the on-going year up to the end of the investigation period (section 5.1.4.3); ▪ the methodology which the Commission applies for the **aggregation of the various injury factors** (section 5.1.4.4); ▪ temporal relationships between causal factors and their effects in the causality analysis (section 5.1.5.1); ▪ standards for the qualitative analysis of the nature and extent with which each factor listed in Article 3(5) ADR/Article 8(6) ASR for the **non attribution analysis** impacts on the Union industry's injury, as well as how individual factors are aggregated (section	5 Evaluation of the European Union's Trade Defence Policy and Practice (throughout)

[880] Since there are no specific weightings of criteria used for decisions on whether to launch an interim review, specific recommendations cannot be made in this regard.

5.1.5.2); ▪ threshold for other factors to break the **causal link** between dumped imports and injury (section 5.1.5.3 and 5.1.5.4); ▪ which type of information would normally be considered as **non-confidential** (examples of information which should normally be treated as non-confidential are the identity of complainants, audited accounts, market data or indices; see section 5.2.3.2); ▪ determination, for the purpose of **interim reviews**, of what is considered a "lasting change" (section 5.3.3). It is also recommended that, following the publication of the handbook on administrative practice, the Commission in each case where the methodology applies differs from the practice as defined in the handbook: ▪ Provide a justifications for the methodology applied in the specific cases; ▪ Describe the methodology applied; and ▪ Update the handbook on administrative practice so as to include the use of the deviating methodology as well as the conditions for application.	

Dumping calculations – treatment of exchange rate fluctuations

The dual requirements of the WTO ADA to use the prevailing market rate and to ignore exchange rate fluctuations are somewhat difficult to reconcile in any WTO member's TD practice. At the same time, since there is no guidance as to how to interpret the relevant measures of the ADA, the EU has considerable latitude. The use of calendar month averages cannot, however, easily be squared with the dual requirements and cannot be recommended, except in the absence of quoted daily rates, in which case the calendar month averages would constitute the best information available as a substitute for the daily rate.

Recommendation 9	See report section(s)
It is recommended that the Commission adopt either of the following two approaches to take exchange rate fluctuations into account: a) a variant of the US system (e.g., the fluctuation band might be defined in terms of one standard deviation of movement around a stationary or trending mean rate rather than an arbitrary percentage, and fluctuations could be ignored by replacing values that are greater than one standard deviation from the mean by the mean plus one standard deviation, rather than by the mean). b) a standard statistical analysis of the behaviour of the exchange rate in the period of investigation, characterising it as stationary, trending or featuring a discontinuity, which could be interpreted as a "sustained movement". The development of a case history of reasonable practice would then permit the distillation of a more fully specified method.	5.1.2.3 Comparison of normal value and export price

Calculation of non-injurious price – determination of target profit rates

Different methods are applied to determine target profits for the determination of the non-injurious price. It would be preferable if criteria for the choice of method were established in order to increase predictability of the outcomes. In this regard, the evaluation team observes that profit rates vary systematically across industries, to a much greater extent across firms, and also over the business cycle.

Recommendation 10	See report section(s)
It is recommended that the target profit rate for the injured industry be established based on the evolution of profits for a closely comparable group of firms (i.e., a "control group") over the same period. The observed rate of change in the profit rate in the control group could then be used to project the counterfactual profit rate for the injured firms over the period in which injury is found to have occurred.	5.1.7.1 Calculation of measures

The proposed approach takes into account the firm and/industry-specific level of profits as well as the variability over the business cycle. Moreover, this approach is consistent with the approach taken in firm-level analysis.

Transparency and decision-making in the Advisory Committee

The operation of the Advisory Committee at present is kept confidential; one justification for this being the prevention of influence or pressure being exerted on Committee members. However, a consequence of the lack in transparency of the Advisory Committee operations is that interested parties with good sources enjoy a procedural advantage over stakeholders which lack such access; an uneven playing field is created for stakeholders.

Recommendation 11	See report section(s)
It is recommended that information about the Advisory Committee and its operations be published. It should be included in the register of committees, and members, meeting agendas and non-confidential versions of minutes be made public. Regarding the avoidance of influencing the voting behaviour, the evaluation considers that a more efficient way than confidentiality might be to introduce secret voting in the Advisory Committee.	5.2.3.2 Transparency and confidentiality of proceedings

Publications and notices

Recommendation 12	See report section(s)
It is recommended that notices announcing the actual expiry of a measure be published as early as possible, i.e. immediately after the period for lodging a review request has ended (three months before the end of the period of application of the measure).	5.2.3.2 Transparency and confidentiality of proceedings

Given the close similarity of refund reviews with other types of reviews in substantive terms, they should also be treated equivalently in procedural terms. This particularly relates to the guarantee of rights of defence. These are at present not ensured, simply because no information about refund investigations – neither the initiation nor the outcome is published.

Recommendation 13	See report section(s)
It is recommended that notices regarding refund reviews be published in the *Official Journal* in the same manner as other reviews.	5.2.3.2 Transparency and confidentiality of proceedings

Duties paid during expiry reviews

At present, AD/CV duties remain in place during an expiry review. If the review results in the termination of measures, there does not seem to be a justification for the extended imposition of

measures beyond the five year period. In the evaluation period, the EU has provided for the refund of duties paid during the expiry review under exceptional circumstances.

Recommendation 14	See report section(s)
It is recommended that AD/CV duties paid during an expiry review, which leads to the repeal of measures, are refunded for the period which extends beyond the normal duration of measures. The "mirror" recommendation to this would be that measures should be imposed retroactively in new investigations if dumping/ subsidisation is found. Nevertheless, the conditions established by WTO rules, i.e. the limited time frame for retroactive application of duties and the requirement of "massive importations," limit the ability of TDI to undo damage that has already been done.	5.3.2 Expiry reviews

6.2.4 Proposed Amendments to the Two Basic Regulations

In view of the EU court judgments, WTO rulings, the practice of TDI as applied by the European Commission and the findings of the evaluation, a number of issues have been identified which warrant to be considered for codification in, or amendment of, the two basic Regulations. The proposed amendments are presented in the order of articles in the two basic Regulations.

6.2.4.1 Proposed amendments to the basic Anti-Dumping Regulation

Article concerned	Proposed amendment	See report section(s)
Article 2(7)(c) ADR	Delete the last sentence regarding the three-month deadline for determining MET.	3.1.2.7 Case C-141/08 Judgment ECJ 2009-10-01 Foshan Shunde Yongjian v Council
Article 4(1) ADR	Delete the reference to Article 5(4) in Article 4(1) ADR, which establishes a link between the standing test for submitting a complaint and the definition of a **major proportion** of the Union industry for injury assessment (equivalent amendment also in Article 9(1) ASR).	5.1.4.1 Union industry standing test for complaints and "major proportion" for injury analysis
Article 5(7) ADR	Align Article 5(7) ADR on **negligible import volumes** with the volume of imports test set forth in the WTO ADA.	5.1.4.6 *De minimis* thresholds
Article 6(6) ADR	Align the text of Article 6(6) ADR on the confirmation of **oral information** in writing more closely and literally with the text of Article 6.2/6.3 of the WTO ADA (equivalent amendment also in Article 11(6) ASR).	5.2.2.2 Investigation instruments
Article 6(7) ADR	Make provisions listing "**interested parties**" open-ended to allow all interested parties (as following from Article 6(5) ADR/) access to the file and ample opportunity to defend their interests (equivalent amendment also in Article 11(7) ASR).	5.2.2.3 Role of interested parties
Article 9(3) ADR	Delete the wording "provided that it is only the investigation that shall be terminated where the margin is below 2 % for individual exporters and they shall remain subject to the proceeding and	5.3.1 General issues related to reviews

Article concerned	Proposed amendment	See report section(s)
	may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11" from Article 9(3) ADR, in response to the ***Beef and Rice*** recommendations (equivalent amendment also in Article 14(5) ASR).	
Article 9(5) ADR	Delete the provisions on **individual treatment** in Article 9(5) ADR as soon as possible. (As long as the current rules on IT are in place, it appears that the Commission has no choice but to apply the IT test, as Article 9(5) ADR does not grant power of discretion to the Commission in this regard.)	3.2.2.3 DS397 Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, China v European Communities
Article 11(4) ADR	Delete the last sentence of **Article 11(4) ADR** or replace it with a provision which codifies the current practice, in cases where **sampling** was applied, of imposing the duty applied on non-sampled cooperating exporters to **new exporters** (equivalent amendment also in Article 20 ASR).	5.3.4 New exporter reviews
Article 11(5) ADR	Delete the provision which requires the completion of expiry and interim reviews on the same date (equivalent amendment also in Article 22(1) ASR).	5.3.3 Interim reviews
Article 11(7) ADR	Delete Article 11(7) ADR which expands the scope of an interim review to also cover the issues addressed in an expiry review in cases where an interim review is going on at the end of the period of application of measures (equivalent amendment also in Article 22(5) ASR).	5.3.3 Interim reviews
Article 13(4) ADR	Align Article 13(4) ADR with current practice regarding **exemptions from the extension of measures in response to circumvention**, by removing the condition of not being related and adding the condition for importers that they must not have been engaged in circumvention of measures (equivalent amendment also in Article 23(4) ASR).	5.6.6 Anti-circumvention investigations
Article 14(4) ADR	Extend the rights of defence established concerning the **suspension of measures** in Article 14(4) ADR to other interested parties as mandatorily defined in Article 6.11 of the WTO ADA (equivalent amendment also in Article 24(4) ASR).	5.3.8 Suspension of measures
Article 14(5) ADR	Clarify that "imports may ***also*** be made subject to **registration** following a request from the Community industry," i.e. thereby implying that it can also be done by the Commission *ex officio* (equivalent amendment also in Article 24(5) ASR).	5.3.1 General issues related to reviews
Article 17(1) ADR	Replace "complainants" with "Union producers" in Article 17(1) ADR on **sampling** (equivalent amendment also in Article 27(1) ASR).	5.1.2.6 Sampling
Article 20 ADR	Make provisions listing "**interested parties**" open-ended to allow all interested parties (as following from Article 6(5) ADR) access to the file and ample opportunity to defend their interests (equivalent amendment also in Article 30 ASR).	5.2.2.3 Role of interested parties
Article 21(1) ADR	**Union interest test:** Replace the term "domestic	5.1.6.3 Methods

Article concerned	Proposed amendment	See report section(s)
	industry" with "Union producers of the like good", expand the list of stakeholders in Article 21(2) ADR from "complainants" to "Union producers of the like good", and make the list open-ended to allow all interested parties to provide their comments on the matter of Union interest (equivalent amendment also in Article 31(1) ASR).	applied in determining the Union interest 5.2.2.3 Role of interested parties
New	Introduce an article codifying the current **remand practice** developed by the Commission in EU court cases, i.e. the reopening of an investigation in order to remedy the contested parts of a regulation.	5.4 Implementation of Judgments

6.2.4.2 Proposed amendments to the basic Anti-Subsidy Regulation

Article concerned	Proposed amendment	See report section(s)
Article 9(1) ASR	Delete the reference to Article 10(6) in Article 9(1) ASR, which establishes a link between the standing test for submitting a complaint and the definition of a **major proportion** of the Union industry for injury assessment (equivalent amendment also in Article 4(1) ADR).	5.1.4.1 Union industry standing test for complaints and "major proportion" for injury analysis
Article 11(6) ASR	Align the text of Article 11(6) ASR on the confirmation of **oral information** in writing more closely and literally with the text of Article 12.2 ASCM (equivalent amendment also in Article 6(6) ADR).	5.2.2.2 Investigation instruments
Article 11(7) ASR	Make provisions listing "**interested parties**" open-ended to allow all interested parties (as following from Article 11(5) ASR) access to the file and ample opportunity to defend their interests (equivalent amendment also in Article 6(7) ADR).	5.2.2.3 Role of interested parties
Article 14(5) ASR	Delete the wording "provided that it is only the investigation that shall be terminated where the margin is below 2 % for individual exporters and they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 18 and 19" from Article 14(5) ASR, in response to the ***Beef and Rice*** recommendations (equivalent amendment also in Article 9(3) ADR).	5.3.1 General issues related to reviews
Article 20 ASR	Align Article 20 ASR with the provisions in Article 11(4) ADR, which states the conditions which **new exporters** must meet and provides for registration of imports and repeal of the duty in force with regard to the new exporter concerned.	5.3.4 New exporter reviews
Article 20 ASR	Add a provision in Article 20 ASR which codifies the current practice, in cases where **sampling** was applied, of imposing the duty applied on non-sampled cooperating exporters to **new exporters** (equivalent amendment also in Article 11(4) ADR).	5.3.4 New exporter reviews
Article 22(1) ASR	Delete the provision which requires the completion of expiry and interim reviews on the same date (equivalent amendment also in Article 11(5) ADR).	5.3.3 Interim reviews
Article 22(5) ASR	Delete Article 22(5) ASR which converts an interim	5.3.3 Interim

Article concerned	Proposed amendment	See report section(s)
	review going on at the end of the period of application of measures into an expiry review (equivalent amendment also in Article 11(7) ADR).	reviews
Article 23(4) ASR	Align Article 23(4) ASR with current practice regarding **exemptions from the extension of measures in response to circumvention**, by removing the condition of not being related and adding the condition for importers that they must not have been engaged in circumvention of measures (equivalent amendment also in Article 13(4) ADR).	5.6.6 Anti-circumvention investigations
Article 24(4) ASR	Extend the rights of defence established concerning the **suspension of measures** in Article 24(4) ASR to other interested parties as mandatorily defined in Article 12.9 of the WTO ASCM (equivalent amendment also in Article 14(4) ADR).	5.3.8 Suspension of measures
Article 24(5) ASR	Clarify that "imports may ***also*** be made subject to **registration** following a request from the Community industry," i.e. thereby implying that it can also be done by the Commission *ex officio* (equivalent amendment also in Article 14(5) ADR).	5.3.1 General issues related to reviews
Article 27(1) ASR	Replace "complainants" with "Union producers" in Article 27(1) ASR on **sampling** (equivalent amendment also in Article 17(1) ADR).	5.1.2.6 Sampling
Article 30 ASR	Make provisions listing "**interested parties**" open-ended to allow all interested parties (as following from Article 11(5) ASR) access to the file and ample opportunity to defend their interests (equivalent amendment also in Article 20 ADR).	5.2.2.3 Role of interested parties
Article 31(1) ASR	**Union interest test:** Replace the term "domestic industry" with "Union producers of the like good", expand the list of stakeholders in Article 31(2) ASR from "complainants" to "Union producers of the like good", and make the list open-ended to allow all interested parties to provide their comments on the matter of Union interest (equivalent amendment also in Article 21(1) ADR).	5.1.6.3 Methods applied in determining the Union interest 5.2.2.3 Role of interested parties
New	Introduce an article codifying the current **remand practice** developed by the Commission in EU court cases, i.e. the reopening of an investigation in order to remedy the contested parts of a regulation.	5.4 Implementation of Judgments

6.2.5 Confirmation of Current Practice and Projects of Change

Finally, the evaluation showed that, regarding a number of issues where EU TD practice could be strengthened, the EU institutions already initiated processes of change. All of these initiatives are commended by the evaluation team, and their timely implementation is considered as highly desirable. In this context, the following change processes are highlighted:

- publication of the handbook of administrative practices/policy handbook;
- the current project of providing interested parties with access to the non-confidential file though the internet;

- the formal adoption of Terms of Reference for the Hearing Officer which will establish a firm and commonly known legal basis for his work;
- the further strengthening of the Hearing Officer's role by divulging knowledge about the Hearing Officer and his work among (potential) users of TDI. Draft information leaflets have already been prepared and should be completed and distributed as soon as possible;
- development of a time-bound action plan for the Working Party on Trade Questions' Paper on "Actions to Address the Difficulties Encountered by SMEs Involved in Trade Defence Instruments" and the implementation of complementary improvements of support instruments:
    - development of a guide on how TD investigations work and how interested parties can participate in the proceedings should be developed;
    - addition of a section on "support" on the trade defence website of DG Trade, which could directly be accessed from the trade defence front page; and
    - provision of basic information about TDI on the trade defence website in all official languages, along with a link to the helpdesk.

6.3 Conclusion

The evaluation conducted in this report of the European Union's policy and practice in respect of TDI, namely AD and AS measures, took place against a background of:

- divided views among Member States as to the efficacy of the instruments;
- an assessment by practitioners that the instruments were procedurally burdensome to use;
- virtually unbridled hostility towards the practice in the professional literature; and
- a growing sense in the policy community that the instruments were out of step with the times as the global organisation of production evolved.

In short, the prevailing perspective on TDI may be summarised as follows. On the one hand, it is seen by some as a costly, cumbersome, and possibly counterproductive instrument constructed for a system of nation-based production that has been in good measure superseded by one in which goods are "made in the world". On the other hand, it is seen by others as an indispensable tool to ensure a level playing field for EU firms by addressing unfair pricing by foreign firms and market-distorting subsidies by foreign governments in the context of an incomplete system of market regulation and disciplines in the international domain.

The evaluation addressed the economic, legal and procedural aspects of the EU's TD system, drawing on an analysis of international practice in seven major users of these instruments: Australia, Canada, China, India, New Zealand, South Africa and the USA.

The evaluation team reached the following main conclusions.

First, the economic analysis in chapter 2 confirmed that the stated rationale for EU TDI – countering unfair trading practices and market-distorting subsidies – could not be supported based on the actual pattern of use. Nonetheless, the analysis identified a number of considerations that greatly mitigate the perceived negative economic effects of TDI. In fact, given the main *de facto* purpose that TDI serves, the chapter argues that its use has been welfare improving for the EU. At the same time, the chapter makes clear that the actual construction of trade defence law is inappropriate for its *de facto* role, resulting in lack of clarity for trading firms and opening the system up to the possibility of protectionist abuse. Further, the economic analysis confirmed that the construction of trade defence law was indeed increasingly out of step with the modern trading environment and recommended use of the flexibility within the system

to apply it so as to minimise the risks of adverse outcomes for the EU, while working in the context of the WTO towards a system of trade remedies constructed in a way better suited to the actual tasks they perform.

The analysis of EU court cases and WTO disputes in chapter 3 showed that the number of litigations related to the EU's implementation of TDI was low. It also confirmed a high degree of compliance, as evidenced by a high – and increasing over the evaluation period – share of claims against the EU institutions rejected by the EU courts. EU TDI were also rarely challenged before the WTO dispute settlement body (DSB), with reports issued in only three disputes during the evaluation period. However, the EU's success rate at the WTO DSB was lower, with about half of the claims being granted, some on important issues such as the non-compliance of the EU's individual treatment regime with WTO rules. Nevertheless, the number of amendments to the two basic Regulations which are required in response to either EU court or WTO DSB decisions is limited.

The international comparison in chapter 4 highlighted that EU TD practice stands out in a number of ways. Notably, the regular application of the public interest test and the frequent reduction of duties through application of the lesser duty rule distinguish EU practice from that in most other countries. In particular, this leaves the EU better placed than the other countries reviewed in terms of having an established practice to deal with the evolution of globalised production systems and the now firmly established heterogeneity of firms in international trade. The chapter analyses the options for improving accessibility to AD/AS instruments by amending initiation policies – such as the right for workers to file complaints or greater use of *ex officio* initiation of investigations – and ensuring cooperation. Furthermore, it highlights two areas where EU TD practice may benefit from drawing on peer countries' experience, namely as regards the transparency and duration of investigations. Finally, contrary to an often-purported view, the international comparison showed that the EU TD system is not more prone to politicisation than most other countries' systems.

Finally, the evaluation of EU trade defence policies and practice in chapter 5 validated most of the methodologies and procedures applied by the Commission. The overall finding therefore is that EU trade defence policies and practice are sound. A number of recommendations regarding specific issues related to both the substantive and procedural dimensions of investigations and reviews have been identified. With regard to substantive issues, these relate to certain aspects in the dumping and subsidisation analysis, injury and causation analysis, the Union interest test and the calculation of the non-injurious price. With regard to procedural issues, it has been noted that, in general, the Commission's practice with regard to the participation of interested parties in proceedings is more inclusive than required by the two basic Regulations. Transparency of proceedings has improved, but could still be improved further. An important example, which was also felt by the evaluation team, was the lack of more detailed descriptions of methodologies both at a general level (i.e. in a policy manual), and in case-specific regulations. Also, the relatively long period required from injury to measures was noted; a number of recommendations have been made, drawing on practice in peer countries, as to how this might at least partly rectified. Last but not least, the Hearing Officer's role was positively evaluated.

In sum, the evaluation has identified a number of issues of TDI which are the result of their conceptualisation in the WTO Agreements (and which therefore also affect how the EU uses TDI).

At the same time, the evaluation team considers that the EU's application of TDI as framed under the two WTO Agreements constitutes good practice in many respects. The purpose of the

recommendations which have been made throughout this report, the main ones of which are summarised in the previous section, is to further strengthen and improve an already good system.

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