

# 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

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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 provide 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:

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“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

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# 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