



**Asia-Pacific
Economic Cooperation**

APEC TRAINING COURSE ON ANTI-DUMPING

3-4 July 2008, Ha Noi, Viet Nam

APEC Committee on Trade and Investment

August 2008

Note: Some of the terms used here do not conform to the APEC Style Manual and Nomenclature. Please visit http://www.apec.org/apec/about_apec/policies_and_procedures.html for the APEC style guide.

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AGENDA
APEC TRAINING COURSE ON ANTI-DUMPING
Hoa Binh Hotel, 3-4 July 2008, Ha Noi, Viet Nam

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3 July 2008		
8.30 – 9.00	Registration	
9.00 – 9.15	Welcoming remarks	H.E. Mr. Nguyen Thanh Bien, Vice Minister of Industry and Trade of Viet Nam
9.10 – 12.00	Session 1: Introduction to Anti-Dumping	Moderator: Ms. Leora Blumberg, Heller Ehrman
9.15 – 10.00	Overview of the Anti-Dumping Agreement: Rights and Obligations	By: Mr. William H. Barringer, Heller Ehrman
10.00 – 10.40	Dispute Settlement Under the Anti-Dumping Agreement: Procedural and Substantive Protections Against Abuse of Anti-Dumping Measures	By: Mr. Claudio Dordi, Professor of Bocconi University, Milan
10.40 – 11.00	Coffee break	
11.00 – 11.40	Key Issues Involved in the Doha Round Rules Negotiations Relating to Anti-Dumping	By: Ms. Margaret Liang, Expert, Ministry of Foreign Affairs of Singapore
11.40 – 12.10	Discussion	
12.10 – 13.30	Lunch	
13.30 - 17.15	Session 2: Procedures and Rules for Conducting Anti-Dumping Investigations	Moderator: Mr. Claudio Dordi, Professor of Bocconi University, Milan
13.30 – 14.10	Overview of U.S. Anti-Dumping Law and Practice	William H. Barringer, Heller Ehrman
14.10 – 14.50	EC Trade Defence Law and Practice	Ms Veronika Hrbata and Ms. Myrto Zambarta, European

		Commission
14.50 – 15.20	Coffee break	
15.20 – 16.00	South Africa Anti-Dumping Experience	Ms. Leora Blumberg, Heller Ehrman
16.00 – 16.40	A comparative study on regulatory and administrative framework for anti-dumping	Mr. Thai Bao Anh, Bao Law Firm
16.40 – 17.15	Discussion	
End of Day 1		
4 July		
9.00 – 12.30	<p>Session 3: Imposing Disciplines on the Application of Anti-Dumping Measures: Key WTO Decisions, Emerging Issues and Strategies:</p> <ul style="list-style-type: none"> • Zeroing • Byrd Amendment • Continuous Bond • Use of Adverse “Facts Available” • Causations in Injury Investigations • Application of Country Wide Rate in Non Market Economy Investigations • CEP Offset Cap • Like Product Definitions • Anti-Circumvention Measures • Compliance With Panel and Appellate Body Decisions 	<u>Moderator:</u> Ms. Margaret Liang
9.00 – 9.40	Trade remedy proceedings and WTO Dispute Settlement	Mr. William H. Barringer, Heller Ehrman
9.40 – 10.20	<p>- Application of Countrywide rate in Non-Market Economy investigations - and the possibility of Market Economy Treatment in EC investigations</p> <p>- Anti-Circumvention</p>	Ms. Myrto Zambarta, European Commission
10.20 – 10.40	Coffee break	
10.40 – 11.20	<p>- Zeroing</p> <p>- Use of Adverse “Facts Available”</p>	Ms. Leora Blumberg, Heller Ehrman

11.20 – 12.00	- Compliance with AB Decisions - Causation in injury investigation	Ms. Veronika Hrbata, European Commission
12.00 – 12.30	Discussion	
12.30 – 14.00	Lunch	
14.00 – 16.20	Session 4: The Experience of APEC Economies and Industries Targeted for Anti-Dumping Measures	<u>Moderator</u> : Mr. William Barringer
14.00 – 14.40	China' experiences in dealing with anti-dumping cases	Mr. Liang Hao, Fair Trade Bureau of Import and Export, Ministry of Commerce
14.40 – 15.20	Viet Nam' experiences in dealing with anti-dumping cases	Ms. Nguyen Dieu Linh, Assistant to Emeritus Chairman of Vietnam Seafood Association (VASEP)
15.20 – 15.40	Coffee break	
15.40 – 16.10	Discussion	
16.10 – 16.20	Closing remarks	Mr. Do Thanh Hong, Viet Nam Senior Official to APEC
End of the Event		

The WTO Antidumping Framework

William H. Barringer

Development of International Antidumping Rules

- Prior to the creation of the General Agreement on Tariffs and Trade (GATT) in 1947, some individual countries such as the U.S. had antidumping laws but there were no internationally agreed upon rules.
- Article VI of the GATT provided exceptions to the MFN and non-discrimination principles of the GATT by permitting the imposition of antidumping and countervailing duties and provided some general rules governing imposition of duties.
- During the Tokyo Round, GATT contracting parties negotiated the Antidumping Code, an attempt to elaborate on the Article VI Rules.
- During the Uruguay Round there were intense negotiations to revise the Antidumping Code resulting in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

Major Changes to Antidumping Rules in the Uruguay Round

- Essentially two sides in the negotiations: (1) frequent users of antidumping measures led by the U.S. and the EC; (2) frequent targets of antidumping measures led by Japan, Singapore, Brazil and other large exporting countries.
- Biggest change was not because of the Antidumping Agreement itself, although these were significant, but because disciplines on the application of antidumping measures were for the first time enforceable because of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.
- Previously a single country could block adoption of a GATT report, thereby rendering it meaningless; that is no longer possible.

Major Changes (cont'd)

- Frequent users main objectives were to codify in the Agreement their existing practices and make it easier to apply antidumping measures.
- Frequent targets wanted to clarify disciplines to make it more difficult to apply antidumping measures and to eliminate certain practices they considered to be abuses of antidumping measures.
- The major unresolved issue after the Uruguay was the question of anti-circumvention measures; the Marrakesh Declaration establishing the WTO contemplated continued negotiations.
- The U.S. was able to insert a “special” dispute settlement standard, but this has largely been ineffective in practice.

Structure of Agreement

- Article 2 – Determination of the existence of dumping and the rules for making the determination
- Article 3 – Determination of whether the industry in the importing country is injured or threatened with injury and rules for making such determination
- Article 4 – Definition of Domestic Industry (for purposes of injury determinations)
- Article 5 – Standards for Initiation and Procedures for Subsequent Investigation
- Article 6 – Evidentiary standards and procedural rights of parties to tender evidence and comment on evidence

Structure (cont'd)

- Article 7 – When Provisional Measures Can Be Applied and Limits on Their Duration
- Article 8 – Permits Authorities To “Suspend or Terminate” Investigations if Respondents Agree to Price Undertakings
- Article 9 – Imposition and Collection of Duties, Including the Opportunity for Review of the Amount of the Duties
- Article 10 – Retroactivity in Critical Circumstances
- Article 11 – Changed Circumstance and Sunset Reviews
- Article 12 – Transparency of Proceedings

Structure (cont'd)

- Article 13 – Opportunity for Judicial or Other Form of Review of Antidumping Determinations
- Article 14 – Antidumping Action on Behalf of Third Country (never used because requires consensus of Council for Trade in Goods)
- Article 15 – Developing Country Members
- Article 16 – Establishes Oversight Committee
- Article 17 – Consultation and Dispute Settlement

Important Substantive Achievements

- Provision for “Fair Comparison” between normal value and export price
- No endorsement of Anti-Circumvention Measures
- Evidentiary and Transparency Disciplines
- Meaningful mechanism to enforce disciplines
- Provided the basis for WTO Panel and Appellate Body Decisions Which Have Eliminated Numerous Abuses
- Set reasonable standards for de minimis margins and negligibility
- Clarified calculation of constructed value as normal value

Important Substantive Achievements (cont'd)

- Prohibition on using normal value based on average home market prices as the basis for comparison with individual export transactions, except in cases of targeted dumping
- Maintaining the non-attribution requirement for injury determinations whereby injury from factors other than dumped imports cannot be attributed to the dumped imports
- Although not set at high enough thresholds, establishment of specific standards for de minimis margins of dumping and negligibility of imports in injury cases was important advance
- Preliminary injury determination to avoid frivolous investigations

Important Substantive Achievements (cont'd)

- Elaboration of evidentiary standards and application of “facts available”
- Improved disciplines on calculation of constructed value, particularly “selling, general and administrative expenses” and profit.

Substantive Failures

- Failed to incorporate a mandatory “lesser duty” rule
- Failed to clearly prohibit anti-circumvention measures
- No special and differential treatment for less developed Member countries
- Created a loophole in accepting “targeted dumping”
- Legitimized rejection of sales below costs in determining normal value
- While including sunset reviews, the agreement failed to make sunset mandatory after 5 years

Substantive Failures (cont'd)

- Endorsement of retroactive systems for collecting duties such as that used by the U.S.
- Failure to define whether subject dumped imports “in and of themselves” must be the cause of material injury or threat thereof
- Failure to clearly address the scope of “imported” products and domestic “like” products

- Is antidumping economically sound basis for departing from normal WTO principles or a “political” convenience?
- Are the disciplines working to avoid abuses?
- Are developing countries and newly industrialized countries likely to be the most frequent users in the future?
- Do developing countries have adequate investigative resources and transparency to allow their decisions to survive scrutiny under the WTO?

Dispute Settlement Under the Anti-Dumping
Agreement: Procedural and Substantive Protections
against Abuse of Anti-Dumping Measures

Prof. Claudio Dordi

Bocconi University, Milan

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Antidumping and WTO dispute settlement

- Summary:
 - Why WTO Dispute settlement is so relevant for AD issues
 - Relevant applicable legislation
 - What AD measures can be challenged before
 - Standard of review
 - Specific provisions for developing countries
 - Implications in terms of implementation of any recommendation of the DSB
 - Sunset/expiry reviews
 - Statistics on dispute settlement on AD

Why AD is important for DS? (and vice-versa)

- AD measures (as well as the other “trade defense measures”) are “unusual” in the WTO system:
 - AD agreement **assigns to the Members** the responsibility for conducting investigation to determine the conditions necessary in order to impose the measures in question are fulfilled (J. Kreier, 2005)
 - When the “conditions” are fulfilled, the Member may apply AD duties on a producer or exporter-specific basis on a non-MFN basis
 - The “conditions” are both substantive and procedural
 - Multilateral control
 - Determinations by Members regarding the existence of such “conditions” are subject to WTO dispute settlement

Why AD is important for DS (and vice-versa)

- Dispute Settlement represents the “final word” regarding the consistency of an AD measure
- However: systematic recourse to Dispute Settlement as the primary guarantor of consistency was neither feasible nor desirable
 - A) systematic recourse against any AD measures would impair the adoption of AD
 - B) not efficient even for the complainant: the Dispute Settlement in the WTO could last few years to arrive to the repeal of the illegal measure
- That’s why the AD agreement provides substantial and a number of procedural rules to be observed in the application of AD measures by the importing Member

Applicable legislation

- Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
- Art. 17 of Antidumping Agreement (special rules for dispute settlement with regard to AD duties)
 - Par. 1: **makes applicable the DSU** to consultation and settlement of disputes under AD agreement (art. 17 and DSU are both applicable to AD disputes)
 - Par. 2: each Member shall **provide adequate opportunity for consultation** regarding representations made by other Members concerning any matter affecting the operation of AD agreement
 - Par. 3: authorizes any Member to ask for **consultation** if it considers that any benefit accruing to it under AD agreement is nullified or impaired

Applicable legislation (2)

- Art. 17.4, as interpreted by the AB in Guatemala-Cement case, provides that, if consultation fails and if the importing member has:
 - i) levied definitive AD duties
 - ii) accepted price-undertakings
 - iii) adopted a provisional measure having a significant impact (and contrary to art. 7.1 AD)
 - The Member that requested the consultation may refer the matter to the Dispute Settlement Body
- The “matter” consists of the “specific measure” at issue and the legal basis for the complain

What can be challenged?

- As clarified in US-1916 Act, in the Request for establishment of a Panel one of the three above mentioned measures must be identified; however, each part of the national legislation can be challenged (i.e. a request can be presented only if the importing State has imposed one the three measures above mentioned)
- Moreover, in the same case it has been clarified that AD national legislation can be challenged before a panel “as such” (not only legislation but even administrative guidance, such as the US Bulletin in the US sunset review case)

What can be challenged

- Formally: the administrative records of the investigation
 - Notice of initiation (art. 6)
 - Example: (Failure to indicate the information required). In Argentina- Ceramic Tiles, the panel stated that an investigating authority could not fault an interested party for not providing information it was not clearly requested to submit.
 - Other examples: Failure to provide information concerning the extension of the period of investigation, failure to set time-limits for the presentation of arguments and evidence, failure to allow interested parties access to information
 - Preliminary and final determinations
 - Example: Guatemala-Cement, the AB noted that Article 12.1.1(vi) explicitly provides that a public notice of the initiation of an investigation shall include adequate information on the 'time-limits allowed to interested parties for making their views known'

What can be challenged (2)

- The petition submitted by the domestic industry to initiate investigation, and any further petitioner's submissions (art. 5)
 - Example: Guatemala-Cement: Guatemala's authority, in violation of Article 5.2, had initiated the antidumping investigation without sufficient evidence of dumping having been included in the application
- The answers to the questionnaires by exporters and importers, and subsequent submissions
 - Example: In US Hot Rolled Steel the AB stated that Article 6.1.1 recognizes that it is fully consistent with the *Anti-Dumping Agreement* for investigating authorities to impose time-limits for the submission of questionnaire responses

What can be challenged (3)

- Any other relevant document issued by the investigating authority, such as Inspection Acts, the disclosure of essential facts (e.g. determination of injury, normal value, dumping margin, costs, etc.)
 - Example: In Mexico – Corn Syrup, the Panel found that Mexico violated Art. 3.1, 3.4 and 3.7 by failing to consider all the factors governing injury under Art. 3, because an investigation of threat of material injury requires a consideration of not only the factors pertaining to threat of material injury, but also factors relating to the impact of imports on the domestic industry (Art. 3.4)

The standard of review

- Art. 17.6: The assessment of the WTO-consistency of a trade remedy should in general terms consist of determining:
 - whether the investigating authority established the facts in an objective manner, based on the factual evidence contained in the records; (17.6 i)
 - whether an objective and neutral evaluation of those facts leads to conclude that there were substantive grounds giving rise to the imposition of the trade remedy (17.6 i)
 - whether the interpretations of the relevant WTO provisions in accordance with customary rules of interpretation of public international law (17.6 ii); of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations

The importance of standard of review

- Three different “models” of standard of review:
 - The panel “review” the determination of the investigating authority on whether the substantive conditions for the application of an AD measure are met
 - The panel can, by itself, decide whether the conditions are met (no deference to national authority)
 - The panel could be restricted to confirm that a determination has been made without examining the substance of the determination (complete deference to national authority)
- Art. 17.6 adopt the first model: the function of the panel is only that to review the administrative authority establishment and evaluation of the facts.

Standard of review

- EC- Pipe Fittings:
 - “In light of this standard of review, in examining the matter referred to us, we must evaluate whether the determination made by the European Communities is consistent with relevant provisions of the *Anti-Dumping Agreement*. We may and must find that it is consistent if we find that the European Communities investigating authority has properly established the facts and evaluated the facts in an unbiased and objective manner, *and* that the determination rests upon a □ permissible□ interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying anti-dumping investigation, nor to substitute our judgment for that of the EC investigating authority even though we may have arrived at a different determination were we examining the record ourselves”

Standard of review and interpretation (17.6 ii)

- The Panel report on *US - Hot-Rolled Steel*: in order to evaluate whether the interpretation reached is a permissible one, the starting point of the panel's analysis should be the Vienna Convention on the law of treaties (art. 31-32)
- Art. 31.1
 - A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose
- Art. 31.2
 - The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Standard of review: interpretation

- 31.3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
- 31.4 A special meaning shall be given to a term if it is established that the parties so intended
- 32: Supplementary means of interpretation

Challenges based on Art. 15 AD

- Art. 15 reads:

-

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

What are “constructive remedies”?

- *EC – Pipe Fittings:*
 - *the Panel* faced an argument by Brazil (*constructive remedies* can include remedies other than price undertakings, such as *quantitative undertakings*).
 - The panel rejected the argument by Brazil arguing that only remedies explicitly provided for in the AD Agreement could be considered to be “constructive remedies”

What are “constructive remedies”?

- EC-Bed Linen (panel)
 - “The “exploration” of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome.
 - Thus, Article 15, in our view, imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.
 - It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country

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Key Issues in Doha Round Rules Negotiations Relating to Anti- Dumping Measures

**APEC Training Course on Anti-
Dumping
Hanoi, 3-4 July 2008**

By Margaret Liang

Doha Mandate

- to negotiations aimed at clarifying and improving disciplines under the AD and SCM Agreements, while preserving the basic concepts, principles and effectiveness of those Agreements.

CHAIRMAN'S TEXT

- Requested by Ministers at Hong Kong
- To serve as “the basis for final stage of the negotiations”
- Released on 30 November 2007 (TN/RL/W/213)
- Chair's Working Document, released on 28 May 2008 (TN/RL/W/232)

OVERVIEW OF CHANGES

- Numerous proposed changes relating to 13 out of 18 Articles of ADA
- Changes relate to, *inter alia*,:
 - Dumping margin calculations
 - Injury determinations
 - Initiation of investigations
 - Due process/transparency
 - Reviews and duration of measures

Selected Issues

- Sunset
- Public interest
- Zeroing
- Product under consideration
- Causation
- Anti-circumvention
- Material Retardation

Sunset: Current Rules

Article 11.3

- Measures must be terminated not later than five years after imposition,
- Unless authorities determine in a review,
- Initiated on own initiative or based on duly substantiated request by or on behalf of domestic industry,
- That expiry is likely to lead to the continuation or recurrence of dumping and injury.

Sunset: New Elements

- Except in special circumstances, review must be initiated based on a written application by the domestic industry
 - Standing required
 - Sufficient evidence required
 - If self-initiate, must explain special circumstances

Sunset : New Elements

- Standard for determination
 - Positive evidence/objective examination
 - All relevant factors
 - No presumptions that assign decisive weight to particular factors

Sunset: New Elements

- Preferably finish review within five years, but in any event no more than six months later
- Effective date of determination retroactive to five years in any event. Must refund money collected with interest.
- Next five year period runs from effective date.

Sunset: New Elements

- AD duty must be automatically terminated in any event no later than 10 years from date of imposition.
- Existing measures – 10 year automatic termination runs as of date of entry into force of DDA.

Sunset: New Elements

- Re-imposition – only pursuant to new investigation based on sufficient evidence initiated pursuant to Article 5.
- In case of new investigation within two years from termination based on sufficient evidence of dumping, injury and causation, expedited provisional measures possible.

“Public interest”: Current Rules

- “Desirable” that imposition of AD duties be permissive.
- No requirement to do a public interest assessment or to maintain discretion not to impose AD duties where legal requirements for imposition are fulfilled.

“Public Interest”: New Elements

- Members shall establish procedures to enable the authorities
- to take due account of representations of domestic interested parties whose interests might be affected by imposition of an AD duty
- when deciding:
 - Whether or not to impose a duty where all requirements for imposition have been fulfilled:
 - Whether the amount of the AD duty to be imposed should be the full margin of dumping or less.

“Public Interest”: New Elements

- Application of these procedures, and decisions pursuant to them, are not subject to:
 - WTO dispute settlement
 - Judicial review requirements of Article 13.

“Public Interest”: New Elements

- Procedures must be notified to WTO
- Determinations subject to public notice and explanation obligations of Article 12.

Zeroing: Current Rules

- Different viewpoints on whether ADA contains provisions that explicitly addresses zeroing
- AB has ruled that zeroing is prohibited both in investigations (WA-WA and T-T) and in reviews.

Zeroing: New Elements

- Investigations
 - Zeroing prohibited in WA-WA comparisons
 - Zeroing permitted in T-T and WA-T comparisons
- Article 9 and 11 Reviews
 - Zeroing permitted

Explanation of “Zeroing Practice”
Under the two main methods:
No findings of dumping

Date	Normal value	Export price
1 Jan	100	100
1 Feb	120	120
1 March	180	180
1 April	200	200

Explanation of “Zeroing Practice” Under the Exception Findings of Dumping

Date	Normal value WA basis	Export price T-by-T	Dumping Amount
1 Jan	150	100	50
1 Feb	150	120	30
1 March	150	180	-30
1 April	150	200	-50

Product Under Consideration: Current Rules

- No specific provision in ADA governing scope of investigated product

Product Under Consideration: New Elements

- Guidelines for determining scope
 - Same basic physical characteristics
 - Differences in models, types, grades, quality doesn't prevent from being one PUC
 - Significance of differences based on relevant factors, including similarity in use, interchangeability, competition, channels of distribution

Product Under Consideration: New Elements

- Initiate, investigate and make determinations with respect to a PUC.
- Must amend product scope if finding during investigation that it includes products not properly included in PUC.

Causation: Current Rules Article 3.5

- Art 3.5 sets forth the “non-attribution” rules whereby authorities may not attribute injurious effects of other factors to dumped imports
- Provisions further require that effects of dumped imports on domestic industry must be analysed separately from effects of other known factors
- Together with this non-attribution rules and first sentence of Art 3.5, authorities are required to determine whether effects of dumped imports, not effects of other factors, cause material injury to domestic industry

Causation: New Elements

New sentence introduced to Art 3.5 to replace last sentence:

“ The examination required by this paragraph **may** be based on a **qualitative analysis** of evidence concerning, inter-alia, the nature, extent, geographic concentration, and timing of such injurious effects. While the authorities **should seek** to separate and distinguish the injurious effects of such other factors from injurious effects of dumped imports, they **need not quantify** the injurious effects attributable to dumped imports and to other factors, **nor weigh** the injurious effects of dumped imports against those of other factors”.

Anti-Circumvention: Current Rules

- No specific provisions in ADA
- Ministerial Decision – Noted negotiators were unable to resolve “problem of circumvention in URD and called on AD Committee to resolve.

Anti-Circumvention: New Elements

- Authorities may find circumvention if PUC Is supplanted by:
 - Parts or unfinished forms of PUC for assembly into PUC,
 - Imports of the same product from a third country assembled from parts or unfinished forms from country subject to AD measure,
 - Imports of a slightly modified product.

Anti-Circumvention: New Elements

- Further requirements:
 - Principal cause of change is AD duty rather than economic or commercial factors unrelated to duty,
 - Imports undermine remedial effect of duty.

Anti-Circumvention: New Elements

- For assembly and assembly in third country cases,
 - Process of assembly or completion must be minor or insignificant, and
 - Cost of parts or unfinished forms must make up a significant proportion of total costs (quantitative tests).

Anti-Circumvention: New Elements

- For third country assembly, the authorities must find that the imports of parts or unfinished forms are dumped under Article 2.

Anti-Circumvention: New Elements

- Must conduct formal review initiated pursuant to duly substantiated request.
- Except in special circumstances, standing requirement applies.
- Article 6 (evidence and procedure) and Article 12 (determinations) apply.

Material Retardation: Current Rules

- One form of “injury” is material retardation to the establishment of domestic industry.
- No specific guidance on when an industry is in establishment or how assessment is to be performed.

Material Retardation: New Elements

- Industry is in establishment if a genuine and substantial commitment of resources has been made to domestic production of a like product not previously produced, but production has not yet begun or been achieved in commercial quantities.

Material Retardation: New Elements

- Notwithstanding above, an industry may be in establishment if established producers are not able to satisfy demand to any substantial degree.
- Collective production capacity of established producers cannot exceed 10% of domestic demand.

Material Retardation: New Elements

- Special circumstances to self-initiate an investigation may exist where
 - the domestic industry is still in establishment, or
 - One or more producers are still in a start-up situation.

Other issues in the draft

- Confidential information
- Facts available
- Disclosure
- Limited examination
- Price undertakings
- Duty assessment, refunds and interests
- New shipper's review

Other issues in the draft

- Public notices
- Third country dumping investigations
- **AD policy review**

Issues not covered in draft

- De minimis dumping margins
- Negligible imports
- Lesser duty (Chair's Text has eliminated the existing "lesser duty" language)
- S+D treatment
 - LDC treatment

Working Document of Chairman: TN/RL/W/232 (28 May 2008)

- Working Document was response to requests by several WTO members for Chair to revise his draft text
- Much controversy surrounding Chair's November 2007 text especially on issue of "zeroing".
- Since November 2007, the NG has held extensive consultations on Chair's draft
- Working Document is not a revised chairman's draft
- Chair has attempted, in Working Document, to consolidate all text-based proposals submitted to NG, together with corresponding Chairman's proposals as contained in Nov 07 draft
- Further consultations will proceed on basis of Chair's Working Document

OVERVIEW OF U.S. ANTIDUMPING LAW AND PRACTICE

William H. Barringer

Agencies

- U.S. Department of Commerce
 - Part of President's cabinet, led by political appointees.
 - Responsible for formally initiating AD/CVD cases.
 - **Responsible for calculating the *extent* of dumping.**
- U.S. International Trade Commission
 - Independent, non-partisan, quasi-judicial federal agency.
 - 6 commissioners. By law, 3 Democrats, 3 Republicans.
 - **Responsible for determining whether domestic industry is *injured* by imports.**

Time Line for Typical AD Case in U.S.

- Day 0: Petition is Filed.
- Day 20: DOC decides whether to initiate (standing).
- Day 45: ITC makes preliminary injury determination.
- Day 160: DOC makes preliminary antidumping determination.
- Day 235: DOC makes final AD determination.
- Day 280: ITC makes final injury determination.

Postponements of 60 days are allowed for DOC preliminary and final determinations; hence, most cases take about a year

What are Antidumping Duties?

- Antidumping duties seek to prevent foreign exporters from engaging in “dumping”.
- “Dumping” is defined as selling in export market at a price lower than home market or below cost.
- What dumping is not:
 - nothing to do with subsidies
 - does not involve predatory pricing
- “Material injury” (or threat) to domestic industry must be demonstrated before AD duties can be imposed.
- Prevention of the establishment of an industry may be more relevant for developing countries, but has seldom been used.

Special Rules for NME Countries

- The U.S. Commerce Department has ruled that China and Vietnam are “non-market economies” (NME).
- Under U.S. law, special AD rules are applied to non-market economies.
- WTO agreements provide little meaningful discipline in terms of non-market economies.
- WTO accession agreements allow special treatment for non-market economies.
- Application of antidumping measures to market economies is governed entirely by Antidumping Agreement.

Market Economy v. Non-Market Economy

- Theory behind special NME rules is that Vietnam and China's home market prices and costs are unreliable – not “market” driven.
- When NME provision applies, DOC ignores exporter's actual home market prices and costs.
- Instead, DOC constructs a “Normal Value” by applying surrogate values from a market economy country to the NME producer's “Factors of Production”

Market Economy Comparisons

- Market economy comparisons are between price to or in the U.S. and normal value based on hierarchy of home market price, third country price or constructed value.
- U.S. price is based on “theoretical” export price or constructed export price depending on affiliation between export entity and importing entity in the U.S.

Respondent Selection

Three Types Of AD Rates

1. Calculated rates of chosen companies (“mandatory respondents”).
2. Weighted-average of calculated rates for mandatory respondents is applied to all non-mandatory respondents that have demonstrated non government control in non-market economy (“separate rate”).
3. Weighted-average of calculated rates for mandatory respondents applied to all non-mandatory respondents in market economies
4. In non-market economies, U.S. also calculates a country-wide rate for all those not participating or which could not prove no government control.

Not All Exporters Will Obtain Own Rate

- In theory, all exporters are entitled to get their own individually-calculated AD rate.
- In practice, DOC has limited resources.
- In past cases with numerous exporters, DOC has selected only a handful, usually the largest exporters but sometimes by using sampling as permitted under the AD Agreement.

Respondent Selection

- At the beginning of each Investigation or Administrative Review, DOC issues a questionnaire requesting the total quantity and value of each potential respondent's sales to the United States during the POI or POR.
- Recently DOC has attempted to use Customs and Border Protection data for respondent selection, but with mixed success.
- U.S. law allows DOC to select either largest exporters or statistically valid sample.
- If there are many exporters, petitioners will argue strongly for statistically valid sample, particularly in reviews.
- In the past, DOC has sought to select enough of the top exporters as Mandatory Respondents to capture 40-50% of the imported goods.

Non-Mandatory Respondents

Non-Mandatory Respondents

Separate Rates – Non Market Economy

- Producers who are not selected as Mandatory Respondents are referred to as Non-Mandatory Respondents.
- Non-Mandatory Respondents may complete a separate rate application in order to receive a separate rate.
- The separate rate application allows the Non-Mandatory Respondent to establish that:
 - It is free from *de jure* government control; and that
 - It is free from *de facto* government control.
- The Separate Rate is calculated as the weighted average of the non-adverse, non-zero antidumping margins that DOC calculates for the Mandatory Respondents.

Non-Mandatory Respondents

Separate Rates (ctd.)

- In recent cases involving China, DOC has chosen as few as two Mandatory Respondents due to funding and staffing issues.
- In *Circular-Welded Carbon-Quality Steel Pipe from China*, all Mandatory Respondents received AD margins based on total adverse facts available (total AFA).
- In this and similar cases, DOC has simply averaged the margins alleged in the Petition and used this figure as the Separate Rate.

Non-Mandatory Respondents

Country-Wide Rates – Non Market Economies

- Producers who are not selected as a Mandatory Respondent and who do not provide complete responses to DOC's Quantity and Value (Q&V) Questionnaire **AND** DOC's Separate Rate Application will be subject to the punitive Country-Wide Rate.
- This rate is typically drawn from the Petition filed by the U.S. industry, and is generally the highest rate that can be corroborated using other data on the record.

Non-Mandatory Respondents (cont'd)

- In market economies, the non-mandatory respondents always received the weighted average rate of the mandatory respondents except when facts available are applied to one or more of the mandatory respondents.

Non-Mandatory Respondents In Non-Market Economies

Separate Rate Certifications

- In an administrative review, any respondent that has previously qualified for a Separate Rate is permitted to submit a certification that their status has not changed.
- This will qualify the respondent to continue to receive a separate rate.
- The certification process is considerably less burdensome than the full separate rate application process.

Investigation of Mandatory Respondents

Mandatory Respondents

- Mandatory Respondents are required to respond to Section A, B, C and D of DOC's antidumping questionnaire.
 - Section A: Government control, ownership, corporate structure, affiliations in Non-Market Economy; General information about company, affiliations, how sales are made, etc. in Market Economy.
 - Section B: Home market sales
 - Section C: U.S. sales and direct sales expenses.
 - Section D: Cost of production (if sales below cost in the home market are alleged)

Surrogate Country and Value

Normal Value in Non-Market Economies

Surrogate Country Applicable to Non-Market Economies

- In the NME context, DOC selects a Surrogate Country to serve as the source of the Surrogate Value data used to calculate Normal Value
- The Surrogate Country is a market economy country which:
 - Is at a level of economic development comparable to that of the NME country (China);
 - Has significant producers of comparable merchandise; and
 - Has good data for determining surrogate values
- In practice, the second two criteria (significant production and quality data) are the most important.
- In practice, DOC typically selects India for China and Bangladesh for Vietnam.
- Petitioner and respondent submit comments on appropriate

Surrogate Values and ME Inputs

- In the NME Context, DOC normally values raw materials (including packing materials) using Surrogate Values from a Surrogate Country.
- **However**, respondents that purchase raw materials from market economy countries may be eligible to have their raw materials valued using the actual prices paid (“Market Economy Inputs”).

Normal Value in Market Economies

- Based on home market price, third country price (if home market not viable) or constructed value (if there are not sufficient sales above costs in home market or third country market)
- Prices generally calculated on ex-factory basis.
- Price comparison is based on export price (if not sold to affiliate in the U.S.) or constructed export price (if sold to affiliate in the U.S.)

Preliminary Determination

- DOC's Preliminary Determination is issued no later than 190 days after the date of initiation of the investigation.
- The Preliminary Determination marks the beginning of the so-called "provisional measures," and the beginning of liability for antidumping duties for the U.S. importers of subject merchandise.
- If both DOC and the ITC determine that critical circumstances exist, the provisional measures may be imposed on a **retroactive** basis, taking effect 90 days prior to the date of the Preliminary Determination.
 - Critical circumstances are characterized by a surge in imports after the initiation of an investigation or after widespread knowledge of an impending petition.

Questionnaires and Questionnaire Responses

- DOC decision is based on responses to initial questionnaire and subsequent supplemental questionnaires.
- Data bases are required for domestic, third country sales and/or constructed value (which provide the basis of normal value) and these are compared to databases for U.S. sales.
- When selling to an affiliated party in the U.S., the starting price is the resale price of the affiliate in the U.S.
- The affiliates resale price is adjusted for costs incurred from the factory to the U.S. and for relative profit (constructed export price or CEP).
- U.S. applies a CEP offset cap.

Verification

- DOC conducts verifications, which is essentially an audit, in order to confirm or disconfirm the validity of all information submitted to DOC by respondents.
- All data are reviewed and compared with original documents, and linked with the respondent's books and records.
- Any discrepancies between the respondent's books and records may result in the use of adverse facts available.
- DOC has a high level of sensitivity to fraudulent practices that are sometimes used by respondents to develop more favorable data, and has developed aggressive techniques to combat this.
- DOC is not, on the other hand, particularly sensitive to fraudulent practices (e.g., tax evasion) that don't impact the validity of the data upon which DOC relies for its AD margin calculations.

Briefs and Hearings

Briefs and Hearings

- Before it makes its Final Determination, DOC may (at the request of any interested party) hold a hearing during which counsel for petitioners and respondents present arguments concerning the issues of the case.
- Following the hearing, parties prepare and file briefs, which address the issues of the case in considerable detail, and then rebuttal briefs, which rebut the arguments presented in the opposition's brief.
- No new factual information may be introduced either at the hearing or in the briefs.

Final Determination

Final Determination

- DOC's Final Determination is issued no later than 280 days (or 325 if final determination is extended) days after the date of initiation of the investigation.
- An "Issues and Decisions Memorandum" accompanies the Final Determination, which addresses each argument presented by any party to the investigation, and sets forth DOC's decision or position on each.
- Public versions of the Decision Memoranda are available on the DOC's International Trade Administration website.

Key Issues

- Model matching and difference in merchandise adjustments
- Home market viability
- Adjustments to derive normal value and net export or constructed export price
- Cost of production
- Affiliation (major inputs from affiliated suppliers and CEP)
- Level of trade comparisons
- SG&A and Profit ratios when constructed value is used as the basis of normal value
- CEP offset cap
- Cut off on new information being submitted

Retroactive Determination of Antidumping Duties

- In U.S., results of antidumping investigation just establishes the “cash deposit” rate until a review is completed.
- Reviews determine the actual duties paid and may be requested in the anniversary month of the antidumping duty order, otherwise liquidation is based on cash deposit rate at time of entry.
- Reviews involve a similar questionnaire/verification process as initial investigation.
- Foreign producer, importer, or U.S. producer can request a review.

Injury Determinations

- Preliminary Determination
- Final Determination

Key Issues in Injury Determination

- Absence of injury based on trends over time.
- Alternative causes of injury.
- Role of other foreign suppliers in actual or potential injury (Bratsk Court Ruling).
- U.S. International Trade Commission collects its own information through questionnaires to importers, exporters, foreign producers, purchasers and U.S. producers.
- Injury investigation is largely focused on U.S. market conditions.

Appeals

- U.S. Court of International Trade
- Court of Appeals for the Federal Circuit



External Trade

EC TRADE DEFENCE LAW AND PRACTICE

Introduction to Trade Defence Services

Who are we?

EU Commission - DG TRADE / Directorate H (TDI)

Main functions

- Trade defence investigations
- Monitoring TDI activities of third countries
- Policy (legislative developments in EU and WTO, methodology, TDI aspects in relations with third countries, etc.)
- Negotiation of TDI rules in the WTO

EU Anti-Dumping - Legal Basis

- WTO regulates trade defence actions of its members.
- EU TDI legislation fully transposes WTO rules: Council Regulation (EC) No 384/96 (the '**Basic Regulation**')
- EU TDI legislation goes beyond WTO rules in certain aspects.

EC Law and Practice

- EC applies WTO+:
 - there are elements in our legislation that go above and beyond WTO requirements
 - Lesser Duty Rule
 - Community (Public) Interest Test
 - Shorter deadlines

The Lesser Duty Rule

- Not required by WTO agreement, but ‘desirable’
- Removed altogether from the draft text issued by the Chairman of the Rules Negotiating Group, despite calls to make it mandatory

The Lesser Duty Rule

- **EC legal provisions:**

- Articles 7(2) and 9(4) of the Basic Regulation

“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.”

The Lesser Duty Rule

Level at which injury is removed:

Calculation of an **injury margin** ('**price underselling**') based on the lowest price level at which Community transactions are considered not to result in injury ('**non-injurious price**').

The Lesser Duty Rule

Non-injurious price:

- full cost ($COP = COM + SG\&A$)
- + normal profit (profit that the industry would have achieved if injury had not occurred)

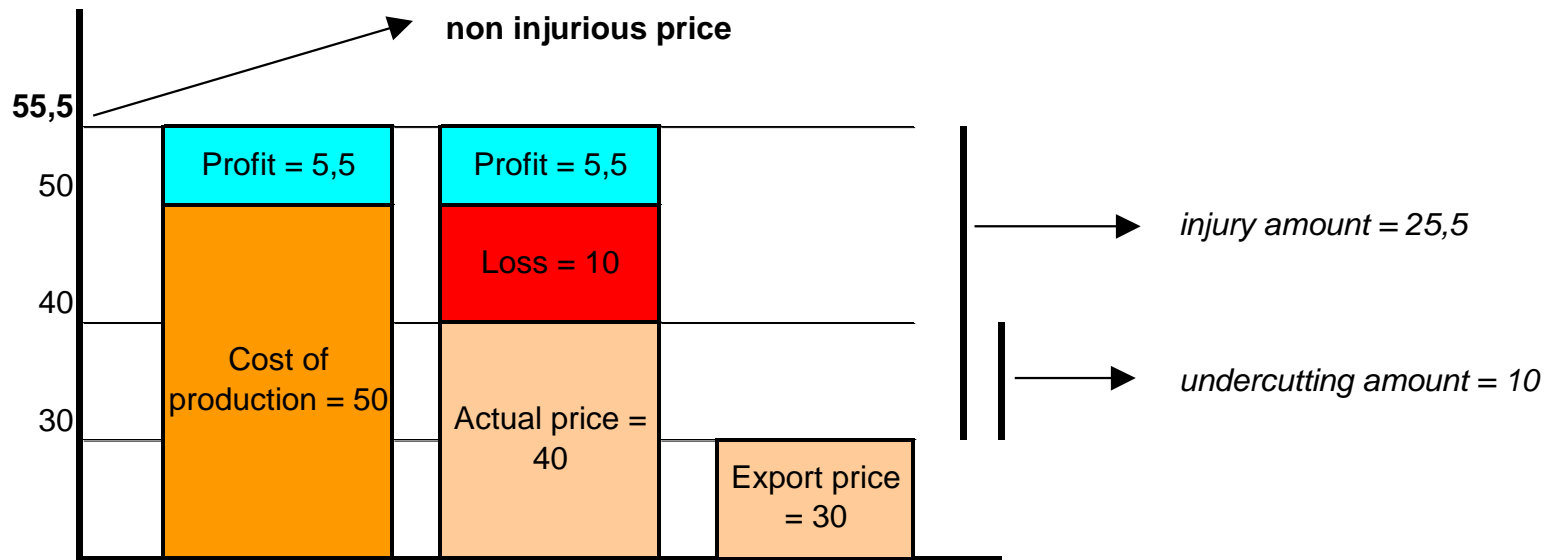
COP = Cost Of Production

COM = Cost of Manufacture

SG&A = Selling General & Administrative costs

External Trade

How to establish a non injurious price for the domestic industry



Normal profit= 10% on turnover

Non injurious price =

1. COP or break even price + profit
2. Actual price + losses + normal profit

Injury Margin (Price Underselling)

Concept: difference between prices:

- non- injurious price of the Community industry
- import prices (actual)
 - both adjusted
 - aggregated for the Community industry
 - for each of the exporters: prices aggregated per model, or prices at a transactions' level in case of targeting.

Injury Margin (Price Underselling)

$$\frac{\text{C. I. non injurious price} - \text{Imports' price}}{\text{CIF imports' price (Community duty unpaid)}} \times 100$$

- Denominator should be the same as the one used for the dumping calculation: margins are established at a comparable level

Injury Margin (Price Underselling)

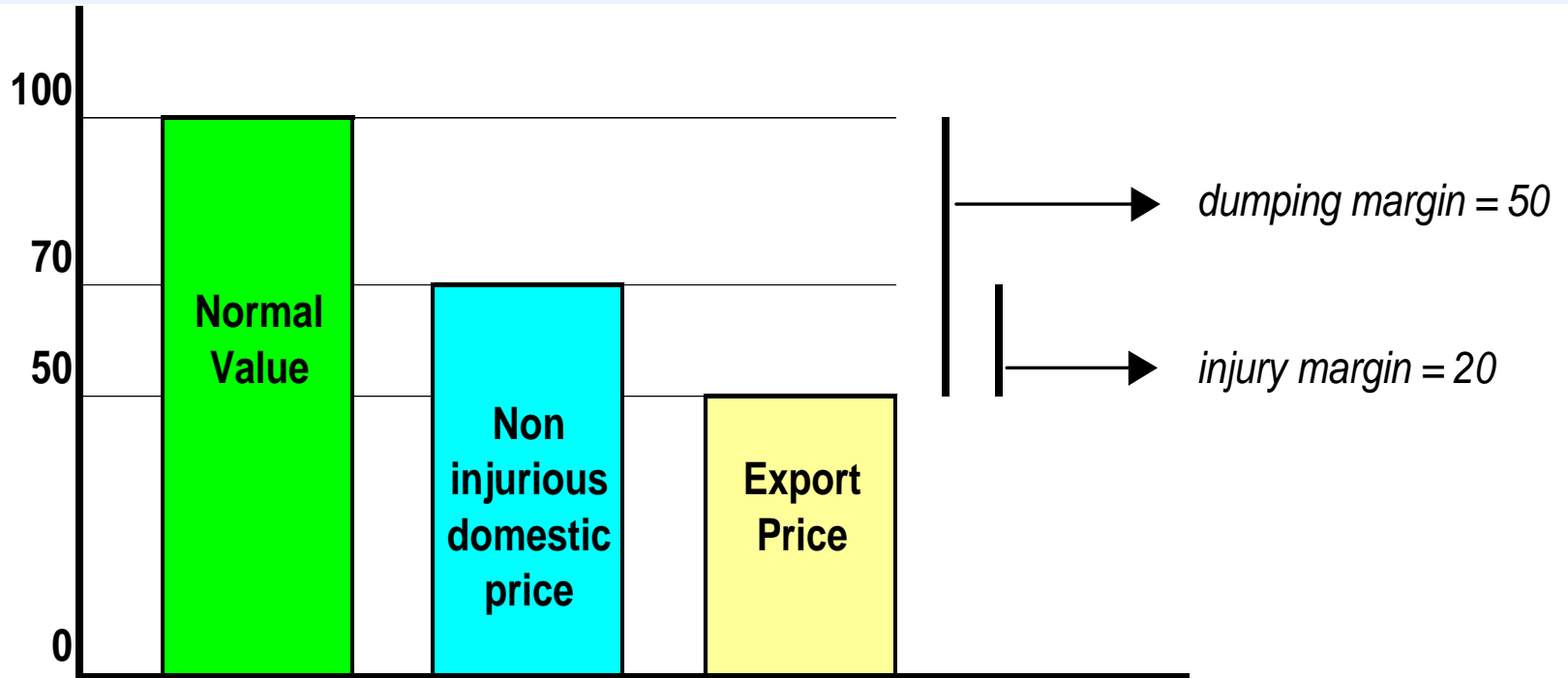
i.e. - Difference between:

- CIF price = 10 €
- Imports' price (px) = 14 €
- Com. industry non injurious price (pt) = 16 €

Expressed as a percentage of the CIF (EU border) import price

$$\frac{(pt - px)}{\text{cif price}} \times 100 = \frac{16 - 14}{10} \times 100 = 20\%$$

Calculation of Injury Margin (“Underselling”)



The Lesser Duty Rule

- A weighted average injury margin is calculated for each exporter.
- ⇒ Apply lesser duty rule:
- Dumping margin = 50%
 - Injury margin = 20%
- ⇒ **Duty imposed = 20%**

Community Interest Test

“Measures...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.”

-Article 21 Basic Regulation

Community Interest Test

- Only the Community systematically applies a public interest test.
- Not required by WTO ADA
- Other WTO members apply it less systematically (e.g., Canada), others not at all (e.g., USA, Australia)

Community Interest Test

- Analysis of the economic effects of AD measures on Community parties;
- Special consideration: to remedy unfair conditions of competition;
- Presumption in favour of imposition – there must be compelling reasons not to impose measures.

Community Interest test

Whose interest?

The Community as a whole, not individual Member States

Art 21(2) Basic Regulation:

- Domestic industry (complainants + non-complainants)
- Importers/traders
- Representative users (intermediate goods)
- Representative consumer organisations

Community Interest Test

Likely effects of measures:

- What is likely to happen if measures are imposed?
 - ⇒ best case vs. worst case scenario
- What is likely to happen if they are not?
- Would the measures be effective?
- Would the benefits to the Community industry be disproportionate to the negative effects on other parties?

Community Interest Test

Balance of interests

- Viability of Community industry
- Market prospects
- Strategy of users, traders, importers
- Substitution effects
- Supply (choice, abundance)
- Competition aspects

EC Procedure

General

- No “automatic” imposition of AD duties
- Not all complaints lodged lead to the initiation of an investigation
- Only about 50% of AD investigations lead to the imposition of definitive duties

EC Procedure

Decision-Making:

- **The Commission**: decides on initiation of proceedings, on provisional measures, on termination of proceedings, on acceptance of undertakings
- **EU Member States**: consulted at different stages in the Advisory and Consultative Committees as well as in the Council working groups
- **The Council**: at minister level adopts the final decision on definitive measures

EC Procedure - Initiation

- General rule: initiations of investigations are generally EC industry-driven
 - ⇒ *ex-officio* initiation (upon Commission's initiative) very rare, only in special circumstances
- Within the legal deadline of 45 days after the Community industry lodges a complaint, the Commission must analyse it, examine "standing", perform all required procedural steps (consultation of Member States, notification of third countries concerned, publication of notice of initiation/decision to reject).

EC Procedure - Investigations

Main procedural steps:

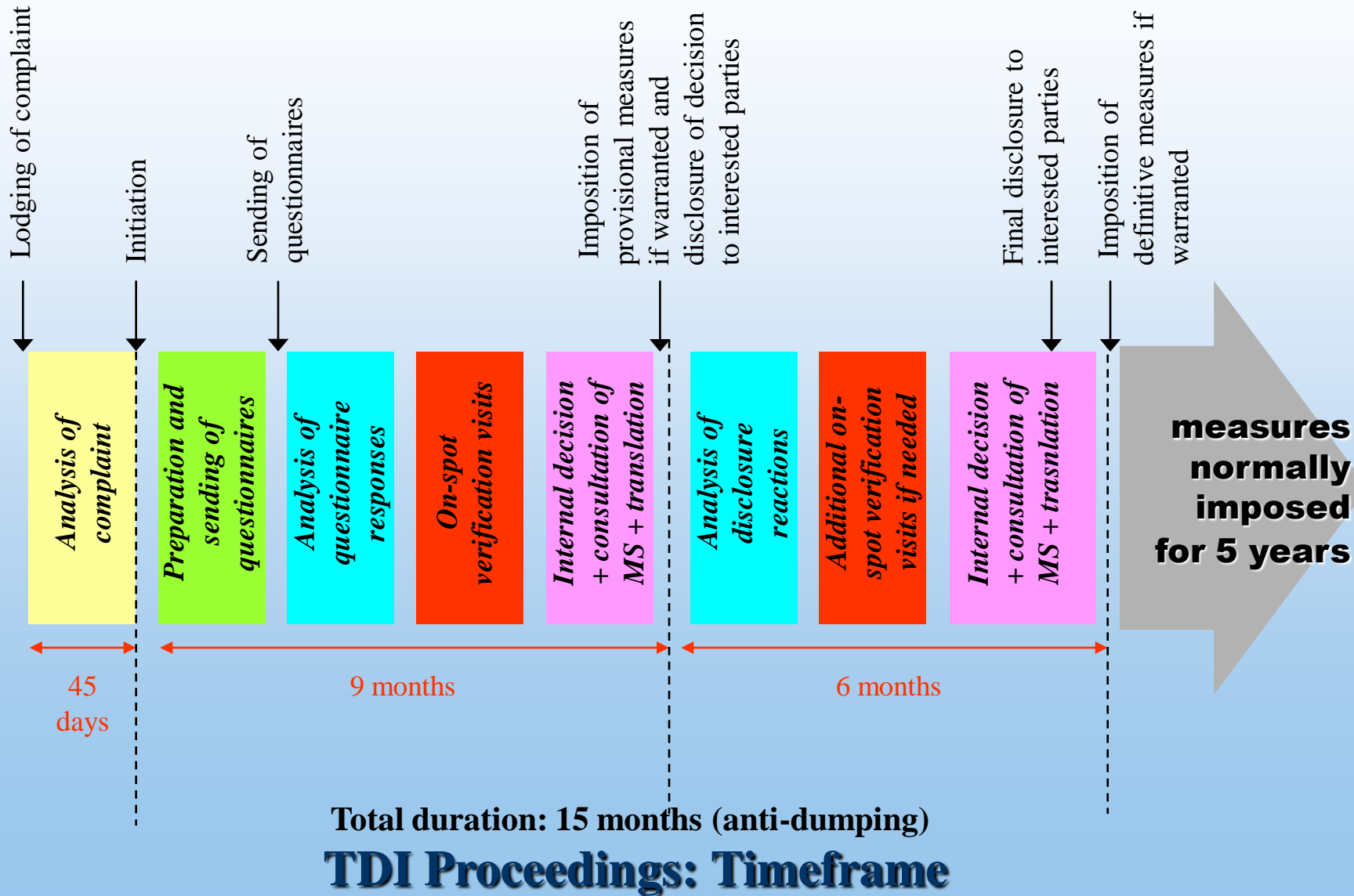
- Questionnaires: sent to parties usually on the initiation day of a proceeding (Notice published in the Official Journal)
- Replies to questionnaires (main questionnaires, sampling forms, claim forms for MET)
- Deficiency letters
- On-spot verification of questionnaire replies and of MET claims
- Analysis, hearings, consultations of Member States

EC Procedure - Investigations

Main procedural steps (contd.):

- Provisional measures: the Commission decides, published in the Official Journal
- Provisional disclosure
- Comments on disclosure
- Analysis, hearings, disclosure of definitive findings, consultation of Member States
- Definitive measures: the Council decides, published in the Official Journal

External Trade



EC Procedure - Timeframe

General timeframe:

from the initiation of a new investigation to the publication of

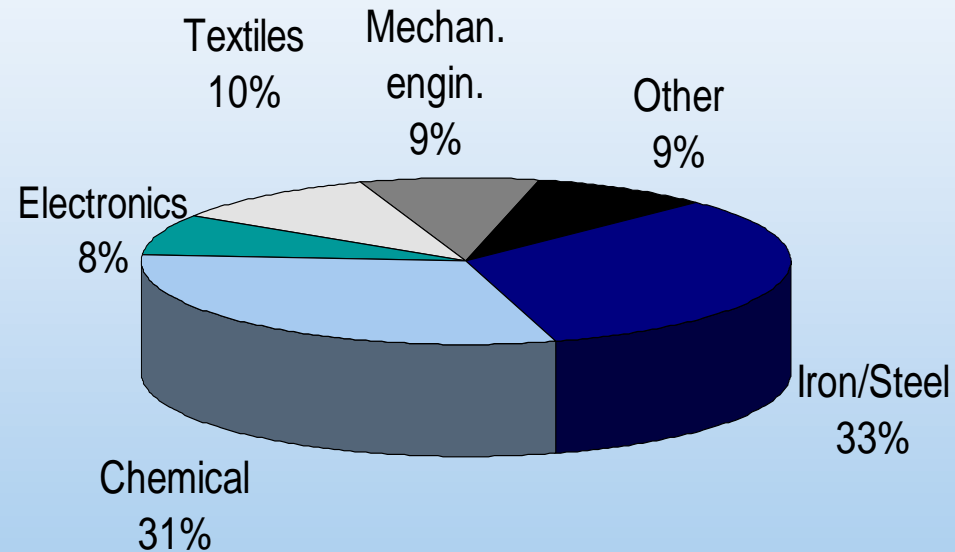
- provisional measures: 9 months
- definitive measures: 15 months

Examples and Figures

- **EU – moderate user of TDI**
- Initiation of on average **65 investigations** annually
- **60%** of investigations **result in measures**
- Yearly adoption of **85 Regulations** imposing, continuing, terminating or modifying measures on average
- Approximately **130 measures** currently in force
- **Half of measures expire** after 5 years
- **Countries mainly affected** by our measures: China, Russia, India, Thailand, Ukraine

Examples and Figures

- **Sectors mostly concerned:**
chemicals, metals, textile, electronics
- **Example of investigations:**
heavy industry (steel bars, fertilizers) and SMEs (textiles, shoes, bicycles, salmon)



TDI action against EU

- EU leading exporter worldwide, hence one of the main targets of TDI actions
- The Commission actively monitors all TDI actions taken against EU Member States by third countries
- The Commission strictly adheres to WTO rules on TDI and takes different types of action to ensure that its trading partners fully respect WTO rules and bilateral agreements
- If necessary, may use WTO framework to address unlawful actions by third countries in the area of TDI

TDI action against EU

Key facts and figures regarding trade defence actions by third countries vis-à-vis the EU:

- End 2005 : 153 measures in force against EU including 103 anti-dumping, 13 anti-subsidy and 37 safeguards
- Main users: United States (26 measures against EU), India (21), Brazil (12), China (10), Ukraine (10)
- Most affected sectors: chemicals, steel, agricultural/food products
- “New” users (notably developing countries) largely overtook “traditional” users

Use of TDI by Other WTO Members

- Nevertheless, most WTO member states are not using trade defence instruments. Many of them do not even have legislation in this area:
- AD: about 34 WTO members* used AD in 1995-(mid)2007; India, USA, EU, Argentina, Turkey most active users
- To use or not to use TDI is a trade policy choice, not an indicator of a country's level of development. If a WTO member decides to use TDI, it must do so in full conformity with all WTO rules.

** as reported to WTO, counting the EU as one*

More information on our website:

**[http://ec.europa.eu/trade/issues/
respectrules/index_en.htm](http://ec.europa.eu/trade/issues/respectrules/index_en.htm)**

**You are very welcome
to contact us if you have any questions!**

HellerEhrman

Solicitors and International Lawyers

海陸國際律師事務所

APEC Training Course on Anti-Dumping
(Ha Noi, Viet Nam, July 2008)

SOUTH AFRICAN ANTI-DUMPING EXPERIENCE

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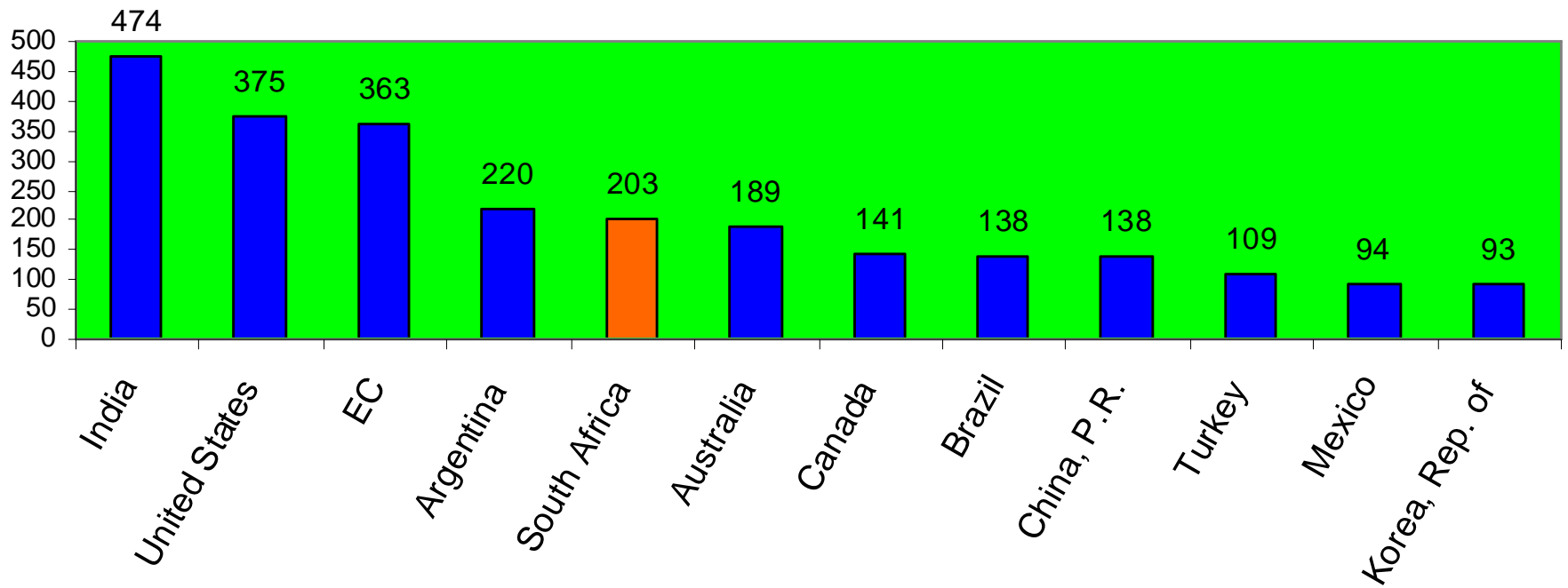
Email: leora.blumberg@hellerehrman.com

SOUTH AFRICA ANTI-DUMPING HISTORY

- First anti-dumping provisions in 1914
- Investigations conducted by
 - Board on Tariffs and Trade (BTT): Injury
 - Customs: Dumping
- From 1992: separate unit in Board of Tariffs and Trade dealing with all trade remedy applications (Board on Tariffs & Trade Act), Customs not involved in investigations, only implementation of duties (Customs & Excise Act)
- Provisions hardly used until 1990's then South Africa became 4th largest initiator in the world

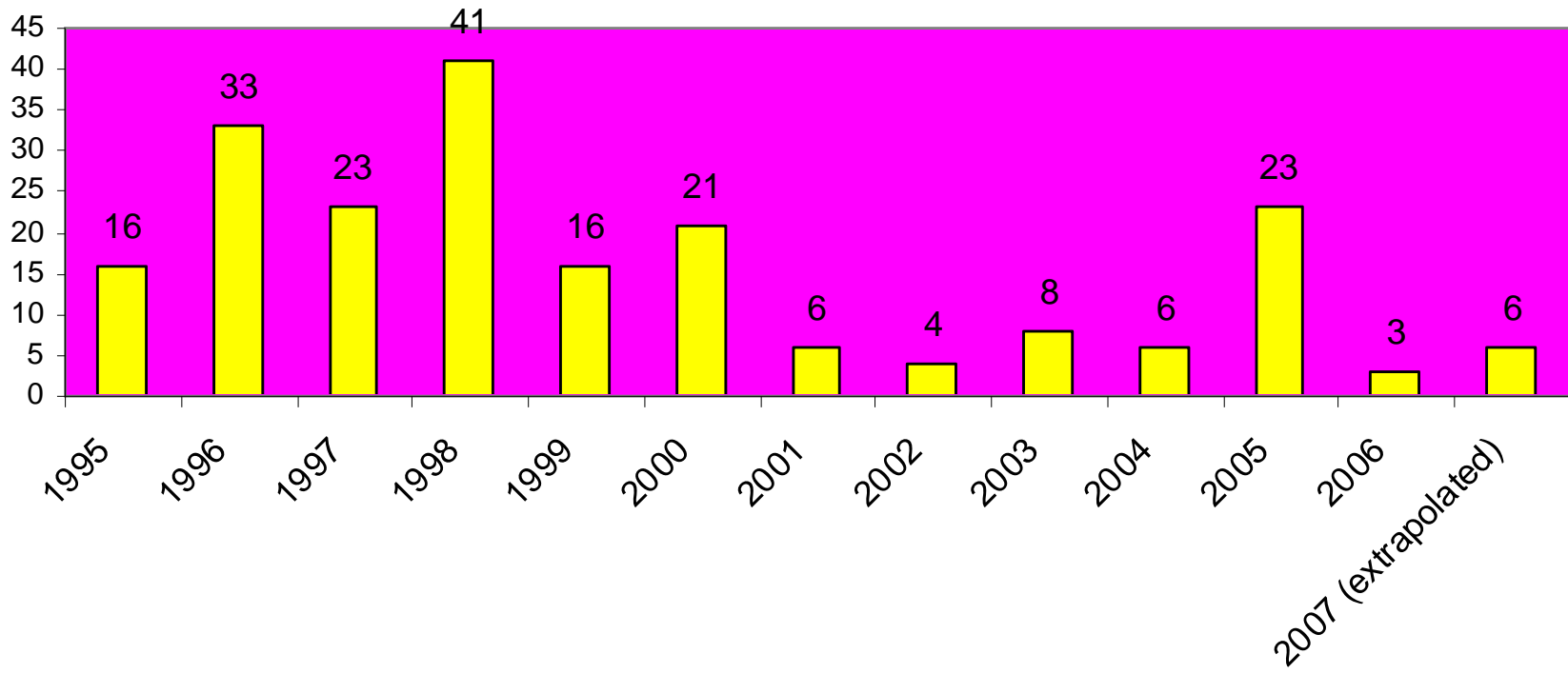
MOST ROBUST ANTI-DUMPERS

AD Initiations (01/01/95 to 30/06/07) (South Africa total = 203)



SOUTH AFRICAN AD INITIATIONS BY YEAR

South African AD Initiations (01/01/95 to 30/06/07)



BACKGROUND - PROCEDURE, LEGISLATION AND JURISPRUDENCE

- From 1996 – 2002 major increase in capacity, implementation of WTO Anti-Dumping Agreement in practice and procedures of BTT
- Broad enabling provisions in BTT and Customs & Excise Acts
- BTT used WTO Anti-Dumping Agreement as its official guidelines
- Relevant case law under old act
 - Chairman, BTT v Brenco Inc (May 2001)
 - Issue of non-disclosure of confidential information challenged in the light of procedural fairness and principles of natural justice
 - Court took cognisance of international practice and constraints faced by an authority in the fair and open conduct of anti-dumping investigations
 - BTT not required to inform the parties of every step and permit parties to be present at verification, would unduly hamper investigation
 - procedural fairness provided by BTT inquiry and report to the Minister, not necessary for every submission to be brought to Minister's attention

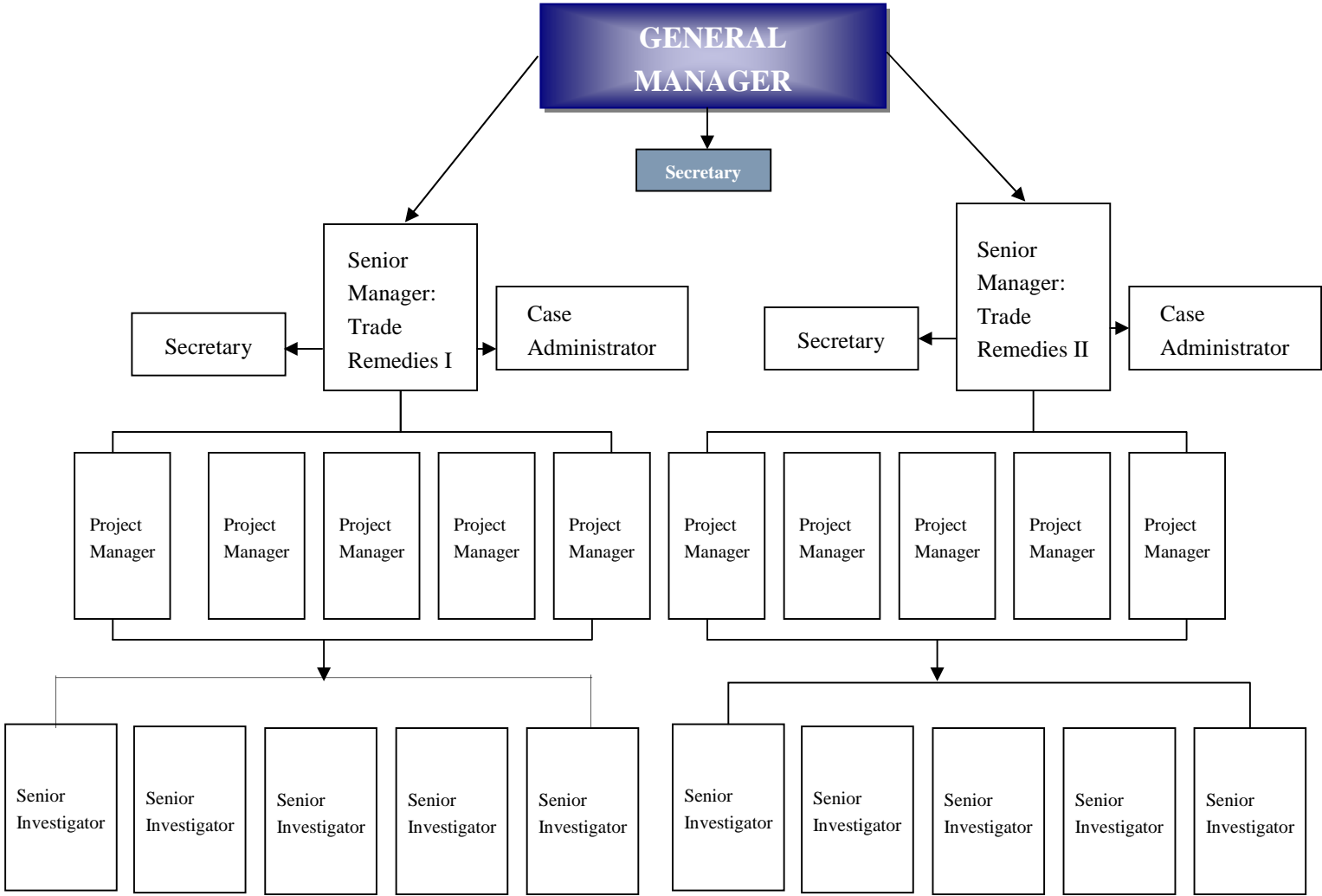
BACKGROUND - PROCEDURE, LEGISLATION AND JURISPRUDENCE

- Rambaxy Laboratories Limited & Others vs Chairman, BTT & others (March 2001)
 - International treaties not part of municipal law unless incorporated by legislative enactment
 - SA bound in terms of constitution to consider customary international law, strong indication that legislature intended to capture the spirit of the international agreement
 - Applicants contended that the BTT Act cannot be interpreted in accordance with GATT and WTO Agreements, with regard to “normal value” and “export price”, dismissed by Court

INTERNATIONAL TRADE ADMINISTRATION COMMISSION (ITAC)

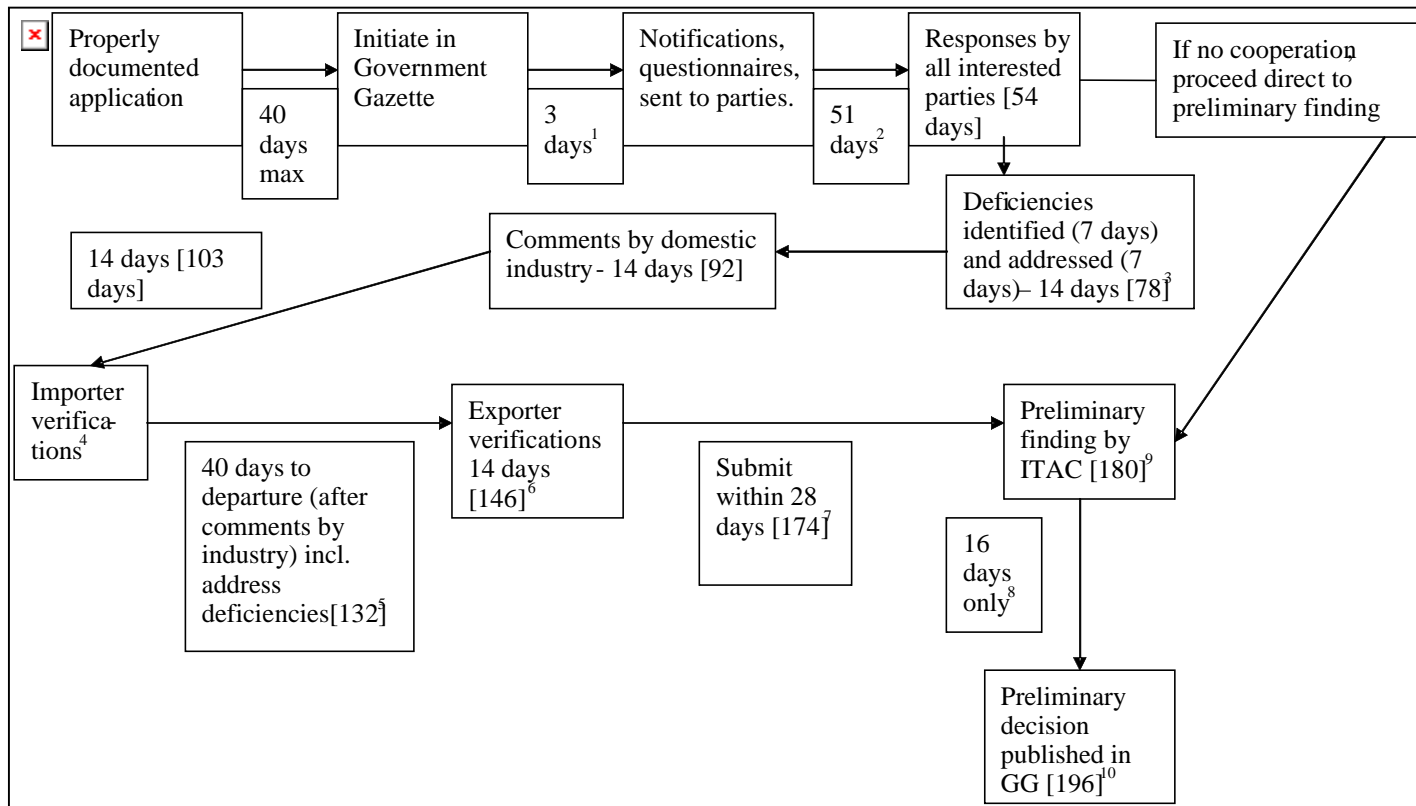
- Significant structural and legislative changes after 2002
- ITAC Established 1 June 2003, in accordance with the International Trade Administration Act, No. 71 of 2002.
- Replaced Board on Tariffs and Trade
- The Directorate Trade Remedies responsible for conducting investigations with regard to unfair trade practices (anti-dumping, countervailing and safeguards).
- One institution deals with dumping and injury

ORGANOGRAM OF ITAC TRADE REMEDIES DIRECTORATE (28 personnel)



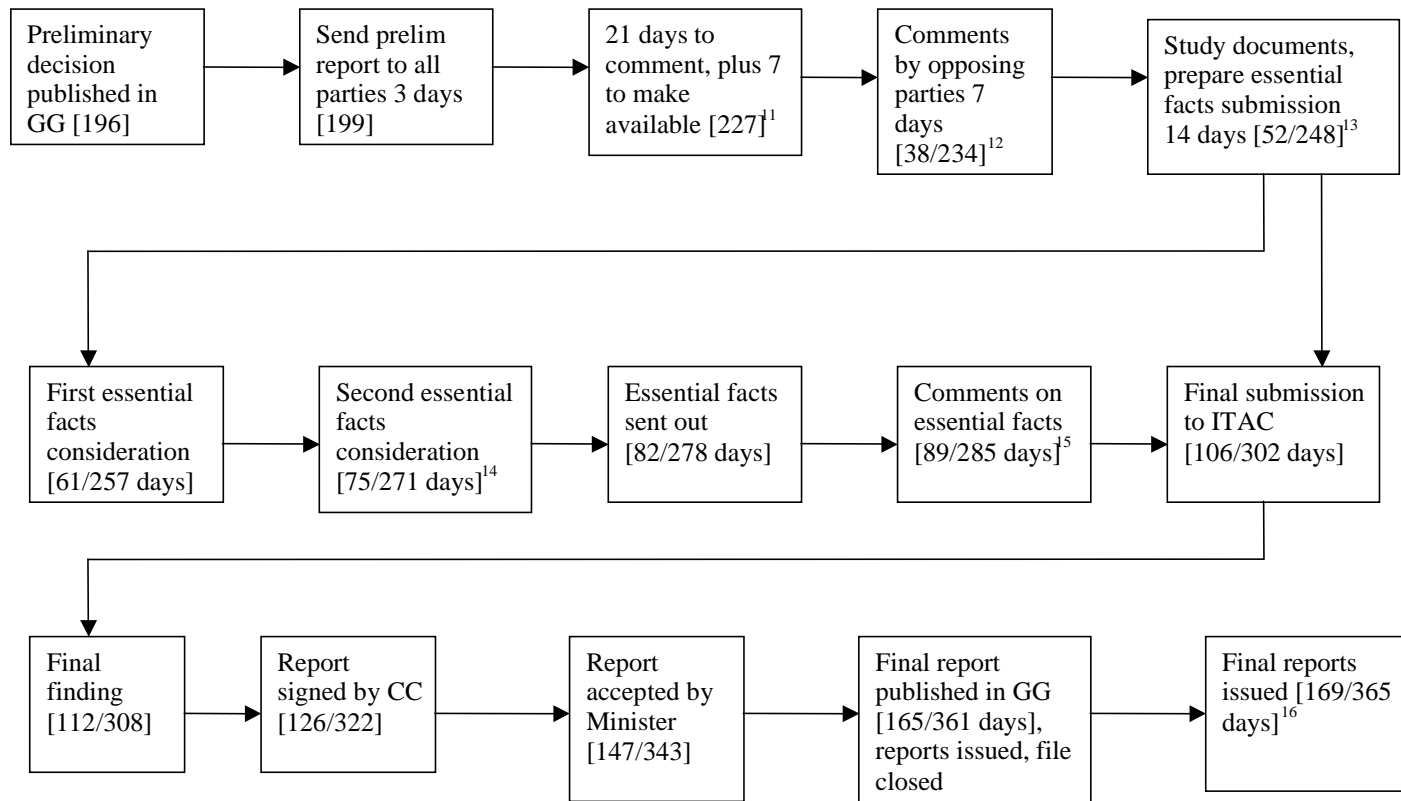
INVESTIGATION PROCESS

TIME FRAME: PRELIMINARY INVESTIGATION PHASE



PROCESS

TIME FRAME: FINAL INVESTIGATION PHASE



LEGAL DEVELOPMENTS: NEW ACT AND REGULATIONS

- International Trade Administration Act, No. 71 of 2002
- Anti-Dumping Regulations prescribed by the Minister of Trade and Industry on 14 November 2003
- Concerns raised about vagueness and WTO compatibility of certain provisions of new regulations by EC and US in WTO Committee meetings

ITA ACT AND CONFIDENTIALITY

- Issues and procedures relating to claims for confidentiality set out in Act
- SA generally treats confidentiality in accordance with AD Agreement (no administrative protective orders)
- ITAC can refuse to take information into account where confidentiality is claimed but not recognised as being confidential by ITAC
- ITAC determination concerning confidentiality can be appealed to the High Court
- Party can seek access to information that is determined by ITAC to be confidential by application to High Court, if mediation with other party fails
 - Uncoated Woodfree A4 Paper from Brazil and Indonesia, mediation successful
 - Tyres from China, mediation failed, interdict granted giving access to confidential information to lawyers

OTHER POLICY AND PRACTICAL ISSUES ARISING OUT OF ACT & REGULATIONS

- Oral Hearings
 - strict requirements, request can be limited and refused
- Adverse Party Meetings
 - must be reasons for not relying on written submissions only, can be refused
 - not been requested yet
- Response to preliminary report reduced to 14 days
 - practice previously 30 days

OTHER POLICY AND PRACTICAL ISSUES ARISING OUT OF ACT & REGULATIONS

- Limitation of exporters /products
 - selection represents largest portion of products / exporters, in consultation with parties
 - Other co-operating exporters get weighted average (exclude negative, de minimus margins and those based on facts available)
 - Residual duty for non-cooperating exporters
 - Exporters only limited in one investigation (Ceramic tiles from Italy)
- Lesser Duty Rule
 - Price disadvantage: extent to which price of imported product lower than unsuppressed selling price of domestic product
 - Applied if exporter and importer have co-operated fully

OTHER POLICY AND PRACTICAL ISSUES ARISING OUT OF ACT & REGULATIONS

- Reviews
 - Interim review
 - not less than 12 months from final finding
 - changed circumstances
 - New shipper review
 - only exports that did not export to SACU during the original investigation
 - not related to any party to which AD applied
- Refund
 - request for reimbursement of duties where shown that the dumping margin has been eliminated or reduced
 - must be submitted during anniversary month of AD duty relating to preceding 12 months, only 1 refund application

OTHER POLICY AND PRACTICAL ISSUES ARISING OUT OF ACT & REGULATIONS

- Anti-Circumvention Reviews
 - Types of anti-circumvention addressed
 - country hopping (if importer, following imposition of AD duties, switches to a related supplier based in another country) eg Gypsum Plasterboard from Indonesia
 - absorption of anti-dumping duties (exporter decreases price to compensate importer or third party without corresponding decrease in normal value or importer does not increase price in line with duty) e.g. PVC from China
 - minor modifications of the product subject to duty e.g. Blankets from PRC and Turkey
 - export of parts, components and sub assemblies with assembly in a third country or in SACU
 - If complaint lodged within a year of final determination, not required to update injury information and may use NVs previously established to determine DM until exporter submits proper information, for purpose of preliminary determination

OTHER POLICY AND PRACTICAL ISSUES ARISING OUT OF ACT & REGULATIONS

- Sunset review
 - AD in place for period not exceeding 5 years from imposition or last review
 - if review initiated prior to lapse of AD duty, duty remain in force until sunset review finalised
 - Progress Office Machines CC v ITAC & Others (September 2007),
 - Supreme Court of Appeal
 - Relates to the date of the “imposition of the final duties” from which the 5 year sunset review period calculated, and prior to which the sunset review application must be initiated - date of calculation from imposition of provisional or final duty?
 - Court held that as final duty imposed “retrospectively” to date of provisional duty, date of imposition of final duties is former date
 - Huge implications since all duties considered to have lapsed before sunset reviews initiated, as ITAC calculated the period from latter date
 - Some 17 final duties affected

OTHER POLICY AND PRACTICAL ISSUES

- Judicial review
 - Normal administrative review
 - Can also challenge preliminary decisions or Commission's procedures prior to finalisation of investigation
 - Interdict brought against Minister of Trade & Industry in the Sunset Review of Uncoated Woodfree White A4 Paper from Indonesia preventing him from approving Commission's recommendation to terminate the investigation, subject to judicial review
 - Interdict brought against ITAC in Carbon Black from Egypt and India
 - Commission decision can be varied to give effect to WTO Dispute ruling or to negotiations under WTO Dispute Settlement Mechanism - never been done
 - Lack of clarity of effect of these provisions

CASE LAW: AFTER ITA ACT

- Raise interesting constitutional issues (constitutional rights vs South Africa's regulatory role and international obligations)
- South Africa struggling to define its regulatory system in the constitutional arena
- Act provides for various remedies that are additional to administrative law remedies
 - invites more litigation
 - results may make administration of anti-dumping investigations and meeting WTO commitments more difficult for ITAC

NON-MARKET ECONOMY TREATMENT

- Until recently South Africa has followed the traditional surrogate methodology
- Embodied in Section 32(4) of the ITA Act, the regulations and practice
- Petitioner proposed and motivated a particular surrogate country, with an industry at a similar level of development as the NME industry
- NME country provided with an opportunity to comment on the selection and to propose an alternate
- If other market economies in the investigation, one of those countries would normally be selected
- Where no market economy countries are involved in an investigation, the domestic industry encouraged to obtain the cooperation of a manufacturer in a market economy
- Individual companies were not given the opportunity to show that governed by market principles

INDIVIDUAL MARKET ECONOMY TREATMENT: QUESTIONNAIRE

- China consistently challenged NME treatment and methodology in bilateral negotiations
- In December 2003, ITAC's questionnaire was changed to reflect the general international trend in allowing individual market economy status for companies
- Permitted in accordance with the new regulations
- Special questionnaire for Chinese companies requesting to be treated as a company operating in terms of market economy principles and to use its own costing and sales data
- If full information not received within time indicated, ITAC could make provisional and/or final findings on the best information available (including normal value indicated for surrogate)

INDIVIDUAL MARKET ECONOMY TREATMENT: QUESTIONNAIRE

- The following factors were considered in determining whether to grant individual market economy status
 - Ownership and stockholding
 - Independence regarding decisions on purchases, output and sales
 - Costs of major inputs should reflect market values
 - Accounting standards
 - Lack of distortions from current or previous government intervention
 - Insolvency laws
 - Exchange rate conversions
 - Treatment of profit

INDIVIDUAL MARKET ECONOMY TREATMENT: INVESTIGATIONS


- Number of investigations where Chinese companies granted market economy status on this basis:
 - Grinding Media (November 2004)
 - 2 cooperating companies granted market economy status, found not to be dumping while non-cooperating companies found to have margins of 52.9%, investigation terminated because no causal link
 - Steel Wheels (August 2005)
 - cooperating company considered to be operating under market conditions and found to have margin of 2,5%, non-cooperating companies found to have margin of 56%, no causal link so terminated
 - Toughened Motor Vehicle Glass (September 2006)
 - cooperating company considered to be operating under market conditions, found not to be dumping, residual dumping margin on non-cooperating exporters based on surrogate value, duty of 73% imposed

MARKET ECONOMY STATUS

- SA agreed to recognise China's market economy status (only in the context of anti-dumping)
- Formal Record of Understanding signed in September 2006
 - can still use surrogate methodology for the purpose of initiation
 - after initiation Chinese exporters can provide information to determine if sales made in the ordinary course of trade
 - same questionnaire as all other exporters
- No. of cases that have treated Chinese exporters the same as other exporters after initiation if co-operation by exporters and information shows that sales in the ordinary course of trade

MARKET ECONOMY STATUS - CASES

- Factors that determine if sold in normal course of trade
 - competition, marketing, advertising, input cost of main raw materials and whether supplied at arms length, ownership of company, source of long term finance, human resources policies)
- Applicable investigations
 - Tyres (March 2007)
 - Used PRC pricing and sales data for co-operating exporters resulting in zero or de minimis duties, surrogate normal value used for non-cooperating exporters, duties from 26.2 – 44.21%
 - Sunset Review on Picks, Shovels, Spades, rakes and Forks (October 2007)
 - Exporters did not cooperate, surrogate normal values used, high duties between 24 – 118%

- 
- Extruded Aluminium Profiles – Preliminary (February 2008)
 - all co-operating exporters got no duty, others over 10%
 - Welded Link Steel Chain (February 2008)
 - co-operating exporters received 0 and 2.4% duty, all other 53%
 - Plates, Sheets, Film, Foil and Strips of Polymers of Vinyl Chloride (April 2008)
 - no or deficient cooperation, duty of 32.7%,
 - South Africa is likely to the start using countervailing methodology against China

Definitive Duties in Place in SA (as of Dec 2007)

Total = 55



Country/Custom Territory	Product	Date of Imposition (Review)
Australia	Flat-rolled products of iron or non-alloy steel	02/04/04
Brazil	Suspension PVC	27/03/97 (18/10/02)
	Uncoated woodfree paper	13/02/98 (20/02/04)
	BOPP Film	13/04/07
	Uncoated woodfree A4 paper	28/05/99
China	Aluminium hollowware	07/02/97 (31/01/03)
	Acrylic fabrics	12/11/04
	Acetaminophenol	20/08/93 (18/06/99) (15/07/05)
	Blankets	18/06/99 (15/06/05)
	Bolts and nuts of iron or steel	06/08/99 (03/06/05)
	Float glass	28/05/99 (05/11/04)
	Flat glass	28/05/99 (05/11/04)
	Garlic	20/10/00 (10/03/06)

Country/Custom Territory	Product	Date of Imposition (Review)
China	Garden picks	03/12/93 (08/03/02) (02/11/07)
	Spades, shovels, rakes, forks	03/12/93 (08/03/02) (02/11/07)
	Door locks and door handles	25/01/02
	Wire ropes	28/08/02
Egypt	Aluminium hollowware	07/02/97 (31/01/03)
	Carbon black	10/09/99
France	Acetaminophenol	18/06/99 (15/07/05)
	Automatic circuit breakers	08/08/97 (17/10/03)
	Suspension PVC	27/03/97 (18/10/02)
Germany	Wire ropes	28/08/02

Definitive Duties in Place in SA (as of Dec 2007)

Country/Custom Territory	Product	Date of Imposition (Review)
India	Carbon black	10/09/99
	Float glass	28/05/99 (05/11/04)
	Flat glass	28/05/99 (05/11/04)
	Garden picks	11/10/96 (14/02/03)
	Paper insulated lead covered electric cable	31/03/00 (11/11/05)
	Welded Galvanised Steel Pipe	14/06/02
	Polyethylene terephthalate (PET)	30/05/06
	Unframed glass mirrors	25/10/06
Indonesia	Gypsum Plasterboard	02/07/04
	Drawn and float glass	03/10/06
	Unframed glass mirrors	25/10/06
	Uncoated woodfree A4 paper	28/05/99
Italy	Automatic circuit breakers	08/08/97 (17/10/03)
Korea, Republic of	Welded stainless steel tubes and pipes	18/06/98 (16/07/04)
	Polyethylene terephthalate (PET)	30/05/06
	Paperboard	22/12/06
	Wire ropes	28/08/02

Country/Custom Territory	Product	Date of Imposition (Review)
Malaysia	Welded stainless steel tubes and pipes	18/06/98 (16/07/04)
Poland	Uncoated woodfree paper	13/02/98 (20/02/04)
Chinese Taipei	Nuts of iron or steel	06/08/99 (03/06/05)
	Welded stainless steel tubes and pipes	18/06/98 (16/07/04)
	Polyethylene terephthalate (PET)	30/05/06
Thailand	Carbon black	13/10/00 (25/10/06)
	Gypsum Plasterboard	13/02/04
Turkey	Acrylic fabrics	10/11/04
	Blankets	18/06/99 (15/07/05)
United Kingdom	Wire ropes	28/08/02
	Suspension PVC	27/03/97 (18/10/02)
United States	Acetaminophenol	18/06/99 (15/07/05)
	Chicken meat portions	27/12/00 (27/10/06)
	Lysine	25/01/02
	Suspension PVC	27/03/97 (18/10/02)

NO. OF SOUTH AFRICAN INITIATIONS PER COUNTRY (01/01/95 – 30/6/07)

EXPORTING COUNTRY	NO. OF INITIATIONS
<i>China, P.R.</i>	28
<i>India</i>	20
<i>Korea, Rep. of</i>	15
<i>Chinese Taipei</i>	11
<i>Germany</i>	11
<i>Indonesia</i>	9
<i>United States</i>	9
<i>Brazil</i>	8
<i>Hong Kong</i>	7
<i>Malaysia</i>	7
<i>Spain</i>	7
<i>United Kingdom</i>	7
<i>Australia</i>	5
<i>Belgium</i>	5
<i>France</i>	5
<i>Thailand</i>	5
<i>Italy</i>	4
<i>Turkey</i>	4
<i>Egypt</i>	3
<i>Ireland</i>	3
<i>Netherlands</i>	3
<i>Austria</i>	2

EXPORTING COUNTRY	NO. OF INITIATIONS
<i>Russia</i>	2
<i>Saudi Arabia</i>	2
<i>Sweden</i>	2
<i>Zimbabwe</i>	2
<i>Argentina</i>	1
<i>Bahrain</i>	1
<i>Bulgaria</i>	1
<i>Hungary</i>	1
<i>Iran</i>	1
<i>Israel</i>	1
<i>Japan</i>	1
<i>Malawi</i>	1
<i>Mozambique</i>	1
<i>Pakistan</i>	1
<i>Poland</i>	1
<i>Portugal</i>	1
<i>Singapore</i>	1
<i>Slovak Republic</i>	1
<i>Switzerland</i>	1
<i>Ukraine</i>	1
<i>Yugoslavia</i>	1
<i>Total</i>	203

APEC TRAINING COURSE IN ANTI-DUMPING LAW

A SHORT COMPARATIVE STUDY ON ANTI-DUMPING LAW OF THE UNITED STATES OF AMERICA, AUSTRALIA AND INDIA

Bao Anh Thai

In this presentation

1. AD administration in three studied countries;
2. Dumping calculation methods;
3. Determination of injury to domestic industry; and
4. “Public interest” in anti-dumping imposition.

AD Administration

AD state agencies

Countries	Determining Dumping	Determining Injury	AD duty
USA	Department of Commerce (DOC)	International Trade Commission (ITC)	DOC
India	Directorate General of Anti-Dumping and Allied Duties (DGAD)		Ministry of Finance
Australia	Australian Customs		Minister of Justice and Customs

Dumping calculation method

$$\text{Dumping Margin} = \text{NV} - \text{EP}$$

NORMAL VALUE

	NV can be determined by (i) Home market price, (ii) Third country price, and (iii) Constructed Value	NME	Economies in transition
U.S.A	Yes	Yes	
AUSTRALIA	Yes	Yes	Yes
INDIA	Yes	Yes	

Dumping calculation method

$$\text{Dumping Margin} = \text{NV} - \text{EP}$$

NORMAL VALUE

	NV can be determined by (i) Home market price, (ii) Third country price, and (iii) Constructed Value	NME	Economies in transition
U.S.A	Yes	Yes	
AUSTRALIA	Yes	Yes	Yes
INDIA	Yes	Yes	

Dumping calculation method

$$\text{Dumping Margin} = \text{NV} - \text{EP}$$

- EXPORT PRICE
- ADJUSTMENTS
- ANTI-DUMPING MARGIN:

USA	AUSTRALIA	INDIA
Antidumping duty is based on dumping margin	Antidumping duty is based on dumping margin	Antidumping duty is the lesser of the follows: (i) dumping margin; or (ii) injury margin. Calculate injury margin & apply Lesser Duty Rate Rule.

Determination of injury

- CUMULATIVE EFFECT

USA	AUSTRALIA	INDIA
Use cumulative effect in determining injury	Use cumulative effect in determining injury	No

•PUBLIC INTEREST IN CONSIDERATION OF IMPOSITION OF AD DUTY

USA	AUSTRALIA	INDIA
AD duty shall be imposed where: (i) Dumping (ii) Injury	Public interest shall be considered	AD duty shall be imposed where: (i) Dumping (ii) Injury

THANK YOU!

Trade Remedy Proceeding and WTO Dispute Settlement

Strategic and Substantive Issues

What WTO Dispute Settlement Can and Cannot Accomplish

- Panels and Appellate Body can only make determinations that certain “measures” taken by WTO Member are or are not in compliance with that Member’s WTO obligations.
- Panels and Appellate Body cannot and do not tell WTO Member how to bring a measure into compliance with WTO obligations – finding is whether measure is consistent with WTO obligations and recommendation, when measure is not consistent with WTO obligations, is to bring it into compliance.
- In addition, WTO dispute settlement proceedings cannot force Members to bring a particular measure into compliance; non-compliance results only in the ability of aggrieved WTO Member to withdraw concessions of equivalent value to the harm from the offending measure.

What Can Dispute Settlement Accomplish (cont'd)

- Use of threatened withdrawal of concessions by aggrieved party can be used to pressure offending Member to eliminate the offending measure or underlying practice by targeting political sensitive sectors in the offending Member country.
- Bringing offending measure into compliance with WTO obligations is not necessarily clear cut:
 - Contrast elimination of payment of revenues of antidumping duties to petitioning parties (i.e. the only possible way of bringing measure into compliance) with ambiguities arising from “causation” determinations in escape clause panel and Appellate Body reports

What Can Dispute Settlement Accomplish (cont'd)

- Contrast reports defining when “adverse facts available” determinations can and cannot be used in calculating “all others rate” with when it is appropriate to apply “adverse facts available.”
- Panels and the Appellate Body tend to make decisions on the narrowest possible basis, thereby restricting the impact of a particular decision (e.g. zeroing) and providing Members with the ability to use alternative approaches in bringing a measure into compliance even if the measure is subsequently found WTO inconsistent
- All of these constraints mean that many WTO disputes are incremental in nature and that several proceedings will be required before an issue is finally settled; the most famous is the dispute over the treatment of pre-privatization subsidies after privatization which is still not finally resolved after a decade.

“As such” and “As Applied” Findings

- Can greatly affect scope and impact of a panel or Appellate Body report.
- As Such violations of WTO obligations mean that the law, regulation or practice underlying a particular measure in effect compel action which is WTO inconsistent
- As Applied violations of WTO obligations mean that the underlying law, regulation or practice could lead to measures which are WTO consistent or inconsistent

Litigation not Diplomacy

- Distinguish between possible diplomatic aspects of dispute settlement (e.g. consultations, negotiated settlement) and litigation aspects (e.g. panel and appellate body proceedings)
- Countries which don't view these disputes as litigation to be handled by experts and send diplomats in to argue the case are at a major disadvantage in the proceedings.
- U.S., Canada, EC, Australia all have government officials, almost always lawyers, that do almost nothing but handle WTO dispute settlement proceedings; countries without such resources usually retain outside lawyers expert in WTO disputes to advise them and prepare the relevant arguments.

Issues of Particular Interests to Vietnam

- Practices to date which have not been subject to WTO dispute settlement:
 - application by U.S. of “countrywide” adverse facts available absent demonstration of independence from government control
 - restrictions on sources of surrogate values to publicly available information and whether Article VI and Appendix II apply to determination of surrogate values
 - non-attribution of injury from other causes to imports in injury investigation (heavily litigated in escape clause cases)
 - application of anti-circumvention measures by U.S. and EC
 - overly broad imported “product” and “like” product definitions

Issues of Particular Interest to Vietnam (cont'd)

- Litigated cases or cases under litigation:
 - zeroing
 - continuous bond

Issues Unique to U.S. Law and Practice Not Yet Brought to WTO

- CEP Offset Cap
- Targeted dumping to avoid prohibitions on zeroing
- Choice of mandatory respondents and Limitations on the number of mandatory respondents

Discussion of Specific WTO Reports Relevant to the Antidumping Area

- AD Cases
- Escape Clause Cases Relevant to AD Decisions
- Countervailing Duty Cases Relevant to AD Decisions

Anti-dumping Investigations involving Non-Market Economies and the possibility of Market Economy Treatment

Introduction

The EC basic Regulation provides that normal value in non-market economies be calculated on the basis of one of the following three ways:

- The price in a market economy third country (the 'analogue' or 'surrogate' (US) country);
- The constructed value in the analogue country;
- The price from the analogue country to other countries, including the Community

OR

- Any other reasonable basis

Choice of Analogue Country

‘An appropriate market economy third country shall be selected in a not unreasonable manner...’

- **No specific guidance in the legislation; in practice the choice is empirical;**
- **Effort to base the choice on consensus – parties given time to comment on initial selection**

Choice of Analogue Country

Main selection criteria:

- **Comparability to product concerned;**
- **Representative domestic sales**
- **Competition conditions;**
- **Cooperation of producers;**
- **Comparable access to raw materials**

Choice of analogue country

- Many times the choice is limited by practical considerations:

Few countries produce the product concerned;

Producers from candidate analogue countries do not cooperate;

Instances where cooperating producers gave unreliable data.

Choice of Analogue Country

Any other reasonable basis

On rare occasions (*Dicyandiamide from China* and *Lever Arch Mechanisms from China*), the Community itself has been used as analogue country for lack of an alternative.

Company-specific Market Economy Treatment

- **Companies from NMEs which are WTO members may claim that they operate in market economy conditions**
- **Claims are examined and the data submitted is verified on-spot**

Company-specific MET

- **For companies granted MET, dumping margins reflect economic behaviour;**
- **Normal value and export price is based on the data of the company;**
- **If the MET claim is rejected, the company may either request ‘individual treatment’ or be subject to the country-wide duty.**

Company-specific MET

- Companies claiming MET must show that they satisfy 5 criteria:
 1. Decisions regarding costs and inputs are made in response to market signals and free from State interference;
 2. One clear set of accounting records, independently audited in line with IAS

Company-specific MET

3. Production costs and financial situation not subject to significant distortions carried over from the NME system;
4. Adequate bankruptcy and property laws;
5. Exchange rate conversions are carried out at market rates

Company-Specific MET

- Examples:
 - *Criterion 1:* Sales restrictions, obligation to buy inputs domestically, State interference in recruitment decisions, disproportionate influence of State in company decisions
 - *Criterion 2:* no proper audit, disregard of major accounting principles, e.g., accruals

Company-Specific MET

- *Criterion 3: assets transferred by the State below market value, cheap loans by the State.*
- *Criterion 4: de facto bankrupt company continuing operations*
- *Criterion 5: Conversions not at actual exchange rate on transaction date*

Individual Treatment (IT)

- **Individual dumping margin based on own export prices with normal value from analogue country**
- **Company must prove that it satisfies the five criteria set out in Article 9(5) Basic Regulation**

Individual Treatment

1. Free to repatriate capital, if foreign-owned company;
2. Export prices and quantities and conditions of sale freely determined;
3. Majority of shares privately owned. If State officials involved, either (i) clear minority or (ii) demonstration of sufficient independence from State interference;
4. Currency conversions at market rates;
5. No State interference permitting circumvention.

ANTI-CIRCUMVENTION

What is circumvention?

‘[A] change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty and where there is evidence of injury or that the remedial effects of the duty are being undermined and...there is evidence of dumping in relation to the normal values previously established for the like product...’

Council Regulation (EC) No384/96, Article 13

The problem of anti-circumvention

Anti-circumvention was part of the Uruguay Round, but members were unable to agree on a text

WTO Decision on Anti-Circumvention *adopted by the Trade Negotiations Committee on 15th December 1993.*

The problem of anti-circumvention

The issue was referred to the Committee on Anti-Dumping Practices for resolution; it has now been debated there for over 10 years.

Some Members believe that the fact that no anti-circumvention provision exists in the ADA does not mean that Members cannot apply such provisions; others disagree and claim that anti-dumping measures can only be imposed in accordance with the GATT 1994 and the ADA.

WTO Members' Views

Arguments against implementation:

- Mere product modifications are not circumvention; any such issues should be dealt with within the scope of the product concerned;
- The true origin of goods subject to an AD investigation should be solved through customs cooperation, not through anti-circumvention investigation;
- Claims of possible circumvention should be treated as distinct dumping cases and a new investigation should be initiated

WTO Members' Views

Arguments for implementation:

- The absence of rules allows Members to implement measures more broadly than necessary and without obeying the rules of procedural fairness set out in the ADA
- If anti-dumping measures are considered to be a valid defensive mechanism against unfair trade practices, then reasonable measures to preserve their integrity should be implemented.

EC Legislation and Practice

Necessary elements:

- **change in the pattern of trade**
- **insufficient due cause or economic justification other than the imposition of the duty**
- **evidence of injury or that the remedial effects of the duty are being undermined**
- **evidence of dumping**

EC Legislation and Practice

- Change in the pattern of trade:

Increased imports of the product from a third country; increased imports of part of the product – evidence of a clear and consistent trend of substitution

Alterations to the product, ‘slight modification’ in order to avoid the AD measures

EC Legislation and Practice

- Insufficient due cause or economic justification:

Are there any quantifiable benefits existing for importers to economically justify the change in the pattern of trade?

Weight will be given to the fact that the change occurred only after AD measures were imposed

EC Legislation and Practice

- Evidence of Injury and Dumping

There must be evidence of undermining the remedial effect of the duty in terms of either quantities or prices

Imports from the third country must be dumped, but no new normal value need be established.

EC Legislation and Practice

- Assembly operations: Conditions:

The operation started or increased since or just prior to the initiation of the AD investigation and the part are from the country subject to measures;

The parts constitute 60% or more of the total value of the parts, except where the value added is greater than 25% of the manufacturing cost; and

The remedial effects of the duty are being undermined and there is evidence of dumping.

EC Legislation and Practice

- **The 60% criterion:**

Origin of the parts: The phrase also applies to parts that are exported, consigned or transhipped from the country subject to measures, unless proven otherwise.

Valuation of the parts: ‘into-factory, duty-paid’ basis (> custom value).

EC Legislation and Practice

- **The 25% test**

Value added to the parts brought in: equals the sum of labour and depreciation costs and other manufacturing overheads incurred, except SGA and profit, expressed as a percentage of the manufacturing cost.

EC Legislation and Practice

- **Procedure**: Same procedural rules as ‘normal’ AD investigations, except:
 - Products are registered on initiation;**
 - Must be concluded within 9 months**
 - Complainants are not investigated**
 - No provisional duties**

EC Legislation and Practice

Producers who can show that they are not related to any producer subject to the measures and that they are not engaged in circumvention practices can be exempted from the extended duty.

EC Legislation and Practice

- **Some statistics over past 6 years:**
 - **3.8 anti-circumvention investigations initiated annually;**
 - **69% of cases result in extension of measures;**
 - **anti-circumvention investigations represent 6.5% of initiations**

What Next?

- **Anti-circumvention provisions were included in the draft text of the Chairman of the Rules Negotiating Group in the framework of the DDA;**
- **Members were sharply divided.**
- **Uncertainty over the future of the Doha Round means we may not have a resolution to this issue any time soon.**

HellerEhrman

Solicitors and International Lawyers

海陸國際律師事務所

APEC Training Course on Anti-Dumping
(Ha Noi, Viet Nam, July 2008)

Zeroing

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BACKGROUND TO ZEROING

- Numerous comparisons between export sales and normal value (NV) are taken into account when calculating overall dumping margin (DM)
- Zeroing - all non-positive margins are regarded as zero rather than a negative number equal to amount by which export price (EP) exceeds NV, in the final weighted-average margin calculation

normal value:	10	8	12
<u>export price:</u>	<u>8</u>	<u>10</u>	<u>11</u>
margin	2	-2	1

All dumping amounts are added and divided by the aggregate export sales amount to yield the overall dumping margin

$$3/29 = 10.3\% \text{ (zeroing)}$$

$$1/29 = 0.34\% \text{ (no zeroing)}$$

BACKGROUND TO ZEROING

- 3 methods of calculating a dumping margin in investigations (pursuant to Article 2.4.2 of AD Agreement) in respect of which zeroing may be applied:
 - weighted average-to-weighted average (WA-WA), transaction-to-transaction (T-T), and weighted average-to-transaction (WA-T) under special circumstances of targeted dumping
- Also question as to whether zeroing can be used in different types of antidumping proceedings, including original investigations, administrative reviews, and sunset reviews

BACKGROUND TO ZEROING

- **Model zeroing**
 - method under which authority makes a WA-WA comparison of export price and NV for each model of the product under investigation and treats as zero the amount by which the WA export price exceeds the WA NV for any model, when aggregating the results of the model-specific comparisons to calculate a weighted average margin of dumping
- **Simple zeroing**
 - method under which authority compares normal value of individual transactions with individual export transactions (T-T) or weighted average normal values with individual export transactions (WA-T), and regards as zero the amount by which the export price exceeds the normal value, when aggregating the results of the comparisons to calculate the margin of dumping

AD PROVISIONS RELEVANT TO ZEROING

- AD Agreement
 - 2.4
 - 2.4.2 first sentence
 - 2.4.2 second sentence
 - 9.3
 - 9.4
 - 6.10
 - 17.6 (ii)
- GATT 1994
 - VI:1
 - VI:2

WTO CASES ON ZEROING

- EC – Bed Linen (DS141)
 - India challenged EC’s zeroing in investigations where WA-WA methodology used for different models (“model zeroing”)
 - EC methodology
 - established a WA normal value (NV) and WA export price (EP) for each model and then calculated a model-specific margin of dumping
 - calculated an aggregate margin of dumping for the product as a whole
 - added model specific dumping margins, zeroing negative margins (numerator)
 - added total value of imports of all models including models with negative margins (denominator)

WTO CASES ON ZEROING

- EC – Bed Linen (DS141) (continued)
 - Panel found EC practice inconsistent with Article 2.4.2
 - determination of dumping could only be made with respect to the product as a whole, not for different models
 - by zeroing EC failed to take into account prices of all comparable export transactions, inconsistent with 2.4.2
 - AB agreed with panel and added that zeroing was also inconsistent the obligation to carry out fair comparison between NV and EP (Article 2 and 2.4.2)

WTO CASES ON ZEROING

- US – SOFTWOOD LUMBER V (DS264)
 - Original Proceedings
 - same methodology challenged, USDOC calculated margin of dumping for each model, then aggregated margins to determine margin for product as a whole, zeroing negative margins in the numerator
 - Panel found model zeroing to be inconsistent with 2.4.2 on the same grounds as EC- Bed Linen, by not taking into account all comparable export transactions (dissenting panelist)
 - AB upheld panel’s reasoning that dumping and dumping margins only exists for “product as a whole”, not sub-groups of a product
 - Compliance Proceedings under 21.5
 - in implementation USDOC carried out T-T comparisons, then aggregated results to calculate DM, zeroing negative margins of T-T comparisons
 - Panel rejected Canada’s claim that inconsistent with 2.4.2 because NB textual differences with T-T methodology:

WTO CASES ON ZEROING

- Compliance Proceedings under 21.5 (continued)
 - “all comparable export transactions” in 2.4.2 did not apply to T-T methodology
 - AB’s finding that DM is calculated for “product as a whole” as opposed to separate models did not apply outside context of WA – WA
 - mathematical equivalence argument in connection with third methodology
 - possible implications on prospective normal value mechanism
- panel rejected “fair comparison” claim under 2.4
- AB reversed and held zeroing in context of T –T comparisons inconsistent with 2.4.2 (use of the plural ‘export prices’) as failed to take account of all transaction-specific calculations, which are mere steps in comparison process to establish DM of product for each exporter, absence of phrase ‘all comparable export transactions’ not relevant
- disagreed with “mathematical equivalence argument and reversed panel decision with regard to 2.4, holding zeroing in context of T-T methodology in original investigations inconsistent with fair comparison requirement provision

WTO CASES ON ZEROING

- US – Zeroing (EC) (DS294)
 - Panel’s findings
 - model zeroing inconsistent with 2.4.2, followed AB reasoning
 - zeroing in administrative reviews where WA-T methodology used not proscribed because obligations under 2.4.2 applied exclusively to investigations (“during the investigation phase”)
 - 9.3 did not require exporter-oriented determination in duty assessment proceedings
 - rejected claim of inconsistency with fair comparison requirement (2.4)

WTO CASES ON ZEROING

- US – Zeroing (EC) (DS294) (continued)
 - AB findings
 - upheld finding on model zeroing
 - reversed panel finding on simple zeroing in administrative reviews, method inconsistent with 9.3 and Article VI:2 of GATT 1994 (“margins of dumping”)
 - confirmed requirement to determine “dumping” and dumping margins for the product under investigation as a whole (by aggregating all the intermediate values) applicable throughout ADA
 - DM for an exporter limits the AD duties - exporter oriented

WTO CASES ON ZEROING

- US – Zeroing (Japan) (DS322)
 - Panel findings
 - model zeroing inconsistent with 2.4.2, does not take into account all comparisons between NV and EP “all comparable export transactions”
 - simple zeroing using T-T comparisons in original investigations not in violation of 2.4.2 and 2.4, contrary to AB in US – Zeroing (EC)
 - declined to endorse a broader application of “product as a whole” beyond WA-WA methodology
 - would render second sentence of 2.4.2 a nullity because without zeroing the third methodology would yield the same mathematical result as WA-WA
 - simple zeroing in administrative reviews and new shipper reviews not contrary to WTO
 - did not find an inconsistency in using in sunset reviews of zeroed margins established in previous administrative reviews

WTO CASES ON ZEROING

- US – Zeroing (Japan) (DS322) (continued)
 - AB findings
 - reversed panel’s finding that simple zeroing in investigations is not prohibited by 2.4.2 (required to calculate DM for product “as a whole”)
 - also held inconsistent with Article 2.4
 - rejected mathematical equivalence argument
 - reversed the panel’s findings regarding simple zeroing in administrative reviews and new shipper reviews, considered to be inconsistent with 9.3, 9.5 and 2.4, stressing calculation of AD duties is exporter-specific and duty paid by importer for a given transaction can not be greater than DM calculated for the exporter from whom the importer buys its products
 - disagreed with panel on sunset reviews, inconsistent with 11.3 to rely on margins calculated through use of simple zeroing in previous administrative reviews

WTO CASES ON ZEROING

- US – Stainless Steel from Mexico (DS344)
 - Panel Findings
 - model zeroing in investigations inconsistent with 2.4.2, but proscription not applicable outside scope of WA-WA comparisons in investigations
 - simple zeroing in periodic reviews not inconsistent with Article VI:1 and VI:2 of GATT 1994 and 2.1, 9.3 and 2.4 of AD Agreement
 - undesirable results if authorities have to take into account export prices of all importers importing from same exporter, general prohibition would render administration of prospective normal value system impractical
 - mathematical equivalence argument in respect of second sentence of 2.4.2
 - at least a permissible interpretation (17.6 (ii))
 - disagreed with the line of reasoning developed by AB regarding the WTO-consistency of simple zeroing in periodic reviews, felt compelled to depart from AB approach in light of obligation under DSU Article 11 to carry out objective examination of matter before it

WTO CASES ON ZEROING

- US – Stainless Steel from Mexico (DS344) (continued)
 - AB Findings
 - reversed panel’s finding that simple zeroing in periodic reviews is not inconsistent with VI:1 and VI:2 of GATT 1994 and 2.1, 2.4 and 9.3 of AD Agreement, and found that simple zeroing in periodic reviews is inconsistent with Article VI:2 and 9.3
 - simple zeroing results in a levy that exceeds an exporter’s margin of dumping which operates as a ceiling for AD duty that can be levied in respect of sales made by an exporter
 - Article VI:2 of GATT 1994 and 9.3 of AD Agreement do not admit another interpretation as far as the issue of zeroing and that mindful of standard of review provided in Article 17.6 (ii)
 - did not make a finding in respect of 2.4
 - expressed concern that panel made findings contrary to previous AB reports adopted by DSB

SIGNIFICANCE OF WTO JURISPRUDENCE

- Japan – Alcoholic Beverages II
 - adopted panel reports are an important part of GATT acquis
 - create “legitimate expectations” and should be taken into account where relevant to any dispute
 - but not binding except to resolve a particular dispute between parties to that dispute (DSU 19.2)
- US – Shrimp (Article 21.5 – Malaysia)
 - reiterated findings in Japan – Alcoholic Beverages II and held same analysis applies to AB reports, expected to follow interpretative guidance provided by AB in original proceedings

SIGNIFICANCE OF WTO JURISPRUDENCE

- US – Oil Country Tubular Goods Sunset Reviews
 - “following the AB’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially when issues are the same”
 - indicates that even though DSU does not require WTO panels to follow adopted panel or AB reports, the AB de facto expects them to do so to the extent that the legal issues are similar
- US – Zeroing (Japan)
 - panel - while recognizing the need to provide security and predictability to the multilateral trading system through development of consistent line of jurisprudence on similar legal issues, drew attention to the provisions of Articles 11 and 3.2 of DSU - should not override panel’s task to carry out objective examination

SIGNIFICANCE OF WTO JURISPRUDENCE

- US – Stainless Steel from Mexico (DS344)
 - Panel - felt compelled to depart from AB's approach in light of obligations under Article 11 of DSU to carry out an objective examination of the matter
 - AB
 - ensuring “security and predictability “ in the dispute settlement system as contemplated in 3.2 of DSU implies that, absent, cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case
 - failure to follow previously adopted AB reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence

ZEROING IN DOHA ROUND NEGOTIATIONS

- First draft of comprehensive texts in the Rules area (bracketed in their entirety) issued by Chair of the Negotiating Group on Rules (November 2007)
 - clearly provides that zeroing prohibited in investigations where WA – WA methodology used, when the authorities aggregate the results of multiple comparisons
 - clearly allows zeroing in original investigations where WA- T and T-T used, and in administrative, new shipper and sunset reviews
- Issued working document regarding negotiations on rules (May 2008)
 - Seeks to convey full spectrum and intensity of reactions to Chair's first draft texts and, to extent possible, to identify the many suggested changes put forward by delegations.

ZEROING IN DOHA ROUND NEGOTIATIONS

- Chairman commented that numerous delegations considered the text on zeroing was unacceptable
 - 20 delegations co-sponsored Working Paper proposing alternative language that would prohibit zeroing in all proceedings and in respect of all methodologies. Also proposed to require consistency between the methodology used in an original investigation and a subsequent proceeding pursuant to Article 9.3.
 - Some delegations believed that while draft text went too far, zeroing might be permitted in some context, such as, WA-T comparison methodology ("targeted dumping"), while it was also suggested that the same methodology need not necessarily be applied in original investigations as in the context of duty collection.
 - One delegation insisted that a restoration of zeroing in all contexts was necessary to return to the status quo at end of Uruguay Round
 - Delegations on all sides of the issue emphasized how critical the issue was to their delegations

HellerEhrman

Solicitors and International Lawyers

海陸國際律師事務所

APEC Training Course on Anti-Dumping
(Ha Noi, Viet Nam, July 2008)

Use of Adverse “Facts Available”

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BACKGROUND TO “FACTS AVAILABLE”

- Administering authority needs cost and sales information of foreign exporters to make dumping assessment usually by data collected in detailed questionnaires and subsequently verified
- If foreign firms don't provide adequate information or are uncooperative, administrators may use information from other sources to conduct the investigation, known as “facts available”
- ADA (and GATT before it) allows administrators to use domestic petitioners' allegations (called “adverse facts available” in some countries) if authorities determine that the foreign firms are deliberately uncooperative
- Regarded by some as critical to encourage respondents to cooperate with authorities

BACKGROUND TO “FACTS AVAILABLE”

- Prior to Uruguay Round
 - administering authorities allowed to use information provided by domestic petitioners about dumping margins if a foreign respondent did not comply fully with requests for information or provide the information in exactly the prescribed computer format
 - implementation of these procedures criticized
 - stringent requirements in tight time schedules applying equally to MNCs and small enterprises
 - deviation could result in entire data submission being discarded and resort to total reliance on “facts available” with domestic petitioners’ allegations as principle source of information

BACKGROUND TO “FACTS AVAILABLE”

- Uruguay Round Reform
 - harder for authorities to find non-compliance
 - encouragement of all legitimate information provided by respondents
 - putting limits on use of domestic sources when facts available information invoked
 - requirement to use all verifiable information provided by foreign firms in a timely manner even if other information incomplete
 - generally restricted ability of domestic authorities to set unreasonable barriers to compliance for respondents and encouraged use of partial “facts available”
 - recognized right to use domestic producers’ allegations but administrators expected to use them with special circumspection

RELEVANT PROVISIONS IN ADA

- Article 6.8
 - authorizes the use of facts available when a party refuses access to or does not provide necessary information within a reasonable period of time or when a party significantly impedes the process of investigation
- Annex II
 - guidelines provided for implementing this provision
 - sets out conditions on the use of facts available
 - considered to be incorporated by reference into Article 6.8 (US – Hot-Rolled Steel) and its provisions which are largely phrased in the conditional tense ('should') are considered to be mandatory (US – Steel Plate)

APPLICABLE WTO CASE LAW

- Requirement to specify in detail the information required implies authorities not entitled to resort to best information available in a situation where party does not provide certain information, if the authorities failed to specify in detail the information required (Argentina - Ceramic Tiles)
- Conditions under which investigating authorities may resort to “facts available”
 - Where a party (i) refuses access to necessary information (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation
(Argentina – Ceramic Tiles)

APPLICABLE WTO CASE LAW

- When not to resort to “facts available”
 - when info is (i) verifiable, (ii) appropriately submitted so can be used in investigation without undue difficulties, (iii) supplied in timely fashion, and, where applicable, (iv) supplied in medium or computer language requested by authorities.
 - AB concluded that if these conditions met, authorities not entitled to reject information submitted (US – Hot-Rolled Steel)
 - No unlimited right to reject all information submitted where some necessary information not provided in terms of Annex II:3, must take into account all information that satisfies criteria provided can be used without undue difficulties in light of relationship with rejected information (US – Steel Plate)

APPLICABLE WTO CASE LAW

- Info which is “verifiable”
 - when “accuracy and reliability of the information can be assessed by an objective process of examination” - this process does not require an on-the-spot verification (US – Steel Plate)
 - not appropriate to use “facts available” as a result of cancelled verification visit when information ‘verifiable’ and not demonstrated that it could not be used ‘without undue difficulties’ (Guatemala - Cement II)
- Relevance of good faith cooperation
 - In terms of Annex II:3 and 5 (if read together), info of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability (Egypt - Steel Rebar)

APPLICABLE WTO CASE LAW

- Degree of cooperation: “to best of ability”
 - principle of good faith commands for a balance to be kept by investigating authorities between effort that they can expect interested parties to make in responding to questionnaires, and practical ability of those interested parties to comply fully with all demands made of them by investigating authorities (US - Hot-Rolled Steel)
 - an interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted, and in any case is not the *only* determinant thereof

(Egypt - Steel Rebar)

APPLICABLE WTO CASE LAW

- Information "appropriately submitted so that it can be used in the investigation without undue difficulties"
 - question of whether info submitted can be used in investigation 'without undue difficulties' is a highly fact-specific issue so considered imperative that authority explain, as required by Annex II:6, the basis of conclusion that info which is verifiable and timely submitted cannot be used in the investigation without undue difficulties (US - Steel Plate)
- Timeliness
 - investigating authorities should not be entitled to reject info as untimely if info submitted within 'reasonable period' of time
 - investigating authorities required to extend deadlines 'upon cause shown', if 'practicable' (6.1.1)

APPLICABLE WTO CASE LAW

- 'reasonable period' must be interpreted consistently with notions of flexibility and balance inherent in concept of 'reasonableness', and in a manner allowing for account to be taken of particular circumstances of each case
- investigating authorities should consider, in the context of a particular case, factors such as: (i) nature and quantity of info submitted; (ii) difficulties encountered by investigated exporter in obtaining the info; (iii) verifiability of the info and ease with which it can be used by investigating authorities in making determination; (iv) whether other interested parties likely to be prejudiced if info is used; (v) whether acceptance of the info would compromise ability of authorities to conduct investigation expeditiously; and (vi) numbers of days by which investigated exporter missed the applicable time-limit.“
- Deadlines are relevant in determining whether info submitted within reasonable period of time but balance needs to be made between rights of investigating authorities to control and expedite investigation and legitimate interest of the parties to submit info and to have it taken into account:

(US – Hot-Rolled Steel)

APPLICABLE WTO CASE LAW

- Justification for non-cooperation
 - failure to cooperate does not necessarily constitute a significant impediment, since ADA does not require cooperation at any cost
 - consequences only arise if authority acts in reasonable, objective and impartial manner, not in this case: exporter objected to inclusion of non-governmental expert with conflict of interest in its verification team, verification cancelled (Guatemala – Cement II)
- Cooperation a two way process
 - authorities entitled to expect a very significant degree of effort - to the 'best of their abilities' - from investigated exporters. At same time, however, not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon exporters (US – Hot-Rolled Steel)

APPLICABLE WTO CASE LAW

- "secondary source ... with special circumspection"
 - even while using special circumspection, authority may have a number of equally credible options in respect of a given question. When no bias or lack of objectivity identified in respect of option selected by authority, the option preferred by the complaining party cannot be preferred by a panel (Egypt - Steel Rebar)
- Authorities' duty to inform on reasons for disregarding information
 - 6.8 read in conjunction with Annex II:6 requires authority to inform party supplying information of reasons why evidence or info not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information (Argentina - Ceramic Tiles)

COMPLIANCE WITH PANEL AND APPELLATE BODY DECISIONS

Introduction

- Dispute Settlement: the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy – arguably one of WTO's most important successes
- *“prompt compliance with recommendations or rulings of the Dispute Settlement Body is essential in order to ensure effective resolution of disputes to the benefit of all Members”*

- Art 21.1 DSU

Source of Rules

WTO:

- the WTO Dispute Settlement Understanding or '**DSU**'
- the WTO Antidumping Agreement or '**ADA**'
 - Art 17 contains provisions on Consultation and Dispute Settlement but no specific rules on compliance

Compliance Provisions in the DSU

Article 21.3

within 30 days from adoption of Panel or AB report, the Member concerned (the party to the dispute to which Panel or AB recommendations are directed) shall inform the Dispute Settlement Body (DSB) of its intentions with regard to implementation of the relevant rulings

Reasonable Period of Time

Compliance shall be carried out:

- immediately or
- within a ‘reasonable period of time’

Reasonable period of time decided by:

- proposal by Member and agreement of DSB; or
- mutual agreement between parties to the dispute; or
- binding arbitration.

Implementation Panel

Article 21.5

Possibility of an ‘implementation panel’

– i.e. where compliance with the original Panel or AB report is thought to be insufficient / non-existent –the complaining party can have recourse to dispute settlement – where possible bringing the issue of compliance before the original panel.

General Provisions

General Principles and Article 21 – various provisions

- implementation is forward-looking – not retroactive
 - ⇒ no reimbursement/refund given
- the DSB monitors the implementation – any Member may raise the issue - the implementing Member reports on its progress
- special attention / measures may be taken if the dispute involves or affects a developing country

Compensation / Suspension

Article 22 DSU

- compensation / suspension of concessions as alternatives to full implementation – temporary
- full implementation within the reasonable period of time is preferred

EC Legislation and Practice

General Facts

- EC: ~ 30 TDI cases where EC party to dispute (~ 15 AD, 7 CVD, 8 SFG) since 1995
- TDI – one of the most important subject areas (number of cases)

EC Legislation and Practice

- WTO cases provide guidance for our TDI policy and have therefore an important impact on our daily case work
- Judicial review guarantees high standards of EC TDI
- EC – (in comparison with some other WTO Members) has a very high level of compliance with WTO rulings

EC Legislation and Practice

Legal Bases:

- Council Regulation (EC) No 384/1996 on protection against dumped imports from countries not members of the European Community - the '**EC Basic Regulation**'
- Council **Regulation** (EC) No **1515/2001** on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters

Regulation 1515/2001

- enacted specifically to enable the EC to bring a measure taken under its Basic Anti-Dumping Regulation into conformity with a WTO ruling
- provides various options:
 - the EC may repeal or amend the measure in question, **or**
 - adopt any other special measures deemed appropriate in the circumstances

Regulation 1515/2001

When taking any measures under this Regulation:

- the Commission may do so with or without a prior review of the relevant measure;
- it may request information from interested parties;
- it may suspend the measure where appropriate.

Regulation 1515/2001

- Enables measures to be taken also in order to take account of legal interpretations made in a report adopted by the DSB with regard to a **non-disputed measure** (i.e. where the DSB report does not concern an EC anti-dumping or anti-subsidy measure)
- ⇒ allows EC to implement rulings in cases between other parties.
- Rules above apply *mutatis mutandis*.

EC Legislation and Practice

Examples of WTO cases against EC

- DS 141 *Bed linen from India*
- DS 219 *Malleable Fittings from Brazil*
- DS 299 *DRAMS from Korea*
- DS 337 *Salmon from Norway*

Example of EC High Level of Compliance

DS 141 Bed linen from India

- the EC took action not only to **implement the ruling with regard to the specific measure** – by adopting Council Regulation (EC) No 1644/2001 which amended the original bed linen measure

but also

- published a notice inviting all exporters subject to AD measures who consider that the measures should be reviewed in light of the AB legal interpretations (e.g. zeroing)

DDA – Discussions on Compliance

- Proposals of **immediate suspension** of measures found to be inconsistent with the ADA – pending implementation.
 - ⇒ Proper balance required – between nature of the violation and consequences (suspension)
 - e.g. substantive violations ⇒ immediate suspension
 - procedural violations ⇒ no immediate suspension

DDA – Discussions on Compliance

- Proposal on **retroactive remedies** – including refund of duties where appropriate.
- Other delegations – **more cautious** and hesitant to introduce trade-remedy specific rules.

State of Play:

- Chair's text – **does not include any of the proposals** for amendment with regard to compliance.

CAUSATION IN INJURY INVESTIGATIONS

Introduction

4 conditions to be fulfilled before anti-dumping measures may be imposed:

- Dumping
- Injury
- Causality
- Community interest (EC requirement → WTO +)

Legal Basis

WTO:

the WTO Antidumping Agreement or 'ADA'

– Article 3.5

EC:

Council Regulation (EC) No 384/1996 on protection against dumped imports from countries not members of the European Community

(the 'EC Basic Regulation')

– Article 3(6) and (7)

EC Rules and Practice

Background Notes

- Community industry (EC rules)
= Domestic industry (WTO terminology)
- Causation need only be shown for injury to the Community industry – not to producers that have been excluded in accordance with the relevant rules (e.g. where they are related to the exporters or importers)

Two-Tier Analysis

Injury often caused by variety of factors, therefore:

Causal link test I:

negative effect of dumped imports on situation of the Community industry

Causal link test II:

other factors also injuring the Community industry breaking the causal link established under test I

Causal Link Test I – the Law

Causal link between dumping and injury

“It must be demonstrated, from all the relevant evidence... that the dumped imports are causing injury. Specifically, this shall entail a demonstration that the volume and/or price levels [of the dumped imports] are responsible for an impact... [injury] and that this impact exists to a degree which enables it to be classified as material.”

– Article 3(6) EC Basic Regulation

Causal Link Test I - Notes

- A causal link finding is **not** limited to cases where dumping is the *sole* cause or even where it is the *principal* cause of the injury suffered.
- ⇒ (this ‘principal cause requirement’ was originally present in the Kennedy Round Anti-Dumping Code of 1967 but was dropped in later codes and not included in the WTO ADA)
- The fact that a Community producer is facing difficulties attributable in part to causes other than dumping – **not** a reason to deprive the producer of the protection against the injury caused by dumping.

Causal Link Test I – the Practice

Negative effect of volume and/or price of dumped imports ?

Coincidence in time between:

- increasing dumped imports **volume**; and/or
- decreasing import **prices** / undercutting

and - increasingly precarious situation of the Community industry

Causal Link Test II – the Law

Known other factors

“Known factors other than the dumped 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 imports under paragraph 6...”

– Article 3(7) EC Basic Regulation

Causal Link Test II

Known factors other than dumped imports

- volume & prices of non dumped imports
- contraction in demand or changes in the patterns of consumption
- restrictive trade practice of third country producers and competition between these and the Community producers
- developments in technology and the export performance of the Community industry
- insufficient productivity/product quality/product range
- self-inflicted injury e.g. misjudging market developments
- exchange rate fluctuation
- others

Causal Link Test II – the Practice

- Examine whether there are other known factors – apart from the dumped imports - which are also injuring the Community industry;
- ⇒ if so, whether the injury caused by these factors is such as to break the causal link established between dumped imports and the injury suffered by the Community industry (i.e. the link established under Causal link test I).
- Causal link can be considered broken if injury to be attributed to dumping is not material – i.e. a reconsideration of Causal link test I in light of the other known factors – (e.g. this happened in *LORS from Japan, Korea, Malaysia, China – 1999*)

Causal Link Test II - Principles

- All relevant factors must be investigated fully.
- Must be based on evidence not mere allegations.
- Importance to be attributed to each factor.
- The injurious effects of the other known factors must be *'separated and distinguished'* from the injurious effects of the dumped imports.
 - *AB decision in US - AD measures on Hot-Rolled Steel from Japan*

DDA - Rules Group Discussions

- Discussion on '*separating and distinguishing*' – whether this terminology helps to clarify the causation standard.
- Discussion on quantitative vs. qualitative analysis of non-attribution. Some Members preferred quantitative methods, whilst others argued that a precise quantification of injury to be attributed to a particular factor – difficult if not impossible.

DDA – Chair’s Text

- The Chair’s text includes a proposal to amend Article 3.5 of the ADA to state that the examination may be based on a qualitative analysis of evidence concerning, among others:
 - the nature
 - the extent
 - the geographic concentration and
 - the timingof such injurious effects.

- No need to quantify or weigh, but should see to separate and distinguish the injurious effects of other factors from the injurious effects of the dumped imports.

Legislation and Practice on Anti-dumping of China

Ha Noi, Viet Nam
July 4, 2008

Liang Hao
MOFCOM, P.R. China

I .Administration Organs Involving in Anti-dumping

1.Competent Authority:

The Ministry of Commerce (MOFCOM)

2.Duty-related Organ:

Customs Tariff Commission of the State Council

3.Enforcing Organ:

The Customs

II .Legislation and Practices on Antidumping

1.Status of Legal Framework

2.Antidumping Practices of China

1. Status of Legal Framework

◆ Laws:

1994, the Foreign Trade Law, revised in 2004

◆ Regulations:

1997, the Antidumping Regulation

2001, the Antidumping Regulation, revised in 2004

◆ Rules:

24 Department Rules

1. Status of Legal Framework

Commentary:

- ◆ A complete and multi-layered framework
- ◆ Start late, but starting point is quite high
- ◆ Focus on the due procedural rights and transparency
- ◆ Provide both guidance to investigator's Implementation and clarification on rights and obligation of interested parties

2. Anti-dumping Practices of China

◆ Anti-dumping Investigation and cases

Since 1997: China has initiated 50 anti-dumping cases (153 according to WTO statistics)

The amount affected by the investigations is about 8.3 billion US dollars

Involve products imported from 24 countries (regions) in the world

2. Anti-dumping Practices of China

◆ Determinations:

39 Cases resulted in positive determinations

9 Cases resulted in negative determinations

2. Anti-dumping Practices of China

Basic Features of China's AD Practices

A. High Concentration of Industries

80% of China's anti-dumping cases are from petrochemical industry.



2. Anti-dumping Practices of China

Basic Features of China's AD Practices

B. High Concentration of Exporting Countries

Japan, Korea, the United States, EU and Taiwan District of China

A decorative graphic consisting of several sets of concentric circles, resembling ripples in water, located in the bottom right corner of the slide.

2. Anti-dumping Practices of China

Basic Features of China's AD Practices

C. Reflect Fairness, Impartiality and Objectivity

9 cases which result in no anti-dumping measure imposed, accounting for 20% of all cases that are completed.

2. Anti-dumping Practices of China

Basic Features of China's AD Practices

D. Escalated awareness of Rights and Interests

Trade clashes can only be solved in accordance with prevailing international rules, not administrative measures

Thanks!





Experiences from Anti-dumping cases and Trade disputes in Seafood Industry

Dr. Nguyen Thi Hong Minh

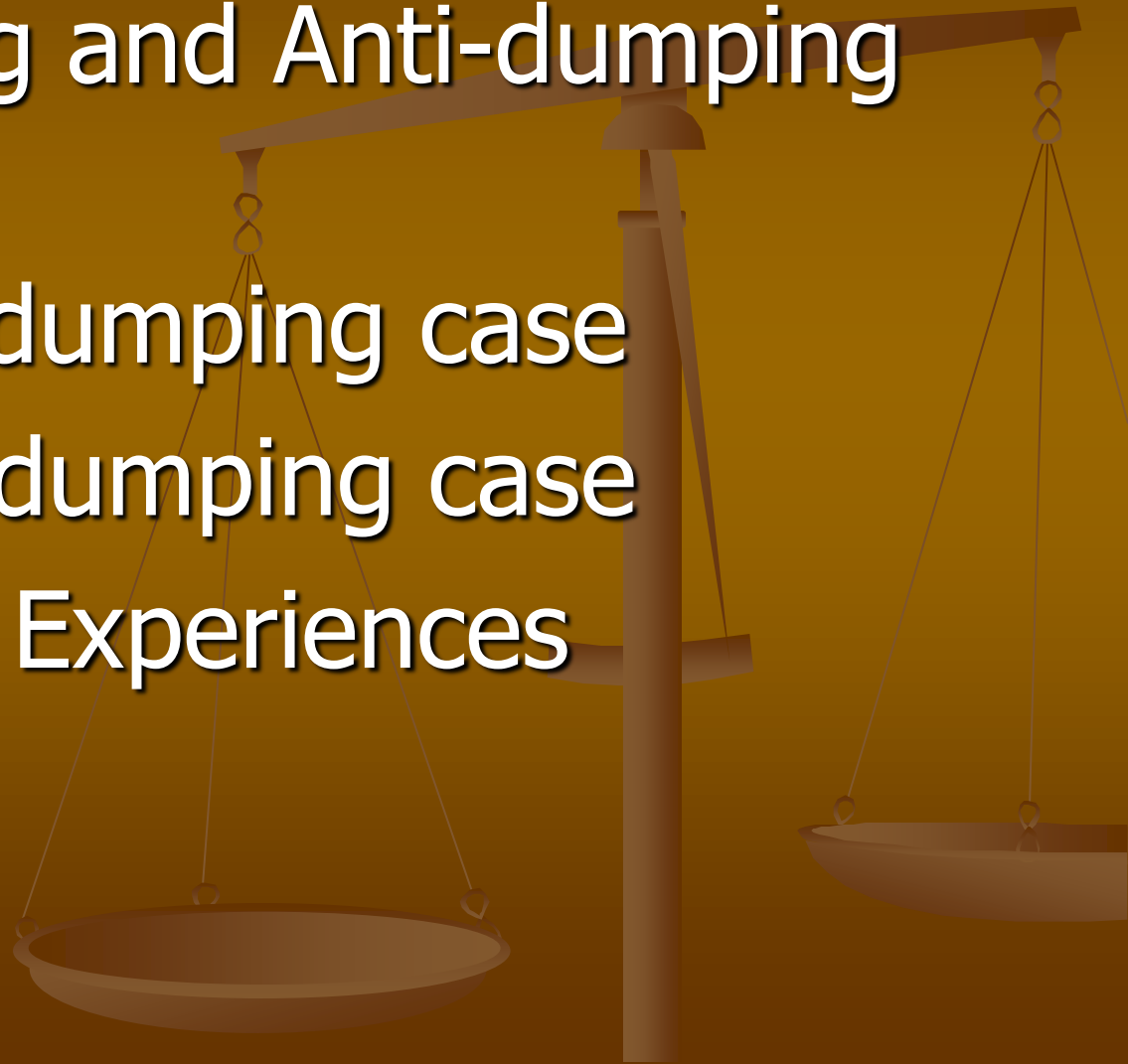
Former Vice-Minister of Fisheries

VASEP Chairman Emeritus

Nguyen Dieu Linh - MBA

Contents

- Anti-dumping and Anti-dumping cases
- Catfish Anti-dumping case
- Shrimp Anti-dumping case
- Lessons and Experiences



Anti-dumping

- Anti-dumping is a measure which is used by many governments, especially in the US to protect the domestic industries from the imported products selling at lower price than the price it normally charges on its own home market, threatens to dominate the market, causing or threatens to cause material injury to the domestic industries.
- Detailed procedures are set out on how anti-dumping cases are to be initiated, how the investigations are to be conducted, and the conditions for ensuring that all interested parties are given an opportunity to present evidence. The legal procedures is regulated by government Law may varies from one government to the others. Under the US Law, the procedures is as follow: filing of the petition, announces mandatory respondents, ITC and DOC investigation, cost of production calculation (applied method will be different between market and non-market economy), ITC hearing, AD duties order announced by DOC, ITC votes for final AD duties order.
- WTO will be involved when a member country does not concur with the final conclusion of the case. The agreement says member countries must inform the Committee on Anti-Dumping Practices about all preliminary and final anti-dumping actions, promptly and in detail. They must also report on all investigations twice a year. When differences arise, members are encouraged to consult each other. They can also use the WTO's dispute settlement procedure.
- Anti-dumping suits happen regularly in international trade. Canada is a country next to the US and its annually export value to the US is over 100 billion USD in which the expenses for AD cases is about 6-10 billion USD.

Catfish Anti-dumping case

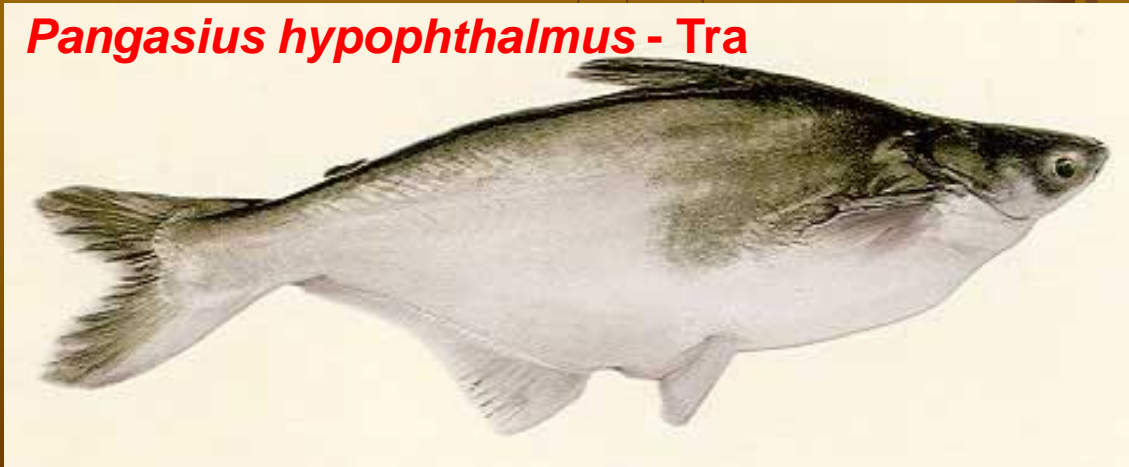
- During 1999 and 2000, the volume of Vietnamese tra and basa catfish imported to the US market increased considerably, which angered American catfish farmers. The Catfish Farmers of America (CFA) plotted a campaign to lobby and pressure Congressmen of the states that raise catfish and drummed up support from legislature and law enforcement agencies to back up their retaliation against imports of Vietnamese catfish:
 - Cut off the budget allocating for FDA to carry out the quality examination on imported tra and basa fish
 - In Nov 2001 US Congress passed Agriculture legislation that limited the definition of catfish only to members of the Ictaluridae family of fish. This decision effectively prohibits US importers, restaurants and supermarkets from labeling fish from Vietnam as Catfish. This is unusual and contradictory scientific decision of US Congress.
 - Some Southern catfish raising states used the US media to provide misinformation to distort the image of Vietnamese tra and basa catfish, told embellished stories about the quality of the fish from Vietnam
- According to the US Custom, in 2001 total value of tra imported from Vietnam to the US was 1.7 million USD, 10 months of 2002 was 12 million USD while total value of the world import in fish category was only 21 million USD.
- In 2002, CFA filed a AD petition against Vietnamese producers of frozen tra and basa fillets, the case ended in 2003 with the high AD duties were imposed.

Species of farmed *Pangasius*

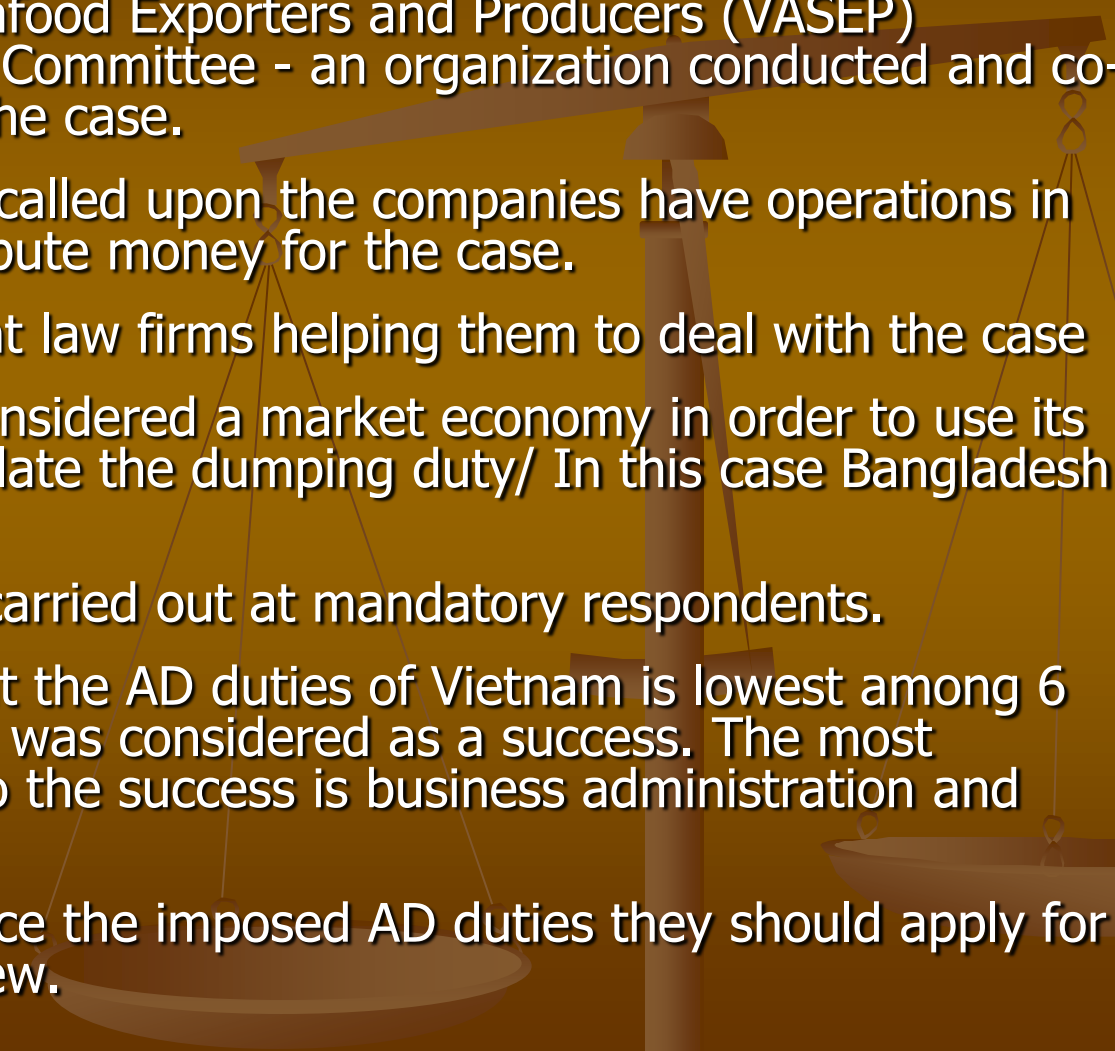
***Pangasius bocourti* - Basa**



***Pangasius hypophthalmus* - Tra**



Shrimp Anti-dumping case

- In 2004, the US Southern Shrimp Alliance (SSA) filed an AD petition against 6 countries export shrimp to the US including Vietnam
 - Vietnam Association of Seafood Exporters and Producers (VASEP) established VASEP Shrimp Committee - an organization conducted and coordinated in dealing with the case.
 - VASEP Shrimp Committee called upon the companies have operations in seafood business to contribute money for the case.
 - Respondents hired different law firms helping them to deal with the case
 - Select a third country is considered a market economy in order to use its cost of production to calculate the dumping duty/ In this case Bangladesh was selected.
 - On-site investigation was carried out at mandatory respondents.
 - In 2006 ITC concluded that the AD duties of Vietnam is lowest among 6 countries respondents and was considered as a success. The most important reason led to the success is business administration and management.
 - If companies want to reduce the imposed AD duties they should apply for annual administrative review.
- 

Vietnam Seafood Export

- **Seafood Export increased during the period 1995-2006**
 - * **Volume: 6.3 times higher**
 - * **Value: 6.0 times higher**
 - **Milestones: 1995 – USD 0.5 billion**
 - 2000 - USD 1 billion**
 - 2002 – USD 2 billion**
 - 2005 – USD 2.5 billion**
 - 2006 – USD 3.3 billion**
 - 2006, Seafood export volume : 805,766 MT (+29,4%), value : USD 3.348 billion (+22,2% compared to 2005)**
 - **Annual average increase : 19,4% during recent 10 years, high record in 2000 :+ 52%, lowest in 1998:+ 4%;**
 - **2006, Vietnam seafood exported to 139 countries and territories compared to only 42 in 1999**
 - **2007 – USD 3,7 billion**
- 

Vietnam Pangasius Success Story

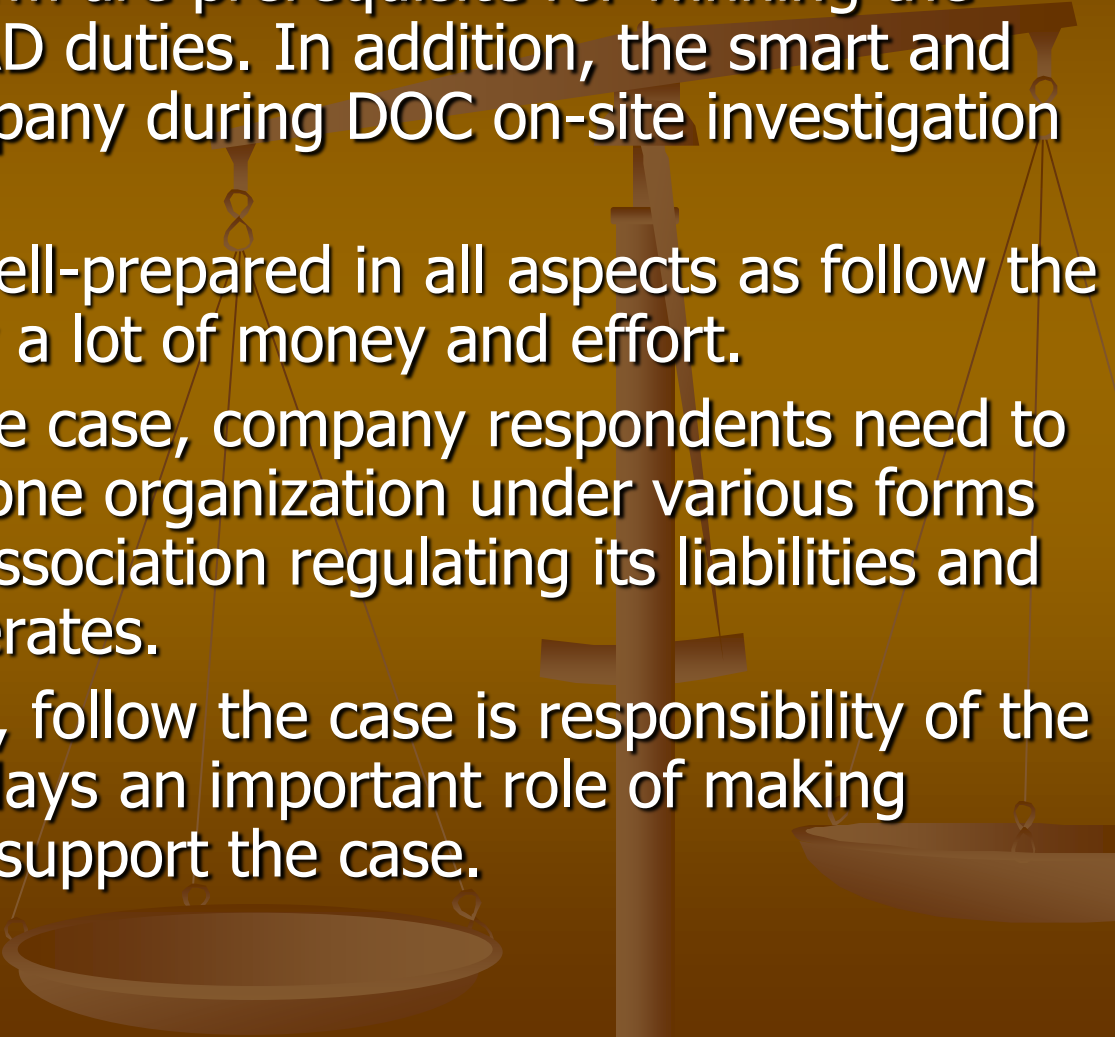
In 10 years 1997-2006, Vietnam *Pangasius*:

- Farming areas increased only **7 times**, reached **9,000 ha**
- Annual commercial production of raw fish increased **36 times**, from 22,500 MT to **825,000 MT**
- Volume of exported *Pangasius* fillets jumped-up more than **40 times**, from 7,000 MT to **286,000 MT**.
- Export revenue increased **37.4 times**, from US\$ 19.7 mill. to **US\$ 736.872 mil**,
- Number of export markets increased to more than **80 countries** and territories, in all continents.
- In 2007 export revenue reached to **1 billion USD**.

Lessons and Experiences

- Initiatively avoid the case before it happens by: negotiation with customers, reduce in production, increase selling price, using quota, etc.
- Many countries have different and smart ways in order to avoid the AD case such as: keep track of market movements, political movements, lobbying activities (especially effective in the US), government relations
- When the AD case started, choosing the right law firm to act on behalf of the respondent is one of the most important factors contributed to success of the case.
- Seeking financial resource to fund for all expenses of the case. VASEP has called upon all of its member companies not only the respondent companies but also other related companies such as: logistics companies, banks, packaging companies...

Lessions and Experiences

- A clear and explicit management system of the company and experiences of the law firm are prerequisite for winning the case or getting the low AD duties. In addition, the smart and wise reaction of the company during DOC on-site investigation is also very important.
 - Companies need to be well-prepared in all aspects as follow the case it will cost company a lot of money and effort.
 - In order to succeed in the case, company respondents need to collaborate and unite in one organization under various forms such as industrial club, association regulating its liabilities and obligation in which it operates.
 - When the AD case starts, follow the case is responsibility of the company. Government plays an important role of making regulation, legislation to support the case.
- 

**THANK YOU
FOR YOUR ATTENTION!**





DEPARTEMEN PERDAGANGAN
REPUBLIK INDONESIA

The Progress of Allegation of Anti-Dumping, CVD & Safeguard Measure in Indonesia

Directorate of Trade Defence, Directorate General of International Trade
Cooperation, Ministry of Trade of Republic of Indonesia

Amount of Allegation Cases on Dumping, Subsidy and Safeguard (1995 - 2007)

Aleggation Cases			
DUMPING	SUBSIDI	SAFEGUARDS	TOTAL
3.097 (89,79%)	193 (5,6%)	159 (4,61%)	3.449 (100%)

Source : WTO, February 2008

ANTI-DUMPING INITIATIONS BY EXPORTING COUNTRY (1995 - 2007)

<i>Alleged Countries</i>		<i>Periode</i>												<i>Jan.- June 2007</i>	<i>Total</i>
		'95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06		
1	China, P.R.	20	43	33	28	40	42	54	51	52	49	55	68	16	551
2	Korea, Rep. of	14	11	15	24	34	22	23	23	17	24	12	12	4	235
3	Chinese Taipei	4	9	16	11	23	15	19	16	13	21	13	14	4	178
4	United States	12	21	15	15	14	12	15	12	21	14	12	11	2	176
5	Japan	5	6	12	13	22	9	13	13	16	9	7	11	2	138
6	Indonesia	7	7	9	5	20	13	18	12	8	8	14	9	2	132
7	India	3	11	8	12	13	10	12	16	14	8	14	6	2	129
8	Thailand	8	9	5	2	19	12	16	12	7	9	13	8	1	121
9	Russia	2	7	7	12	17	12	9	18	2	8	3	4	1	102
10	Brazil	8	10	5	6	13	9	13	4	3	9	4	8	1	93
LAINNYA*)		74	91	118	129	140	134	172	135	79	54	53	49	14	1242
TOTAL		157	225	243	257	355	290	364	312	232	213	200	200	49	3097

Catatan: 1) Ada sebanyak 42 negara penuduh dumping; 2) *) = Terdapat 89 negara pengekspor

COUNTERVAILING INITIATIONS BY EXPORTING COUNTRY (1995 - 2007)

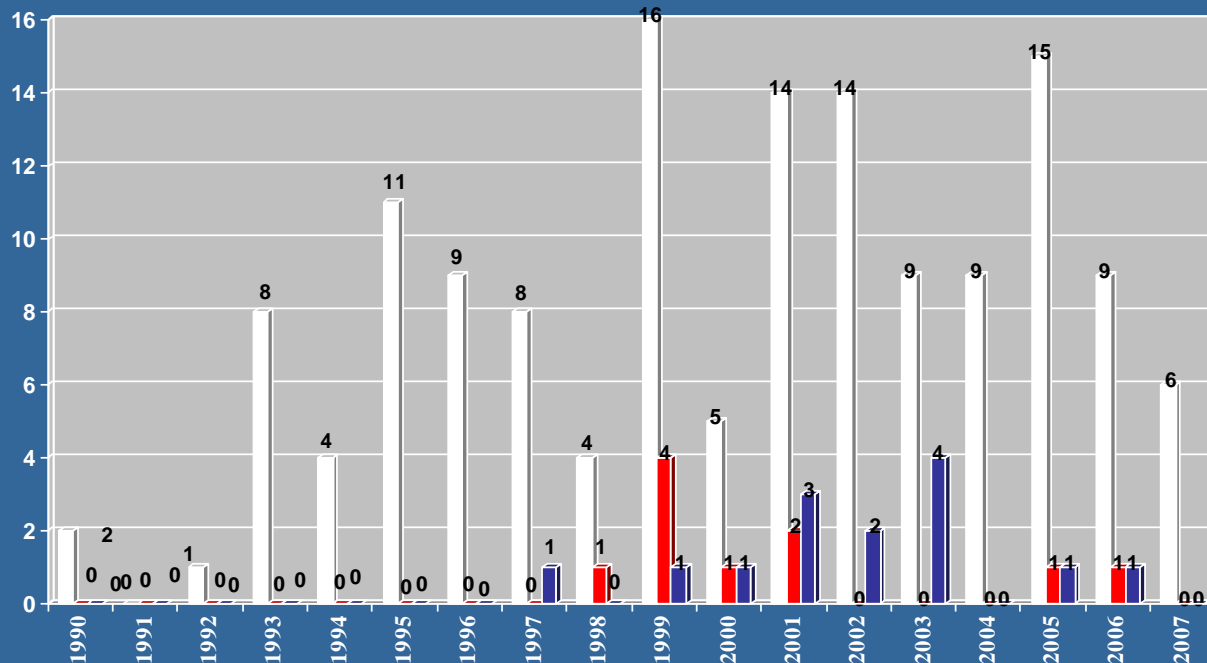
Period Alleged Countries		95	96	97	98	99	00	01	02	03	04	05	06	Jan.- June 2007	Totals
		1	India	1	0	3	6	5	7	8	2	8	1	1	1
2	Korea, Rep. of	0	0	0	5	4	1	1	2	0	1	1	1	0	16
3	Italy	3	2	1	3	1	0	1	1	1	0	0	0	0	13
4	Indonesia	0	0	0	1	5	1	2	0	0	0	1	1	0	11
5	European Community	3	1	1	1	1	0	0	1	2	0	0	0	0	10
6	Thailand	1	0	0	0	5	1	0	0	0	1	1	0	0	9
7	Canada	0	1	1	1	0	0	2	2	0	1	0	0	0	8
8	France	0	0	0	2	2	0	2	0	0	0	0	1	0	7
9	Chinese Taipei	0	0	1	0	5	0	0	0	0	1	0	0	0	7
10	Brazil	0	0	1	1	1	1	2	0	0	0	0	1	0	7
Lainnya*)		2	3	8	5	12	7	9	1	4	3	2	4	1	61
Total		10	7	16	25	41	18	27	9	15	8	6	9	2	193

Catatan: 1) Ada sebanyak 40 negara penuduh subsidi; 2) *) = Terdapat 31 negara pengekspor.

Sumber: WTO, Pebruari 2008



ALLEGATION CASES ON DUMPING, SUBSIDY & SAFEGUARD TO INDONESIA SINCE YEAR 1990 s.d DESEMBER 2007



DUMPING = 143 CASES ■ SUBSIDY = 11 CASES ■ SAFEGUARDS = 14 CASES

TOTAL = 168 CASES

Note : Year 2008 there is 6 new allegation cases: Motor Cycle Tire & PTY (Turkey), Toilet Tissue Paper (Australia), Acrylic Fiber & sunset review bicycle tire (Argentina), Viscose Staple Fiber (Brazil)

**ALLEGATION CASES TO INDONESIA HANDLE BY DIRECTORATE OF TRADE DEFENCE
DIRECTORATE GENERAL OF INTERNATIONAL TRADE COOPERATION, MoT (1996-2007)**

DUMPING	SUBSIDI	SAFEGUARDS	AMOUNT
143	11	14	168

COUNTRY	JUMLAH
1. UNI EROPA	26
2. AMERIKA SERIKAT	21
3. INDIA	19
4. AUSTRALIA	18
5. AFRIKA SELATAN	11
6. SELANDIA BARU	9
7. MALAYSIA	8
8. PHILIPINA	8
9. KANADA	6
10. TURKI	6
11. ARGENTINA	5
12. MESIR	4
13. THAILAND	4
14. BRASIL	3
15. MEKSIKO	3
16. CINA	3
17. PAKISTAN	3
18. KOLOMBIA	3
19. KOREA SELATAN	2
20. JAMAICA	2
21. PERU	2
22. TAIWAN	1
23. TRINIDAD & TOBAGO	1
TOTAL	168

CASES STATUS		
DIHENTIKAN	DIKENAKAN	DALAM PROSES
83	77	8

PRODUK INDONESIA YANG DITUDUH :

KERTAS, BUKU HARIAN, ALUMUNIUM, BATERAI KERING, BAN, BAJA, TEKSTIL & PAKAIAN JADI, PRODUK KIMIA, SERAT SINTETIK, ALAS KAKI, SEPEDA, JARI-JARI & PENTIL SEPEDA, LAMPU NEON, KOREK API GAS, CPO, FILTER OIL, MAINAN ANAK-ANAK, PLYWOOD, SEMEN, KACA, KERAMIK, PENCIL, GYPSUM, CAKRAM MAGNETIK, KARUNG PLASTIK, RING BINDER, IKAN TUNA DALAM KALENG, JAMUR DALAM KALENG, ENGSEL PINTU & JENDELA, BAN SEPEDA & MOTOR.

ALLEGATION CASES STATUS ON DUMPING, SUBSIDI, & SAFEGUARD MEASURES TO INDONESIA (1990 - 2007)

CASES STATUS	CASES AMOUNT	ALLEGATION CASES		
		DUMPING	SUBSIDI	SAFEGUARDS
Terminate	83 (49,4%)	72	6	5
Impose	77 (45,8%)	63	5	9
On Process	8 (4,8%)	8	0	0
TOTAL	168 (100%)	143	11	14

INDONESIAN PRODUCTS WHICH ALLEGED OF DUMPING, SUBSIDI DAN SAFEGUARD SINCE YEAR 1996 -2007

No.	Product	Country
1.	Clear Float Glass	India, Afrika Selatan, Thailand, Australia, Selandia Baru, Philippina
2.	Polyethelyne Terephthalate (PET)	Uni Eropa, Amerika Serikat, India, Malaysia, Turki, Argentina
3.	Coated and Uncoated Woodfree Paper and Others Paper, toilet papers	Afrika Selatan, Korea Selatan, India, Malaysia, Australia, Amerika Serikat
4.	Hot Rolled Plate	Amerika Serikat, Kanada, Australia, Thailand
5.	Gypsum Plaster Board	Malaysia, Afrika Selatan, Selandia Baru, India
6.	Footwear	Uni Eropa, Peru, Selandia Baru, Argentina
7.	Polyester Staple fiber	India, Kolombia, Uni Eropa
8.	Pocket Lighter	Uni Eropa, Korea Selatan
9.	Partially Oriented Yarn	India, Uni Eropa
10.	Produk Kaca & Gelas	Philippines, Afrika Selatan, Thailand

Sumber : DPP, Ditjen KPI, DEPDAG 2008

Terima Kasih



**PAPUA NEW GUINEA COUNTRY
REPORT**

APEC ANTI-DUMPING SEMINAR

**HOA BIN HOTEL – HANOI,
VIETNAM**

3RD – 4TH JULY, 2008

**Alex Kerangpuna
Win Waring**

Introduction

Papua New Guinea is a WTO member and its effort towards implementing commitments and obligations, including Anti-dumping Agreement (ADA) is quite challenging.

At present, it does not have legislation and effective institutional mechanism to deal with the dumping issues. This has translated into insignificant awareness conducted at domestic level to inform industries and consumers on dumping issues, and how government should invoke anti-dumping duty or other trade remedies to protect industries from injuries caused by dumped goods.

For the purpose of this report, it aims to provide an overview of domestic legislation and role of national agencies responsible for implementing the Anti-dumping Agreements, industries utilization of the agreement and problems that PNG faces in tackling the challenges posed by dumped products.

Background

Papua New Guinea has undertaken commitments for policy shift towards reduction in tariffs over a very short period of time either through the:

- (i) Structural Adjustment Programmes (SAP) imposed by the World Bank and IMF;

The tariff rationalization and liberalization under the Tariff Reform Programmed (TRP) is part of SAP and is seeing the reduction of tariffs across the board. In that context, tariffs do not provide any level of comfort or safety net for domestic industries and domestically produced products anymore, particularly when hit with dumping or imported surges.

- (ii) As Part of its Trade Liberalization Commitments in WTO and other Trade Agreements/arrangements

Trade Negotiations are resulting in commitments to reduce trade barriers for growth in trade and PNG is directly involved in this process in various fora.

This is an area that will balance out the potential negative impacts of trade liberalization if we get it right.

Couples with ,massive reduction in tariff rates over the last five (5) years, the absence of proper trade remedies policy and legislation is raising concerns for many in the private sector, who have been expressed that appropriate safety nets must be provided for the domestic industries, firms and workers.

Domestic Legislation and Institutional Framework on Anti-Dumping

Papua New Guinea does not has an Anti-dumping policy and legislation to effectively address the issue of dumping at domestic level. Although, it has certain legislations and institutions that are responsible for implementing the agreement, there is still limitation on the specificity of addressing Anti-dumping rules.

As a result, the institutions concerned, particularly the Ministry of Foreign Affairs and Trade, Independent Consumer and Competition Commission (often dealing with Competition and Counterfeit agreements), Internal Revenue Commission (Customs and tariff) and Treasury Department (Finance and Budget) are now having inter-agency consultations to formulate a policy that would eventually lead to enactment of legislation on the Anti-dumping.

The Trade Division, within the Ministry of Foreign affairs and Trade, rely on the Multilateral Agreement (Implementation of Art.6 of GATT 1994) as its official guideline to provide broad advice to industries and relevant authorities where there is a need to do so. Unfortunately, the industries concerns on dumping cannot be fully addressed given the non-existence of such legislation and institutional body to specifically deal with the problem.

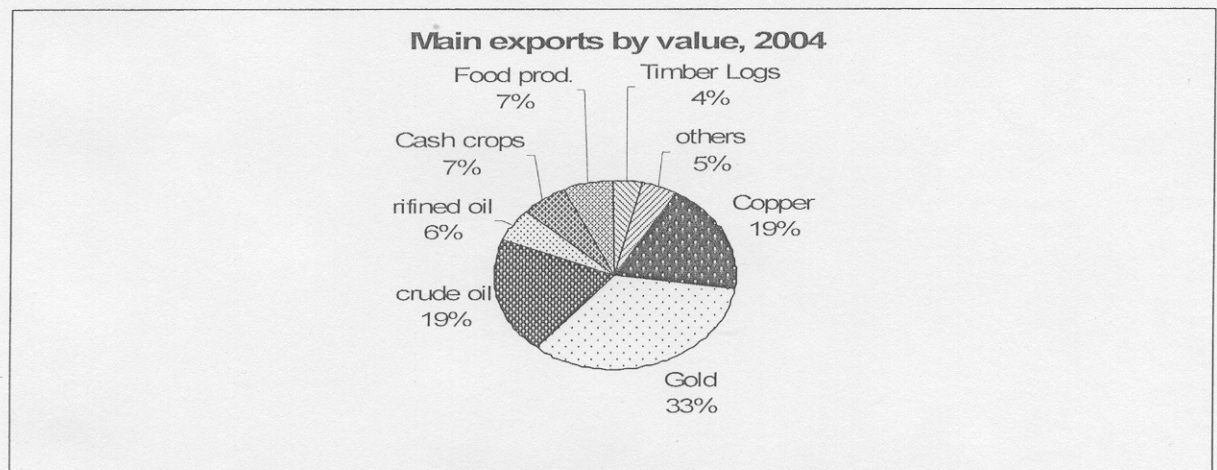
Even few companies have already lodged complains on dumped products and the material injury it may have caused to their products, the government on the other hand does not take necessary steps to invoke Article 6 of GATT 1994. Basically because there is no domestic legislation and regulatory framework to complement the WTO Anti-Dumping Agreement in imposing

anti-dumping duty. This makes it difficult at the moment for both the government and private sector to advance in this area.

Industries and Anti-dumping

Papua New Guinea is a major importing consumer country of industrial products. Manufacturing Industries constitute less than 5 per cent of its total export and 3 per cent of GDP. This represents the minute scale and contribution of industry in the overall economy that requires protection from dumped 'like products' and level of injury this may impact on local industries, welfare of employees and FDI.

Briefly on PNG major exports, this include gold, accounting for one third of total export receipts, copper and crude oil (with an additional 19% share each), manufactured food products (7%) and agriculture crops (7%). Others (5%) would constitute industries other than the manufactured food products.



Furthermore, current government's inward investment policies will trigger new industries, therefore, implementing government agencies should be proactive in preparing themselves to handle dumping issue in the future that would be faced by these industries. Such technical capacity building programmes including this APEC Anti-Dumping Seminar may place implementing agencies in a better position to address anti-dumping or other trade issues when arises.

made Coke drinks. The government unfortunately did not response positively to initiate investigation on the issue, and this is still pending.

It is anticipated that more of similar cases will emerged in future and for the government to adequately address the issue, it must enact anti-dumping legislation, to deal with the problem.

Benefits of Papua New Guinea in the APEC Anti-Dumping Seminar in Hanoi, Vietnam

At the outset, it is anticipated that Mr. Alex Kerangpuna and Mr. Win Waringi will learn a lot in this two-day presentation from different speakers and experiences shared by other member economies on implementing the Anti-dumping Agreement. Thus, the two and their institutions will benefit from this Seminar in the following ways:

- be able to advise their respective agencies on the importance of having a domestic Anti-dumping policy and legislation to address the problem of dumping.
- imparting necessary experiences shared by presenters and participants to address dumping at domestic level
- may participate effectively in future APEC Seminars on the Anti-dumping to inform the APEC Secretariat and WTO on what PNG has been doing to implement ADA

Conclusion

In conclusion, PNG is yet to have Anti-Dumping policy and legislation in place. It is in the process of formulating a policy and will be enacting anti-dumping legislation to counter the issue of dumped products and scale of injuries this could cause to local industries, employees and consumers alike.

It is therefore, the Anti-dumping Seminar is timely for PNG that its participants would hopefully gain adequate knowledge and experiences shared by professional speakers and participants to assist in the formulation of the Anti-dumping policy and legislation.

The legislation will provide safety net for local industries that are currently exposed to the dumped products.

PART 1

PHILIPPINE ANTI-DUMPING LAW



Philippine Legislation

- Section 301 of the Tariff and Customs Code of the Philippines
- Republic Act No. 8752 (Anti-Dumping Act of 1999)
- Implementing Rules and Regulations
- Commission Order No. 00-01



Investigating Agencies

- Department of Trade and Industry-Bureau of Import Services (DTI-BIS) and
- Department of Agriculture (DA), in case of agricultural products.
- Tariff Commission (TC)
- Bureau of Customs (BOC)



STAGES OF ANTI-DUMPING INVESTIGATION

- Prima Facie Determination – five (5) working days to decide
- Preliminary Determination – within two (2) days:
 - a. DTI/DA notifies the government of the country of export or origin about the impending dumping investigation.
 - b. Notifies all interested parties about the initiation of the investigation and sends questionnaires. Respondents were given thirty (30) working days to return the questionnaires.

STAGES OF ANTI-DUMPING INVESTIGATION

- c. The requirement of a dumping bond shall be made not sooner than sixty (60) days from the date of the initiation of the investigation and only for a period of four (4) months.
- d. The Secretary of DTI/DA shall immediately terminate the anti-dumping investigation upon negative findings.
 - Final Determination
 - Issuance of Department Order

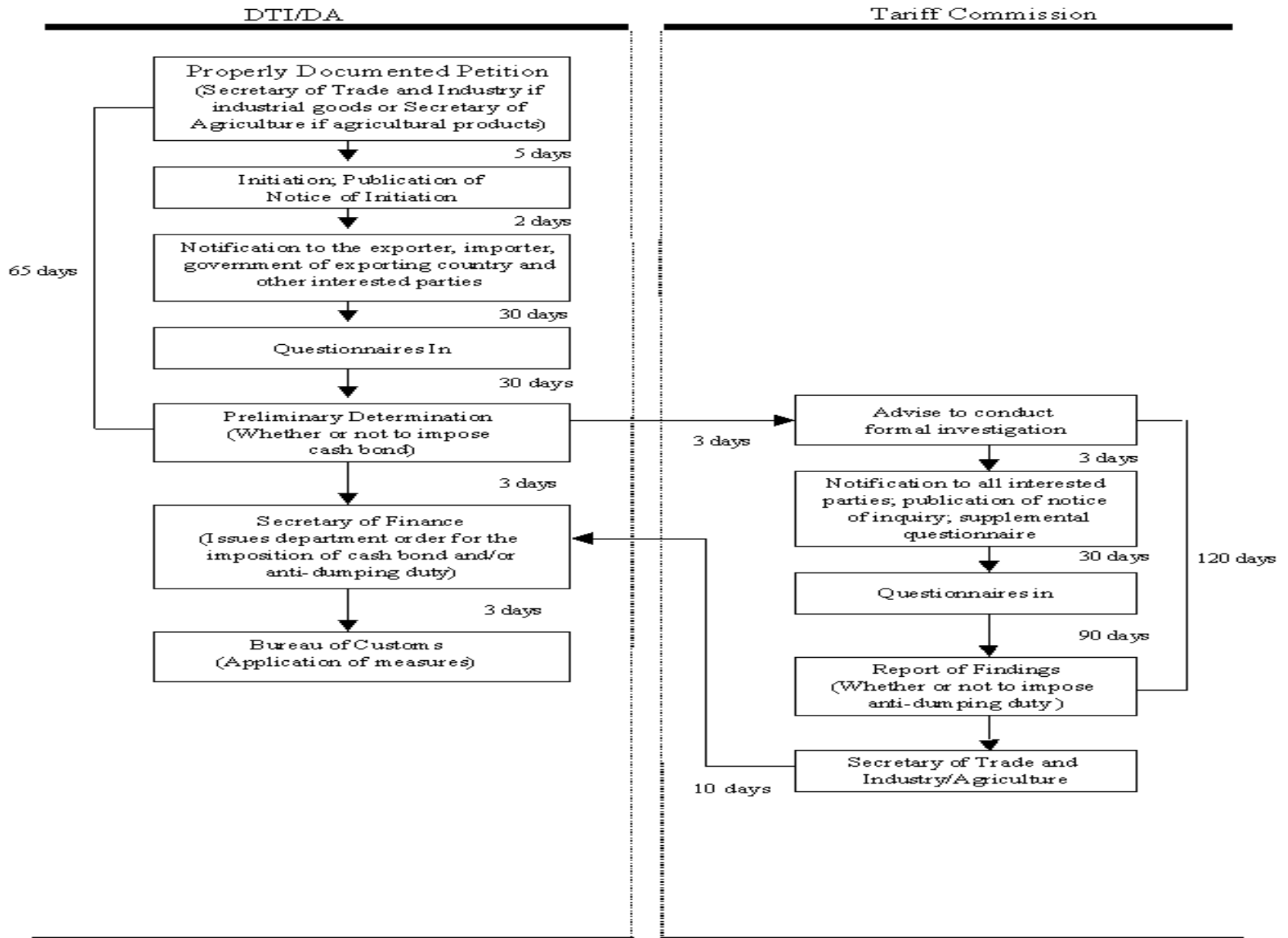


PART 2
PHILIPPINE EXPERIENCE
AND
FORMAL INVESTIGATION BY
THE TARIFF COMMISSION

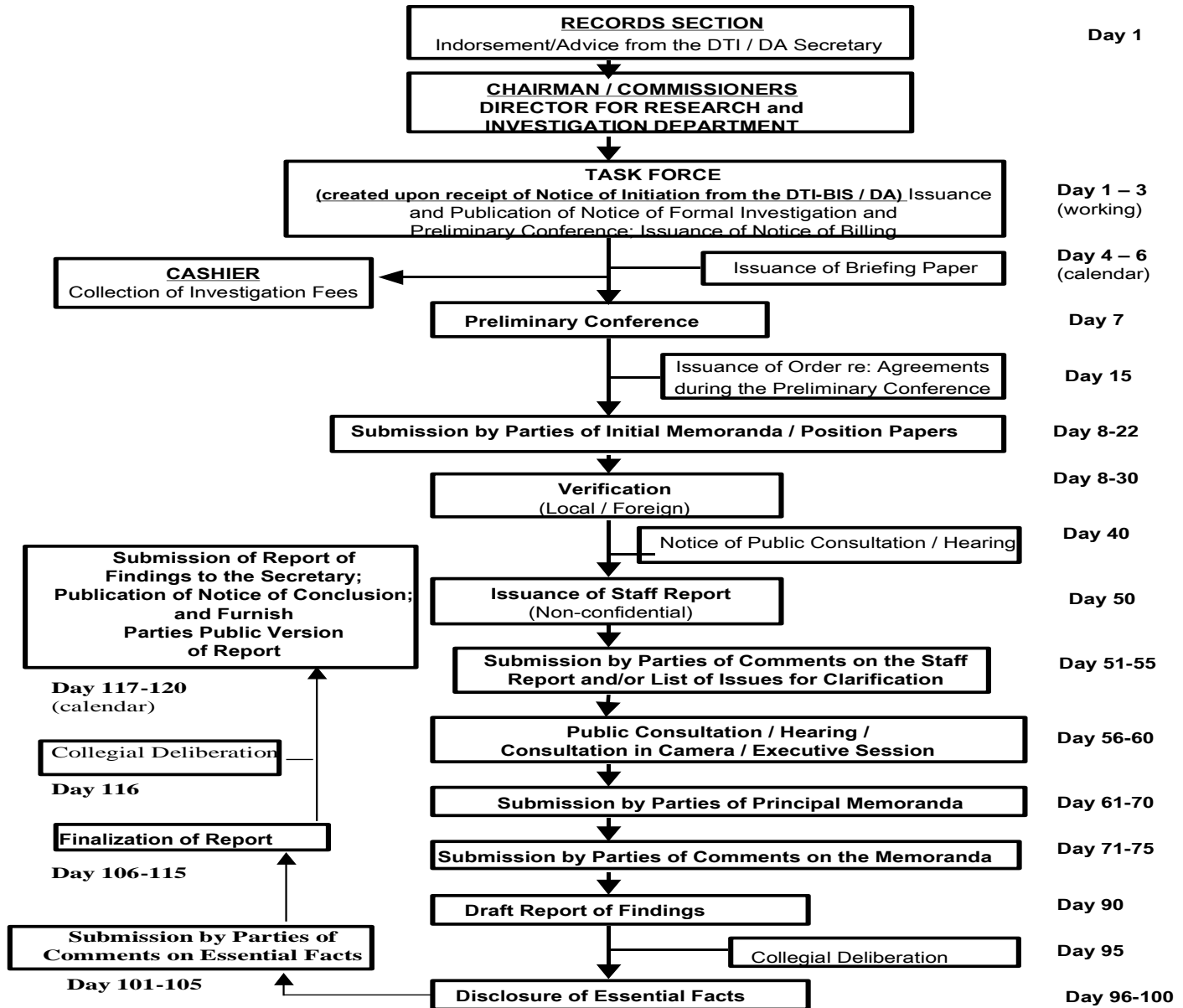


FLOWCHART ON ANTI-DUMPING INVESTIGATION

Republic Act No. 8752



Flowchart of Procedures of the Tariff Commission's Formal Investigation under Section 301, as amended by RA 8752
(Number of Days: 120 Days)



- Most dumping petitions were dismissed at level of Preliminary Investigation.
- Of the seven (7) petitions formally investigated by the Commission from 1999-2001, there were only four (4) affirmative finds as follows:
 - CRC from Malaysia
 - Steel Billets from Russia
 - Float Glass from Indonesia
 - Polypropylene Resins from Korea
- From 2001 to 2003, most petitions were filed under Safeguard Measure Act.



ANTI-DUMPING CASES

No.	Product	Country	Initiation	Current Status
1.	Sodium Tripolyphosphate	People's Republic of China	September 2003	AD duties imposed
2.	Galvanized Malleable Coated Fittings and Zinc Coated Fittings	People's Republic of China	For review, however no domestic industry initiated	
3.	Sulfuric Acid Technical Grade	Japan	January 13, 2003	Case dismissed
4.	Corrugating Medium Paper	Thailand	December 23, 2002	Case dismissed
5.	Cold Rolled Coils and Sheets (CRC)	Chinese Taipei	July 7, 2000	Case dismissed

ANTI-DUMPING CASES

No.	Product	Country	Initiation	Current Status
6.	Clear Figured Glass	People's Republic of China	July 11, 2000	Case dismissed
7.	PVC Floor Covering	Thailand	July 26, 1995	AD duties imposed
8.	Polypropylene Resins	Korea	August 16, 1999	AD duties imposed
9.	Clear Float Glass	Malaysia	September 23, 1999	AD duties imposed
10.	Clear and Tinted Float Glass	Indonesia	September 23, 1999	AD duties on clear; the rest dismissed

ANTI-DUMPING CASES

No.	Product	Country	Initiation	Current Status
11.	Hot Rolled Coils	Russia	February 27, 1999	Case dismissed
12.	Billets	Russia	May 28, 1999	AD duties imposed
13.	Cold Rolled Coils and Sheets	Russia and Ukraine	September 16, 1998	RUS→AD duties imposed UKR→ Case dismissed
14.	Monosodium Glutamate	Indonesia	August 24, 1994	Case dismissed
15.	Cold Rolled Coils and Sheets	Malaysia	October 5, 1999	AD duties imposed

Maraming Salamat sa Inyong Pakikinig.
(Thank you for listening.)



Ms. Elvira C. Ignacio and Maria Theresa B. Paclibare
Philippine Tariff Commission

Thailand's Experiences on Anti-Dumping Cases

According to Anti-Dumping Agreement under GATT, it is allowed the country in which a product is dumped to take protective action if it can establish that such product is dumped and thereby causes injury to the domestic industry of that product. To a certain extent, Thailand has to logically emphasize on the definition of dumping as price discrimination practiced. However, the frequent use of anti-dumping actions against exports from developing countries by major trading countries has become a matter of serious concern.

Thailand's experiences on anti-dumping cases would be when the Anti-dumping measures are used as a protective action against dumped import products from other countries as well as being used by other countries against exported products from Thailand.

Anti-Dumping measures of Thailand are under the supervision of Department of Foreign Trade, Ministry of Commerce by the Bureau of Anti-Dumping. The Bureau of Anti-Dumping has occupied approximately 30 officers which have been divided into two categories as followed.

1. Offensive officers
 - 20 offensive officers have been engaged in the area of analyzing regarding to the complaint as well as conducting Anti-dumping investigation in order to make a synopsis used for considering an imposition of Anti-dumping measures.
2. Defensive officers
 - 10 defensive officers have been engaged in analyzing regarding to rules and regulations among other countries including the obligation under agreements in order to counteract by using strong argument and giving some advices to domestic industry when Thai products are being accused.

Anti-Dumping and Countervailing Act B.E.2542 (Thai AD Act) has been created in the year 1999 in accordance with WTO Anti-Dumping Agreement (ADA). It allows us to take protective action against dumped import that caused material injury to the domestic industry. Nevertheless, every step of investigation and consideration has been strictly abided by the Act by the Committee on Dumping and Subsidy. The Committee is consisted of delegates from relevant authority such as the Board of Investment of Thailand, the Federation of Thai Industries, the Office of Consumer Protection Board, Economist, Lawyer, Accountant, etc.

The Committee will examine the accuracy and adequacy of evidence provided in the application (complaint) on behalf of domestic industry to determine whether there is sufficient evidence to justify the initiation of investigation. If there is, the committee will initiate the anti-dumping investigation and proceed in line with the determination on dumping, injury and casual link between dumped import and injury.

The decision whether or not to impose an anti-dumping measure will be made by the Committee. When an anti-dumping measure is imposed in respect of any product, an anti-dumping duty will be collected in the appropriate amounts in each case by using the full margin of dumping or less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

Thailand's use of Anti-dumping measures against dumped import products.

Thailand has imposed Anti-Dumping measures against dumped import products from other countries for 24 cases as following.

No	Product	Number of Case	Country/Custom Territory
1.	Angles, Shapes, and Sections of Iron or Non-Alloy Steel: H-Sections	1	China, P.R.
2.	Citric Acid	1	China, P.R.
3.	Cold Rolled Carbon Steel Sheet and Strip in Coils and Cut-To-Length	2	Kazakhstan, Russia
4.	Flat Cold-Rolled Stainless Steel	4	Chinese Taipei, European Union, Japan, Korea, Rep of.
5.	Flat Hot Rolled in Coils and not in Coils	14	Algeria, Argentina, Chinese Taipei, India, Indonesia, Japan, Kazakhstan, Korea, Rep of., Romania, Russia, Slovak, South Africa, Ukraine, Venezuela
6.	Glass Block	2	China, P.R., Indonesia

Anti-dumping measures imposed against exported products from Thailand

Anti-Dumping Measures have been imposed against exported products from Thailand by other countries for 48 cases as following.

No.	Country	Number of Case	Product
1.	Argentina	2	New Pneumatic Tires, Plain Weave of Nylon or Polyester Filament
2.	Australia	3	Galvanize Steel Pipe, Canned Pineapple, Linear Low Density Polyethylene
3.	Brazil	2	Bicycle Tires, Viscose Fiber
4.	Egypt	3	Pencils, Porcelain & Ceramic, Fluorescent Light Bulbs
5.	European Union	7	Pipe Fitting, Polyethylene Terephthalate (PET), Welded Tubes, Coumarin, Stainless Steel Fasteners, Plastic Bags, Canned Sweet Corn
6.	India	6	Acrylic Fiber, Partially Oriented Yarn, Citric

			Acid, 6-Hexanelactam, Nylon Filament Yarn, Poly Vinyl Chloride (PVC)
7.	Indonesia	1	Carbon Black
8.	Jamaica	1	Ordinary Portland Grey Cement
9.	Malaysia	1	Polyethylene Terephthalate (PET)
10.	New Zealand	2	Plasterboard, Steel Reforcing Bars and Coils
11.	Pakistan	1	Polyester Filament Yarn
12.	South Africa	2	Carbon Black, Gypsum Plasterboard
13.	The United States of America	7	Canned Pineapple, Butt-Weld Pipe Fittings, Steel Pipe & Tubes, Hot Rolled Carbon Steel Flat Products, Prestressed Concrete Steel Wire and Strand, Polyethylene Retail Carrier Bags, Frozen Warm Water Shrimp
14.	Trinidad & Tobago	2	Lead Acid Batteries, Portland Grey Cement
15.	Turkey	8	Synthetic Filament Textile, Polyester Staple Fiber (PSF), Bicycle Tires, Motorcycle Tires, Polyethylene Terephthalate (PET), Pipe Fittings, Pencils and Painting Pencils with Graphite, Polyester Textured Yarn

SUMMARY REPORT

APEC TRAINING COURSE ON ANTI-DUMPING

The APEC Training course on Anti-dumping was held in Ha Noi, Viet Nam on 3-4 July 2008 under CTI 01/2008A Project, which was approved by BMC in 2007. The Training course was participated by representatives from China, Indonesia, Malaysia, Hong Kong China, Papua New Guinea, Peru, the Philippines, Chinese Taipei, Thailand and Viet Nam and speakers from Singapore, the United States, Vietnam, Italy and the European Union.

The Training course was divided into the following 4 sessions:

Session 1: Introduction to Anti-Dumping

Session 2: Procedures and Rules for Conducting Anti-Dumping Investigations

Session 3: Imposing Disciplines on the Application of Anti-Dumping Measures: Key WTO Decisions, Emerging Issues and Strategies

Session 4: The Experience of APEC Countries and Industries Targeted for Anti-Dumping Measures

Hereby are key discussion points at the training course:

In the first Session, participants were introduced about rules and obligations under the WTO Anti-dumping Agreement. Anti-dumping is a legal measure allowed by the WTO to ensure fair trade and to safeguard local industries against dumped products. Dumping occurs if a company sells at a lower price in an export in the importing country, under certain circumstances the importing economy authorities may impose anti-dumping duties to offset the effects of the dumping. The GATT 1947 contained a special article on dumping and anti-dumping action. Article VI of the GATT condemns dumping that causes injury, but it does not prohibit it.

Determination of dumping:

- Article 2 of the ADA covers the determination of dumping and sets out basic principles and leaves discretion to WTO members with respect to implementation.

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

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

- Article 2.3 covers the construction of the export price.

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

- Article 2.5 deals with transshipments.

- Article 2.6 defines the like product.

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

Session 2 and 3 touched upon procedures and rules for conducting anti-dumping investigations and imposing disciplines on the application of anti-dumping measures. According to statistics, since the establishment of the World Trade Organization (WTO), the WTO has been reported 3,097 anti-dumping cases during 1995 – 2007. Several APEC members are the biggest victims in this field. Up to June 2007, 8 out of 10 countries which are the most frequent target of suspicions that they sell exported goods at a lower price than on their home markets are in the APEC region. The cumulative anti-dumping probes worldwide against China have numbered more than 551 (ranking number 1 in the world), followed by the Republic of Korea (235 cases), Chinese Taipei (178 cases), the United States (176 cases), and Japan (138 cases). APEC's percentage in the world's total anti-dumping cases now accounts for 60 per cent (1,838 out of 3,097 cases) while APEC's trade share

in the world is 48 per cent only. This has proved that the use of anti-dumping measures has been more and more popular. Therefore, learning about the rights and obligations and procedures and rules for conducting anti-dumping investigations is of crucial importance to every economy to ensure that anti-dumping measures will be used in the right and justifiable manner, thus preventing from creating barriers to trade.

The AD procedures include the following 9 steps: (i) initiation of a case; (ii) initial investigation; (iii) preliminary determination; (iv) imposition of provisional measures; (v) price commitments; continuation of investigation; (vi) final decision; (vii) official imposition of definitive measures; (viii) annual review and (ix) review of sunset clause.

In Session 3, participants were also introduced about key concepts of anti-dumping, including zeroing, continuous bond, use of adverse “fact available”, causation in injury investigations, application of country wide rate in non-market economy investigation (MET), like product, anti-circumvention measures etc...

Participants were also highlighted with the key problems faced by exporting producers in countries which are considered as non-market economies for the purpose of anti-dumping investigations. It also underlines some very interesting issues concerning the construction of a normal value. Some real AD case shows that even when exporting producers can be granted MET, the determination of the normal value can be a difficult issue which, when not executed properly, can lead to significant distorted results to the detriment of the exporting producers. There is the importance for exporting producers to remain vigilant towards the calculation operated by the investigating authority and to have accounting records which are properly kept and allow for a clear identification of all costs items included in (or deducted from) the cost of production of the product under investigation. Indeed, any claim for a specific adjustment or deduction in the cost of production must be substantiated on the basis of the accounting records of the company.

In Session 4, participants listened to experiences of China and Viet Nam in dealing with anti-dumping cases. Representatives of Vietnam Seafood Association presented about the anti-dumping measures imposed by the US on Tra Fish and Shrimp and lessons drawn from the cases.

Overall, participants shared the feelings that the Training course is very useful for them to learn about anti-dumping and would like to see more courses on relevant topics.
