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3.6 Anti-dumping Measures

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NOTE

The **Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

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WHAT YOU WILL LEARN

The official title of this WTO agreement reads *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.However, it is consistently referred to as the *Anti-Dumping Agreement* (ADA).
The ADA sets out the conditions under which WTO Members may apply anti-dumping measures as a remedy against injurious dumping in their markets. It provides detailed rules on the concepts of *dumping* and *material injury* and contains many procedural provisions that WTO Members, wishing to take anti-dumping action, must comply with.

This Module gives an overview of the provisions of the *Anti-Dumping Agreement*, and how these provisions have been interpreted by Panels and the Appellate Body over the last seven years. It covers both substantive and procedural rules. Since the entry into force of the ADA in 1995, ten WTO Panel reports have been issued interpreting ADA provisions, of which seven were appealed. These Panel and Appellate Body reports offer crucial interpretations of key provisions of the Agreement. Panel and Appellate Body findings form an important element of this Moduleare covered in tandem with the relevant provisions. This Module takes into account reports issued until 31 August 2001.

The first Section gives a general overview of the ADA.
The second Section, entitled "the determination of dumping", explains in some detail the three forms of dumping, considered actionable under the ADA. The third Section on the "determination of injury" examines the material injury requirement, as well as related concepts such as the determination of the like product and the domestic industry and the causal link between the dumped imports and the injury suffered by the domestic industry.

The fourth Section, entitled "the national procedures", highlights the various stages of an anti-dumping investigation and discusses the rights of interested parties.
Section 5 discusses WTO dispute settlement procedures particular to the ADA.
Section 6 analyses the position of developing countries under the ADA.

This Module describes how to conduct a simple anti-dumping calculation and the formal stages of anti-dumping procedures. It also identifies the areas in which the case law of thePanel and the Appellate Bodyhas had a significant impact on the application of the ADA provisions.

1. INTRODUCTION

This section gives an overview of the history of international regulation of dumping, anti-dumping measures and forms of dumping and injury. It also provides a summary overview of the Anti-Dumping Agreement [ADA] and explains certain key terms in the ADA.

1.1 History

Dumping occurs if a company sells at a lower price in an export market than in its domestic market. If such dumping injures the domestic producers in the importing country, under certain circumstances the importing country authorities may impose anti-dumping duties to offset the effects of the dumping.

National anti-dumping legislation dates back to the beginning of the 20th century. The GATT 1947 contained a special article on dumping and anti-dumping action. Article VI of the GATT *condemns* dumping that causes injury, but it does not prohibit it.

***Article VI:1* GATT 1994**

> *The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.*

Rather, Article VI authorizes the *importing Member* to take measures to offset injurious dumping. This approach follows logically from the definition of dumping as price discrimination practised by private companies. The GATT addresses *governmental* behaviour and therefore cannot possibly prohibit dumping by private enterprises. Moreover, importing countries may not find it in their interest to act against dumping, for example because their user industries benefit from the low prices.

Thus, GATT (and now the WTO) approaches the problem from the other side, *i.e.* from the position of the importing Member. However, recognizing the potential for trade-restrictive application, GATT (like WTO) law prescribes in some detail the circumstances under which anti-dumping measures may be imposed.

Since 1947, anti-dumping has received elaborate attention in the GATT/WTO on several occasions. Following a 1958 GATT Secretariat study of national anti-dumping laws, a Group of Experts was established that in 1960 agreed on certain common interpretations of ambiguous terms of Article VI.

An Anti-Dumping Code was negotiated during the 1967 Kennedy Round and signed by 17 parties. The Code was revised during the Tokyo Round. The Tokyo Round Code had 25 signatories, counting the EC as one. Although the 1979 Code was not explicitly mentioned in the Ministerial Declaration on the Uruguay Round, fairly early in the negotiations a number of GATT Contracting Parties, including the EC, Hong Kong, Japan, Korea and the United States proposed changes to the 1979 Code.

1.2 Current Situation

Article VI was carried forward into GATT 1994. A new agreement, the Agreement on Implementation of Article VI [ADA], was concluded in 1994 as a result of the Uruguay Round. Article VI and the ADA apply together.

Article 1 ADA

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

1.3 Outline of ADA

The ADA is divided into three parts and two important annexes. Part I, covering Articles 1 to 15, is the heart of the Agreement and contains the definitions of dumping (Article 2) and injury (Article 3) as well as all procedural provisions that must be complied with by importing Member authorities wishing to take anti-dumping measures. Articles 16 and 17 in Part II establish respectively the WTO Committee on Anti-Dumping Practices [ADP] and special rules for WTO dispute settlement relating to anti-dumping matters. Article 18 in Part III contains the final provisions. Annex I provides procedures for conducting on-the-spot investigations while Annex II imposes constraints on the use of best information available in cases where interested parties insufficiently cooperate in the investigation.

1.4 Actionable Forms of Dumping

GATT 1947 applied only to goods which implied that dumping of services was not covered. Indeed, the General Agreement on Trade in Services, negotiated during the Uruguay Round, does not contain provisions with respect to dumping or anti-dumping measures.

It has furthermore long been accepted that neither Article VI (nor the ADA) cover exchange rate dumping, social dumping, environmental dumping or freight dumping.

On the other hand, the reasons why companies dump are considered irrelevant as long as the technical definitions are met: Dumping may therefore equally cover predatory dumping,[1] cyclical dumping,[2] market expansion dumping,[3] state-trading dumping[4] and strategic dumping.[5]

Conceptually, the calculation of dumping is a comparison between the export price and a benchmark price, the normal valueof the like product. Depending on the circumstances in the domestic market, this normal value can be calculated in various manners as shown in Section 2 below.

1.5 Like Product

Article 2.6 ADA

The term like product ('produit similaire') is defined in Article 2.6 ADA as a product, which is identical, *i.e.* alike in all respects, to the product under consideration, or in the absence of such a product, another product, which has characteristics closely resembling those of the product under consideration. This definition is strict and may be contrasted, for example, with the broader term 'like or directly competitive products' in the Safeguards Agreement. In the context of the ADA, the term is relevant for both the dumping and injury determination.

Typical like product might be, for example, polyester staple fibres, stainless steel plates, or colour televisions [CTVs]. Such products can often[6] be classified within a Harmonized System[7] heading. Thus, polyester staple fibres fall under HS heading 55.03, stainless steel plates fall under HS heading 72.19 and CTVs under HS heading 85.28.

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

1.6 Forms of Injury

In order to impose anti-dumping measures, an authority must determine not only that dumping is occurring, but also that such dumping is causing material injury to the domestic industry producing the like product. Material injury in this context comprises present material injury, future injury (threat of material injury) and material retardation of the establishment of a domestic industry. These concepts are explained in Section 3.

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[1] Dumping in order to drive competitors out of business and establish a monopoly.
[2] Selling at low prices because of over-capacity due to a downturn in demand.
[3] Selling at a lower price for export than domestically in order to gain market share.
[4] Selling at low prices in order to earn hard currency.
[5] Dumping by benefiting from an overall strategy which includes both low export pricing and maintaining a closed home market in order to reap monopoly or oligopoly profits.
[6] Depending on the product definition, however, the product under investigation may sometimes cover several HS headings while at other times it may need to be defined further because the HS heading is too broad.
[7] Harmonized Commodity Description and Coding System, developed by the World Customs Organization in Brussels.

1.7 Investigation Periods

In order to calculate dumping and injury margins, the importing Member authorities will select an investigation period [IP]. This is often the one-year period, preceding the month or quarter in which the case has been initiated. Some jurisdictions, however, use shorter investigation periods, for example, six months. Extremely detailed cost and pricing data will need to be provided for this investigation period. On top of that, an injury investigation period [IIP], detailerd in Section 3 below, will be selected, in order to determine whether the dumping has caused injury.

1.8 Test Your Understanding

1. **Under the WTO, are companies allowed to dump their products in export markets?**
2. **A domestic industry of a WTO Member alleges that the currency depreciation of another WTO Member allows the exporters of that Member to sell at dumped prices. Assuming that the other conditions have been satisfied, can the WTO Member initiate an anti-dumping investigation?**
3. **A company argues that it dumped because of a downturn in the business cycle. In other words, it did not intend to cause injury to the domestic industry in the importing country. Will this defence be accepted?**
4. **A domestic industry argues that while its financial situation is all right for the moment, it fears that dumped imports may cause it injury in the future. Is the importing country Government allowed to start an anti-dumping case on this basis?**
5. **Can coffee producers in a WTO Member bring an anti dumping complaint against dumping by tea producers from another WTO Member?**

2. THE DETERMINATION OF DUMPING

This section reviews the dumping determination in detail. It analyses concepts such as export price and normal value. It also addresses the need for a fair comparison as well as comparison methods between the two. The section concludes with several calculation examples designed to show how dumping margins are computed.

2.1 Overview of Article 2

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

"normal value"

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 of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product 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.

"export price"

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 transhipments.

Article 2.6 defines the like product.

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

***Panel Report*, Thailand-H-Beams**

> *Article 2 contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin.*[8]

[8] *Panel Report, Thailand – Anti- Dumping Duties on Angels, Shapes and sectionsof Iron or Non-Alloy Steel and H-Beams from Poland, (Thailand - H-Beams), WT/DS122/R para. 7.35.*

2.2 The Export Price

According to Article 2.1 ADA, the export price is the price at which the product is exported from one country to another. In other words, it is the transaction price at which the product is sold by a producer/exporter in the exporting country to an importer in the importing country. This price is normally indicated in export documentation, such as the commercial invoice, the bill of lading and the letter of credit. It is this price that is allegedly dumped and for which an appropriate normal value must be found in order to determine whether dumping in fact is taking place.

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

"constructed export price"

Article 2.3 ADA provides that the export price then may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. In such cases, allowances for costs, duties and taxes, incurred between importation and resale, and for profits accruing, should be made in accordance with Article 2.4 ADA. Such allowances decrease the export price, increasing the likelihood of a dumping finding.

This was an important reason for a WTO Panel to interpret the relevant part of Article 2.4 restrictively.

***Panel Report*,US-Stainless Steel**

> *The term "should" in its ordinary meaning generally is non-mandatory, i.e., its use in this sentence indicates that a Member is not* required *to make allowance for costs and profits when constructing an export price. We believe that, because the failure to make allowance for costs and profits could only result in a higher export price – and thus a lower dumping margin – the* ADAgreement *merely permits, but does not require, that such allowances be made.*
> *...we view this sentence as providing an* authorization *to make certain specific allowances. We therefore consider thatallowances not within the scope of that authorization cannot be made.* [9]

2.3 Normal Value

2.3.1 Standard Situation: Domestic Price

Article 2.1 provides that a product is dumped if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. This is the standard situation: the normal value is the

[9] *Panel Report, United States – Anti- Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea(US – Stainless Steel), WT/DS179/R, paras. 6.93-6.94 footnotes omitted.*

price of the like product, in the ordinary course of trade, in the home market of the exporting Member.

This definition presupposes that there are in fact domestic sales of the like product and that such sales are made in the ordinary course of trade. In this context, it is important to remember that, in the first stage, comparisons are made between identical or closely resembling models and that only later one weighted average dumping margin is calculated per producer/exporter. Thus, in the first stage, each exported model is matched to a domestic model, where possible, in order to determine whether a domestic price in the ordinary course of trade exists.

If this is found to be the case and if, for example, the domestic price of a model is 100 and its export price is 80, the *dumping amount* is 20 and the *dumping margin* is 20/80x100=25%.[10]

2.3.2 Alternatives: Third Country Exports or Constructed Normal Value

Article 2.2 ADA

Article 2.2 provides that 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 sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the dumping margin shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that the price is representative, or with the cost of production in the country of origin plus a reasonable amount of administrative, selling and general costs and for profits.

In other words, Article 2.2 envisages three special situations and provides two alternative methods for calculating normal value in such cases (often called: third country exports and constructed normal value). Some of these are further explained below.

Situation 1: No domestic sales in the ordinary course of trade.

It may occur that different models are sold in the domestic and the export markets.In the case of CTVs, for example, some countries have the PAL/SECAM system while other countries use the NTSC system. Authorities may then decide that CTVs with different systems cannot be compared.

It is also possible that there are no domestic sales *in the ordinary course of trade*, notably because domestic sales (either of the like product or of certain types) are sold at a loss.

Situation 2: Unrepresentative volume of domestic sales; five per cent rule

[10] *In order to calculate the dumping margin, most countries divide the dumping amount by the CIF export price because any anti-dumping duties imposed will be levied at the CIF level.*

It may also happen that a producer does not sell the like product on the domestic market in representative quantities.

Footnote 2 ADA

> *Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.*

"home market viability test"

Thus, authorities will generally have to decide whether domestic sales of both the like product and individual models represent five per cent or more of the export sales to the importing Member (at this stage sales below cost are included). This is sometimes called the home market viability test. If this is not the case, an alternative normal value must be found, either for the like product or for specific models.

2.3.3 Second Alternative Method: Constructed Normal Value

In dumping investigations, importing Member authorities routinely request both price and cost information in order to check whether domestic sales are made below cost. A WTO Panel has upheld this practice.

***Panel Report*, Guatemala-Cement II**

> *...Nothing in those provisions prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost.*[11]

Most companies produce several products. Furthermore, costs must be calculated on a type-by-type basis. Cost calculations therefore invariably include cost *allocations*. Suppose, for example, that the product under investigation is polyester staple fibres [PSF]. The main raw materials used in the production of PSF are PTA (purified terephthalic acid) and MEG (mono ethylene glycol), which may be manufactured by the same producers. Producers of PSF may also produce other items such as partially oriented yarn and polyester textured yarn. These are all different products, but they may be produced in the same factory. PSF itself in turn can be broken down in various types, for example, on the basis of quality, denier, decitex, lustre, and silicon treatment. Each combination of these would constitute a separate type.

Allocation of costs is not only complex, but also may involve corporate choices, with which the investigating authority may not necessarily agree. In principle, however, the records of the producer under investigation prevail.

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[11] *Panel Report, Guatemala - Anti-Dumping Measures on Grey Portland Cement from Mexico (Guatemala-Cement II), WT/DS156/R, para. 8.183.*

Article 2.2.1.1 ADA

...costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs.

Article 2.2 distinguishes three elements of constructed normal value:

- cost of production;
- reasonable amount for administrative, selling and general costs (often called SGA);
- reasonable amount for profits.

With respect to the calculation of the latter two cost elements, Article 2.2.2 sets out various possibilities.

Article 2.2.2. ADA

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

"ordinary course of trade"

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

***Appellate Body Report*, EC- Bed Linen**

...Reading into the text of Article 2.2.2(ii) a requirement provided for in the chapeau *of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii)....*
Therefore, we reverse the finding of the Panel in paragraph 6.87 of the Panel Report that, in calculating the amount for profits under Article 2.2.2(ii) of the Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.*[12]

***Appellate Body Report*, EC- Bed Linen**

...To us, the use of the phrase "weighted average" in Article 2.2.2(ii) makes it impossible to read "other exporters or producers" as "one exporter or producer". First of all, and obviously, an "average" of amounts for SG&A and profits cannot *be calculated on the basis of data on SG&A and profits relating to only* one *exporter or producer. Moreover, the textual directive to "weight" the average further supports this view because the "average" which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the "weighted average" relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase "weighted average" envisages a situation where there is more than one exporter or producer.*[13]

2.3.4 Special Situations

"sales below cost"

Where domestic sales of the like product and comparable models are representative, it often happens that *some* domestic sales are sold below cost of production. Article 2.2.1 provides that such sales below cost may be treated as not being 'in the ordinary course of trade' and may be disregarded, *i.e.* excluded from the normal value calculation, only where the investigating authorities determine that such sales are made within an extended period of time in substantial quantities at prices which do not provide for the recovery of all costs within a reasonable period of time. In practice, sales below cost are often excluded where the weighted average selling prices is below the weighted average per unit costs or where they represent more than 20 per cent of the quantity of total domestic sales of the models concerned. Exclusion of sales below cost will increase the normal value and thereby makes a finding of dumping more likely, as the example below shows. In this example the full cost of production is 50:

Date	Quantity	Normal value	Export price
1/8	10	~~40~~	50
10/8	10	100	100
15/8	10	150	150
20/8	10	200	200

[12] *Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC-Bed Linen), WT/DS141/AB/R, paras. 83-84.*
[13] *Appellate Body Report,* EC-Bed Linen*, para. 74, footnote omitted.*

In this example, involving four sales transactions of 10 units each, the domestic sales transaction made on 1 August at a price of 40 is lower than the cost of 50. As it represents 25 per cent of domestic sales (> 20 per cent), it may be excluded. As a result, the average normal value becomes (100+150+200/3=) 150. The average export price is (50+100+150+200/4=) 125. Therefore, the dumping amount is 25 and the dumping margin is 20 per cent. If, on the other hand, the domestic sale of 40 would have been included, the average normal value would have been 122.5 and no dumping would have been found.

2.3.5 Related Party Sales on the Domestic Market

"related party"

It may happen that domestic producers and distributors are related. Some WTO Members will then ignore the prices charged by the producer to the distributor on the ground that they are not arms' length transactions. Instead, they base normal value on the sales made by the distributor to the first independent customer. This price will be higher and is therefore more likely to lead to a finding of dumping.

In *US – Hot-Rolled Steel*, the Appellate Body considered the practice a permissible interpretation and reversed the Panel finding that it could find no legal basis for this practice in the ADA. However, the Appellate Body cautioned that in such cases special care must be taken to effect a fair comparison.

***Appellate Body Report*, US – Hot-Rolled Steel**

> *The use of downstream sales prices to calculate normal value may affect the comparability of normal value and export price because, for instance, the downstream sales may have been made at a different level of trade from the export sales. Other factors may also affect the comparability of prices, such as the payment of additional sales taxes on downstream sales, and the costs and profits of the reseller. Thus, we believe that when investigating authorities decide to use downstream sales to independent buyers to calculate normal value, they come under a particular duty to ensure the fairness of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison.* [14]

"transhipments"

In the typical situation, a product is exported from country A to country B. However, it is possible that more than two countries are involved in the product flow. Article 2.5 ADA deals with this situation. The basic rule is that where products are not imported directly from the *country of origin* but are exported from an intermediate country, the export price shall normally be compared with the comparable price in the *country of export* (country of transhipment).

By way of exception, Article 2.5 nevertheless allows a comparison with the price in the *country of origin*, if, for example, the products are merely transhipped through the country of export, such products are not produced in the country of export, or there is no comparable price for them in the country of export.

[14] *Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US – Hot-Rolled Steel), WT/DS184/AB/R, para. 168.*

2.4 Non-market Economy Dumping/Surrogate Country

GATT 1994, which was originally negotiated in 1947, contains a footnote to Article VI.

***Second Supplementary Provision to paragraph 1.2 of Article VI* GATT 1947**

> *It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate*

This provision has formed the basis for some GATT/WTO Members not to accept prices or costs in non-market economies as an appropriate basis for the calculation of normal value on the ground that such prices and costs are controlled by the Government and therefore not subject to market forces. The investigating authority will then resort to prices or costs in a third - market economy - country as the basis for normal value. This means that export prices from the non-market economy to the importing Member will be compared with prices or costs in this *surrogate/analogue country*.

"surrogate/ analogue country"

It may be noted that for several systemic reasons the surrogate country concept tends to lead to findings of high dumping. To give an example: producers in the surrogate country will be competing in the market place with the non-market economy exporters and it is therefore not in their interest to minimize a possible finding of dumping for their non-market economy competitors.

2.5 Fair Comparison and Allowances

Article 2.4 ADA

Article 2.4 lays down as key principle that a fair comparison shall be made between export price and the normal value. This comparison shall be made at the same level of trade, normally the ex-factory level, and in respect of sales made at as nearly as possible the same time. The ex-factory price is the price of a product at the moment that it leaves the factory. Thus, Article 2.4 envisages that costs incurred after that be deducted to the extent that they are included in the price.

If, for example, an export sale is made on a CIF basis, this means that the seller pays for the inland freight in the exporting country, ocean freight and insurance. Thus, these costs are included in the export price and must therefore be deducted to return to the ex factory level. If, on the other hand, the terms of the sale are ex-factory, no deduction will need to be made because the price is already at an ex-factory level.

Article 2.4 goes on to require that due allowance shall be made in each case, on its merits, for differences which affect price comparability, including

differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

It must be emphasized that the wording of Article 2.4 is open-ended and requires allowance for *any* difference demonstrated to affect price comparability.

"net back"

The calculation examples provided at the end of this section explain in more detail how importing Member authorities may *net back* a market price to an ex-factory price.

2.6 Comparison Methods

Where multiple domestic and export transactions exist, as will normally be the case, the question arises how these transactions must be compared with each other. This issue is addressed by Article 2.4.2 ADA. Article 2.4.2 contemplates two basic rules and one exception.

2.6.1 Main Rules

In principle, prices in the two markets should be compared on a weighted average to weighted average basis or on a transaction-to-transaction basis. A calculation example may be helpful. Assume the following:

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

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

Under the transaction-to-transaction method, domestic and export transactions which took place on or near the same date will be compared with each other. In the perfectly symmetrical example above, the transactions on 1 January will be compared with each other and so on. Again, the dumping amount will be zero.

2.6.2 Exception

Exceptionally, weighted average normal value may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods,

and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of one of the two principal methods.

If we apply the exceptional method to the example above, the result will be quite different:

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

"zeroing"

Thus, there is a positive dumping amount of 100 (75 and 25 on the first two transactions) and a negative dumping amount of 100 (-25 and –75 on the last two transactions). The negative dumping occurs because the export price is actually higher than the normal value. If the negative dumping can be used to offset the positive dumping amount, no dumping will be found to exist. However, it has been the practice of some WTO Members not to allow such offset and to attribute a zero value to negatively dumped transactions. This is known as the practice of *zeroing*. As a result of application of this method, in the example above the dumping amount will be 100 and the dumping margin: 100/500x100=20%.

Article 2.4.2 ADA

Use of this method implies that if just one transaction is dumped, dumping will be found.[15] The method therefore facilitates dumping findings. Prior to the conclusion of the Uruguay Round, it was standard practice of some WTO Members to apply this method.[16] Because of pressure exerted by other WTO Members, Article 2.4.2 was adopted and WTO Members generally resorted to use of the weighted average method (the first of the two main rules).

However, within the weighted average method, some WTO Members applied a new type of zeroing: *inter-model zeroing*. If, for example, model A was dumped while model B was not dumped, the Members would not allow the negative dumping of model B to offset the positive dumping of model A. In *EC-Bed Linen*, the Appellate Body upheld the Panel finding that this practice was inconsistent with Article 2.4.2:

***Appellate Body Report,* EC – Bed Linena**

> *Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of* all *comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of "all" comparable export transactions. …By "zeroing" the "negative*

→

[15] *If, on the other hand, all transactions are dumped, the weighted average method and the weighted average to transaction-to-transaction method will yield the same result. This, however, is relatively rare.*

[16] *The EC practice was challenged unsuccessfully in the GATT by Japan in* EC-ATCs, *Panel Report,* EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan, *ADP/136 issued 28 April 1955, unadopted.*

> *dumping margins", the European Communities, therefore, did* not *take fully into account the entirety of the prices of* some *export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did* not *establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of* all *comparable export transactions – that is, for* all *transactions involving* all *models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does* not *take fully into account the prices of* all *comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is* not *a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.*[17]

In *US-Stainless Steel*[18]*,* the Panel ruled that the United States' use of multiple averaging periods in the *Plate* and *Sheet* investigations was inconsistent with the requirement of Article 2.4.2 to compare a weighted average normal value with a weighted average of all comparable export transactions. The United States had divided the investigation period for the purpose of calculating the overall margin of dumping into two averaging periods to take into account the Republic of Korea's won devaluation in the period November-December 1997, corresponding to the pre- and post-devaluation periods. The United States had calculated a margin of dumping for each sub-period. When combining the margins of dumping calculated for the sub-periods to determine an overall margin of dumping for the entire investigation period, the DOC[19] had treated the period November-December, where the average export price was higher than the average normal value, as a sub-period of zero dumping—where in fact there was *negative dumping* in that sub-period. The Panel concluded that this was not allowed under Article 2.4.2—although the Article did not prohibit multiple averaging as such; multiple averaging could be appropriate in cases where it would be necessary to insure that comparability is not affected by differences in the timing of sales within the averaging periods in the home and export markets.

2.7 Simplified Calculation Examples

The operation of these complicated rules is illustrated by the following simple calculation examples.

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[17] *Appellate Body Report,* EC-Bed Linen*, para. 55.*
[18] *Panel Report,* US-Stainless Steel*, paras. 6.105-6.125*
[19] *Throughout the Panel Report DOC is used to refer to the "United States Department of Commerce".*

Example 1: Direct sale to unrelated customers

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

The dumping margin is: (82-79/100x100) = 3%. This example illustrates that while the domestic and export *sales prices* are the same, there is nevertheless a dumping margin because the *ex factory* export price is lower than the *ex factory* normal value.

Example 2: Direct sale to unrelated customers

Normal value	Export price
Producer X → unrelated customer	Producer X → unrelated importer
Sales price: 100	CIF sales price: 100
- duty drawback: 5	- physical difference: 5
- discounts: 5	- discounts: 2
- packing: 1	- packing: 1
- inland freight: 1	- inland freight: 1
	- ocean freight/insurance: 6
- credit: 6	- credit: 1
- guarantees: 2	- guarantees: 2
- commissions: 2	- commissions: 2
= ex-factory normal value: 78	= ex-factory export price: 80

The dumping margin on this transaction is: (78-80/100x100) = -2. Invoking the exception of Article 2.4.2, last sentence, some countries may not give credit for the *negative* dumping in the computation of the weighted average dumping margin, and attribute a zero value to it (zeroing). However, the CIF price will be taken into account in the denominator of the calculation of the weighted average dumping margin.

Example 3: Construction of export price

Normal value	Export price
X → unrelated customer 140	X →related importer → unrelated retailer 100 140
- duty drawback: 5	- discounts subs.: 5
- discounts subs.: 5	- inland freight subs.: 0.5
- inland freight subs.: 0.5	- credit by subs.: 2
- packing: 1	- guarantees by subs.: 2
- credit.: 4	- net SGA subs.: 17 (12.14%)
- guarantees: 2	- reasonable profit subs. (5%): 7
-level of trade: 24 (17.14%)	- customs duties paid by subs.: 8.2
	- constructed EP: 98.3
	- ocean freight/insurance: 6
	- inland freight: 1
	- packing: 1
	- physical difference: 5
= ex-factory normal value: 98.5	= ex-factory export price: 85.3

The dumping margin on this transaction is: (98.5-85.3=13.2/100x100) = 13.2%.

In this calculation example, we have made an adjustment on the normal value side for a difference in the level of trade equal to 17.14 per cent or 24. Such a difference in levels of trade exists because the producer sells in both his domestic market and his export market to retailers. In the export market, his importer acts as a distributor. In the domestic market, however, the producer performs the distributor function in-house. An adjustment must be made for his indirect costs and profits relating to this function because, on the export side, the same costs and profits are deducted in the process of constructing the export price. The example assumes that, as the functions are the same in

both markets, the costs and profits will be the same too (12.14 per cent and five per cent). In reality, the situation is often more complex and the level of trade adjustments may give rise to heated arguments with claims sometimes being rejected on evidentiary grounds.

In *US-Hot-Rolled Steel*, the Appellate Body emphasized in a comparable case involving domestic sales through an affiliate distributor that allowances must be made with extra care in order to effectively calculate the normal value at the ex-factory level and ensure fair comparison.

Article 2.4, in fine, ADA

> *If…price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, ort shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.*

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

2.8 Test Your Understanding.

1. **A WTO Member initiates an anti-dumping investigation in which it only analyses price dumping. In other words, it does not examine cost dumping. Is this allowed?**
2. **A WTO Member decides to treat a non-market economy country as a market economy for purposes of its anti-dumping law and practice. Can it do so under the WTO?**
3. **In order to avoid taxation in the importing Member a multinational company sells to its related party in the importing country at an artificially high price. How can an investigating authority solve this problem?**
4. **An export-oriented company has only minimal sales in its home market. Can such sales be used as the basis for normal value? Are there alternative manners in which normal value may be established?**
5. **A company sells in its domestic market to a related distributor for a price of 100. The related distributor sells to a related retailer for a price of 140. The retailer sells to an (unrelated) end-user for a price of 190. Which price should an investigating authority use? Which allowances, if any, should be made?**

3. THE DETERMINATION OF INJURY

The determination of injury consists of a determination that the dumped imports have caused material injury to the domestic industry producing the like product.

3.1 Overview of Article 3

Article 3.1 is an introductory paragraph providing that the injury determination shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

Article 3.2 provides more details on the analysis of the volume factor and the price factor.

Article 3.3 establishes the conditions for cumulation.

Article 3.4 provides the list of injury factors that must be evaluated by the investigating authority.

Article 3.5 lays down the framework for the causation analysis, including a listing of possible 'other known factors.'

Article 3.6 contains the product line exception.

Articles 3.7 and 3.8 provide special rules for a determination of threat of material injury.

3.2 The Notion of 'Dumped Imports'

Throughout Article 3, the notion of 'dumped imports' is used. However, many cases involve a mixture of dumped and non-dumped transactions. Furthermore, dumping determinations are normally made on a producer-by-producer basis and it is therefore possible that certain producers are found not to have dumped. A conceptual issue therefore is whether such non-dumped imports may be treated as dumped in the injury analysis. In the *EC-Bed Linen* case, India argued that non-dumped transactions ought to be excluded from the injury analysis.

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

***Panel Report*, EC-Bed Linen**

> *...It is possible that a calculation conducted consistently with the AD Agreement would lead to the conclusion that one or another Indian producer should be attributed a zero or* de minimis *margin of dumping. In such a case, it is our view that the imports attributable to such a producer/exporter may not be considered as "dumped" for purposes of injury analysis. However, we lack legal competence to make a proper calculation and consequent determination of dumping for any of the Indian producers – its task is to review the determination of the EC authorities, not to replace that determination, where found to be inconsistent with the AD Agreement, with our own determination. In any event, we lack the necessary data to undertake such a calculation. Thus, while the treatment of imports attributable to producers or exporters found to* ***not*** *be dumping is an interesting question, it is not an issue before us and we reach no conclusions in this regard.*[20]

3.3 The Like Product/Product Line Exception

Section 1 explains that the definition of the like product plays a role in both the dumping and the injury determination because it is with respect to this product that dumping and injury must be established.

Article 3.6 ADA

As an exception to the principle that it must be established that the domestic industry producing the *like product* must suffer injury by reason of the dumped imports, Article 3.6 provides that when available data do not permit the separate identification of the domestic production of the like product on the basis of such criteria as the production process, producers' sales and profits, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided. This is sometimes called the *product line* exception.

Suppose, for example, that the domestic industry brings an anti-dumping complaint against fresh cut red roses. It is possible that in such a case the domestic industry does not maintain specific data with regard to production processes, sales and profits of this product, but only with respect to the broader category of all fresh cut roses. In such a case, Article 3.6 would permit the investigating authority to assess the effects of the dumped imports with respect to all fresh cut roses.

3.4 The Domestic Industry

Article 4 ADA

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

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[20] *Panel Report,* EC-Bed Linen*, WT/DS141/R, para. 6.138.*

There are two exceptions to this principle.

First, where domestic producers are related to exporters or importers or themselves import the dumped products, they *may* be excluded from the definition of the domestic industry under Article 4.1(i). Such producers may benefit from the dumping and therefore may distort the injury analysis. Exclusion is a discretionary decision of the importing Member authorities for which the ADA does not provide further guidance.

If for example, an investigation is initiated against PSF and that one of the targeted foreign producers has also established a factory in the importing Member, thereby qualifying as a domestic producer. This domestic producer might be opposed to imposition of anti-dumping measures on its related company and could therefore, for example, take the position that it is not injured by the dumped exports. Article 4.1(i) allows the investigating authority to exclude this producer from the injury analysis.

Second, a regional industry comprising only producers in a certain market of a Member's territory may be found to exist under Article 4.1(ii) if these producers sell all or almost all of their production in that market and the demand within that market is not to any substantial degree supplied by producers of the product located elsewhere in the territory. Injury may then be found even where a major portion of the total domestic industry is not injured, provided that there is a concentration of dumped imports into the isolated market and the dumped imports are causing injury to the producers of all or almost all of the production in that market. If the regional industry exception is used, anti-dumping duties shall be levied only on imports consigned for final consumption to that area. Where this is not allowed under the constitutional law of the importing Member, exporters should be given the opportunity to cease exporting to the area concerned or to give undertakings. Findings of the existence of a regional industry are relatively rare and tend to be confined to industries where transportation is a major cost item, such as, for example, cement.

Last, it is noted that the definition of the domestic industry is closely linked to the standing determination which importing Member authorities must make prior to initiation.

3.5 Material Injury

The determination of material injury must be based on *positive* evidence and involve an *objective* examination of the volume of the dumped imports, their effect on the domestic prices in the importing Member market and their consequent impact on the domestic industry. The Appellate Body has held that this determination may be based on the confidential case file and overruled a panel finding that it follows from the words 'positive' and 'objective' that the injury determination should be based on reasoning or facts disclosed to, or discernible by, the interested parties.

***Appellate Body Report*, Thailand-H-Beams**

> *...An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the* Anti-Dumping Agreement*, involves the collection and assessment of* both *confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the* Anti-Dumping Agreement *must be based on the* totality *of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information...We consider, therefore, that the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve an "objective" examination of the required elements of injury does* not *imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation. Article 3.1, on the contrary, permits an investigating authority making an injury determination to base its determination on* all *relevant reasoning and facts before it.*[21]

However, the Appellate Body emphasized due process rights of interesting parties, emanating from Articles 6 and 12 ADA, against which the injury determination must be scrutinized. These will be discussed in Section 4 below.

3.5.1 Injury Investigation Period

A recommendation of the WTO Committee on Anti-Dumping Practices provides that injury should preferably be analysed over a period of at least three years.[22] This period is often called the injury investigation period [IIP]. Such a relatively long period is needed particularly because of the causation requirement.

While the industry must be suffering material injury during the regular investigation period and detailed injury margin calculations in the case of application of a lesser duty rule will be based on the data existing during the regular investigation period, the analysis of injury and causation needs a longer period in order to examine trend factors, such as those mentioned in Articles 3.4 and 3.5 ADA.

3.5.2 Volume and Prices

Article 3.2 ADA

Article 3.2 provides more details on the volume and price analysis. It emphasizes the relevance of a significant increase in dumped imports, either absolute or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authority must consider whether there has been a significant price undercutting by the dumped imports, or whether the effect of the imports has been to significantly depress prices or prevent price increases, which otherwise would have occurred.

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[21] *Appellate Body Report,* Thailand-H-Beams*, WT/DS122/AB/R, paras. 107 and 111.*

[22] *WTO Committee on Anti-Dumping Practices - Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations - Adopted by the Committee on 5 May 2000, G/ADP/6*

The wording is understandably broad because injury can occur in many forms. Thus, for example, in the typical situation, there will be an absolute increase in the volume of imports over the IIP coupled to a decreasing trend in prices of the imports. Indeed, the simultaneous occurrence of these two trends will be a strong indicator not only of injury but also of causation because it indicates that producers are gaining market share through aggressive pricing.

In many other cases, however, the situation will not be so clear-cut. It is possible, for example, that domestic producers cut back production, while foreign producers continue to export at steady levels. This would mean that the imports increase relative to production (but not in absolute terms). Similarly, with regard to prices, it is possible that, faced with increased costs for raw materials, domestic producers are precluded from increasing prices to pass on the price increase to their customers through the presence in the market of low-priced imports which are sold at the same price as before.

3.5.3 Cumulation of Dumped Imports from Various Countries

Article 3.3 ADA

The principle of cumulation, contained in Article 3.3, means that where imports from several countries are simultaneously subject to anti-dumping investigations, their effects may be assessed cumulatively for injury purposes as long as they do not qualify for the *de minimis* or *negligibility* thresholds and a cumulative assessment is appropriate in light of the conditions of competition among the imports and between imports and the like domestic product. Many WTO Members apply cumulation almost as a matter of course as long as the thresholds are not met.

3.5.4 Examination of the Impact of the Dumped Imports on the Domestic Industry

Article 3.4 ADA

Article 3.4 requires that the examination of the impact of the dumped imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry producing the like product in the importing country and then mentions 15 specific factors. Article 3.4 concludes that this list is not exhaustive and that no single or several of these factors can necessarily give decisive guidance.

The 15 injury factors Article 3.4 ADA

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

The scope of this obligation has been examined in four panel proceedings thus far.[23] All four Panels, strongly supported by the Appellate Body in *Thailand-H-beams*, held that the evaluation of the 15 factors is mandatory in each case and must be clear from the published documents.

***Appellate Body Report*, Thailand-H-Beams**

> *...The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities..." We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the* Anti-Dumping Agreement.[24]

***Panel Report*, EC-Bed Linen**

> *It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely a factor cannot be evaluated without the collection of relevant data.*[25]

3.5.5 Threat of Injury

It may occur that a domestic industry alleges that it is not yet suffering material injury, but is threatened with material injury, which will develop into material injury unless anti-dumping measures are taken.

Article 3.7 ADA

However, because such statements are easy to make and any investigation based on threat of material injury will necessarily be speculative because it involves analysis of events that have not yet happened, Article 3.7 offers special provisions for a threat case. Thus, a determination of threat must be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury, must be clearly foreseen and imminent.

In making a threat determination, the importing Member authorities *should* consider, *inter alia*, four special factors.

***Special threat factors Article 3.7*, ADA**

> *(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;*
>
> *(ii) sufficiently freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;*
>
> *(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and*
>
> *(iv) inventories of the product being investigated.*

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[23] *Panel Report, Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Mexico – Corn Syrup) WT/DS132/R; Panel Report, Thailand-H-Beams; Panel Report, EC-Bed Linen; Panel Report, Guatemala-Cement II.*

[24] *Appellate Body Report,* Thailand-H-Beams*, para. 125, footnote omitted.*

[25] *Panel Report,* EC-Bed Linen*, para. 6.167.*

No single factor will necessarily be decisive, but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur. The *Mexico – Corn Syrup*[26] Panel concluded that a threat analysis must also include evaluation of the Article 3.4 factors.

3.6 Causation/Other Known Factors

The evaluation of import volumes and prices and their impact on the domestic industry is relevant not only for determining whether the domestic industry has in fact suffered material injury, but often will also be indicative of whether the injury has been caused by the dumped imports or by other factors. Thus Article 3.5 ADA, first sentence, refers back to Articles 3.2 and 3.4 ADA.

Article 3.5 ADA

Furthermore, the demonstration of the causal link must be based on an examination of all relevant evidence before the authorities, which must also examine any known factors other than the dumped imports which are also injuring the domestic industry, and the injury as a result of such other known factors must not be attributed to the dumped imports. Article 3.5 then provides a non-exhaustive list of other factors which may be relevant depending on the facts of the case.

The other known factors, Article 3.5 ADA

> *...the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.*

In *Mexico – Corn Syrup*, for example, the Panel addressed the Mexican authorities' analysis of an alleged restraint agreement between Mexican sugar refiners and soft drink bottlers.

***Panel Report*, Mexico – Corn Syrup**

> *...the question for purposes of an anti-dumping investigation is not whether an alleged restraint agreement in violation of Mexican law existed, an issue which might well be beyond the jurisdiction of an anti-dumping authority to resolve, but whether there was evidence of and arguments concerning the effect of the alleged restraint agreement, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future. If the latter is the case, in our view, the investigating authority is obliged to consider the effects of such an alleged agreement, assuming it exists.*[27]

A WTO Panel has held that, contrary to the Article 3.4 factors, the Article 3.5 factors need not be examined as a matter of course in each administrative determination. Rather, such examination will depend on the arguments made

[26] *Panel Report,* Mexico – Corn Syrup*, para.7.127.*
[27] *Panel Report,* Mexico – Corn Syrup*, para. 7.174. footnote omitted.*

by interested parties in the course of the administrative investigation.

***Panel Report*, Thailand-H-Beams**

The text of Article 3.5 refers to "known" factors other than the dumped imports which at the same time are injuring the domestic industry but does not make clear how factors are "known" or are to become "known" to the investigating authorities. We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative *the effects of* all *possible factors other than imports that may be causing injury to the domestic industry under investigation.*[28]

***Panel Report*, Mexico – Corn Syrup**

While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry.…In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7.[29]

3.7 Injury Margins

The determination whether dumping has caused material injury to the domestic industry producing the like product is generally made with respect to the country or countries under investigation. By nature, this is either an affirmative or a negative determination. If the determination is affirmative, WTO Members, which apply a lesser duty rule in accordance with Articles 8.1 and 9.1, will then calculate injury margins.

The ADA does not give any guidance on such calculation and arguably leaves its Members substantial discretion. Injury margins are normally producer-specific, as are dumping margins, and that they will compare the prices of imported and domestically produced like products, focusing on whether the former are undercutting or underselling the latter.

Example 1: Calculation injury margin, based on price undercutting

	Domestic producer X	Foreign exporter Y	Foreign exporter Z
Price	100	80	110
Injury margin		(100-80=20)/80x100=25%	100-110=-10=0

[28] *Panel Report,* Thailand - H-Beams*, para. 7.273 footnote omitted.*
[29] *Panel Report,* Mexico – Corn Syrup*, paras. 7.126-7.127.*

Example 2: Calculation injury margin, based on price underselling

	Domestic producer X	Foreign exporter Y	Foreign exporter Z
Price	100	80	110
Target price	121		
Injury margin		(121-80=41)/80x100=51.25%	(121-110=11)/110x100=10%

In the second example, it is assumed that the unit cost of domestic producer X actually is 110. Faced with the low-priced imports, however, he has been forced to sell below cost. A target price may be calculated for producer X, comprised of his costs plus a reasonable profit, for example 10 per cent. In the example, the target price will therefore become: 110+(110x10%=11) = 121.

3.8 Test Your Understanding

1. **An administering authority investigating injury allegedly caused by dumped tomato imports determines that inventories are not a relevant injury factor for such a highly perishable product and therefore does not evaluate it in the definitive measure. Is this legal?**
2. **A domestic industry wishes to bring an anti-dumping case against the producers of the like product in another country. However, one of the producers is related to an exporter and opposes the case. Can the investigating authority initiate the case?**
3. **The investigating authority finds that the volume of dumped imports has consistently decreased during the past three years. Can it nevertheless find that injury has been caused by dumped imports?**
4. **The investigating authority finds that imports were in fact higher-priced than the products sold by the domestic industry. Can such higher-priced imports cause injury to the domestic industry?**
5. **In an anti-dumping case involving five exporters, the investigating authority finds that four of them did not dump. The fifth exporter dumped some 50 per cent of its exports while the other 50 per cent was not dumped. In analysing the volume of the dumped imports, which data should the investigating authority use?**