

WORLD TRADE ORGANIZATION

**A Handbook on Anti-Dumping
Investigations**

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PART I PROCEDURES

I. INTRODUCTION

Dumping is, in general, a situation of international price discrimination, where the price of a product when sold to the importing country is less than the price of the same product when sold in the market of the exporting country. It is generally accepted in the multilateral trading system that if dumping takes place, it might result in unfair trade as the domestic industry of the importing country might suffer harm as a result of the dumping. If this is the case, the authorities of the importing country may, if certain requirements are met, take action against dumping. Anti-dumping action can therefore only be taken if dumping is taking place, accompanied by consequent injury to the domestic industry.

The purpose of an anti-dumping investigation is to ascertain whether dumping is taking place and causing injury to the domestic industry of the country importing the allegedly dumped products. In other words, the process focuses on (i) establishing a “normal value” of the product when sold in the domestic market of the exporting country; (ii) establishing the export price of the product; (iii) comparing the export price with the normal value established; and (iv) ascertaining whether the domestic industry of the importing country is suffering injury as a result of the dumped imports. The rules of the multilateral trading system require that anti-dumping investigations be conducted with due cognizance taken of the principles of “due process,” that is, that anti-dumping investigations have to be conducted in a transparent, objective and equitable way, with all interested parties given adequate opportunity to defend their interests.

On the face of it, it appears as if it is simply a case of identifying dumping by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases it is necessary to undertake a series of complex analytical steps in order to determine the appropriate export price and the appropriate price in the domestic market of the exporting country to make a fair comparison between the two prices to ascertain if dumping exists. Furthermore, a detailed analysis of the state of the domestic industry of the importing country has to be undertaken to ascertain whether it is suffering injury, and finding whether the allegedly dumped imports are causing the injury. All this has to be done within the rules of the multilateral rules-based trading system.

II. MULTILATERAL LEGAL FRAMEWORK

Since 1 January 1995 the rules of the multilateral trading system relating to anti-dumping are found in the following World Trade Organisation (“WTO”) provisions:

- (i) Article VI of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”)

Article VI contains the basic provisions relating to anti-dumping action and is the “enabling provision”;

and

- (ii) the Agreement on Implementation of Article VI of GATT 1994 (the “Anti-Dumping Agreement,” or the “AD Agreement”).

The AD Agreement contains detailed provisions relating to methodologies and procedural issues.

These two legal instruments are to be read together.

The three basic preconditions which have to be met before anti-dumping action can be taken are set out in Article VI of GATT 1994. In particular, the WTO Member taking such measures must have determined: (i) that the imports in question are dumped; (ii) that its own industry is materially injured, or is threatened with material injury, or that the establishment of a domestic industry is being materially retarded; and (iii) that the injury under (ii) is being caused by the dumped imports. Dumping may only be counteracted if all three requirements are met.

Although all Members of the WTO are also parties to the AD Agreement, it is not mandatory for Members to have in place a legal framework for anti-dumping action, or to take anti-dumping action when, or if, injurious dumping occurs. However, the AD Agreement specifies that if a Member chooses to take anti-dumping action, such action must be consistent with the rules set out therein and shall be preceded by the required investigation conducted on the basis of the provisions of the AD Agreement.

In particular, Article 1¹ provides that:

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

Therefore, for WTO Members, the imposition of anti-dumping measures is subject to the following conditions:

¹ Unless otherwise noted all references to Articles should be understood as references to Articles of the AD Agreement.

- an investigation must have been initiated and conducted in accordance with the provisions of the AD Agreement;
- as a result of that investigation it must have been determined that the imports concerned:
 - are dumped;
 - that the domestic industry is suffering material injury, a threat of material injury, or that the establishment of a domestic industry is materially retarded;²
 - and
 - that the injury being suffered by the domestic industry is causally linked to the dumped imports.

WTO Members are precluded from taking action against injurious dumped imports other than the application of anti-dumping measures. Article 18.1 of the AD Agreement provides:

No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. (footnote omitted)

The measures allowed by the AD Agreement are (i) provisional measures, (ii) definitive anti-dumping duties, and (iii) price undertakings.³

The AD Agreement contains detailed procedural rules which have to be observed in conducting investigations, as well as substantive rules regarding the methodologies to be applied in calculating the dumping margin, determining whether injury exists, and in establishing whether a causal link exists between the dumping and the injury.

Table I.1 gives an outline of the provisions of the AD Agreement⁴ governing the procedural and the substantive aspects of investigations.

III. DOMESTIC LEGAL FRAMEWORK

The modalities of incorporating the provisions of the WTO Agreements, and therefore also the AD Agreement, in the domestic legal systems of Members, and the design of the institutional aspects regarding anti-dumping investigations, are preparatory arrangements which have to be addressed prior to considering the initiation of an anti-dumping investigation. These issues are addressed only in a cursory fashion as the modalities and structures involved are to a large degree determined by the constitutional law of each Member, the delegation of powers to different bodies and agencies, and other overarching considerations.

² The term “injury” will hereinafter be understood to include all three forms of injury, unless otherwise indicated.

³ Articles 7, 8, and 9, read together with Article 17.4 of the AD Agreement.

⁴ See http://www.wto.org/english/docs_e/legal_e/final_e.htm for the text of the AD Agreement. Attached as Annex IV.

Table I.1: *AD Agreement Provisions Applicable to Investigations*⁵

Provision	Issue
Article 2	Definition of dumping Determination of dumping: <ul style="list-style-type: none"> • Calculation of export price (EP) • Calculation of normal value (NV) • Adjustments to EP and NV • Calculation of dumping margin
Article 3	Determination of injury Causal link between the dumped imports and injury
Article 4	Definition of “domestic industry”
Article 5	Initiation of an investigation
Article 6	Investigation
Article 7	Provisional anti-dumping measures
Article 8	Price undertakings
Article 9	Definitive anti-dumping duties
Article 10	Retroactive imposition of anti-dumping duties
Article 11	Duration and reviews of anti-dumping duties
Article 12	Public notice and explanation of determinations
Article 13	Judicial review
Article 15	Special treatment for developing countries
Article 17	Special additional dispute settlement rules and procedures, i.e., in addition to those in the <i>WTO Understanding on Rules and Procedures Governing the Settlement of Disputes</i> , including standard of review rules

The automatic application of the provisions of the AD Agreement, being part of a broader international treaty, the WTO Agreement, in the domestic legal systems of WTO Members is not a given in the case of all Members. The manner in which the provisions of international treaties, and therefore the AD Agreement, are made part of a Member’s domestic legal system depends on the constitutional law of that Member. If the constitutional law of a Member does not provide for the automatic incorporation of the AD Agreement into its domestic legal system, and depending upon the legal system involved, the AD Agreement may be incorporated directly into domestic law, as is, or may be incorporated into domestic law indirectly, by means of implementing or enabling legislation. Members commonly supplement the incorporation of the AD Agreement into domestic law by adopting a supplemental, or secondary, set of provisions in the form of regulations (by-laws) or subsidiary legal instruments, as the AD Agreement does not contain detailed provisions on all issues. Such regulations (by-laws), or subsidiary legal instruments, often set out

⁵ Article 14 governs the application of anti-dumping measures on behalf of a third country. Article 16 deals with the functioning of the WTO Committee on Anti-Dumping Practices (ADP Committee) and contains some notification requirements to the ADP Committee. Article 18 sets out a number of final provisions, including the obligation to bring laws, regulations, and administrative procedures into conformity with the AD Agreement, and to inform the ADP Committee of any changes in such laws and regulations.

more detailed provisions regarding both the procedural and substantive aspects of anti-dumping investigations, which may be considered as not suitable for enactment into a law. Therefore, prior to initiating any anti-dumping investigation, the domestic legal basis for such action has to exist.

Institutional aspects

While the creation of domestic institutional and legal bases for imposing measures in terms of the AD Agreement is not a legal requirement of the AD Agreement as such, it appears to be, as a practical matter, a *sine qua non* for effective action and for ensuring consistency with the AD Agreement. Therefore, before any investigation is initiated, a Member should create the institutional framework, with the investigating authorities designated and empowered to conduct anti-dumping investigations. The necessary decision-making structure should also be developed. The AD Agreement does not contain any requirements or guidelines with respect to the institutional aspects relating to investigations. Generally, a specialized department or body is designated within a particular government ministry or office to conduct the investigative part of the process. It is common practice for anti-dumping investigations to be conducted by officials of either the Ministry of Trade and Industry, the Ministry of Commerce, the Ministry of Finance, or by officials of the Customs Department. Some Members have established a bifurcated system, where the dumping and the injury investigations are undertaken by two different government bodies.⁶ In bifurcated systems, the body responsible for determining injury is often a body independent from the central government.

Other Members have established a unitary system, where both aspects of investigations are handled by a single government body.⁷ In a unitary system, the body responsible for the administration of the anti-dumping laws may also be independent from the government.⁸ In some jurisdictions, different stages of the investigation are handled by different government bodies. For example, one body is responsible for the initiation and preliminary determination, while another is responsible for the final determination.⁹

It is common practice that, regardless of whether the process is unitary or bifurcated, the decision-making part of the process is separated from the investigative process. The practice of Members regarding the actual decision-making process and the level at which decisions are taken, also differs. In some jurisdictions, the final decisions are taken by a minister, a group of ministers, or senior officials, acting on the recommendation of the relevant ministry or body. In other jurisdictions,

⁶ The United States, Canada, and Argentina, are examples, although the bifurcation occurs at different stages in the three systems. In Argentina, the process is bifurcated from the filing of the application, while in Canada, the process is bifurcated following the preliminary determination. In the United States, the responsibility for dumping and injury issues is bifurcated from the outset. However, one agency, the Department of Commerce, has responsibility for initiation.

⁷ For example, the European Communities, New Zealand, Mexico, Brazil, South Africa.

⁸ For example, the Venezuelan and Korean anti-dumping investigating authorities, which are independent bodies responsible for both the dumping and injury aspects of the process.

⁹ For example, the Philippines.

the body, or bodies, mandated to deal with anti-dumping, have full powers of decision-making. In still other jurisdictions, the independent decision-making authority is restricted to the initiation and preliminary determination phase, with the final decision on definitive measures residing with a minister or group of ministers.

As the analyses done in an anti-dumping investigation require a multiplicity of professional skills, the staff of anti-dumping investigating authorities typically includes technical experts, including lawyers, economists (mainly trade economists), accountants, financial analysts and computer specialists. The number of staff in any anti-dumping authority will be a function of available resources and the likely number of investigations to be handled. It is critical for the proper functioning of an anti-dumping unit to recruit, train, and retain qualified experts with the necessary skills, and that the necessary support services and resources are provided.

IV. PROCEDURAL ASPECTS OF AN ANTI-DUMPING INVESTIGATION

A. OVERVIEW OF AN ANTI-DUMPING INVESTIGATION

The following section is a basic overview of how an anti-dumping investigation unfolds in practice. It also describes in summary fashion how anti-dumping measures resulting from such investigations are assessed and reviewed over time. In order to relate the practical aspects of an investigation to specific provisions of the AD Agreement, references to the relevant articles of the AD Agreement are given.

Initiation of an investigation

An investigation is normally initiated as a result of a complaint in the form of a written application by the domestic industry¹⁰ alleging that it is suffering injury, or a threat thereof, because of dumped imports (Article 5.1). The first step is the consideration of whether the application meets the documentation requirements (Article 5.2). If not, it has to be supplemented or re-submitted. Once the application is accepted as properly documented, the government of the exporting country has to be notified (Article 5.5). The authorities must next examine the accuracy and adequacy of the evidence provided (Article 5.3) and take a decision whether there is sufficient evidence, on a *prima facie* basis, that an investigation should be initiated, or, to reject the application (Article 5.8). Before initiation, the authorities must ensure that the application has the required degree of support of the domestic industry (Article 5.4). On initiation of the investigation, public notice thereof must be given (Article 12.1). As anti-dumping investigations are product- and country-specific, the public notice must, *inter alia*, identify the product at issue,¹¹ the exporting country,

¹⁰ In special circumstances, investigations can also be self-initiated by authorities without a written request having been received (Article 5.6), although the evidentiary and procedural requirements have to be met.

¹¹ Hereinafter referred to as "subject product" or "subject products".

or the country of origin (e.g. “fresh cut flowers from Frisia,” “polystyrene resin from Camilia”), set out deadlines for comments and provide contact details of the investigating authority (Article 12.1.1).

Preliminary determination

Further detailed information is then gathered mainly from exporters, importers and the domestic industry by means of questionnaires (Article 6.1). Once the responses to the different questionnaires have been received, a preliminary determination on whether there is dumping and consequent injury may be made. If there is insufficient evidence of dumping and/or consequent injury, the investigation has to be terminated. If the preliminary determination is in the affirmative, and if the authorities have found that it is necessary to take action to prevent injury being caused while the investigation is still in progress, they may, but are not obligated to, impose preliminary measures (Article 7.1). Preliminary measures may take the form of a provisional duty, or preferably, a security by cash deposit or bond (Article 7.2) which may be equal to, but not higher than, the amount of the dumping margin provisionally estimated (Article 7.2). Preliminary measures may not be applied sooner than 60 days after initiation of the investigation (Article 7.3). Provisional measures are not applied for a period longer than 4 months, or 6 months if the investigating authorities examine whether a duty lower than the margin of dumping would be sufficient to remove the injury being suffered by the applicant industry (Article 7.4).¹² Public notice of the preliminary determination must be given.

Final determination

After the preliminary determination stage the investigation is continued and the information submitted verified (if verification was not done before the preliminary determination). During this part of the process, the parties have the opportunity to comment on the factual and legal basis of the preliminary determination and to submit further evidence (Article 6.2). At the conclusion of the investigative phase, a final determination has to be made, based on all the evidence obtained by the investigating authorities. Once the authorities have made a final determination that dumping exists and that the domestic industry is suffering material injury as a result, definitive (final) anti-dumping duties may be imposed (Article 9.1). Dumping margins are normally calculated on an exporter-specific basis (Article 6.10), and as a rule, are based on the information each individual exporter submits in its questionnaire response, or otherwise in writing. However, non-cooperating exporters (i.e. those who do not submit a questionnaire response, or provide incomplete and/or incorrect data) may be assessed a dumping margin based, partly or wholly

¹² These periods can be extended to 6 months and 9 months, respectively, if exporters accounting for a significant share of the trade involved request the authorities to do so (Article 7.4).

on “facts available,” which might include information as submitted by the applicant (Article 6.8 and Annex II).

In terms of the AD Agreement, the imposition of definitive anti-dumping measures is not mandatory, that is, the authorities have the option *not* to impose measures, even if all the requirements for its imposition have been met (Article 9.1).¹³ Final measures are applied in the form of final anti-dumping duties, that is, duties in addition to the normal applicable import duties, and are imposed by public notice. Alternatively, the authorities may enter into price undertakings, whereby individual exporters undertake to revise their export prices, or cease exports at dumped prices, so that the injurious effect of the dumping is eliminated (Article 8.1). As in the case of preliminary anti-dumping measures definitive duties may be imposed at a level equal to, but not higher than the dumping margin. However, it is desirable that the duty be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry (Article 9.1). Price undertakings are also subject to these two provisions (Article 8.1). If the final determination is negative with respect to either dumping, injury, or causal link, the investigation is terminated. Public notice of the final determination, whether affirmative or negative, has to be given (Article 12.2). Public notice has also to be given of any decision to accept a price undertaking, of the termination of an undertaking, and of the termination of a definitive anti-dumping duty (Article 12.2).

Throughout the process, the authorities are under an obligation to protect the confidentiality of “confidential” information submitted to it by interested parties in the context of the investigation (Article 6.5).

Duration of investigations

As a rule, anti-dumping investigations are to be concluded within a period of one year after initiation, unless special circumstances are found to prevail. However, in no case can a period of 18 months be exceeded.

Duration of final anti-dumping duties

The maximum duration of anti-dumping duties is 5 years, unless a review (called a “sunset” or “expiry review”), covering both dumping and injury, is initiated before the expiry of the 5 years and it is determined that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury (Article 11.3).

Reviews

Any party can request the authorities to review the continued imposition of anti-dumping duties if they submit positive evidence substantiating the need for a review, *inter alia*, information indicating that circumstances have changed and that either dumping is no longer taking place, and/or that the original applicant industry is

¹³ In some jurisdictions, it is mandatory in terms of domestic legislation to impose duties once all the requirements have been met.

no longer suffering material injury as a result of dumping – sometimes called a “changed circumstances review.” The authorities can also, on their own initiative, initiate a review (Article 11.2).

The AD Agreement provides that the amount of the anti-dumping duty shall not exceed the margin of dumping established (Article 9.3). Therefore, in addition to a review under Article 11.2, dumping margins may be updated periodically, with subsequent adjustments to the duties imposed, so as to avoid collecting definitive duties in excess of the dumping margins. Since definitive duties collected correspond to the dumping margins originally calculated, they may not reflect *current* dumping margins over time. In order to avoid this situation, investigating authorities shall, upon request for a refund by either the exporter or importer, re-calculate the dumping margins based on more recent data. On the basis of such re-assessments, definitive duties paid in excess of the actual dumping margins must be reimbursed (Articles 9.3.1 and 9.3.2). Normally, such procedures must be completed within 12 months.

Overview of process

Flow Chart I.1 provides an overview of a typical anti-dumping investigation, and of the review and assessment procedures.

V. KEY DEFINITIONS AND CONCEPTS APPLICABLE TO THE INVESTIGATION

As specialized terminology and concepts will be used, and as an anti-dumping investigation is guided by certain principles and main procedural elements, these issues will be addressed and explained first before going into the process of the investigation itself.

A. DEFINITIONS

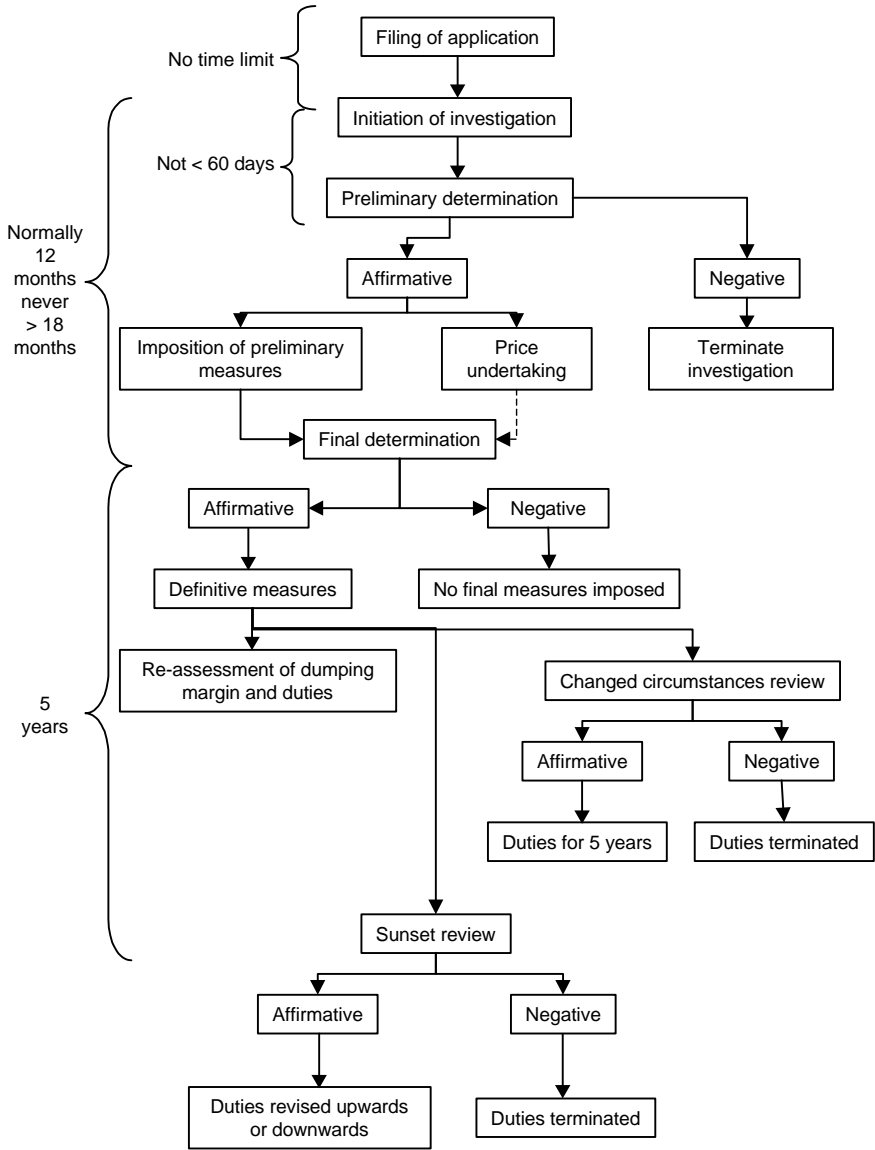
“interested parties”

According to Article 6.11, “interested parties” shall include:

- exporters or foreign producers of the product under investigation, their trade or business association;
- importers of the product under investigation, or their trade or business association;¹⁴
- the government of the exporting Member; and
- producers of the like product in the country of import or their trade and business association.¹⁵

¹⁴ If trade or business associations are involved, they will only be regarded as “interested parties” if the majority of the members are producers, exporters, or importers of the subject product – Article 6.11(i).

¹⁵ Article 6.11(iii).



Flow Chart I.1: Overview of an AD investigation

The list of “interested parties” is not exhaustive. Article 6.11 explicitly allows Members to include foreign or domestic parties, other than those mentioned above, as interested parties. Any additions to the list will depend on the domestic requirements of the Member involved.

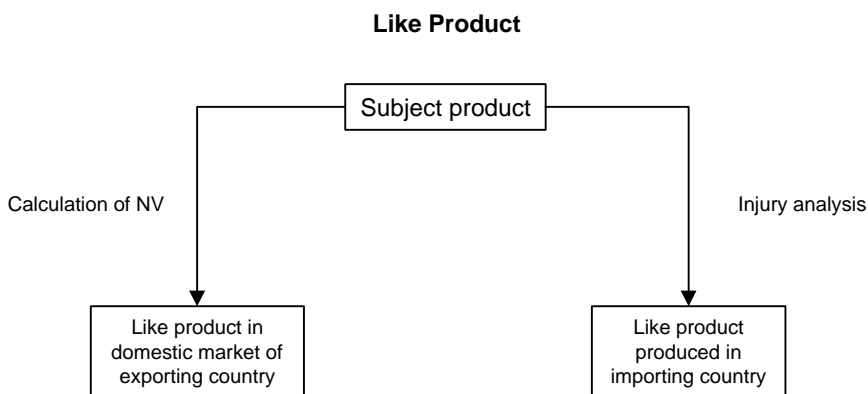
“like product”

“Like product” is defined in Article 2.6 of the AD Agreement as:

... a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

The determination of the “like product” is a critical element in any anti-dumping investigation, as it not only determines which product will fall within the scope of the injury analysis, and therefore determine the domestic industry to be investigated allegedly suffering injury, but it will also be relevant in determining which product in the domestic market of the exporting country will be used to determine the normal value. The determination of the “like product” is therefore relevant in the context of the determination of the margin of dumping, as well as in the context of the injury determination.

The following chart gives a graphic illustration of where the issue of a “like product” is relevant.



The AD Agreement does not contain any further guidance, apart from the definition in Article 2.6, on the issue of determining the “like product.” It is common practice for investigating authorities to have developed some criteria which they apply on a case-by-case basis. Members have applied different criteria in determining like product, including the following:

- The physical characteristics of the merchandise
- Degree of commercial interchangeability of the products
- Raw materials used in manufacturing

- Manufacturing methods and technologies used in production of the merchandise
- The functions and end uses of the merchandise
- Industry specifications
- Pricing
- Quality
- Tariff classification
- Channels of distribution and marketing of the merchandise
- The presence of common manufacturing facilities or use of common employees in manufacturing the merchandise
- Customer and producer perceptions of the products
- Commercial brand/commercial prestige.

Authorities commonly place greater weight on those factors that establish clear dividing lines among potential like products, and less emphasis on factors that indicate minor product variations. What constitutes a “clear dividing line” between potential like products, is sometimes one of the most hotly disputed issues in an anti-dumping investigation.

The “like product” should be determined as early as possible in the investigation, as it shapes and affects the entire process. However, it might be necessary, in some cases, to revisit the issue later in the process.

“export price”

Although there is no definition or description of “export price” in the AD Agreement, it is normally understood to mean the price paid or payable for the export product.

“normal value”

Normal value is defined in Article 2.1 of the AD Agreement as “the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”

“subject product”

This is the product allegedly dumped and exported to the importing country and allegedly injuring the domestic industry producing a like product in the importing country.

“domestic industry”

Refers to the industry in the importing country allegedly being injured by the allegedly dumped products.

“domestic market”

Refers to the domestic market in the country of origin of the allegedly dumped products, or in other words, the domestic market of the exporting country.

“margin of dumping”

The margin of dumping is the extent by which the normal value exceeds the export price, and is expressed either in percentage terms or as a specific amount.

B. KEY CONCEPTS

The following paragraphs describe the main provisions in the AD Agreement dealing with procedural concepts, specifically:

- provisions regarding “due process”;
- the treatment of confidential information;
- the principle of “facts available”; and
- the verification of information submitted by parties.

1. “DUE PROCESS” PROVISIONS

The basic right of parties to due process throughout the investigation is addressed in a number of provisions of the AD Agreement. Article 6.2 lays out the general principle that interested parties shall have a full opportunity for the defence of their interests.

More specifically, Article 6.1 provides that interested parties shall be given:

- notice of the information which the investigating authorities require; and
- ample opportunity to present in writing all evidence which they consider relevant.

Article 6.1.2 stipulates that, subject to the requirement to protect confidential information, written evidence presented by one party shall be made available promptly to other interested parties participating in the investigation.

Article 6.4 specifies that “whenever practicable,” interested parties shall be given timely opportunities:

- to see all information that is relevant to the presentation of their cases that is used by the investigating authorities conducting the investigation, provided that such information is not confidential, and
- to prepare presentations on the basis of this information.

The AD Agreement contains additional, more detailed, provisions protecting the rights of interested parties in the investigation. These are addressed in detail below, in the context of the steps to be followed by the investigating authorities during the investigation.

2. TREATMENT OF CONFIDENTIAL INFORMATION

Given the nature of an anti-dumping investigation, it is inevitable that detailed company-specific information will have to be disclosed to the investigating authority. As the disclosure of such information to any other party might be detrimental to the interest of the companies providing the information, the AD Agreement contains detailed provisions on how the investigating authorities should deal with information claimed to be of a confidential nature. It requires the investigating authorities to accord special treatment to confidential information submitted by parties in the course of the proceedings. The AD Agreement makes it clear that confidential information cannot be disclosed to other parties without the specific permission of the party submitting the information.

Article 6.5 specifies which information is to be treated as confidential, describes the steps to be taken to ensure that confidential treatment is justified, and sets out rules for the submission of non-confidential summaries of confidential information.

Pursuant to Article 6.5, information shall be treated as confidential by the investigating authorities if it is:

- by nature confidential – for example, if its disclosure would be of significant competitive advantage to a competitor or if its disclosure would have a significantly adverse effect upon the person supplying the information or upon a person from whom that person acquired the information; or
- provided on a confidential basis by parties to the investigation.

Confidential treatment is not automatic. Article 6.5 specifies that parties requesting confidential treatment for any information submitted must show “good cause” why the information should be treated as confidential. Although footnote 18 to the AD Agreement notes that requests for confidentiality should not be rejected arbitrarily, the investigating authorities are not obligated to accept information as confidential merely because the party has submitted it as such. The authorities have to assess the reasons given for the claim of confidentiality and decide whether confidential treatment is warranted.

If the claim for confidentiality is warranted, Article 6.5.1 requires the supplier of the confidential information to file a non-confidential summary thereof. These summaries must be “sufficient in detail to provide a reasonable understanding of the substance” of the confidential information concerned.¹⁶ The reason why a non-confidential summary of the information is required is that it is a recognised principle of law that any party which might be negatively affected by an action taken by authorities has a right to know the case against it to enable it to defend its own interests. The party involved is not entitled to have access to all the details of the case against it, as long as it has sufficient information to know what the case against it is. This principle should therefore always be followed by authorities in

¹⁶ Article 6.5.1.

deciding whether the summaries of the confidential information are sufficient to allow the affected party to know what the case against it is.

However, recognizing that is not always possible to summarize the confidential information in a non-confidential form, Article 6.5.1 provides that, in such exceptional circumstances, the party submitting the information must provide a statement of reasons as to why a non-confidential summarization is not possible.

If the investigating authorities have found that a request for confidential treatment is not warranted, the party submitting the information must either agree to make the information concerned public or authorize its disclosure in generalized or summary form. If the party refuses, the investigating authorities may disregard the information in question for the purposes of the investigation “unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct”.¹⁷

In summary, Article 6.5 provides that, if requested, and if they accept the request, the investigating authorities have to provide special treatment for confidential information. If confidential status is granted to certain information, the supplier has to submit a non-confidential summary of such information. If the request is found not to be warranted by the authorities, the supplier can either authorise its publication as is, or provide a summarized non-confidential version. If the supplier is not prepared to follow any of the two options above, the authorities may disregard such information. However, under no circumstances can the authorities disclose information, claimed by the supplier to be confidential, to any other party without the specific permission of the party submitting it.¹⁸

The information classified as “Confidential” is kept in the confidential file and the non-confidential summaries in the public file. See section VII.C, *infra*.

The rules with respect to the process relating to information for which a party has requested confidential treatment is represented graphically in Flow Chart I.2.

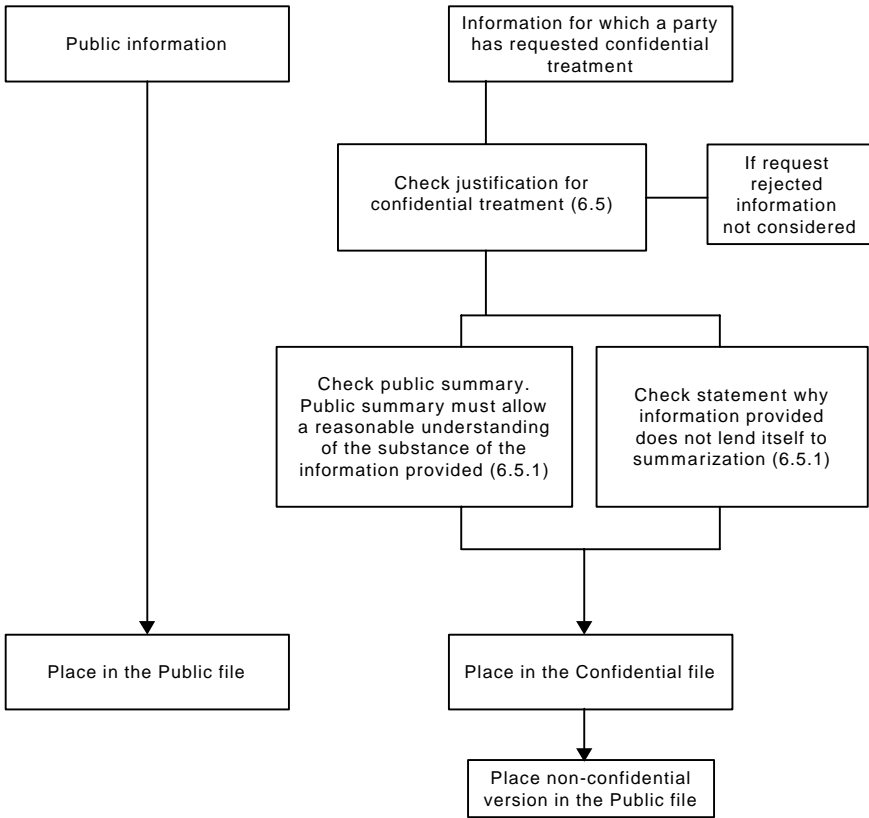
3. “FACTS AVAILABLE”

Certain information is required before an assessment can be made whether a product is dumped and a domestic industry is injured. The question therefore arises what options does the AD Agreement provide to the investigating authorities if certain information required for these assessments has not been provided by the parties requested to do so.

Article 6.8 provides that in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, determinations, both preliminary and/or final, may be made on the basis on the facts available, which might include information contained in the application for the initiation of an investigation.

¹⁷ The AD Agreement is silent regarding what to do with information for which confidential treatment is requested, but for which no justification for such treatment is provided. Some Members consider that in this case, the information would fall under Article 6.5.2, and will refuse to accept it.

¹⁸ Article 6.5.



Flow Chart I.2: How to approach public information and information for which a party has requested confidential treatment

Annex II to the AD Agreement provides further guidance with respect to the application of this provision.

During the course of an investigation a number of situations may arise in which this provision might become relevant. The following two situations occur quite commonly: Firstly, the exporter does not reply to the questionnaire at all. In such a case, the investigating authorities may calculate the dumping margin for that exporter based on facts available. The second situation is where an exporter submits a response to the questionnaire in part, but fails to provide the required data or information on some specific aspects. An example is where some information on adjustments, although requested, was not provided. In such a case, the investigating authorities might calculate some aspects of the normal value for the exporter concerned on the basis of facts available, while basing the remainder of the calculations for that exporter on the information submitted.

A critical issue in this context is what would constitute the “facts available” on which a determination may be based. While the AD Agreement does not go into any detail on this matter, it is common practice for investigating authorities to treat as “facts available” the information in the application, including the information on which the allegation of dumping is based.¹⁹ The “facts available” could also include information provided by other parties to the proceedings or information to which the authorities have access. It is the general practice of some investigating authorities not to regard information submitted by other investigated foreign producers and exporters as “facts available.” The rationale for this is that if such information was taken into consideration, it might provide an incentive for foreign producers or exporters not to reply to the investigation questionnaire if they considered that the information provided by other investigated foreign producers or exporters would yield a more advantageous result, that is, a lower dumping margin than if the determination was based on their own information.

Paragraph 7 of Annex II requires the investigating authorities, where practicable, to check information from secondary sources, including the application, against information from other independent sources. However, it goes on to note 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 that party than if the party did cooperate.”

A dumping margin calculated based on facts available is not intended to be punitive, as it is clear that the investigating authorities should approach reliance on facts available with circumspection and should take into account information which is reliable. However, the provision enables investigating authorities to complete an investigation even in the absence of cooperation by the investigated foreign producers or exporters, and calculate individual dumping margins for such parties.

C. VERIFICATION OF INFORMATION FROM EXPORTERS AND IMPORTERS

Once all the information requested has been received, the issue arises as to whether the information should be accepted on its face value, or whether its accuracy should be confirmed.

Article 6.6 requires that the investigating authorities satisfy themselves as to the accuracy of the information upon which their findings are based. Once all information requested has been received and processed, the investigating authorities will be in a position to confirm, as necessary, that the data submitted by the parties during the course of the proceedings are accurate.

Exactly how the investigating authorities should “satisfy themselves as to the accuracy of the information” is not regulated by the AD Agreement. It is not

¹⁹ Paragraphs 1 and 7 of Annex II specifically indicate that the investigating authorities may rely on information in the application in making a determination based on facts available.

mandatory in terms of the AD Agreement to do on-site verifications. Article 6.7 together with Annex I set out specific rules governing on-site foreign verifications.

Article 6.7 requires:

- the agreement of the firms concerned; and
- notification to the government of the Member in question, and
 - no objection to the verification by that government.²⁰

Annex I to the AD Agreement sets out a number of additional requirements for on-the-spot verifications in the territory of another Member:

- upon initiation of the investigation, the government of the exporting Member, as well as the known exporters concerned, should be informed of the intention of the investigating authorities to verify questionnaire replies on the spot;²¹
- verifications are conducted once the questionnaire response has been received, unless the firm agrees to the contrary and the Government of the exporting Member is informed and does not object;²²
- sufficient advance notice of the proposed verification should be given;²³
- the explicit agreement of the exporter concerned should be obtained before the verification visit is finally scheduled;²⁴
- the exporter concerned should be advised of the general nature of the information to be verified and of any further information that needs to be provided, although this should not preclude on-the-spot requests to obtain further details in the light of the information obtained;²⁵
- once the firms concerned have agreed to the verification visit, the Government of the exporting Member should be notified of the names and addresses of the firms to be visited, and the dates agreed upon;²⁶
- if, in exceptional circumstances, it is the intention of the investigating authorities to include non-governmental experts in the investigating team, the exporter concerned and the Government of the exporting Member must be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.²⁷

²⁰ The AD Agreement does not provide guidance as to the time-frame within which the Government of the exporting Member should object to the verification. Investigating authorities generally establish relatively short deadlines in this regard, to avoid delaying the investigation. The AD Agreement is also silent as to the options should the government of the exporting Member object to a proposed verification. Clearly, the verification may not take place if the objection is maintained. However, nothing in the AD Agreement precludes the investigating authorities consulting with the Government of the exporting Member.

²¹ Paragraph 1 of Annex I. It is therefore common practice for investigating authorities to inform exporters about the possibility of on-the-spot verification of questionnaire responses at the time the questionnaires are issued.

²² Paragraph 7 of Annex I.

²³ Paragraph 5 of Annex I.

²⁴ Paragraph 3 of Annex I.

²⁵ Paragraph 7 of Annex I.

²⁶ Paragraph 4 of Annex I.

²⁷ Paragraph 2 of Annex I.

Article 6.7 and Annex I pertain only to foreign verifications. The AD Agreement is silent with respect to the issue of verifications concerning domestic producers and importers. It is the practice of many authorities to conduct such verifications routinely, governed by the administrative law of the Member concerned. In order to accord the same treatment to all interested parties, many investigating authorities follow the same procedures for such verifications, although there is no explicit obligation to do so in the AD Agreement. The practice of Members as to when on-site foreign verification is done varies. Some investigating authorities do the verification of the exporters/manufacturers before the preliminary determination, whereas others do it after the preliminary determination, in the phase leading to the final determination. The verification of the domestic producers is normally done as early on in the process as possible.

An on-site verification generally consists of a visit by the staff of the investigating authority to a company that replied to the questionnaire for the purpose of confirming whether the information reported accurately reflects the business records of that company.²⁸

An on-site foreign verification (a dumping verification) generally involves two major elements:

- a test for whether the information submitted is complete; that is, whether any relevant information was omitted,²⁹ or irrelevant information added in;³⁰
and
- a test whether the information submitted corresponds to the figures in the sales, accounting and financial records of that company. This test is generally carried out on the basis of a sample. For instance, investigators may select a sample of home and export sales and review all the documentation (orders, invoices, shipping and payment records, etc.) related to those sales. The sample might be chosen randomly, or on the basis of pre-determined criteria, such as, for instance, the home sales with the lowest prices and the export sales with the highest prices.

It is a common practice of investigating authorities to check the information in questionnaire responses for internal consistency.

²⁸ An on-site verification may be the best way to test the accuracy of the information reported in a questionnaire response since it allows comparing the information reported against its source, the company's business records. As business records often cannot be removed from a company's premises, it is not possible to verify a questionnaire response by requesting a company to send the investigating authority originals of the relevant business records.

²⁹ The exporter concerned might have excluded from the questionnaire response home sales made at high prices, or export sales made at low prices.

³⁰ The exporter concerned might have included in the questionnaire response home sales, made at low prices, that do not qualify as sales of the like product (the product like the exported product sold in the domestic market of the country of export). Alternatively, it might have included in the questionnaire response export sales, made at high prices, which do not qualify as sales of the product under investigation.

On-site foreign verifications involve verification of responses to dumping questionnaires. In turn, on-site domestic verifications generally concern the responses to injury questionnaires, but they may also concern the responses to certain parts of the dumping questionnaires, such as those concerning domestic importers related to the exporters.

Members usually conduct on-site verifications of responses to both kinds of questionnaires. However, many Members do not verify on-site each and every questionnaire response received. This approach is understandable, particularly with respect to verifications conducted in foreign countries, which can be very costly.³¹ However, even if no on-site verification takes place, the authorities must satisfy themselves, by whatever other means are available and deemed appropriate, as to the accuracy of the information relied upon.

Unless the investigating authority is required by domestic law or practice to verify all information, choices will have to be made as to which information, and specifically, which companies' information, will be verified. There are no criteria in the AD Agreement for selecting which information submitted by which parties to verify. It is suggested that, in order to ensure that the proceedings are fair and unbiased, selection criteria should be established in advance, and applied consistently. For instance, the investigating authorities might choose to verify questionnaire responses from the largest exporters, or from the exporters with the lowest preliminarily calculated dumping margins. The investigating authorities might choose to verify the information submitted by a domestic producer where the reported prices are significantly higher or lower than those reported by other domestic producers, or where a domestic producer's financial performance is significantly different from that of other domestic producers.

During an on-site verification, investigators may request information going beyond the information reported in the questionnaire responses, either to check information provided in those responses, or because the need for additional information becomes apparent during the course of the verification (see paragraph 7 of Annex I to the AD Agreement). Such information may be requested on the spot, or a deadline for subsequent submission might be established, keeping in mind that sufficient time must be available to process the information received in light of the deadlines for the investigation. On-site verifications may take two to three days per firm, if no costing data are verified. If costing data are also verified, an on-site verification may well require additional time, as checking costing data can be a complex and time-consuming task.

Article 6.7 of the AD Agreement requires that subject to the requirement to protect confidential information, the authorities shall make the results of any on-the-spot foreign verification available, or shall provide disclosure thereof in the context of the "essential facts" process before the final determination is made, to the firms to which they pertain and may make such results available to the applicants. In some

³¹ Occasionally, a few Members have conducted on-site foreign verifications in an indirect manner; that is, by way of allowing a company's external accountants to conduct on-site verifications on behalf of the investigating authorities according to a work plan designed by the authorities themselves.