

A COMPERATIVE STUDY ON REGULATORY AND ADMINISTRATIVE FRAMEWORK OF ANTI-DUMPING

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A COMPARATIVE STUDY ON REGULATORY AND ADMINISTRATIVE FRAMEWORK FOR ANTI-DUMPING

INTRODUCTION

Although Vietnam has been subject to anti-dumping actions in recent years, antidumping is a relatively new issue to both the Vietnamese Government and to Vietnamese enterprises. The antidumping legal framework of Vietnam was promulgated only very recently. Ordinance No. 20/2004/PL-UBTVQH, concerning the Dumping of Import Goods into Vietnam, is the main legal text on antidumping and was passed by the Standing Committee of Vietnam's National Assembly on 29 April 2004. Following the Ordinance, the Government of Vietnam issued Decree 90/2005/ND-CP providing details concerning implementation of the Ordinance. The Department of Competition Administration (in Ministry of Trade), the stage agency responsible for administering antidumping activities, was established in February 2004 and has not carried out any AD investigation up to now.

In this fast-changing environment, it was decided to conduct research under the Vietnam-Australia CEG Facility project to understand the regulatory and administrative systems in some other countries. From that, Vietnam can understand and learn from the anti-dumping regimes of countries that have much more experience in this area. Therefore, this research paper provides a comparative review of the Antidumping (“AD”) regulatory and administrative framework of the United States, Australia and India.

The paper is structured in seven parts. First it offers an overview of the anti-dumping process in the three countries, followed in Part 2 with comparative review of several critical issues of AD laws. Part 3 is an analysis of forms and guidelines used during the AD investigation. Part 4 is on the roles and responsibilities of stakeholders in AD cases in the three countries. Part 5 is a comparative overview of the AD administrations. Parts 6 and 7 are comparative reviews about of human resources and finance issues in AD processes.

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PART I: ANTI-DUMPING PROCESSES (INITIATING AND DEFENDING)

Initiating of an anti-dumping investigation

This section provides an overview of a typical anti-dumping investigation under a legislation that complies with the Anti-Dumping Agreement (ADA) of the WTO, with particular reference to the three countries being investigated, namely the US, Australia and India. The differences in terms of regulations, practices and procedures in an anti-dumping (AD) investigation in these three countries will be identified, based on which, more detailed analysis will be made subsequently.¹

A typical AD investigation can be described in the following stages (figure 1):

Stage 1: Filing of application to initiate an anti-dumping investigation

Stage 2: Initiation and preliminary investigation phase

Stage 3: Final investigation phase and imposition of definitive anti-dumping measures

Stage 4: Review and appeal

Stage 1: Filing of application to initiate an anti-dumping investigation

Specific requirements, both procedural and substantive, of each country in this stage are analysed and compared below:

Institutions to which applications are lodged:

In the US, the application must be filed simultaneously, i.e. on the same day, with Department of Commerce (Commerce) and International Trade Commission (Commission), the two institutions in charge of AD issues. Within 20 days after the date on which the petition is filed, Commerce determines whether the petition alleges the elements necessary for the imposition of a duty and contains information reasonably available to the petitioner supporting the allegations. If the determination is affirmative, Commerce initiates an investigation to determine whether dumping exists; if negative, it dismisses the petition and terminates the proceeding.²

In Australia, applications must be made to Australian Customs, which has sole responsibility for AD investigations. Within 20 days upon receipt of an application, Customs will undertake an initial examination to determine if a prima facie case exists for the initiation of an investigation. During this time, the merits of the application and any other information considered relevant to the particular case are assessed. Customs rejects applications that do not meet the necessary criteria for initiation.³

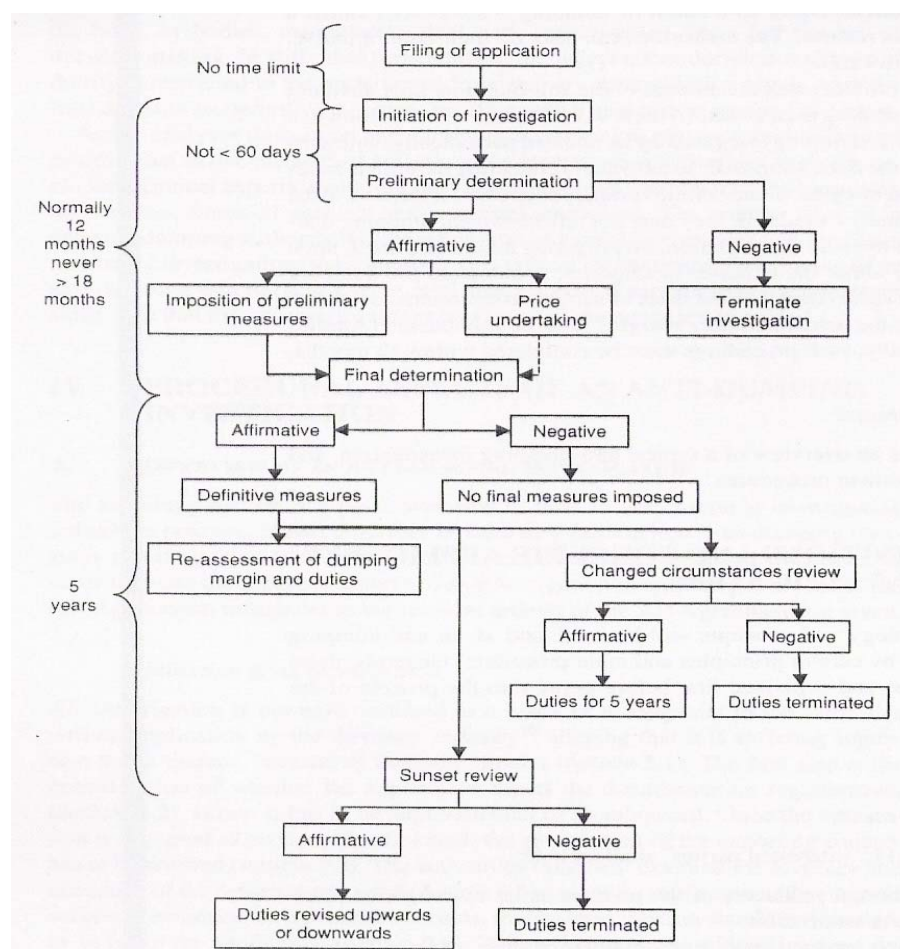
¹ This section was written with reference to/citation from Anti-Dumping -A Handbook (draft) prepared by Asian Law Group and the Outline of Regulatory and Administrative Framework by Jurgen Kurtz for this project.

² http://www.usitc.gov/trade_remedy/731_ad_701_cvd/handbook.pdf

³ http://www.customs.gov.au/webdata/resources/files/Antidumping_050203.pdf

In India, applications must be lodged with the Designated Authority in the Directorate General of Anti-Dumping & Allied Duties (DGAD) under Ministry of Commerce for a preliminary screening. The application is scrutinized to ensure that it is adequately documented and provides sufficient evidence for initiation. If the evidence is not adequate, then a deficiency letter is issued normally within 20 days of the receipt of the application. Otherwise, the initiation notice will be issued normally within 45 days of the date of receipt of a properly documented application.⁴

Figure 1(Anti-Dumping Procedures according to WTO AD-Agreement)



(Source: Czako, Human, Miranda, *A Handbook on Anti-Dumping Investigations*, p.10.)

- While application has to be submitted to both institutions (Commerce and Commission) in the US, it has to be submitted to only one institution in Australia and India (Australian Customs and Directorate General of Anti-Dumping & Allied Duties in Australia and India respectively).
- The time period for screening is both 20 days in both US and Australia, but longer in India (45 days).

⁴ http://commerce.nic.in/ad_guide.htm

Application forms:

The application must include evidence of dumping, injury and the causal link between the effect of the dumped goods and the injury suffered by the domestic industry (Art. 5.2 ADA). The 3 countries have specific provisions on the contents of an application, which are in compliance with ADA regulations, these provisions will be explored further.

Status of applicants:

Art. 5.1 ADA stipulates that an application for an anti-dumping investigation must be lodged *'by or on behalf of the domestic industry'*, which is followed by all 3 countries in their AD laws. A complaint will only be considered to have been made "by or on behalf of the domestic industry" if the producers supporting the complaint represent more than 50 per cent of total production produced by domestic producers which express either support for or opposition to the complaint; and the producers expressly supporting the complaint account for 25 per cent or more of total domestic production.

The WTO agreement does not have the option to allow employees of domestic producers of the like products to initiate an application for a dumping investigation and both Australia and India follow this. U.S. law however, recognizes that industry support for a petition may be expressed by either management or workers. If the management of a firm expresses a position in opposition to the views of the workers in that firm, The US DC will not consider that firm during the investigation. Thus, with more parties eligible for application, it becomes easier to file a petition in the US.

De Minimis dumping margins/negligible dumping volume or injury:

Art. 5.8 of AD stipulates that an application will be rejected and an investigation immediately terminated if the Investigating Authorities determine that there is not sufficient evidence of either dumping or injury or the dumping margin is negligible (de minimis) or the volume of the dumped imports is negligible or the injury is negligible. The US, Australian and India AD Laws all follow this regulation.

The dumping margin, the difference between 'normal price' and 'export price', is considered to be de minimis if it is less than 2% (expressed as percentage of export price). The volume of dumped imports is considered to be negligible if the volume of dumped imports from one individual country is less than 3% of the total import volume of the allegedly dumped product, and the countries with less than 3% import volume collectively account for less than 7% of total imports.

Stage 2: Initiation and Preliminary Investigation Phase

Procedural requirements:

Public notice:

Before the investigation starts, ADA stipulates that all interested parties must be notified and a public notice issued (art. 12 ADA).

In the US, the Commission will prepare a notice of investigation for publication in the *Federal Register*. The purpose of the notice is to provide information to the public concerning the subject matter of the investigation and the schedule to be followed.

In Australia, when Customs initiates an investigation, public notification is made in the Commonwealth of Australia Gazette and a national newspaper, usually the Australian Financial Review. Customs also issues an Australian Customs Dumping Notice (ACDN) to explain procedures and time frames for the investigation.

In India, when the Designated Authority is satisfied that there is sufficient evidence in the application, a Public Notice is issued in the Official Gazette initiating an investigation to determine the existence and effect of the alleged dumping.

All three countries follow exactly the ADA regulation in terms of public notice.

Access to information and opportunity for defense of interests:

Art 6.1, 6.2, 6.4, 6.9, 6.12 ADA stipulate that during the investigation, interested parties must be given access to all relevant information so that they could prepare their defense. The access to information could be by the initiating country providing application and questionnaires to foreign authorities, producers and exporters so that they could have sufficient time to defend their interests. In addition, users of the products, importers and consumer associations also are allowed to provide information related to the investigation. Finally, before a determination is made, the authorities must inform all interested parties of the essential facts under consideration that will form the basis of the decision.

In the US, information to all interested parties is provided during the investigation through conferences, hearings, briefings and votes, and preliminary and final determination are published in Federal Register. A publication containing the views, determination and non-confidential version of staff reports is served on interested parties to the investigation and made available to the public.

In Australia, the Customs also makes a public notification of an investigation in order to invite submissions of information from all interested parties. There are two types of submissions: the first is a confidential version, which Customs uses in its investigation. And the second is a non-confidential version, which is accessible to all interested parties through a Public File held at Customs House.

In India, the Authority provides access to the non-confidential evidence presented to it by interested parties in the form of a public file, which is available for all parties.

Due dates:

Each stage of an investigation must follow certain deadlines by which interested parties are required to provide information and investigating authorities to inform their views and determinations.

Table 1: ADA of WTO

	Not to be exceeded	Absolute maximum
Duration of anti-dumping investigation (Art. 5.10 ADA)	15 months	18 months
Minimum time to reply to questionnaires (Art. 6.1.1 ADA)	30 days	Extension possible
Earliest date provisional measures can be imposed from initiation of investigation (Art. 7.3 ADA)	60 days	
Application of provisional measures – normal (Art. 7.4 ADA)	4 months	6 months (upon request of exporters)
Application of provisional measures – lower duty examination (Art. 7.4 ADA)	6 months	9 months (upon request of exporters)

Period for which retroactive imposition of provisional measures following violation of undertaking is allowed (Art. 8.6 ADA)	90 days before application of provisional measures	-
Determination of final anti-dumping duties on retrospective basis (Art. 9.3.1 ADA)	12 months (after date of request for final assessment)	18 months
Refund for excess anti-dumping duties paid on prospective basis (Art.9.3.2)	12 months (from request for refund)	18 months
Review of imposed anti-dumping duties (Art. 11.3 ADA)	5 years (from imposition)	-
Duration of review (Art. 11.4 ADA)	12 months (from initiation of review)	-

Table 2: United States

(source: <http://ia.ita.doc.gov/pcp/ppt/statutory-time-frame-for-investigations.ppt>)

Stages:	Normal (day)	Extension (day)
Filing of application	0	0
Initiation	20	40
Preliminary determination by ITC	45	45
Preliminary determination by DOC	160	210
Final determination by DOC	235	345
Final determination by ITC	280	390
Decision to impose duties by DOC	287	397

Table 3: Australia

(source: http://www.customs.gov.au/webdata/resources/files/Antidumping_050203.pdf)

	Normal (day)	Extension (day)
Filing of application	0	
Initiation	20	
Submission of information of interested parties	40	
Preliminary affirmative determination (in the form of securities)	60+	
Final determination and statement of essential facts	110	
Response by interested parties to statement	130	
Final Recommendation to Minister	155	
Interested parties apply to TMRO for review	30	
TMRO review	60	

Table 4: India

(source: <http://commerce.nic.in/Guide.PDF>)

	Normal (day/week/month)	Extension (day/week/month)
Filing of application	0	0
Preliminary screening of application	2-4	
Initiation	7 days of receipt of petition	
Preliminary Findings	60-70 of initiation	
Provisional Duty imposed	4-6 weeks of preliminary findings	
Period of Provisional Duty	Not exceed 6 months	
Final Findings	Normally 1 year from initiation date	6 more months

- All three countries comply with WTO ADA in terms of deadlines for each stage
- The period of investigation (the period used to determine dumping margins and injury margins) vary among countries (287 days in US, 155 in Australia and 365 in India).
- It is noted that the longer the investigation period, the more time there is for the defendant parties to complete the questionnaire and for the investigating authorities to verify the information provided. So for a developing country with not much experience in AD, it may be preferable to provide for a long investigation period (1-1.5 year) to account for complex cases, within deadlines in ADA. See table 5 for more information about the investigation period of some countries.

Table 5: Investigation Period of Some Countries (source: WTO)

WTO	One year and in no case more than 18 months
Brazil	One year and in no case more than 18 months
Mexico	260 days
Argentina	One year , no limit for the extended time period specified
USA	Investigations : 407 days Administrative reviews – 545 days
EU	One year and in no case more than 15 months from its initiation.
Canada	210 days and in exceptional cases 255 days.
Korea	Within a year of publication date of the official gazette. With extension not more than 18 months
India	One year and in no case more than 18 months

Sustantative requirements:

Any anti-dumping investigation will focus on the determination of dumping, injury and the causal link between the two. Anti-dumping duties can only be imposed if all three conditions have been positively determined (ADA). There are some differences in the determination of dumping and injury among the three countries, which will be explored in subsequent part.

According to ADA, the determination of margin of dumping is based on export price and normal price. There is no definition of export price in the AD Agreement and different countries have different ways to define it.

In US, the export price is “the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States”.

In Australia, the export price is usually the amount that the importer has paid or is to pay to the exporter for the goods, excluding any post exportation charges such as ocean freight and overseas insurance. To establish export prices, Customs investigates the transaction price and contractual arrangements between Australian importers and overseas exporters.

In India, the export price is the price paid or payable for the goods by the first independent buyer.

Alternatively, a constructed export price will be used instead (e.g. the transaction price is not reliable due to arrangements between exporters and importers...) and the three countries have different methods to adjust export price (analyzed later in this paper.)

In terms of normal value, Art. 2.1 ADA stipulates that it is “the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.” As with export prices, in certain conditions, adjustments need to be made to compute a constructed normal value to allow for a fair comparison between the export price and normal value.

The AD Agreement gives little instruction on how to conduct an injury determination and consequently these vary from country to country (stipulations of each the three countries will be analysed in later part).

After there is evidence that there is dumping, material injury and causal link of dumping and injury, the Investigating Authority will make a preliminary determination whether dumping has occurred. The Investigating Authority then submits its view and decision to the Deciding Authority on whether dumping has occurred and a recommendation on whether to impose provisional measures. As stipulated in Art. 7.1. ADA, if the preliminary determination is affirmative by Deciding Authority, provisional measures can be imposed if these provisional measures are necessary to prevent injury being caused during the continuing investigation.

US: The preliminary phase involves both the Commission and DOC as investigating authorities. The Commission will make a determination, of whether there is a reasonable indication that an industry in the US is materially injured or is threatened with material injury, or the establishment of an industry is materially retarded due to subject import. For its part, the Commerce will make a preliminary determination, of whether the subject imported merchandise is being dumped. Under normal circumstances, provisional duties are imposed when Commerce publishes notice of its affirmative preliminary determination in the Federal Register.

Australia: Provisional measures (in the form of securities) may apply with an affirmative preliminary determination. However, securities will only be imposed where there is sufficient verified information that material injury is being caused by dumping and that such action is necessary to prevent further injury being caused during the investigation. The imposition of securities will be accompanied by a Preliminary Affirmative Determination that states the reasons for the action.

India: A provisional duty not exceeding the margin of dumping may be imposed by the Central Government on the basis of the preliminary finding recorded by the Designated Authority.

Stage 3: Final Investigation Phase and Imposition of Definitive Anti-Dumping Measures

During the final phase, interested parties are provided opportunities to submit their responses to preliminary determination and provide more information, based on which the Investigating Authority can reassess the situation to make final determination. This final determination will then be submitted by Investigating Authority to Deciding Authority. In turn, the Deciding Authority must give all interested parties access to the essential facts, which form the basis of the decision, before the final determination on whether to impose duties is made (Art. 6.9 ADA).

US: the final phase of investigation involves both Commerce and Commission. The Commerce will make a final determination of whether the subject imported merchandise is being dumped and the Commission makes a final determination of injury as a consequence of dumping. After that, The Commission will submit its final determination to Commerce so that Commerce can issue its decision on imposing the duties. The order to impose duties by Commerce “must” be made within one week after receipt of final affirmative determination from Commission.

Australia: the Customs, after completing its investigation will publish a detailed Statement of Essential Facts, which summarizes the outcome of the investigation and forms the basis of the final finding report to the Minister. It will address whether the goods are dumped; the Australian industry has suffered, or is likely to suffer, material injury; and, the dumping causes or threatens that material injury. After considering of all information submitted by interested parties the last time, Customs will then complete a final finding report to the Minister that contains conclusions and recommendations. On the basis of Customs’ report, the Minister will make a decision as to whether anti-dumping action should be taken.

India: The Designated Authority will inform all interested parties of the essential facts which form the basis for its decision before the final finding is made. It will issue a decision to impose anti-dumping orders and set the level of duty. Under the Indian Law, it is required to restrict the duty a lesser duty i.e. the lower of the two margins (dumping margin and injury margin), which is sufficient to remove the injury to domestic industry.

- The regulation in terms of imposing duties is stricter in the US (The Commerce has no alternative other than making order to impose duties after receiving final affirmative determination from Commission.) Whereas in Australia, the Minister can make a decision whether to impose duties even with definitive findings of dumping and injury (a public interest is considered also). See table 6 for more information about the public interest clause in some countries.
- While the US and Australia impose the duties based on dumping margin, the Indian Law use the lesser duty, which is more favorable to foreign exporters. However the Customs Tariff Act as amended in 1999 provided that AD can be imposed up to the dumping margin to protect domestic industry. See table 7 for more information about the lesser duty rule in some countries.

Table 6: Public Interest Clause of Some countries (source: WTO)

Countries	Brazil	Mexico	Argentina	US	EU	Canada	Australia	India
Public Interest Clause	No	No	Yes	No	Yes	Yes	Yes	No

Table7: Lesser Duty Role in Some Countries (source: WTO)

Brazil	Mexico	Argentina	USA	EU	1.1.1.1.1 Canada	India
Desirable but not necessary	Possible but not necessary	Possible but not necessary	No, duty equal to dumping margin	Yes, duty is equal to injury	Possible if it is in the public interest	Not mandatory

Price undertaking:

Exporters and foreign producers can make a voluntary price undertaking/ commitment once an affirmative preliminary determination has been made. If the price undertaking is accepted by the authorities of the investigating country, proceedings are terminated without the imposition of any anti-dumping duties (Art. 8.1 ADA). With the price undertaking/commitment exporters can offer to revise their export prices or cease exports to the area in question at dumped prices.

US: Suspension Agreement is similar to the provision of price undertaking provided in ADA. If DOC and foreign exporters could reach a Suspension Agreement, DOC will terminate its investigation on these exporters.

Australia: As an alternative to the imposition of duties, the Minister may accept a written undertaking from an exporter to conduct future export trade to Australia in such a manner that injury will not be caused to the Australian industry.

India: The Designated Authority may suspend or terminate investigation if the exporter concerned furnished an undertaking to revise his price to remove the dumping or the injurious effect of dumping. No price undertaking may, however, be accepted in case it is found that acceptance of such undertaking is impracticable or unacceptable.

- While all three countries have provision of price undertaking, in practice, usually foreign producers/exporters find it difficult to persuade DOC of US to accept a suspension agreement which is favorable to them.
- Price undertaking was also not frequent in India until the last few years (sometimes because price undertaking was lower than injury margin and authorities did not accept them), but this is changing (in 2001, there was 5 cases of undertaking in India).

Stage 4: Review and Appeal

There are two different types of reviews: (i) The review of the anti-dumping measures and (ii) the legal review before a domestic tribunal or within the WTO dispute settlement system regarding the imposition of anti-dumping duties or matters relating to the compliance with the AD Agreement.

Review of the anti-dumping measures:

(Art. 11 ADA). The anti dumping measures can be reassessed through the review process. The review can lead to termination of dumping duty ahead of schedule, continuation of duty till the end of the 5-year period or extension of this 5-year period by another 5 years.

- Review within the 5-year period from the time the decision to impose AD duty is made. This review can be done by the authorities of importing country on their own initiative requested by any interested party who can provide sufficient information that justifies a review. The content reviewed include: (i) the continued imposition of the duty is still necessary to offset the dumping and/or (ii) whether injury will continue or recur if the duty is removed or changed. After the review, the authorities will make the decision on whether the duty is necessary and if the result is not, the duty will be terminated right after this decision.
- Review right before the end of 5-year period (“sunset” review). This review can be done by the authorities or due to the request of the domestic industry. If the authorities conclude that the termination of the duty after the 5-year period will lead to the continuation or recurrence of dumping and injury, they can make the decision to continue the duty for another 5 more years.

In the US, the administrative review is conducted by DOC, the Sunset review by both DOC and ITC under their jurisdiction similar to investigation process, and changed circumstance review by DOC or ITC. In Australia, a specialized independent body, the Trade Measures Review Officer (TMRO) has responsibility for undertaking reviews of specific decisions in the dumping process. The TMRO has no investigative function and will not gather new information. In India, The Designated Authority is responsible for reviewing the need for the continued imposition of AD duty on its own initiative or from request of interested parties due to changed circumstance and also for new producers/exporters.

- While the review agencies conducted in US and India are also the ones in charge of investigation, the agency in charge of review in Australia is an

independent body solely responsible for reviewing (TMRO), which helps improve the transparency and objectivity during the review process.

Judicial review:

- Judicial Review before a Domestic Tribunal – Art. 13 ADA.

Each Member ‘whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determination’. These tribunals must be independent from institutions that have made decisions which are now being reviewed. The judicial review before a domestic tribunal allows review of the consistency of anti-dumping actions with existing domestic legislation.

- WTO Dispute Settlement Mechanism – Art. 17 ADA

In accordance with the provisions of the Dispute Settlement Understanding (“DSU”) (Art. 17 ADA), the Member Countries can go before a panel established under the DSU to challenge the imposition of anti-dumping measures, challenge the imposition of preliminary anti-dumping measures and raise all issues of compliance with the requirements of the Agreement. The panel will review on if the investigation and decision of the authorities of the importing country is adequate, fair and objective. It is noteworthy that only member countries can participate in the dispute settlement procedures in the WTO.

Defending in an anti-dumping investigation

Being informed about initiation of an AD action abroad

In accordance with the WTO Antidumping Agreement, foreign governments are not required to publish an application for the initiation of an investigation. Nevertheless, after receipt of a properly documented application, and before proceeding to initiate an investigation, the authorities are required to notify the government of the exporting Member concerned. Upon receipt the notice of an AD initiation, the AD authorities inform the respondents of the AD actions (although in many cases, the respondents receive such notice before the AD authority of its country).

Preparation for an AD action

As mentioned in this paper, in all three studied countries, business associations play an important role in AD actions. Firstly, the associations should disseminate information to their members. Secondly, the associations need to compile, preferably ahead of time, the type of information that will be requested of companies in questionnaires issued by the importing countries (for example when the products were sold, their prices, channels of distribution, etc.). The more lead time the respondents have in being able to prepare their defenses, the better result they can expect. Thirdly, the associations and enterprises work with foreign AD investigation team who in some cases carrying out on-site investigation. Fourthly, the respondents and associations prepare for their presentation and arguments in

the hearing held by foreign AD authority. And finally, the associations and respondents cooperate with the AD authority in its home country to have consultation with foreign AD authority or consultations with the WTO in case the foreign AD measures imposed unfairly.

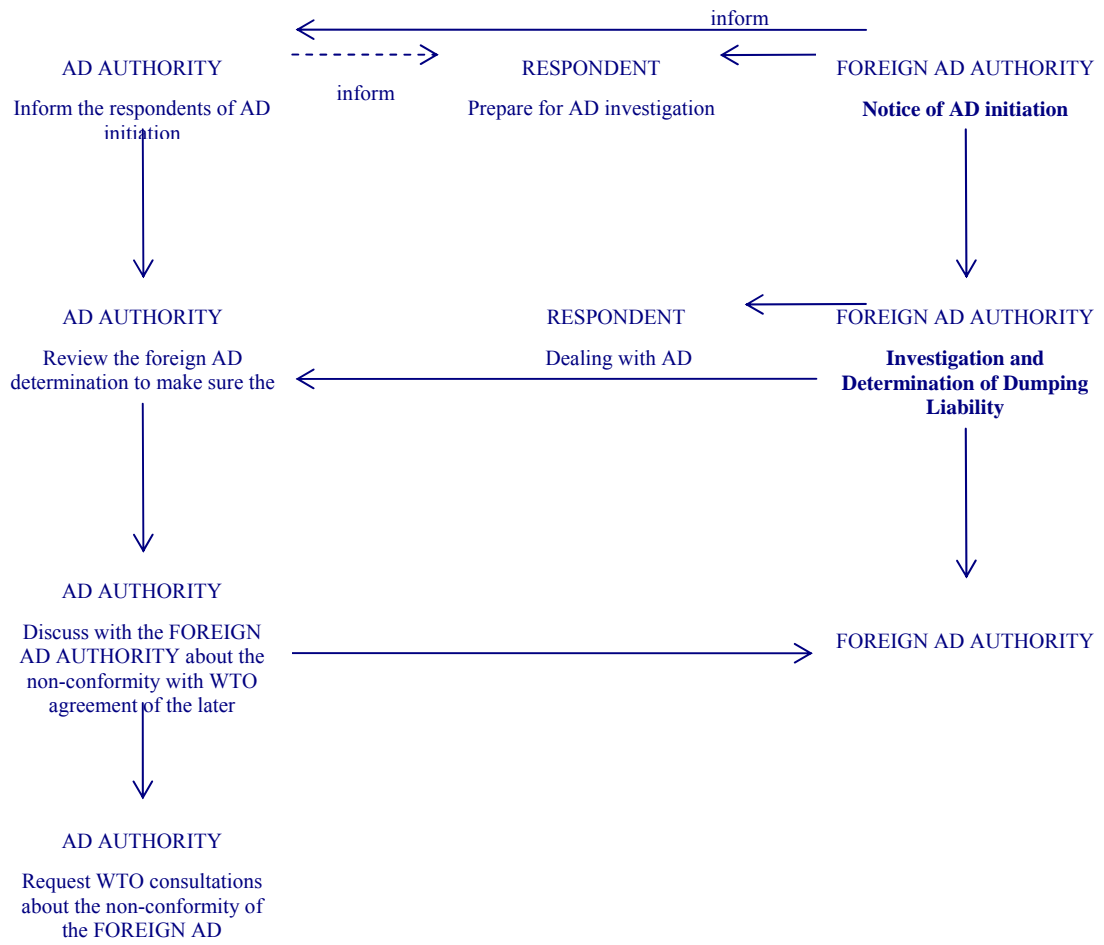
Authority's Assistance to the Respondents

The AD authority track events as they occur during the course of the foreign AD investigation. Along with prior notice of a case, the AD authority obtains copies of the complaints that are filed and subsequent initiation notices, so that they may examine them for consistency with international legal requirements. Copies of the main determinations in AD (both preliminary and final determinations made by foreign government agencies) are also forwarded to the AD authority to review its consistency with WTO Antidumping Agreement.

If there is evidence that another country has failed to comply with the obligations of WTO antidumping agreement, the AD authority can consult with the offending country on a bilateral basis or even request WTO consultations in cases where its exporters are being treated in a fashion inconsistent with the requirements of the WTO.

In the U.S. the state agency responsible for supporting American exporters in AD actions abroad is the Department of Commerce (particularly the Import Administration and one of its divisions the Trade Remedy Compliance Staff). In Australia, the Department of Foreign Affairs and Trade is responsible for this function. And in India, the state agency responsible for AD administration is the Directorate General of Antidumping and Allied Duties within the Department of Commerce, the Ministry of Commerce and Industry. Nevertheless, this agency does not provide technical assistance to Indian exporters with regards to dealing with AD actions abroad.

Figure 2 Defense in an AD action abroad (the U.S.A and Australia)



PART II: REGULATIONS

Although anti-dumping regulation systems are different from country to country, the major issues addressed by such legislation is usually: (i) the process of an antidumping case, which includes the petition, investigating and review process, (ii) the state agencies in charge of investigation and its functions and (iii) the enforcement of antidumping orders. Of those issues, the investigation process with methods applied by the investigating agencies in calculating and determining the dumping and injury is one of the most important things which could lead to different results of the investigation and dumping margins. In this part, we focus on the most important issues which are:

- (i) the methods in which dumping is calculated;
- (ii) the identification of injury to the domestic industry; and
- (iii) the utility of including a “public interest” criterion as a vetting mechanism in the anti-dumping process.

DUMPING CALCULATION METHOD

The calculation of a dumping margin may be expressed as a simple mathematical equation. In brief, dumping margin is the amount by which the “normal value” (“NV”) of the goods exceeds the “export price” (“EP”).

Although it is a simple equation but the dumping margin of a subject merchandise can be very different depending on the methods that investigating agency use to determine NV, EP and other adjustments to this basic formula.

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

Normal Value:

All the studied countries determine NV based on the price paid (or payable) for like goods sold in the domestic market of the country of export - either by the exporter or by other sellers of the goods. The NV determined by this way is also called as the “home market price” in the U.S. or “domestic sales” in Australia and India.

The domestic sales or home market price will not be used if:

- suitable domestic sales are not available, or
- it is not practical to obtain information on such prices, or
- there are suitable domestic sales but these are not considered relevant because of other reasons, such as the volume being too low to permit a fair comparison.

In these circumstances determination of the normal value may be based upon (i) comparable representative export price to an appropriate third country, or (ii) cost of

production in the country of origin with reasonable addition for administrative, selling and general costs and for profits. Those NV are often referred to as “third country price” and “constructed value”.

However, there are differences between the studied countries in terms of determining NV in the case of the so-called “non-market economies” (“NME”)⁵. The NME concept is used in the U.S. antidumping laws⁶. If a country is considered as NME, the NV is based upon a constructed value.⁷

Besides NME concept, the Australian AD law has a new concept applicable to centrally planned countries which is “economies in transition”⁸. In an economy in transition, there may be some sectors free of the government control, but in some other sectors, the government may still have considerable control over the domestic price of certain goods. The method used for determining normal values in the case of economies in transition is made on a case-by-case basis. If the selling price of subject merchandise is subject to the price control of the government, the normal value may be determined having regard to all relevant information including the normal value options used for a non-market economy. If the raw materials, which accounting for more than 10% of the costs of production, are supplied by a state wholly owned enterprise, a substitute raw materials will be chosen and the method to determine the cost of the substitute materials is on the case-by-case basis.

The Indian AD law provides that “[i]n the case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including India, or where it is not possible, on any other reasonable basis, including the price actually paid or payable in India for the like product, duly adjusted if necessary, to include a reasonable profit margin”⁹

	NV can be determined by	NME	Economies in transition
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⁵ Briefly, “non-market economies” is referred to countries in which the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under normal methodologies.

⁶ See <http://www.mekongconomics.com/publications.htm> for an analysis of the US definition of a non-market economy and its application to Vietnam.

⁷ In NME cases, each NME respondent has to report to the American authority (Department of Commerce - DOC) the quantities of direct materials and labor used to manufacture the subject merchandise, and DOC values these inputs using prices in a suitable market economy country.

⁸ Australian Customs, *Australia’s Anti-dumping and Countervailing Administration*, p. 6, available at (<http://www.customs.gov.au/site/page.cfm?u=4227> last access on Oct 25, 2005).

⁹ Ministry of Commerce and Industry, *Initiation Notification*, July 30, 2001, (available at http://commerce.nic.in/adint_thermal.htm).

	(i) Home market price, (ii) Third country price, and (iii) Constructed Value		
U.S.A	Yes	Yes	
Australia	Yes	Yes	Yes
India	Yes	Yes	

Export Price:

All the studied countries generally determine EP as an amount paid to the foreign exporter in the first sale to unaffiliated purchaser in the importing country. If there is no EP or the EP is not reliable because of affiliation or a compensatory arrangement between the exporter and the importer or a third party, the EP may be constructed on the basis of the price at which the imported goods are first resold to an unaffiliated purchaser. This price is called Constructed Export Price (“CEP”).

Adjustments:

In order to achieve an “apples-to-apples” price comparison, the AD laws of the studied countries allow the investigating authorities to have various adjustments in calculating NV and EP (or CEP). The “starting” prices are adjusted to account for any differences in the prices resulting from verified differences in physical characteristics, quantities sold, levels of trade, circumstances of sale, applicable taxes and duties, and packing and delivery costs. The AD laws of all studied countries give the investigating authorities the power to decide which factors to be used in adjustment in order to ensure that it is a “fair comparison”.

Comparison, Injury Margin and Lesser Duty Rate Rule:

All the three countries use three methods of comparison between NV and EP (or CEP) to determine dumping margin:

1. Compare weighted average price to weighted average price;
2. Compare transaction prices to transaction prices; and
3. Compare weighted average price to transaction prices.

However, only in the case of India, the AD authority calculates Injury Margin and applies Lesser Duty Rate Rule. The injury margin is the difference between the fair selling price due to the domestic industry and the landed cost of the product under consideration. Landed cost for this purpose is taken as the assessable value under the Indian Customs Act and the basic customs duties. In accordance with the Indian AD law, antidumping duty should be calculated based on the lower of the dumping margin and the injury margin. This rule is called Lesser Duty Rate Rule.

In the United States and Australia, the AD authorities do not calculate the injury margin and therefore, the antidumping duty is solely based on the dumping margin.

Figure 3 Antidumping duty

USA	Australia	India
Antidumping duty is based on dumping margin	Antidumping duty is based on dumping margin	Antidumping duty is based on either: (i) dumping margin; or (ii) injury margin.

INJURY

Determination injury is important in AD investigation because without affirmative injury to domestic industry it is inconsistent to WTO AD Agreement to levy AD duties on the imported goods.

In the United States, the International Trade Commission is responsible for determining injury. In Australia, it is the function of Australian Customs. In India, the Department of Commerce (the Directorate General of Antidumping and Allied Duties) is in charge of conducting antidumping investigation.

Definition of Injury

In all three countries use the definition of the WTO AD Agreement of the term “injury” – which means either (i) material injury to a domestic industry, (ii) threat of material injury to a domestic industry, or (iii) material retardation of the establishment of a domestic industry. All three countries determine the injury based on the analysis of price and volume effects and other indicators such as:

- employment and wages;
- production levels;
- capacity utilization;
- forward orders;
- return on investment;
- cash flow;
- ability to raise capital;

- investment; and
- increased inventory holdings (stock levels) caused by decreased sales volumes and pricing pressures.

Cumulative Effect

The United States and Australia consider the cumulative effect of the dumped imports from all of other countries if such imports compete with each and the domestic like products, even though the imports from one or more of these countries might account for a small percentage of the market penetration. (Cumulative analysis refers to the consideration of dumped imports from more than one country on a combined basis in assessing whether dumped imports cause injury to the domestic industry. Obviously, since such analysis will increase the volume of imports whose impact is being considered, there is a greater possibility of an affirmative determination in a case involving cumulative analysis.)

India does not consider cumulative effect in determining injury.

PUBLIC INTEREST IN CONSIDERING ANTIDUMPING MEASURES

In Australia, the AD law requires that in addition to findings of dumping and injury, AD measures may only be imposed if they are shown to be in the interest of the importing country. The Minister is the person who has the power to decide to not impose AD duty if it is against the interests of Australia.

This is called the “public interest test” in AD making decision process. This is a hotly debated provision of the Australian AD law. Domestic industries (particularly the Australian Chamber of Commerce and Industry) oppose and consider it as “... inconsistency of application and considerable vulnerability to political misuse (that is, distorting decision-making by incumbent governments for electoral advantage at the cost of good economic and policy rigor);” It is also criticized by import supporters who worry that the “public interest” can be used for “the national interest of protecting a specific industry from the injurious effects of dumped imports”. Both the above worry about misuse of the concept, but in fact, used properly, it is an important step to ensure that protective responses really are to the benefit of the country as a whole (which includes Australian consumers) rather than just for a narrow interest group (some enterprises and their workers).

The “public interest” requirement is a useful mechanism in which to insert a broad safety valve to avoid AD duties if they appear to be politically undesirable or economically costly. The “public interest” criteria is one way to reflect the interest of consumers who ultimately bear the burden of AD duties. It is also advisable to consider consumer interest (net static and dynamic welfare losses) at the initial stage of consideration to initiate an investigation.

In the United States and India, the imposition of AD duties is mandatory once dumping and resulting injury to domestic industry are found.

RECOMMENDATIONS

We recommend Vietnam (i) to consider the public interest, particularly the consumers' interests in AD decision making, (ii) to apply Injury Margin and Lesser Duty Rate Rule; and (iii) not to use cumulative analysis in determining injury.

Although Vietnamese industries need to be protected from unfair trade, it is important to consider the consumers' interests who benefit from lower price of goods. Protection of industry is a financial tax on consumers and, anyway, does not always help the domestic industry to improve its efficiency and strengthen its competitiveness. For the same reason, the Injury Margin and Lesser Duty Rate Rule will reduce AD duty and therefore lessen the burden that consumers have to bear once the AD duty imposed. The reason not to use cumulative analysis is it distorts the analysis by artificially increasing the volume of imports whose impact is being considered.

Part III: FORMS AND GUIDELINES

This section will review the 3 key types of forms and guidelines that relate to an anti-dumping investigation and draw out similarities and differences of these documents among the 3 countries. These include:

- (i) Application by the domestic industry to initiate the AD investigation;
- (ii) Questionnaires released to interested parties;
- (iv) Handbooks/manuals/administrative guidelines.

Application:

Article 5.2 of the Antidumping Agreement sets out the requirements for the contents of this application. It must include *evidence on dumping and injury and a causal link between the dumped imports and the alleged injury*. Specifically, it must include:

- *the identity of the applicant* and a description of the volume and value of the domestic production of the like product by the applicant;
- *a complete description of the allegedly dumped product*, the names of the country or countries of export, the identity of each known foreign exporter or foreign producer and a list of known persons importing the product in question;
- *information on prices* at which the product in question is sold for consumption in the domestic markets of the country or countries of origin and information on export prices into the importing country; and
- *information on the evolution of the volume of the allegedly dumped imports*, the effect of these imports on prices of like product in the domestic market and the consequent impact of the imports on the domestic industry.

The US follows almost exactly what is required in ADA, both in terms of order and contents. The US petition includes 5 sections: 4 sections like those in ADA and another section to account for critical circumstances (that allows for the limited retroactive imposition of duties if certain conditions are met).¹⁰

Australian application form also covers the information required in ADA but is structured in 3 parts: the first seeks information about the Australian industry to assess claims of injury due to dumping, the second relates to evidence of dumping, and the last part is for supplementary information (e.g. exports from NME, economies in transition..)¹¹

Indian application form also covers similar information but has been streamlined by the AD Directorate to make it more concise (22 pages as compared with 40 pages in an Australian form), which makes it easier for Indian producers to lodge the claims. It is

¹⁰ <http://ia.ita.doc.gov/pcp/sample-model-outline.html>

¹¹ The sample application form was distributed in the hands-out during the training workshop on anti-dumping for associations in Vietnam, organized by Ministry of Trade of Vietnam-CEG within the project (June 2005)

structured in 6 parts: first part includes imported product information, the second part includes Indian industry information, the third part evidence of dumping, the fourth part evidence of injury, the fifth part evidence of causal link, and the last part costing information.¹²

For Vietnam authorities: current regulations in AD Ordinance and Decree follow requirements in ADA. When preparing specific application form, the following issues should be considered:

- The application form should be concise and easy for local producers to complete
- The contents should be comprehensive to include sufficient evidence of dumping, injury and causal link
- There should be clear instructions on how to complete the application, the eligibility of applicants (to make sure that the application is on behalf of the industry), the timelines (the time for screening the application and deciding on initiating a case), how to complete both confidential and non-confidential versions and how to request in terms of confidential information.
- In addition to application form, an initiation checklist could be prepared to help the authorities in charge in analyzing/assessing the application (the US has a very detailed checklist concerning initiation for the DOC, which is published in the IA AD Manual).

Questionnaires:

Questionnaires are lists of questions sent to the main ‘interested parties’ in the AD investigation; the foreign producers/exporters, importers and domestic producers to obtain information necessary for the investigation.

The WTO Antidumping Agreement does not prescribe the format of questionnaires and countries can devise questionnaires at their own discretion. Questionnaires used in many countries have become more and more complicated with requests for information which may not be directly relevant to the inquiry, which implies that it has become more and more difficult for foreign producers/importers to defend themselves.

A questionnaire for exporters and foreign producers normally includes *organizational details* including information on corporate structure, marketing set-up and accounting practices; *merchandise under investigation* seeking detailed information on product catalogue, brochures..., *sales information* including details of quantity and value of sales in domestic market and foreign market; and *financial information*.

The questionnaires for exporters and foreign producers of 3 countries cover requests for information normally included in a typical questionnaire of this type.

US: a sample foreign exporter questionnaire contains 2 parts and 5 pages long, including (i) general information of producer and trade and (ii) related information (product

¹² <http://commerce.nic.in/Guide.PDF>

information, sale information, production capacity, shipments, and inventories..), with not much requirements of financial information.¹³

Australia: the exporter questionnaire is long (57 pages) and comprehensive (with very detailed instructions, glossary of terms, attachments, which may be complicated to complete). It includes following main parts: company structure and operations; sales (to Australia, domestic sales) and export price; export and like goods; & costing information.¹⁴

India: the exporter questionnaire is 22 pages long with following main parts: general information; sales information; price structures and sales arrangements; costs of production, profit (with requirements of attachments of financial statements).¹⁵

In Vietnam: when preparing specific questionnaires, following issues should be considered:

- Design a general format for each type of questionnaire
- The questionnaires should be comprehensive to seek sufficient information which forms the basis for calculating dumping and injury and determining causal link
- Provides clear instructions, especially for questionnaires to domestic producers to support VN domestic producers, who are not experienced in initiating an investigation.
- For each case, follow the standard format, but modify to reflect the product under investigation (the product should be precisely defined to start the investigation). The draft questionnaires can be sent to applicants for comments and to product experts to help in defining and classifying products.
- Identify appropriate recipients of the questionnaires (to identify appropriate foreign exporters, support from the Vietnam embassy could be necessary, e.g., names of exporters, relationship between exporters and importers.....)
- Setting appropriate time limits for response (it is important that there should be enough time for Vietnam producers to provide information).

Handbooks/manuals/guidelines/Miscellaneous Administrative Guidelines:

To facilitate the effective use of anti-dumping legislation, it is generally necessary to prepare and adopt detailed administrative guidelines to assist the users and enforcers of the system. These guidelines become important as a means of minimizing the risk that interpretations or decisions by case-handlers in an anti-dumping investigation are later ruled WTO-illegal.

¹³ http://www.usitc.gov/trade_remedy/731_ad_701_cvd/handbook.pdf

¹⁴ The sample questionnaire was distributed in the hands-out during the training workshop on anti-dumping for associations in Vietnam, organized by Ministry of Trade of Vietnam-CEG within the project (June 2005)

¹⁵ http://commerce.nic.in/exp_questionnaire.pdf

US: US ITC Handbook on AD, US ITA Manual on AD

India: Directorate General of AD & Allied Duties published India AD Guidelines, India AD Booklet

Australia: Dumping Liaison Unit of Australian Customs Service published AD booklet on Australia AD administration

- All these countries publish very comprehensive, detailed manuals, guidelines, FAQs, samples of application forms, questionnaires for all interested parties in an AD investigation and all of these posted on the website, accessible to the public.
- Vietnam should also learn from these countries to make easy for inexperienced domestic producers/exporters in both attacking and defending cases, to provide information for and educate the public in AD issues. This is especially relevant considering that there are more and more AD cases against Vietnam. The issuance of AD Ordinance, Decree serves as legal basis to initiate against dumping goods from other countries but more detailed guidelines/manuals are necessary.

PART IV: ROLES AND RESPONSIBILITIES

There are five main stakeholders in a given anti-dumping investigation: (i) Domestic producers of foreign 'like products' being dumped; (ii) Importers or consumers of those foreign products; (iii) Exporters/foreign producers; (iv) The government of the exporting country; (v) The domestic 'investigating authority'

Role of Domestic Industry

The first party in anti-dumping investigation is the domestic industry that is suffering the adverse effects of dumped imports. Their roles include:

- Be vigilant in observing the price and volume trends of competing goods and should lodge an application as soon as possible after experiencing a given level of adverse impact.
- To make sure the application is on behalf of the industry and provide all necessary information in the application and questionnaires within due dates
- Make careful preparations for consultation meetings/briefings
- Request to review determinations if appropriate
- Implement PR activities to support an application

Role of Importers/Consumers:

Importers and consumers of the foreign product under investigation may have a strategic interest in opposing an anti-dumping investigation as it is they who will have to bear the burden of an anti-dumping duty. However some domestic anti-dumping laws do not explicitly engage these broader interests. There is no "public interest" requirement in both U.S. and Indian law. This is in contrast to the Australia law

Role of Exporters/Foreign Producers

It is the responsibility of the exporters and foreign producers of the dumped product to contest the anti-dumping investigation. As defendants, they should:

- Read the application carefully, provide accurate and detailed information when completing questionnaire within time limits (to avoid the case that investigators will use "best available information" that may not be favorable)
- Request confidential treatment of information where possible and provide a justification for confidential treatment
- Cooperate with investigators
- Find lawyers/consultants to help defend the case and provide necessary expertise (e.g. in filling questionnaires)

- Mobilize financial resources to defend the case
- Make careful preparations for consultations/briefings
- Request for price undertaking if appropriate
- Request to review determinations if appropriate
- Implement public relations activities to support a defense

Role of the Government of the Exporting Country

The government of the exporting country is specifically listed in ADA as one of the interested parties in an investigation. After the domestic investigating authorities notify the government of the exporting member before starting an investigation, the foreign government will normally then inform the affected exporters and producers of the dumped products often through a relevant trade association.

Finally, if both the importing and exporting countries are WTO members, the government of the exporting country can initiate dispute settlement proceedings under the WTO if the domestic AD law fails to comply with the provisions of ADA.

Role of the Investigating Authorities

The domestic investigating authorities have the responsibility to conduct the anti-dumping investigation. They are responsible for notifying the government of the exporting member before starting an investigation, for determining the existence of dumping, margin of dumping, and determining injury, make recommendations on if the duties are imposed to deciding authorities. They are required to give notice and reasonable opportunities to all interested parties to present their views on the investigation and public notice during the investigation.

Role of the government and domestic industry of three countries

Role of Government:

- Provide infrastructure
- Provide legislation, regulations, process
- Provide forms and questionnaires samples
- Not provide financial support to domestic enterprises which lodge the AD claims and defend the case (however, the Byrd Amendment of US allows the provision of AD duties to affected domestic producers)
- Provide enterprises with technical assistance and information, e.g. India provides legal consulting service related to the standing of domestic producers. In Australia, the Dumping Liaison Units in Australia Customs provides an advisory service. Under the Import Administration (IA) of US, there is a AD petition counseling and analysis unit to assist US companies, such as helping companies understand US dumping law and the process of filing a petition,

providing guidance to potential petitioners to assist them in determining what types of information will be required and ensuring their petition in compliance with initiation standards.

- Carry out activities to raise awareness of enterprises and public in AD issues (via publications - manuals, guidelines, Q&A, questionnaires and application forms, annual reports, website, seminars, workshops)
- Provide training to investigators
- Negotiate free trade deals
- Has some influence: decisions in terms of deciding to adopt recommended measures from investigating authorities, issue guidelines on issues such as NME, amend legislation
- Open to lobbying: change legislation and practice, free trade negotiations
- Keep track of the foreign AD investigation process to ensure sure it is in consistency with WTO agreement.

Role of Domestic Industry:

Be very active and play decisive role in AD investigation.

- Collect information to file an application
- Hire lawyers, consultants, representatives
- Mobilize financial resources
- Participate actively in the investigation.
- Complete questionnaires
- Implement PR/lobby activities with authorities and interested groups

PART V: GOVERNMENT ADMINISTRATION

The operation of WTO-compliant anti-dumping regime requires a relatively heavy institutional capacity, which is comprised of 2 main categories:

- the administrative organ(s) charged with the determination of dumping and injury;
- the judicial tribunals charged with review of administrative anti-dumping decisions.

Administrative organs:

While the developing countries have one single authority to deal with both dumping and injury, most developed countries (e.g. the US) separate determinations of dumping and injury. This means that they put separate persons, if not separate administrative agencies, in charge of the determination of dumping of injury. There are both advantages and disadvantages of both systems. Vermulst (1997) argues that the use of one agency seems preferable for developing countries as there is substantial overlapping of data used for determining dumping and injury and it is efficient and manpower-friendly to put one agency in charge of both. However, some experts (Qureshi 2000) point out that the involvement of two separate authorities may ensure a greater transparency and reduce the possibility of bias.

The Antidumping Agreement does not contain any specific provisions on this point. So countries are free to choose the most suitable mechanism for them.

US: The administration of laws and agreements on AD measures in the United States is the responsibility of the International Trade Administration (ITA) in the Department of Commerce (DOC) and of the United States International Trade Commission (USITC). In AD investigations, the ITA is responsible for the determination of the existence and margin of dumping. The USITC is responsible for the determination of material injury to the domestic industry as a result of the imports of the dumped products. The U.S. Customs Service is responsible for collecting cash deposits of AD duties.

The mission of the International Trade Administration (ITA) is to enforce antidumping (AD) laws and agreements that provide remedies for unfair trade practices. ITA is headed by the Under Secretary for International Trade, who oversees the operations of four principal units, among which is Import Administration (IA), which administers the Antidumping and Countervailing Duty Acts.¹⁶

IA is organized in which all offices work on investigations and administrative reviews. The main offices include 1) the Office of Policy formulates and disseminates policies which govern the administration of the AD and CVD laws, 2) the Office of the Chief Counsel for IA (a unit of the General Counsel's Office rather than ITA) provides comprehensive legal support and advice; 3) the IA Office of Accounting analyzes and verifies cost information and works closely with case analysts in the actual calculation of dumping margins and net subsidies; and 4) the IA Central Records Unit maintains all

¹⁶ www.ita.doc.gov

official and public reading files, receives and distributes all case-related computer tapes and written filings, and assists in the preparation of court records.

The U.S. International Trade Commission is an independent, nonpartisan, quasi-judicial federal agency that provides trade expertise to both the legislative and executive branches of government, determines the impact of imports on U.S. industries, and directs actions against certain unfair trade practices. Its five operations are: import injury investigations, intellectual property-based investigations, research programs, trade information services, and trade policy support. It consists of a six commissioners appointed by the President. This agency oversees a professional staff of investigators, industry analysts, financial analysts, accountants, economists, and attorneys. It maintains a close relationship with DOC during an AD investigation to avoid duplicative collection and processing of information.

India: The national law on anti-dumping has been in place since 1985. However, the first case of anti-dumping was initiated only in 1992 and since then, the Designated Authority in the Department of Commerce has been handling anti-dumping cases. The formal set-up of Directorate General of Anti-Dumping and Allied Duties came into existence in April 1998 in the Ministry of Commerce. The Directorate General of Anti-Dumping and Allied Duties (DGAD) is headed by an officer of the rank and status of Additional Secretary to the Government of India as the Designated Authority (DA). The DA is assisted by a Joint Secretary, a Director, six Investigating Officers and four Costing Officers. In addition, there is a section headed by a Section Officer to service the DGAD.¹⁷

The Designated Authority is responsible for: (i) to investigate as to the existence, degree and effect of any alleged dumping in relation to import of any article; (ii) to identify the article liable for anti-dumping duty; (iii) to submit its findings, provisional or otherwise to Central Government, (iv) to recommend the amount of anti-dumping duty and (v) to review the need for continuance of anti-dumping duty.

The Designated Authority's function, however, is only to conduct the anti-dumping investigations and make recommendations to the Central Government for imposition of antidumping duty. Such duty is finally imposed/levied by a Notification of the Ministry of Finance. Thus, while the Department of Commerce recommends the Anti-dumping duty, it is the Ministry of Finance, which levies such duty.

Australia: Australian Customs has sole responsibility for investigating and reporting to the Minister on dumping matters. These investigations cover applications for new anti-dumping measures; reviews or revocations of existing measures; dumping duty assessments; and applications for continuation of existing measures past the five-year sunset period. In addition, Customs provides an advisory service - through the Dumping Liaison Unit - to assist all interested parties involved in dumping matters.¹⁸

- While US maintains a bifurcated system, where determination of dumping and margin is undertaken by two different bodies, Australia and India use a unitary system where a single agency is in charge of both.

¹⁷ http://commerce.nic.in/ad_guide.htm

¹⁸ http://www.customs.gov.au/webdata/resources/files/Antidumping_050203.pdf

- In all three countries, the decision-making part is separate from investigation process (in the US, DOC will make the final decision after receipt of final determination from ITC, in Australia, the Minister makes final decision after receipt of final recommendations from Customs and in India, the Central Government, i.e. the Ministry of Finance will impose duties after receipt of recommendations from DGAD).
- For Vietnam as a developing country, the use of a unitary system (as stipulated in Ordinance and Decree) may be preferable, considering that there is substantial overlap between the data collected to determine dumping and injury, efficiency gains in terms of constraints in human resources, capacity building for staff who conduct all stages of investigation, and there may be not many cases in early stages of AD law.

Judicial Review of Administrative Actions

Article 13 of the Antidumping Agreement provides that WTO members, which adopt anti-dumping legislation, must also maintain independent judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review of administrative determinations.

US: the Court of International Trade (CIT) is responsible for reviewing AD determinations. CIT will review on if the determinations have been made based on “important evidence” and “compliant with the law”, i.e. legal issues, not matters of fact. The decision of CIT can in turn be appealed to US Court of Appeal for Federal Circuit.

India: an appeal against the order of the DGAD lies to Custom, Excise, and Gold (Control) Appellate Tribunal (CEGAT) – a judicial tribunal. It reviews final measures and is independent of administrative authorities. If the Designated Authority or the interested parties are not satisfied with the order of the CEGAT, the same can be appealed in the Supreme Court, either by the Designated Authority or any of the interested parties.

Australia: legal challenge may be made against many of aspects of the process including: the decision by Customs to accept and initiate an application; the final finding by Customs; terminations by Customs; and the TMRO’s finding on dumping duty liability. Challenges are made by way of application to the Federal Court of Australia, principally under the Administrative Decisions (Judicial Review) Act. Parties who challenge decisions by Customs can only challenge on points of law. It is not possible to dispute matters of fact.

- All the three countries use a separate tribunal for judicial review (different from other countries, like EU which use regular courts). The disadvantage of a separate tribunal is the cost involved but could be justified given technical complexity of an AD case and the potential for WTO-compliance oversight by WTO DSU.
- In Vietnam, the Ordinance (Art. 26) states that appeal can be made to a court pursuant to Vietnam Law, however, this provision is still general. Vietnam may consider setting up a specialized court in AD issues, e.g. International Trade Court, which is especially relevant in the context of Vietnam acceding to WTO.

PART VI: HUMAN RESOURCE NEEDS

Human resource in AD investigation is important because it is a complicated process which requires inter-discipline knowledge. Core government cadre need to be anti-dumping specialists, but so do private sector service providers. In this part we discuss about the human resources in the three countries.

AD AUTHORITY'S STAFF

In the U.S.A, AD investigation is carried out by the International Trade Commission (determining injury) and the Department of Commerce (determining if the subject merchandise is dumped or not). Each agency will set up an investigating team to conduct the investigation. This team normally consists of an investigator, an economist, an accountant or auditor, an industry analyst, an attorney at law and a supervisory investigator. Depending on each case, this team can have more assisting staff.

In order to carry out an AD investigation, the investigating team have to cooperate with other state agencies in charge of import and export, trade policy, statistics, ministries in charge of the industries, etc. The staff of those state agencies should also have knowledge about AD. We find out that in all three studied countries, the AD authorities have intensive training programs for its staff and personnel of other state agencies on AD.

LAWYERS, SPECIALISTS AND CONSULTANTS

We found out that in all three studied countries, there are large number of law firms and lawyers practicing in international law. For example in the United States, there are about 250 law firms specializing international law, in the Australia, this number is 74. Besides law firms, all three countries have a large number of auditors, economists, and industry analysts who speak English and are able to participate in AD investigations.

We also found in the three countries, the official language is English the most popular language in international trade and the language of Dispute Settlement Body of the WTO. In addition, the legal systems of all three countries are common law with the intensive use of precedents. As the WTO's dispute settlement rules heavily based on precedents, this is an advantage for those countries.

Due to a large pool of available professionals who could participate in AD investigation, the respondents in those countries have more choice in selection consultants in terms of prices and service quality.

RECOMMENDATIONS FOR VIETNAM

At present time, Vietnam has more than 3,000 lawyers but only a handful of them practicing in international trade law and can speak a foreign language. In addition, the legal system of Vietnam is a civil law which does not accept precedents. This is a disadvantage for Vietnamese lawyers and AD authority staff in dealing with AD cases abroad, especially in major markets like North America, and dealing with dispute settlement process at the WTO level.

Our suggestions to improve this situation are as follows:

- Organize training courses to improve foreign language skills (especially English) of the AD authority staff, and lawyers;
- Besides law-background staff, the AD authority needs to recruit more staff who have background on economics, accounting, and expertise in particular industries;
- Strengthen the relationship with foreign AD authorities to exchange knowledge and experiences in handling AD cases;
- Organize training to provide business associations and enterprises general knowledge on international AD laws;
- Form an Association (or just make a list) of Vietnamese legal and economic consulting firms relevant to AD and other trade disputes. Then target this group with training, information, and other opportunities to more rapidly build their capacities.
- Cooperate with foreign law firms to train the staff of business associations and the Vietnamese AD authority. Mr. Andrew Huston, the international legal consultant in our project, has suggested that in each AD case, when a business association hire a foreign law firm to represent them, they can request the foreign law firm to accept several staff of the business association or of the Vietnamese AD authority to work as trainees in the law firm during the case. The hands-on experience that they have during this period will be valuable for them in dealing with next cases.

PART VII: FINANCIAL ISSUES

In this part, we present the financial sources for each stage in AD defense and AD initiation and the methods to mobilize those sources in the three studied countries.

The activities in relation to an AD case can be summarized as follows:

- (i) Prior to the AD case: monitoring of other countries' use of AD actions against a country's exporters. The monitoring can be carried out by both or either of exporters or the AD authority in their home country.
- (ii) During the AD case:
 - investigation activities carried out by the AD authority;
 - activities of petitioners to and respondents to cooperate with the investigating AD authority; and
 - activities of the AD authority in the respondents' home country to keep track of AD investigation process.
- (iii) Follow up the AD case: the AD authority in the respondent's home country consults with foreign AD authority and/or the WTO about the unfair treatment to its exporters.

FINANCIAL SOURCES FOR THE ACTIVITIES IN AD DEFENSE:

Prior to the AD action:

In the U.S.A the Trade Remedy Compliance Staff of the Import Administration ("IA") of the Department of Commerce is the agency responsible for monitoring the development of AD laws and the use of AD actions against the U.S. exporters. The financial resources for those activities are provided by the Federal budget channeled through IA. Business associations also carry out some forms of monitor to important export markets by their own expenses.

In the U.S.A and Australia, the AD authority (IA in the U.S.A and the Department of Foreign Affairs and Trade in Australia) provide free-of-charge advice and technical assistance on foreign AD laws to the exporters who are dealing with AD actions abroad.

In Australia and India, there is no particular state agency responsible for monitoring the development of AD laws and regulations in other countries. The expenses for monitoring (if any) are funded by business associations.

During the AD action:

In the U.S.A., the government does not have any financial support to their exporters to deal with an AD action abroad. All expenses for the AD authority to keep track and study

the investigation of foreign AD authority are paid by the state budget. However, the Indian government has financial supports to its exporters for antidumping suits abroad.¹⁹

Follow up the AD action:

The financial resources for the AD authority to communicate with foreign AD authority about AD measures and/or all dispute settlement at the WTO are from the state budget. The respondents of an AD action abroad do not pay for the AD authority in its home country to carry out necessary acts to protect their interest from unfair trade measures abroad.

¹⁹ In 2005, the Indian government, through the Market Access Initiative (MAI) financed 194,000 rupees for the Seafood Exporters Association of India for defending anti-dumping suits in the U.S.A. Ministry of Commerce, *Performance Budget 2005-2005*, p. 121. (available at <http://commerce.nic.in/budget/budget2005&06.htm>. Last access on October 25, 2005)

Figure 4 Financial Resources in AD Defense

Activities	U.S.A	Australia	India
<p><u>1. Prior to AD action:</u></p> <p>Monitor the development of other countries' AD laws and regulations, and the use of AD against foreign exporters.</p>	Government and Business (if any)	Business (if any)	Business (if any)
<p><u>2. During AD action</u></p> <p>All expenses of the respondents for dealing with the AD investigation</p>	Business	Business	Business, and partly supported by the Government
<p>Keep track of the foreign AD investigation process to ensure sure it is in consistency with WTO agreement.</p>	Government	Government	Government
<p><u>3. After AD action</u></p> <p>Discuss with foreign AD authority about the unfair treatment in AD investigation</p>	Government	Government	Government
<p>Bring the case to WTO Dispute Settlement Body</p>	Government	Government	Government

FINANCIAL SOURCES FOR THE ACTIVITES IN AD INITIATION:

Prior to the AD action:

In all three countries, the expenses for collection of necessary data for a petition of AD and for professional services of lawyers and experts in preparation of AD petition should be paid by petitioners.

In the U.S.A, the Petition Counseling and Analysis Unit (PCAU) of the Import Administration of the Department of Commerce is responsible for (i) providing the U.S. enterprises with free-of-charge guidance on what types of information required for AD initiation, and (ii) assisting them in ensuring their petition is in compliance with statutory initiation standards and provides small businesses with publicly available tariff and trade data.

In Australia, the AD authorities also provide technical assistance in the form of guidance to domestic industry in order to prepare for AD petitions. The assistance is free-of-charge to the domestic industry.

In India, there is no particular state agency to assist potential petitioners to prepare AD petition.

During the AD action:

In all three studied countries, the expenses of the AD authority to conduct the investigation are funded by the state budget. The petitioners have to pay for the expenses incurred during the investigation.

Follow up the AD action:

The financial resources for the AD authority to communicate with foreign AD authority about AD measures and/or all dispute settlement at the WTO are from the state budget. The petitioners do not pay for the AD authority to carry out necessary acts at the WTO level.

Figure 5 Financial Resources in AD Initiation

Activities	U.S.A	Australia	India
<u>1. Prior to AD action:</u>			
Collect information and data for an AD petition.	Business	Business	Business
Technical assistance by the AD authority	Free-of-charge	Free-of-charge	
<u>2. During AD action</u>			
All the expenses of the petitioners for dealing with the AD investigation	Business	Business	Business
All the expenses of the AD authority to conduct investigation.	Government	Government	Government
<u>3. After AD action</u>			
All the expenses for the dispute settlement at the WTO level	Government	Government	Government
Distribution of AD revenues to affected domestic producers	Government (Byrd Amendment)	No	No

Of the three countries, only the U.S.A has a scheme to directly support the AD petitioners by distributing the collected AD duties. This scheme is set forth in the Continued Dumping and Subsidy Offset Act on October 28, 2000, which is also known as the “Byrd

Amendment”. In accordance with this law, the annual AD revenues are distributed by the Commissioner of the U.S. Customs and Border Protection to “affected domestic producers”. The International Trade Commission (“ITC”), the agency responsible to determine injury in AD investigation is the one which determine the list of “affected domestic producers”.²⁰

Conclusion and recommendation

It is worth noting that the governments of all three studied countries provide certain financial assistance to its domestic industry in AD initiation and its exporters in defending AD actions abroad. The financial assistance can be direct or indirect, but its exact form must comply with WTO rules.

The U.S. Government provides both direct and indirect financial assistance. The indirect financial assistance includes the free-of-charge services of the Trade Remedy Compliance Staff to monitor the use of AD in other countries, and guidance for domestic industries in initiation of AD actions. The direct financial assistance which are most disputable and criticized by many countries including the WTO is the distribution of AD revenues to the U.S. enterprises under the “Byrd Amendment”.

The Indian Government, like the U.S. Government, provides financial assistance to its exporters who are defending AD action abroad. However, this assistance goes through the Market Access Initiative scheme, which does not make it as a subsidy to Indian enterprises.

The Australian Government, provide indirect financial assistance to business by offering technical assistance to enterprises in dealing with AD cases abroad.

In the near future, the number of AD actions against Vietnam will increase corresponding to the growth of the country’s exports. However, Vietnamese exporters is lack of knowledge about foreign AD laws and regulations. They do not have a monitoring scheme of AD legislative development in their major markets either (mostly due to lack of financial resources). For that reason, the Government need to allocate a certain financial

²⁰ In 2001, one year after the introduction of the Byrd amendment, over US\$230 million was distributed to 900 claimants; in 2002, US\$330 million was distributed to 1,200 claimants; and in 2003, US\$190 million was distributed to 1,800 claimants.

In 2002, the European Union together with Australia, Brazil, Chile, India, Japan, Korea and Thailand complained to the World Trade Organization about the Byrd amendment on the grounds that the offsets under the “Byrd Amendment” were an illegal response to dumping and subsidies. A WTO Panel Report was issued in September 2002 and, following an appeal by the US, the Appellate Body confirmed in January 2003 that the Byrd amendment was inconsistent with the Anti-Dumping Agreement, the Subsidies and Countervailing Measures Agreement, the GATT 1994 and the WTO Agreement as the offsets under the CDSOA were a non-permissible action against dumping and subsidies.

In 2003, the Bush’s Administration failed to convince the Congress to repeal the “Byrd Amendment”. After the Congress refused to repeal the law, a statement from the Office of the U.S. Trade Representative (“USTR”) in response to the WTO decision said that the U.S. will seek to comply with its WTO obligations, but did not say that it would seek a repeal of the Byrd Amendment.

resources for this activity. The funds need to be allocated to the AD authority in order to avoid any violation of WTO agreement on subsidies in the future.

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