Injury in Anti-Dumping Proceedings

The Need to Look Beyond the Uruguay Round Results

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INTRODUCTION: INJURY—THE WEAK SIDE OF THE ANTI-DUMPING CODE

The injury side of the anti-dumping instrument is clearly less developed and less regulated by the GATT Anti-Dumping Code than the dumping side. The new text which resulted from the Uruguay Round does not basically alter this disequilibrium.

The Code provides quite precise guidance as to the elements to be taken into consideration in order to establish whether injury to the domestic industry occurred. Other aspects of the injury determination such as, for example, the rules concerning the establishment of the causal link between dumping and injury (causation) and the calculation of injury margins are not sufficiently developed.

The inadequate guidance provided by the Code combined with the lack of consensus on the economic analysis concerning basic injury-related concepts has resulted in a multitude of national rules and practices concerning the injury side of the anti-dumping instrument. Thus, for example, the EC is consistently applying an injury threshold calculation, whereas most of the other big users of anti-dumping instrument have not incorporated an injury threshold concept into their national legislations.[1]

It is, however, clear that:

— if not all dumping results in injury, or

— if the injury caused by the dumping can be removed by anti-dumping duties lower than the anti-dumping margin,

then, both the spirit of the Code and its legally binding obligations would seem to require the application of an anti-dumping duty lower than the dumping margin, thus the calculation of an injury threshold.

More precise GATT rules have to be developed concerning the causation and the injury threshold calculation which would leave less wide interpretation margins than the actual Code. Such rules would necessarily result in common or at least similar practices for all Contracting Parties.

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[1] The United States and Canada do not apply the lesser duty rule. Australia applies it in the form of NIFOBs—non-injurious FOB margins. See J. Jackson and E. Vermulst, *Anti-Dumping Law and Practice: A Comparative Study*, University of Michigan Press, Simon and Schuster, 1990.

In order to develop more precise GATT rules in that matter, the Contracting Parties need first to achieve a common analysis of the basic economic mechanisms involved: Is all dumping causing injury? How is dumping causing injury? How to establish the causal link between dumping and injury? Is it possible to remove the injury with a lower anti-dumping duty? What can an injury threshold mean?

The calculation of an injury threshold should be, like the calculation of an anti-dumping margin, a very precise exercise. However, in most cases, the economic phenomena involved in an injury evaluation and an injury threshold calculation require the interpretation and combined evaluation of complicated economic relations involving company-related parameters like price policies, market strategies, and also links with other factors and economic phenomena exterior to the companies concerned like market elasticities, market characteristics and even macro-economic parameters like inflation, economic growth etc. Overall, the injury side is more global in the elements that are taken into consideration, thus more complicated when precise calculations are needed than the dumping side, the latter being basically a company-concentrated exercise and an accounting challenge.

Especially in cases where several other causes of injury exist together with dumping and the causation of injury by dumping should be demonstrated, it would be necessary, in theory, to calculate complicated elasticities in order to demonstrate the causation of injury by dumping. In practice, the anti-dumping authority in charge of the investigation has only a few man-months of time available. Thus, a methodology of establishing injury and of calculating an injury threshold is needed, which should be:

— based on well-defined and widely accepted legal and economic concepts;
— possible to apply in practice within reasonable time limits;
— as global as possible, i.e. one methodology for all anti-dumping cases or, if this is not possible, at least a set of rules based on the same principles and resulting, as is already to a large extent the case on the anti-dumping side, in comparable methodologies and calculations used in comparable cases; and
— able to guarantee, despite its simplicity, that the Code's principles are strictly respected.

The main aim of this article is to contribute to the definition of such a global methodology. After a presentation of the GATT requirements in Part A, a methodology is proposed, based on the accumulated experience of the EC Commission.[2] In order to stress the practical orientation of this methodology, a kind of guide to the investigator presentation by steps is chosen for Part B. The steps are presented in the order that could be followed by the investigator during an anti-dumping proceeding. For each step, the underlying economic principles are presented as well as a practical way of applying them to each specific case. A list of contents of this article is annexed.

[2] For overviews of the injury determination by administering agencies in the EC, the United States, Australia and Canada, Jackson and Vermulst, *op. cit.*, *supra*, footnote 1.

PART A: *Injury in the Uruguay Round Anti-Dumping Code in Historical Perspective*

Part A will mainly concentrate on the definitions of injury in the Uruguay Round Anti-Dumping Code. However, as this Code has not developed from a vacuum, the historical evaluation of the injury requirement will be discussed first.

I. NATIONAL LEGISLATIONS

The first countries to enact anti-dumping laws were Canada (1904), New Zealand (1905), Australia (1906), and the Union of South Africa (1914). Section 801 of the American Revenue Act of 1916 mandated the imposition of fines against foreign producers if it could be proved that those producers sold their products at lower prices in the United States than in their domestic market and had the intent to destroy or injure a U.S. injury or restrain its development (predatory dumping). The common characteristic of these laws was that none of them required actual or potential injury before action could be taken.

In 1921, four countries enacted anti-dumping legislation. Three of these countries made some form of injury a prerequisite for imposition of duties as well. The British Safeguarding of Industries Act provided that employment in a United Kingdom industry had to be or had to be likely to be seriously affected by foreign articles sold below the cost of production. The Australian Industries Preservation Act required that detriment might result to an Australian industry by reason of dumped imports. The New Zealand anti-dumping law did not contain an injury requirement.

The fourth country was the United States. As originally presented in the House of Representatives, the American Anti-Dumping Act of 1921 did not contain an injury standard. An injury standard was included in a Senate proposal and was eventually adopted by the House of Representatives. According to Viner, the law was a "model of draftsmanship"[3] and superior to the Canadian law, among others, because:

> "The limitation of anti-dumping duties to a product which injures or is likely to injure an American industry leaves it open to a wise customs administration to refrain from interference with all dumping whose benefit to the American consumer is not clearly offset in part at least by an injury, actual or prospective, to American industry."[4]

Internationally, the League of Nations became interested in dumping in the 1920s. In a Memorandum on Dumping written for the League in 1926,[5] Viner remarked that dumping duties should be applied only to goods of a kind which were produced on a substantial scale in the importing country, unless there was evidence that the dumped imports were responsible for the lack of development of a domestic industry. Furthermore, he advised that the application of the duties should be contingent upon the existence of a distinct probability that the continuance of dumping would result in substantial injury to domestic industries.

[3] J. Viner, *Dumping: A Problem in International Trade*, New York, Kelley, at 262, 1966 edition.
[4] Id., at 263.
[5] J. Viner, *Memorandum on Dumping*, 36 League of Nations, O.J. 1, 1926.

In 1946, the United Nations Economic and Social Council (Ecosoc) established preparatory committee to prepare an agenda for a United Nations Conference o Trade and Development. During the first session of the committee in London, th United States submitted a Suggested Charter for an International Trade Organizatio (ITO) of the United Nations. Article 11 of the Charter dealt with anti-dumpin duties. The ITO Charter provided that as a general rule each party would undertak not to impose anti-dumping duties unless it determined first:

> "... that the dumping ... [would be] such as to injure or threaten to injure a domesti industry, or ... [would be] such as to prevent the establishment of a domestic industry."[6]

The preparatory committee in turn established a drafting committee which me at Lake Success in New York and tightened the phrase like or similar product to lik product and added the adjective material to injury. However, the remainin terminology remained virtually the same in a subsequent Geneva Draft, which became Article 34 of the Havana Charter and Article VI of the GATT.

The General Agreement came into force on 1 January 1948 on the basis of the Protocol of Provisional Application. Because Article VI is placed in the second part of the Agreement, Contracting Parties only committed themselves to apply the Article to the fullest extent not inconsistent with existing legislation. The Protocol, therefore, obviously favoured parties which already had anti-dumping legislation in force by that date, and as a result were not bound by possibly more stringent Article VI provisions.[7]

II. ARTICLE VI OF THE GATT

Article VI GATT provides in relevant part:

> "1. 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.
>
> 6(a) No contracting party shall levy any anti-dumping ... duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry ..."

As far as injury is concerned, Article VI establishes four conditions:
— there must be injury;
— the injury must be material;
— the injury must result from the dumping; and
— there must be injury to a domestic industry.

While the concept of dumping is—rather vaguely—delineated, unfortunately none of the four criteria relating to injury is defined.

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[6] Id., at 17, 18.

[7] Marc Hansen and E. Vermulst, *The GATT Protocol of Provisional Application: A Dying Grandfather*, 27 Columbia J. Transn. L., 263–308, 1989; Barcelo, *Anti-Dumping Laws as Barriers to Trade: The United States and the International Anti-Dumping Code*, 57 Cornell L. Rev., 525, 1972.

III. The GATT Secretariat Study

The GATT Secretariat[8] from 1955 through 1957 conducted a study of those national anti-dumping laws that were actually used. In addition to these country studies, a general section of the study was devoted to the problems arising from the application of anti-dumping and countervailing duties. The report found that, with the exception of Sweden, none of the eight countries investigated used the term material injury. Furthermore, the term industry created some difficulty. Did it have to include the whole national industry or only a part of it? Most countries considered only the effect which the imports had on the relevant sector of the industry. Indeed, as the report noted:

> " . . . a case where the importation of a product would create a danger for the whole national industry is difficult to imagine."

IV. The Reports of the Group of Experts

The 1958 Secretariat study showed that there were clearly differing interpretations between the GATT signatories with respect to the key terms of Article VI. During the thirteenth session, the Norwegian and Swedish delegations proposed the establishment of a group of governmental experts in order to exchange information with regard to certain technical requirements of their respective legislations. The Group of Experts issued two reports that in many respects were to form the basis for the later-established Kennedy Round Anti-Dumping Code. The first report[9] focused on substantive issues while the second report was devoted to procedural issues.[10]

Anti-dumping duties in the view of the Group were to be regarded as "exceptional and temporary measures" to deal with specific cases of injurious dumping. With regard to the injury concept, the experts stressed that action should only be taken "when material injury, i.e. substantial injury, is caused or threatens to be caused"[11] and that no precise definitions or set of rules could be given.

As to the term industry, the Group agreed that, as a guiding principle, judgments of material injury should be related to total national output of the like commodity concerned or a significant part thereof. This seems to be the first time that the term like is mentioned in relation to industry but the Group does not connect it with the term

[8] GATT Secretariat, *Anti-Dumping and Countervailing Duties: A Comparative Study of Existing Legislation and Application*, July 1958, at 5.

[9] *Anti-Dumping and Countervailing Duties*, Report adopted on 13 May 1959 (L/978), B.I.S.D., 8th Supp., 145–153, 1959.

[10] *Anti-Dumping and Countervailing Duties*, Second Report, adopted on 27 May 1960 (L/1141), B.I.S.D., 9th Supp., 194–201, 1960.

[11] A 1966 report of the International Chamber of Commerce stated that material injury meant a "substantial reduction in the returns obtained by the domestic industry" while an Organisation for Economic Co-operation and Development (OECD) report, published in the same year, found that the Group of Experts' definition was too strict, because it unduly limited the number of cases of injurious dumping.

like product, thereby leaving it open if the term like commodity has the same meaning or, perhaps, a broader meaning. The Group also agreed that the use of anti-dumping duties to offset injury to a single firm within a large industry (unless that firm were an important or significant part of the industry) would be:

> "... protectionist in character and the proper remedy for that firm lay in another direction" (principle of standing).

V. The Anti-Dumping Code of 1967

When the Kennedy Round negotiations started in 1963, there was a growing realization of the protectionist impact that non-tariff barriers had on trade, and the Contracting Parties agreed that these should be dealt with in the negotiations. Anti-dumping laws at this stage were considered to be a non-tariff barrier.

Within the GATT Committee on Non-Tariff Barriers, a special Group on Anti-Dumping Policies was set up, consisting of Canada, the European Community, Japan, Norway, Sweden, Denmark, Finland, the United Kingdom and the United States. After initially focusing on criticism of the law and practice of the United States, the Group eventually took up the U.S. proposal of an international Anti-Dumping Code. On 7 October 1965, the United Kingdom presented a first draft of the Code[12] that would form the basis for subsequent discussions. Various position papers, a first set on procedural issues and a second set on substantive points, were then circulated from November 1965 to 29 July 1966.[13] Of these, the discussion papers presented by the United States may be singled out because they attempted to open up an in-depth discussion about the rationale of dumping and anti-dumping action. In the event, the U.S. initiative was torpedoed by most other delegations which felt that the basics of Article VI GATT should not be reconsidered.[14] A series of seven concrete drafts[15] then followed from 23 August 1966 to 5 May 1967, the last of which resulted in the 1967 Anti-Dumping Code (hereinafter 1967 Code). It has to be noted that it was the

[12] Spec (65) 86, 7 October 1965.

[13] TN.64/NTB/W/2, 23 November 1965 (Secretariat paper); TN.64/NTB/W/3, 10 January 1966 (United States); TN.64/NTB/W/2/Rev.1, 17 January 1966 (Secretariat paper); TN.64.NTB/W/4, 27 January 1966 (Japan); TN.64/NTB/W/5, 23 February 1966 (Secretariat paper); TN.64/NTB/W/6, 3 March 1966 (Secretariat paper); TN.64/NTB/W/8, 11 March 1966 (Secretariat paper); TN.64/NTB/W/9, 6 April 1966 (Canada); TN.64.NTB/W/10, 19 April 1966 (United Kingdom); TN.64/NTB/W/10/Add.1, 21 April 1966 (EC); TN.64/NTB/W/10/Add.2, 22 April 1966 (Japan); TN.64/NTB/W/10/Add.3, 28 April 1966 (United States); TN.64/NTB/W/10/Add.4, 29 April 1966 (Norway); TN.64/NTB/W/10/Add.5, 5 May 1966 (Canada); TN.64/NTB/W/10/Add. 6, 5 May 1966 (Denmark); TN.64/NTB/W/10/Add. 7, 6 May 1966 (Sweden); TN.64/NTB/W/10/Add. 8, 20 May 1966 (Australia); TN.64/NTB/W/10/Add. 10, 30 June 1966 (Finland); TN.64/NTB/W/11, 6 June 1966 (Secretariat paper); TN.64/NTB/W/12, 22 June 1966 (United Kingdom); TN.64/NTB/W/12/Add. 1, 23 June 1966 (Norway); TN.64/NTB/W/12/Add. 2, 24 June 1966 (EC); TN.64/NTB/W/12/Add. 3, 29 June 1966 (Canada); TN.64/NTB/W/12/Add. 5, 30 June 1966 (United States); TN.64/NTB/W/12/Add. 4, 30 June 1966 (Finland); TN.64/NTB/W/12/Add.6, 1 July 1966 (Japan); TN.64/NTB/W/12/Add. 7, 4 July 1966 (Denmark); TN.64/NTB/W/12/Add. 8, 7 July 1966 (Sweden); TN.64/NTB/W/12/Add. 9, 8 July 1966 (Australia); TN.64/NTB/W/11/Rev. 1, 29 July 1966 (Secretariat paper).

[14] See, e.g. the EC position paper TN.64/NTB/W/1C/Add. 1, 21 April 1966.

[15] (1) TN.64/NTB/W/13, 23 August 1966; (2) TN.64/NTB/W/14, 9 December 1966; (3) TN.64/NTB/W/16, 3 March 1967; (4) TN.64/NTB/W/17, 28 March 1967; (5) TN.64/NTB/W/18, 14 April 1967; (6) TN.64/NTB/W/19, 24 April 1967, as amended by TN.64/NTB/W/19/Corr. 1, 1 May 1967; (7) TN.64/NTB/W/20, 5 May 1967.

intention of the drafters that the 1967 Code would be an elaboration of, and not an amendment to, Article VI.[16]

Article 4(a) of the 1967 Code 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."

Essentially three exceptions to this definition are made. First, if producers are also importers of the dumped merchandise, they may be excluded (producer-importer exception). Second, under exceptional circumstances, a regional industry can be found (a) if the regional producers sell all or almost all of their production in the regional market and (b) if the market is not supplied by outside sources. However, such a regional industry can then only be considered injured if there is injury to all or almost all of the total regional production (regional industry exception). Third, more indirectly, Article 3(d) of the Code provides that the effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms such as the production process, the producers' realizations and profits. When the domestic production of the like products has no separate identity in these terms, the effect 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 (product line exception). The draft of the United Kingdom delegation gave the following example on this point:

> "In a case of dumping of teddy bears, for example, it would be necessary to decide whether the effects of the imports could and should be assessed in relation to the domestic production of teddy bears alone or of soft toy animals or of all soft toys."

The 1967 Code does not define material injury but requires a consideration of all factors relevant to determining the state of the industry in question.[17] One should note that the 1967 Code defines the valuation of injury as "the evaluation of the effects of the dumped imports on the industry."[18] Such valuation must be based on an examination of all factors having a bearing on the state of the industry, which includes factors such as:

— development and prospects with regard to turnover;
— market share;
— profits;
— prices (including the extent to which the delivered, duty-paid price is lower or

[16] John B. Rehm, *Developments in the Law and Institutions of International Economic Relations: The Kennedy Round of Trade Negotiations*, 62 Am. Int'L, 403, at 430, 1968.

[17] 1967 Code, Article 3(b). The text of Article 3(b) states: "The valuation of injury—that is the evaluation of the effects of the dumped imports on the industry in question—shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (level of undercutting), export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive business practices. No one or several of these factors can necessarily give decisive guidance."

[18] Id.

higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country);[19]
— export performance;
— employment, volume of dumped and other imports;
— utilization of capacity of domestic industry;
— productivity;
— restrictive trade practices.

The Code further indicates that injury resulting from other factors, such as the volume and prices of undumped imports of the product under investigation, competition between the domestic producers themselves, or contraction in demand due to substitution of other products or to changes in consumer tastes, should not be attributed to the dumping.

Threat of injury has to be based on facts, and not on allegation, conjecture or remote possibility.[20] If dumping does not currently cause injury but might do so in the future, the required change in circumstances has to be obviously foreseen and the injury has to be imminent; for example, a likelihood of a substantial increase in imports.

If the ground for the petition for relief is the retardation of the establishment of an industry, there has to be proof that such an industry is indeed in the process of being established. Such proof might be that the plans for the new industry have reached such an advanced stage that a factory is being constructed, or that machinery has been ordered.[21]

As far as the strength of the causal link is concerned, the 1967 Code stipulates that the dumped imports demonstrably have to be the principal cause of material injury, and that the administering authorities shall weigh, on the one hand, the effects of the dumping, and, on the other hand, all other factors which, taken together, may cause injury.[22] Although the 1967 Code does not use the word outweigh, the above language would appear to indicate that dumping should be a more important cause of injury than the aggregate of all other factors which cause injury.[23] There was no consensus, however, on this point. The U.S. delegation, for example, interpreted the language to mean that dumping must be a more important cause than any other substantial cause. The United States Tariff Commission (now International Trade Commission—ITC), on the other hand, was of the opinion that the standard could

[19] The U.S. delegation had proposed to adopt an "alignment defense" in the form of an amendment to the definition of dumping (see TN.64/NTB/W/12/Add. 5, 30 June 1966). Under the U.S. proposal, a product would not have been considered dumped if (a) the price of the exported product is no lower than the comparable price for the like product prevailing in the importing country and (b) the exporter of the product does not increase his share of the market in the importing country. However, this proposal encountered resistance from almost all other delegations, including the EC, Denmark, Japan and Finland. The compromise was the rather weak wording that the price comparison between imported and locally produced merchandise ought to be one of the factors in determining whether injury occurs as a result of the dumping.

[20] 1967 Code Article 3(c).

[21] Ibid., Article 3(a).

[22] Ibid., Article 3(c).

[23] J. F. Beseler, *Die Abwehr von Dumping und Subventionen durch die Europäischen Gemeinschaften*, Nomos Verlagsgesellschaft, 1980, 97.

mean two things. First, the aggregate effect of all injurious factors is material injury and dumping is the principal factor, or, alternatively, dumped imports are individually the cause of material injury and such injury is greater than the injury caused by all other factors.[24]

VI. The Tokyo Round Anti-Dumping Code

During the Tokyo Round, non-tariff barriers again were an important issue. Three factors encouraged the participants to revise the 1967 Code. The first factor was the negotiation of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Subsidies Code). Because there are many common characteristics to anti-dumping and countervailing duty law, especially in the procedural field and in the determination of injury, it was decided that the 1967 Code should be revised to conform to the provisions of the Subsidies Code. The second factor[25] was the growing irritation in the European Community with the ways in which the United States Tariff Commission interpreted the causation and industry requirements of the 1921 Act, oblivious to the 1967 Code standards.[26] Finally, the EC realized that certain requirements of the 1967 Code, notably the causation standard, might have been a little too stringent and left too little room for administrative discretion.[27]

The result was a new Agreement on Implementation of Article VI of the GATT (hereinafter the 1979 Code) which differed from the 1967 Code primarily in the field of causation, but also slightly changed the language concerning material injury and the definition of the regional industry. The net result seems to be a more protectionist approach to anti-dumping measures, in that an injury determination is easier to make.

The definition of industry changed in two important ways. First, the possibility of excluding producers, who were at the same time importers of the dumped merchandise, gave way to the broader possibility of excluding any producers who were related to exporters or importers of the dumped goods or who were themselves such importers. Second, the regional industry concept was clarified.

Once again, the term material injury is not defined, but the indicia of material injury seem to be more logical and less haphazard than those in the old Code. The 1979 Code states that the administering authorities shall consider:

(i) the volume of the dumped imports (has there been a significant increase in dumped imports, either in absolute terms or relative to production or consumption?);

(ii) the effect of the dumped imports on domestic prices (have the imports significantly undercut domestic prices or otherwise significantly depressed

[24] Report of the U.S. Tariff Commission to the Senate Finance Committee on S. Con. Res. 38, *A Concurrent Resolution Regarding the International Anti-Dumping Code*, 90th Cong. 2d Sess., 12, 13 (1968).
[25] See Beseler, *supra*, footnote 23, at 23.
[26] Id., at 22.
[27] Id., at 23.

prices or prevented price increases which otherwise would have occurred?); and

(iii) the consequent impact on the domestic producers, to be measured, *inter alia*, by an evaluation of all relevant economic factors which influence the state of the industry concerned such as:
— actual and potential decline in output,
— sales,
— profits,
— productivity,
— return on investments,
— utilization of capacity,
— factors affecting domestic prices,
— actual or potential negative effects on cash flow,
— inventories,
— employment,
— wages,
— growth, and
— the ability to raise capital or investments.

It is obvious that these three factors are relevant not only towards determining the existence of injury but also to analyzing how the injury has been caused.

The 1967 Code requirements that dumped imports must be the principal cause of injury, and that the effects of the dumping must be weighed against all the other factors possibly causing injury, are replaced by a much weaker condition, i.e. that the "dumped imports are, through the effects of dumping, causing injury."[28] Other factors which, at the same time, are injuring the industry must not be attributed to the injury. Such factors include:
— the price and volume of non-dumped imports;
— contraction in demand;
— changes in consumption patterns;
— 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.

The footnote in the passage cited above refers to paragraphs 2 and 3 of Article 3, thereby reinforcing the proposition that volume, price effects and the resulting impact on the domestic industry of the dumped imports are important indications of causation.

VII. Subsequent activities of the Anti-Dumping Code Committee

Since the conclusion of the Tokyo Round Anti-Dumping Code in 1979, the Committee on Anti-Dumping Practices has on several occasions agreed on certain

[28] 1979 Code, Article 3.

interpretations of the Code. In this context, a 1985 recommendation[29] must be mentioned providing that anti-dumping action based on threat of injury must be confined to those cases where the future injury must be clearly foreseen and must also be imminent. Relevant factors would include:

— a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importations thereof;
— sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing country's market taking into account the availability of other export markets to absorb any additional exports;
— whether exports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further exports; and
— inventories in the importing country of the product being investigated.

VIII. The Uruguay Round Anti-Dumping Code

Practically from the outset of the Uruguay Round, proposals to change the 1979 Code have surfaced. Not surprisingly, the direction of these proposals has not been uniform, with some countries taking the position that the 1979 Code should be expanded in scope while other countries have sought to limit its potential for protectionist abuse. The new Anti-Dumping Code again is a compromise. As far as injury is concerned, major changes relate to the legitimization of cumulation under certain circumstances and to the introduction of the *de minimis* import percentage concept.

Article 3.3 of the new GATT Anti-Dumping Code provides that:

> "Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess effects of such imports only if they determine that (1) the margin of dumping established in relation to the imports for each country is more than *de minimis* as defined in paragraph 8 of Article 5 and that the volume of import from each country is not negligible and (2) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like domestic product."

It is usual practice in the EC to resort to exporter and exporting country cumulation in assessing the volume of imports. In *Technointorg*, the European Court of Justice (ECJ) upheld in general terms the practice of exporter and exporting country cumulation.[30] Although it is the usual practice, country cumulation is not

[29] *Recommendation Concerning Determination of Threat of Material Injury*, GATT, B.I.S.D., 32d Supp., 1986.

[30] The ECJ stated that: " . . . it should also be borne in mind that where, as in this case, the dumped products come from different countries, it is in principle necessary to assess the combined effects of such imports. It is consistent with the objectives of Regulation No. 2176/84 that Community authorities should be able to examine the effect on Community industry of all such imports and consequently take appropriate action against all exporters, even if the volume of each individual exporter's exports is relatively small." Joined Cases 294/86 and 77/87, *Technointorg v. Commission and Council*, ECR [1988], 6077, at 6116.

automatic. In some cases, imports originating in certain countries have been decumulated, leading to no injury findings. For example, in *Cotton yarn*,[31] imports originating in India and Thailand were not cumulated with imports originating in Egypt, Turkey and Brazil, because of the small market shares held by exports from India (0.7 percent) and Thailand (0.1 percent); in *Synthetic fibres of polyester*,[32] imports originating in the German Democratic Republic (GDR) were decumulated because of the decrease of dumped imports from the GDR and the lower level of price undercutting; in another *Synthetic fibres* case,[33] exports of U.S. producers (producer decumulation) were decumulated because the physical characteristics of their products were generally different and because of the absence of competition with Community production and other imports in terms of price levels.

While EC practice may already largely conform to the new provision in the GATT Anti-Dumping Code, the clearer rule will require the EC authorities to examine the appropriateness of cumulation more systematically and in detail.

It may also be noted that the new Code would appear not to allow cumulation for products subject to different investigations. Past EC practice of cumulating products subject to different investigations[34] will therefore no longer be possible.

Article 5.8 of the new GATT Anti-Dumping Code provides that there shall be immediate termination where it is determined that the volume of the dumped imports, actual or potential, or the injury, is negligible. On the first point, Article 5.8. further specifies that:

> "... the volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 percent of imports of the like product in the importing country unless countries which individually account for less than 3 percent of the imports of the like product in the importing country collectively account for more than 7 percent of imports of the like product in the importing country."

The language in the final text is quite different from the previous Dunkel draft text where the *de minimis* volume was defined as a 1 percent market share in the importing country or a collective market share of 2.5 percent.[35]

Needless to say, the 3 percent of imports test will only be less stringent than the 1 percent market share test when the total imports represent more than a 33 percent market share in the importing country. The new test leads therefore to the paradoxical result that the higher the imports, the more advantageous the new test.

The 7 percent collective market share test means that in cases involving many countries with a small market share, protective measures can still be taken. This will

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[31] *Cotton yarn from Brazil, Egypt, Turkey, Thailand (and India)*, O.J. L 217/17 (1991).
[32] *Synthetic fibres of polyester from the GDR, China, Czechoslovakia*, O. J. L 19/26 (1982).
[33] *Synthetic fibres of polyester from Mexico, Romania, Taiwan, Turkey, USA, Yugoslavia*, O.J. L 151/52 (1988).
[34] See, e.g. *Certain electronic weighing scales from Singapore, Korea*, O. J. L 112/20 (1993) (provisional); *Certain electronic weighing scales from Japan*, O. J. L 104/4 (1993) (definitive).
[35] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Dunkel Text, 20 December 1991) at F.10.

be an incentive for EC producers to bring cases against as many countries as possibe in order to avoid application of the *de minimis* rule.

The concept of negligible injury is not further defined. Presumably, it would apply where there is minimal undercutting or underselling or where the impact on the domestic industry is small.

PART B: *Towards a Global and Transparent Injury Methodology*

I. FIRST STEP: ESTABLISH THAT MATERIAL INJURY OCCURRED

(a) *Definition*

The Code uses the term "material injury" caused to the national industry without really defining what material injury is. In practice, the concept of material injury is widely understood as:

— injury widespread in the industry;
— seriously negative evolution of at least one of the main factors considered in the injury.

Overall, there is a concept of benchmark. Not any injury is material injury in the sense of the Code. We will call "material injury" the injury as defined in the Code and "injurious effect" the injury remaining below this benchmark.[36] The term injury covers any kind of injury, i.e. includes both the other categories.

The factors to be taken into consideration, according to the Code, in order to establish the existence of material injury are quite well defined.[37] In practice, the establishment of material injury by the investigating authorities leads in most cases to quite indisputable results. When disputes arise, they usually concern:

— the injury findings which sometimes cannot be clearly categorized as material injury as defined above. It is true that a wide margin is left by the Code to the investigating authorities concerning the concept of benchmark mentioned above; and/or
— the causation arguments—how has dumping caused or contributed to the material injury?

(b) *Findings of the First Step*

The first aim of the investigation should be to establish, as the then U.S. Tariff Commission (now ITC) already mentioned in its 1968 report,[38] whether the "aggregate effect of all injurious factors is material injury." In other words, the result of the first step should be to conclude whether or not the domestic industry has suffered material injury; the causes of that injury would be established during the following steps.

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[36] The notion of *de minimis* injury was also introduced in the Uruguay Round results. See Part A, VIII, *supra*.
[37] See Tokyo Round Code, Part A, Section V and Uruguay Round Code, Part A, Section VII, *supra*.
[38] See Part A, Section IV, *supra*.

II. Second Step: Material Injury Due to Causes Other Than Dumping

(a) *Causation of Injury*

Injury can be caused by the evolution of market conditions such as demand for diversification, or by the competitive advantage of the foreign companies in prices, in quality, organization and many other factors which can be considered as part of acceptable competition. Injury can also be self-inflicted through, for example, wrong commercial strategies, wrong investment decisions, production inefficiencies, etc.

Injury can also be caused by dumping. As briefly examined above in Part A, Section V, since the 1979 Code, the causation request does not imply that dumped imports are the principal cause of injury. They only have to cause injury through the effect of dumping.

How can one distinguish between the injury caused by dumping and the injury due to other causes?

(b) *Injury Due to Other Causes*

The second step of the investigation would be to examine whether the material injury is evidently and directly linked to other causes. The causation of the material injury by causes other than dumping has to be evident and direct, if the investigators were to conclude that those other factors have caused the material injury and thus to declare dumping non-injurious.

For example, if together with the dumped imports, other low-priced imports occurred, is it really possible to distinguish between the effect of the dumped imports and the effects of the low-priced non-dumped imports? In theory, only the calculation of specific elasticities (prices/quantities) together with clear assumptions concerning the substitutability and complementarity[39] of the goods imported with the domestic products can determine the causal link.[40]

In practice, such elasticities are extremely difficult, if not impossible to establish. In the case of the example above, the investigator will first try to identify a clear and evident link between the low-priced non-dumped imports and the material injury.[41] If he fails to identify such a clear link, he will then go a step further and examine whether

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[39] Goods are "substitutes" when they are directly competitive on the market. An increase in the price of one tends to increase the consumption of the others. Goods are "complements" when they tend to be used together, so that an increase in the price of one tends to push down the consumption of the others (e.g. hi-fi and loudspeakers). See R.S. Pindyck and D.L. Rubinfeld, *Micro-economics*, Maxwell MacMillan International, 1992, (2nd edition) Singapore, at 32.

[40] Some consumer behaviour analysis, in the economic sense, is particularly relevant, in this context. To take an example, blue pens are perfect substitutes with red pens only for users who do not care about the colour. If one of three users of pens wants to own both a red and a blue pen, then the blue pens become complements of red pens for this one-third of the consumers and remain a perfect substitute for the remaining two-thirds of the consumers (who do not care about the colour). Thus, if the domestic industry produces only red pens, an importer of blue pens will cause only two-thirds of the injury that an importer of red pens will cause, for the same level of import and domestic prices, to the domestic producers of red pens.

[41] For example, in the case of products like hi-fi products which have strong market segments, it is possible that the injury to the domestic industry is caused only in some identifiable segments of the market, thus the high market penetration of a specific non-dumped model can be much more injurious to the domestic industry than the imports of dumped but commercially unsuccessful models.

the dumping alone caused or contributed to the material injury, keeping in mind that, if several factors have caused the material injury, it is impossible to determine precisely the extent of the respective contributions to injury.

(c) *Findings of the Second Step*

Thus, the second step should allow the investigator to reach one of the following conclusions:

(i) the material injury is entirely caused by factors other than dumped imports, thus the dumping has not caused injury and the investigation should be terminated; or

(ii) the material injury is at least partially caused by factors other than dumped imports; or

(iii) no factors other than dumped imports have been identified as a cause of the material injury.

When the conclusion in either (ii) or (iii) above is reached, then the investigator should move to step three in order to establish whether dumping itself (and not just dumped imports) has caused or has contributed to injury.

III. Third Step: Causation of Injury by Dumping

(a) *Is it Possible that Dumping is not Causing Injury?*

The effect of dumping is that the imported product is sold at lower prices than if it were not dumped. This decrease in prices has two well-known effects. First, consumers enjoy an increase in their purchasing power and have more money left for additional purchases (income effect). Second, they will rather consume more of the goods that have become cheaper and less of the other (domestic) goods that are now relatively more expensive (substitution effect). In "normal" markets, these two effects will have a combined effect towards an increased consumption of the imported goods. However, the economic analysis has already established well-known exceptional market situations where the decrease in the import price may not affect the demand for the domestic like products:

(i) when the two goods are complements or independents[42] and not substitutes;

(ii) some cases of "inferior goods" known as Giffen goods;[43]

(iii) some cases where the demand curve of the domestic product is not continuous and the price decrease due to dumping is lower than the necessary

[42] Two goods are independents when the change of price of one does not have any effect on the sales of the other. For the definition of complements, see footnote 39, *supra*.

[43] In the case of an "inferior" good, the income effect is negative: as income rises, consumption falls. In the case of "Giffen goods", the negative income effect is stronger than the substitution effect and when its price falls, its consumption falls or does not increase.

amount to produce an effect on the quantities of the domestic product. For example:

— imported good G1, domestic good G2
— because of brand fidelity, no substitution within a range of price differences of 10 percent
— same prices at starting point
— a dumping of 8 percent on good G1 will have no effect on demand for good G2;

(iv) several other cases can be constructed on the basis of well-known basic market demand analysis. For example, among the negative network externalities,[44] one can refer also to the well-known snob effect.[45] It is clear that a reduction in price can induce a change of the demand curve due to the fact that the product concerned loses its "snob value" for the consumer, as each individual consumer will anticipate that more people will own the specific product as a result of the decrease in its price. In some circumstances, the change of the demand curve can offset the effect of price decreases and result in lower quantities sold.

(b) *Under What Conditions is Dumping Causing Injury?*

From the point of view of the investigator, the way to proceed in practice will be relatively simple. Usually, the investigator will make sure that:

— the definition of like product is respected (physical similarity between domestic and imported product); and
— the market concerned is an open mass market characterized by high competition among suppliers and a multitude of buyers.

In most cases those two conditions are enough in order to conclude that when dumping occurs in such markets, there is always, as a result, injury suffered by the domestic industry, and the investigator will not be able to clearly distinguish between the effect of the dumped imports[46] and the effect of dumping itself, but he will conclude that dumping has certainly contributed to material injury.

However, it is obviously important for the investigator to be well aware that exceptions exist and to make sure that he is not faced with one of those. A serious study of the market circumstances should allow the identification of non-substitute goods, inferior goods, brand fidelity affecting demand curves, predominantly negative externalities, and other exceptional circumstances having the same effect.

In other words, the investigator will have to make sure that the market of the imported product under investigation is not an exceptional market in the sense of the exceptions mentioned under (a) above, but rather a normal market (as also defined there).

[44] See Pindyck and Rubinfeld, *supra*, footnote 39, at 118–120. There is a network externality where a person's demand for a specific good is not only the function of price but also depends on the demands of other people for the specific good.

[45] The snob effect refers to the desire to own exclusive or unique goods. The snob effect of a good is higher the fewer the people who own or anticipate owning. The opposite effect is the "band wagon" effect which refers to the desire to have a good that everyone has for fad or style or utility (e.g. of utility: demand for CD players and availability of software).

[46] See "commercially acceptable effect", Part B, Section IV(b), *infra*.

Concluding (after checking the conditions above) that the dumping causes injury does not necessarily mean that it is causing material injury.

(c) *How is Dumping Causing Injury?*

The answer to that question requires a brief description of the economic mechanisms which are the link between, on the one hand, the lowering of the price ▲P1 of the imported good (G1) which is dumped and, on the other hand, the elements (loss of market share, profitability, etc.) on the basis of which it is required by the GATT Code to establish that material injury occurred for the domestic industry during the period concerned.

The price change due to dumping is defined as follows:

$$\blacktriangle P1 = (P1 - P1') > 0,$$

where P1′ is the dumped price and P1 is the price without dumping, ▲P1 is different from the dumping margin and P1 can be different from the normal value to the extent that P1 is the price and ▲P1 is the price differential (price change) observed on the import market at consumer prices level whereas dumping margin and normal value are concepts applied at ex-factory level and comparing the domestic and export prices.

We have already briefly discussed the income effect and the substitution effect which normally result in lower quantities sold of the domestic good (G2).

$$\blacktriangle Q2 = (Q2 - Q2') > 0,$$

where Q2 are the quantities of G2 sold when no dumping occurred (G1 sold at P1) and Q2′ are the quantities sold after dumping occurred (G1 sold at P1′).

For the purpose of analysis, we will distinguish two kinds of effects of the price change ▲P1 on the domestic industry:

(i) the direct effects which are:
- — the change of quantities ▲Q2 of the domestic product sold on the domestic market as a result of the price change ▲P1 of the imported good and,
- — the injury resulting directly from ▲Q2. For example, if the domestic industry lost 50 percent of its market share as a result of ▲P1 and is experiencing losses because of under-utilization of its capacity due to the reduction of its output by the same 50 percent, then both the market share losses and the reduction of capacity are direct effects of dumping.

(ii) the indirect effects:
- — if the domestic industry has reacted by reducing its own prices by ▲P2 in order to compensate partially or fully for ▲P1, then the resulting consequences (loss of market share, profitability, etc.) will be considered an indirect effect.

In other words, direct effects are those which occurred as consequences of ▲P1 from the market forces, whereas indirect effects are those which occurred only after the adoption of new price and market strategies by the domestic industry.

Although at first sight, the distinction can appear somewhat superficial, there is

an important difference from the point of view of the investigator: before the causation of the indirect effects can be attributed to dumping, an evaluation of the domestic industry strategy is necessary in order to make sure that the investigator is not facing a situation of "self-inflicted injury". For example, who started the price undercutting or price depression? Has the domestic industry over-reacted by cutting its prices too much, probably trying to exclude from the market a foreign newcomer, thus causing self-inflicted financial losses?

(d) *Findings of the Third Step*

The investigator at the end of the third step will reach, in relation with the findings of the previous steps, one of the following conclusions:

(i) dumping has not caused injury or contributed to injury (in the case of market circumstances mentioned under (a) above, or in the case of self-inflicted injury) in which case the investigation will be terminated; or

(ii) the material injury is entirely caused by dumped imports and dumping itself has contributed to it; or

(iii) dumping has contributed to the material injury together with the other causes not related to the dumped imports and identified under step two.

In both cases (ii) and (iii), further consideration is needed under step four in order to evaluate the extent of the contribution of dumping to material injury.

IV. Fourth Step: Contribution of Dumping to Material Injury

(a) *Negligible Injury or Negligible Contribution to Injury*

The injury or the contribution of the dumping to injury can be negligible. The negligible injury is an additional concept which was introduced in the new Code mainly in the context of cumulation.[47] In practical terms, a *de minimis* injury should have resulted in the termination of the investigation under step one.[48]

We will now briefly discuss the case of the negligible contribution to injury. This should be done by establishing basic parameters like minimal dumping margins or minimal quantities sold. The criterion of 3 percent of imports by exporting country or 7 percent on a cumulative basis is introduced in the new Code.[49] If it is concluded that a *de minimis* injury is caused by the dumping, then the case should be closed without injury found.

The negligible injury is to be understood as part of the injurious effect, the latter being wider than the former.[50] Indeed, nowhere in the new Code is it argued that the injury is either negligible or material. In fact quite the opposite is true: between the concepts of negligible and material, a wide margin of interpretation is left by the Code

[47] See Part A, Section VII, *supra*.
[48] No material injury resulting in termination of the investigation. See Part B, Section I, *supra*.
[49] See Part A, Section VII, *supra*.
[50] Id.

to the investigating authorities. The Code is trying to achieve two, to some extent, contradictory objectives at the same time. It tries, on the one hand, to define general notions and principles which by their nature are difficult to quantify, especially because not all the Contracting Parties share the same views, and, on the other hand, to provide as precise a guidance as possible to the investigating authorities in order to avoid abuses. Thus, the correct interpretation of the Code in that respect seems to be a directly practical one: if the injury caused by dumping is obviously negligible, then the investigation should be terminated. If the injury caused by dumping is not obviously negligible and there is material injury overall (due also to causes other than dumping) then the investigating authority should proceed to a further examination of causation.

(b) *Contribution to Material Injury and Cumulation*

The approach and analysis presented up to now, which corresponds in its main principles to the practices of most Contracting Parties and to the GATT requirements, can provide the necessary evidence to justify the existence of material injury and to demonstrate the causal link between it and the dumped imports.

Up to that stage, dumped imports are considered from the point of view of their global effect on the market and on the domestic industry (injury), which includes at least four levels of cumulation:

(i) The term cumulation as used in the Code refers to the cumulative assessment of the effects of imports from more than one country. Some conditions are imposed on that practice and the concepts of *de minimis* dumping and negligible volumes are introduced in the Code.[51]

(ii) The cumulation at the level of the producers of the same country is considered obvious and applied automatically.

This is the first case where the anti-dumping instrument, unlike the competition policy for example, can hit hard individual companies which have not really committed an unfair action. Indeed individual companies can be penalized through the anti-dumping instrument not because of their unfair behaviour or because of the consequence of their direct actions (causing injury), but rather because of general market circumstances or because of the behaviour of other exporters of their own country on which they have no influence whatsoever.

The more flagrant case is the one of the small exporter who aligns his prices both on the domestic and export markets and causes an evidently negligible injury. Even if he is also *de facto* taking advantage of the higher prices of the domestic market, the lack of unfair behaviour or intention, a negligible market share, a negligible volume of exports and thus a negligible injury caused make, in some cases, a strong argument for excluding some mainly

[51] Id.

small and very small companies from anti-dumping measures. It is difficult from a practical point of view to argue in favour of a "negligible injury test" at an individual exporting company level. However, the investigating authorities should use their full margin of appreciation in a positive sense, considering, for example, the relative importance of the big exporters compared with the small (or very small) ones. This is only one aspect illustrating a wider reality: the anti-dumping instrument is less and less appropriate for dealing with small companies, and the small companies are less and less able to deal with the increasing burden and requirements of anti-dumping proceedings which become, and rightly so for the bigger companies, more and more detailed and sophisticated.

(iii) An additional kind of cumulation results from the absence of distinction between the effect of dumped imports and the effect of dumping.[52] We can distinguish the effect of dumped imports into two parts: on the one hand, the effect of dumping and, on the other hand, what we can call the "commercially acceptable effect" of dumped imports. For example, let us assume:

— G1, the imported good
— G2, the domestic good
— P1 = \$65, the price of G1 without dumping
— P1′ = \$60, the price at which G1 is effectively sold

thus $\triangle P1 = (P1 - P1') = \$65 - \$60 = \$5$, the price difference of G1 due to dumping.

Of course, the introduction of the imported product (G1) affects directly the quantities (Q2)[53] sold of the domestic product (G2). Let us then also assume:

— Q2, the quantities of G2 sold for P1 = \$65
— Q2′, the quantities of G2 sold for P1′ = \$60
— Q2″, the quantities of G2 sold before imports started.

Then, in this example:

— the commercially acceptable effect is the loss of sales volume of the domestic product which would have been caused by the imports, if the imported product were sold at a non-dumping price, i.e. at P1 = \$65:

$$\triangle Q2' = (Q2'' - Q2)$$

— the effect of dumping is the loss of sales volume of the domestic product due to dumping itself, i.e.:

$\triangle P1 = \$5$ for $P1' = \$60$:

$$\triangle Q2'' = (Q2 - Q2')$$

where $\triangle Q2 = (\triangle Q2' + \triangle Q2'') = (Q2'' - Q2')$ the total loss of sales volume of G2 because of the imports of G1 at P1′ = \$60.

[52] The Code clearly requires the investigator to establish that the material injury contribution to injury is effectively caused by the dumped imports through the effect of dumping. See Part A, Section VII, *supra*.

[53] To simplify the example, we assume that the size of the market remains unchanged after the introduction of the imported product. Thus, every market share gained by G1 is lost by G2.

Theoretically, it is possible that the dumped imports contribute or even cause entirely the material injury mainly through their commercially acceptable effect and not through the effect of dumping.

In practice, there will be few cases where it will be possible to conclude that the dumped imports are causing or contributing to material injury not through dumping but through the commercially acceptable effect. Most of those cases will be attributable to very low dumping margins and thus will be taken care of by the new additional security valve which is added to the new Code where the *de minimis* dumping results in termination of the proceeding. However, the possibility exists that the dumping is not *de minimis*; the commercially acceptable effect of dumped imports is significant but their contribution to injury through the effect of dumping is negligible. In such very exceptional circumstances, the investigator should use the margin of appreciation provided by the Code and terminate the proceeding.

(iv) In cases where the dumped imports have contributed to material injury together with other causes, the criterion of "material" has, in practice,[54] to be satisfied through the cumulative injury caused by all factors. This is an additional kind of cumulation which can also result, in exceptional cases, in anti-dumping duties being imposed on companies because of specific circumstances or because of the behaviour of other companies. Thus, as already explained above, if dumping has caused injury which is negligible or within the injurious effect[55] but does not reach the benchmark to be qualified as material injury, and no other factor has aggravated the injury suffered by the domestic industry, the case should be terminated. On the other hand, if other factors, completely independent of the dumping, have caused additional injury, thus making the total injury "material", the contribution of the dumping to that material injury can result in anti-dumping duties being applied on the exports concerned.

From a practical point of view, the only partial answer is to consider carefully the negligible contribution to injury as mentioned under IV(a) above. Once again, the margin of appreciation of the investigating authorities remains important and should be carefully exercised.

(c) *Findings of the Fourth Step*

The investigator at the end of the fourth step will reach one of the following conclusions:

(i) the contribution of dumped imports to the material injury is negligible. In that case the proceeding is terminated;

(ii) the contribution of dumping to the material injury is negligible despite the fact that dumped imports have caused injury mainly or exclusively through

[54] Mainly because of the practical impossibility in most cases to distinguish in a quantifiable way between the different causes of injury.

[55] See Part B, Section IV(a).

their commercially acceptable effect. Also in that case, the proceeding ought to be terminated;

(iii) dumping has contributed to the material injury. In that case, the next step will deal with the evaluation of the individual contribution to injury.

V. Fifth Step: Individual Contribution to Injury

(a) *Definitions*

The individual contribution to injury is the part of the material injury caused by the dumping practised by the individual exporter.

We have briefly discussed the fact that the establishment of the causation of material injury by dumping is done, in practice, on the basis of the global effect of the dumped imports.

In theory, any attempt to establish the level of injury caused by the dumped exports of each individual exporter (i.e. individual contribution to injury) would need a further analysis similar to that mentioned above concerning the causation of material injury itself. It would imply an examination of complicated elasticities calculating the influence of each exporter on the prices/quantities of the market in general and on the prices/quantities of the domestic industry in particular. Such complicated elasticities would, in most cases, simply be impossible to establish with sufficient accuracy and, in any case, impossible to establish within reasonable time-limits. Furthermore, an additional complicated analysis would be needed in order to distinguish between the effect of dumping and the commercially acceptable effect of exports at the level of the individual exporter. Once again, such an analysis is often impossible in practice.

(b) *Global Allocation of the Injury to Individual Exporters*

In practice, the move from the macro-economic level (global dumping causing or contributing to global injury) to the micro-economic level (contribution of the individual exporter to the global injury) is usually done on the basis of a global conclusion that each individual exporter who practised dumping has contributed to the material injury.

Under what conditions can such a global conclusion be considered sound from the economic point of view?

Basically, the same conditions, already checked during the previous four steps for the cumulated effect of dumped imports on injury, should apply for the individual exporter as well.

Some of these conditions apply or are automatically valid for the individual exporter, such as the existence of material injury (step 1) or the existence of factors other than dumping which also cause injury (step 2).

However, the market circumstances mentioned under step 3, which determine whether the imported products were sold on the domestic market under competitive

conditions, need to be reconfirmed at individual exporter's level. Thus, for example, it might be important to:

— examine the existence of market segments which can be so isolated from competition that they can justify an exclusion of the individual exporter from the "global allocation" of injury (for example, extreme cases of brand fidelity in niche markets);
— consider price differences affecting substitutability, for example in cases where the selling price of the imported product is so much higher that it is obvious that the substitutability with the domestic like product is non-existent or that the consumers' choice is not really affected by the price difference due to dumping;[56] and
— finally, carefully examine also the possibility of a negligible contribution to material injury at an individual level.[57]

Thus with those additional precautions/conditions, it can be considered economically sound to assume that if material injury exists, caused by dumped imports on a cumulative basis, then the price difference due to dumping practised by the individual exporter has contributed to that material injury. The principle of the individual contribution thus established allows the investigator to reach the conclusion that the individual exporter has contributed to the material injury. However, nothing is really established concerning the extent of this contribution, other than the fact that it is not negligible. Because no effort whatsoever is developed in order to calculate the extent of the contribution of each exporter to the material injury, we referred to this step as a "global allocation" of injury to the individual exporters.

(c) *Findings of the Fifth Step*

At the end of the fifth step, the investigator will reach one of the following conclusions:

(i) the individual exporter has not contributed at all to or has a negligible contribution to the material injury, thus no anti-dumping duty should be applied to him; or
(ii) the contribution of the individual exporter to the material injury is established through a process of global allocation of the injury and the investigator will move to the sixth step to work on the calculation of the individual injury threshold.

[56] This is one case where the revision of the new Code establishing for the first time the relevance of the level of dumping as an element to be considered in determining material injury should be carefully applied even at the level of the individual exporter; for example, price difference on the market of 50 percent, dumping of 5 percent.
[57] Already discussed in Part B, Section IV(b), *supra*.

VI. Sixth Step: Injury Factors to the Considered in the Injury Threshold Calculation

(a) *Injury Threshold: The Concept of Price Remedy*

What does the injury threshold represent from an economic point of view? On the one hand, the injury threshold is an effort to quantify the injury suffered by the domestic industry. In other words, an effort to quantify the parameters which were used in order to demonstrate that the domestic industry suffered material injury (loss of market share, reduced profitability, etc.).

On the other hand, the injury threshold calculation provides one of the two ways which lead to the calculation of the anti-dumping duty (the other way being the calculation of the dumping margin). The choice between the two ways must be done on the basis of the lesser duty principle, i.e. the lower of the two percentages (injury threshold or dumping margin) being chosen to become the anti-dumping duty.

Thus, the injury threshold is defined as a price remedy to dumping the same way as the anti-dumping duty itself is a price remedy to dumping. The calculation of the anti-dumping duty is supposed to provide an answer to the following question: what should be the necessary increase in the price of the imported good (P1) in order to:

— eliminate the price difference due to dumping (when the dumping margin is calculated); and/or

— eliminate the injury caused by dumping to the domestic industry (when the injury threshold is calculated)?[58]

The price remedy nature of the injury threshold determines the parameters which are to be taken into consideration for the purposes of its calculation. This means that the "necessary increase" in the prices of the imported product has to be somehow linked to the parameters which were used in order to establish that material injury for the domestic industry occurred (loss of profitability, loss of market shares, etc.). Such links can only be established on the basis of more or less direct elasticities[59] depending on the number of the parameters involved and the circumstances of the case and involving, in most cases, prices and quantities of both the imported and domestic product.

Thus, the investigator will have to decide which factors, from those which have been used to justify the existence of material injury, must be taken into consideration in the injury threshold calculation. He will have to justify a quantifiable link (elasticity) between those factors and the necessary increase of the price of the imported good. If he is not able to identify a quantifiable link, then the factors concerned should be ignored.

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[58] See also E. Vermulst and P. Waer, *The Calculation of Injury Margins in EC Anti-Dumping Proceedings*, 25 J.W.T. 6, December 1991, pp. 5–42.

[59] See, for example, direct or indirect effects, *supra*, Part B, Section III (c). Furthermore, the term "elasticities" in this context is to be understood in a broad sense meaning a quantifiable and mathematically expressed relation between the two or more economic parameters/variables which can only be established, as is the basic principle of any econometric analysis, on the basis of a well-known and established link between those two economic variables.

In practice, the investigator will find it extremely difficult to collect enough information to justify a reasonable hypothesis on price/quantities elasticities, much less to proceed with a precise calculation of those elasticities. Thus, in practice, calculations which require the use of direct elasticities involving prices and quantities should be avoided as much as possible.[60] The practical way to circumvent the almost impossible task of defining elasticities between the price of the imported good and the injury factors is by working on some simplified assumptions such as the target market equilibrium,[61] and the target prices.[62]

(b) *The Concept of Target Market Equilibrium*

Because the market equilibrium based on the price/quantities elasticities of both domestic and imported goods is, in almost all cases, a reality too complex to allow even reasonable approximations in a "what if" approach, within the context of an anti-dumping investigation (limitations of time and human resources) two practical directions seem appropriate to be followed by the investigator which should result in the definition of a target market equilibrium:

(i) Try to restore a previously existing and clearly identifiable market equilibrium which existed before the dumping started through the introduction of the price remedy which creates the same price differences existing at that time, implicitly assuming that the quantities sold (market shares) will adapt again and come back to the previous equilibrium. In practice, only in extremely few cases, if any, will the pre-dumping market equilibrium be clearly identifiable.

(ii) Assume that the market shares (quantities) remain the same for the same price differences between domestic and imported product ($\Delta P = P1 - P2$ for different values of P1 and P2) and calculate "necessary increases" of the price of the imported product (P1), allowing corresponding increases of the price of the domestic good (P2), only in order to eliminate aspects of the material injury that can be related in a linear and direct way to prices. For example, loss of profitability, lack of investment ability for product innovations, etc., compensated by a theoretical increase in the prices of the domestic good ($\Delta P2$) equal to the necessary increase in the price of the imported good ($\Delta P1$) without changes in the quantities sold of both goods G1 and G2.

Both approaches have two main weaknesses. First, they are an over-simplification of reality. However, this weakness is compensated by an advantage of simplification and predictability. A more complicated approach would require a full econometric analysis of the market concerned, would be practically impossible to

[60] An additional reason to avoid using mathematical forms of price/quantities elasticities is the fact that the form of the demand curve (function) and the form of the substitution curve (functions) are in practice almost never linear, whereas the formulas used for the final calculation of the injury threshold are always linear for obvious reasons of simplicity.

[61] See Part B, Section VI(b), *infra*.

[62] See Part B, Section VII, *infra*.

apply, would not necessarily result in a better approximation of the realities of the market and would produce highly unpredictable results.

Second, the domestic industry might decide not to follow the assumptions of the methods. Thus, for example, the domestic industry might decide not to increase its prices and try instead to gain market share by maintaining lower prices. Its gains in that case would be lower or higher than anticipated depending upon the quantities/prices elasticities involved.

In any case, from the point of view of the investigating authority, the best possible approximation of market reality is to adopt a working hypothesis as close as possible to a market equilibrium observed—before dumping started or during the investigation period.

(c) *Injury Threshold: Eliminating Future Injury, Not Compensating for Past Injury*

The anti-dumping duty itself is conceived in the Code as a way to eliminate the effect of dumping from the moment it is imposed and by no means as a way to penalize the exporter for the benefits he obtained by practising dumping during some past period. If not, an anti-dumping duty higher than the dumping margin could be justified!

In the same way, the injury threshold should aim at eliminating the injury suffered by the domestic industry but not at compensating this industry for the injury suffered since the dumping started. Thus, any method of calculation involving cumulation over a period of time of injury factors, especially on more than an annual basis, should be avoided. Some elements of time are in some cases unavoidable, e.g. when the ability of the domestic industry to invest in new products was hindered by dumping over a considerable period. In that case, eliminating injury can only mean restoring this ability. This can only be achieved on a working hypothesis involving some period in the future (one year or more). In such a case, some balance should be maintained between the future period where elimination of the injury will occur and the past period where injury occurred. (For example, it cannot be acceptable to cumulate loss of profits for several years and to calculate an injury threshold which should allow the domestic industry to recover those lost profits within one year.)

The importance of the non-cumulation of the past injury becomes even more obvious when we consider the link between injury threshold and material injury.

(d) *Injury Threshold and Material Injury*

In practice, as was established on the basis of the four previous steps, the investigator still does not know precisely which part of the material injury is due to dumping, which part is due to the commercially acceptable effect of dumped imports and which part is due to other causes.

Consequently, as soon as a calculation link is established between one of the injury factors and the injury threshold, the calculation of an injury threshold becomes

de facto a search for an answer to the question—what should be the increase in the prices of the imported goods in order to eliminate the material injury suffered by the domestic industry?

In other words, in practice, the injury threshold is calculated, in most cases, as a remedy to material injury which is evaluated as being the consequence of the dumped imports (not strictly the consequence of the price differences due to dumping) and even, depending on the specific circumstances of the case, the consequence of other factors not related to the dumped imports.

(e) *Injury Threshold and Anti-Dumping Duty*

It now becomes clear that, assuming precise and accurate calculations on both the dumping and the injury sides, the injury threshold can be, depending on the specific circumstances of the case, higher than, equal to or lower than the dumping margin.

(i) If it is higher, it means that the "injurious effect of price difference due to dumping" has caused only part of the material injury and that material injury was also caused by the commercially justified injurious effect of dumped imports or even by factors other than the dumped imports.

(ii) If the injury threshold is strictly equivalent to the dumping margin, then this should mean that the full material injury was caused only by the "injurious effect of price difference due to dumping".

(iii) On the same basis, if the injury threshold is lower than the dumping margin, it means that material injury was due only and exclusively to dumping and that it can be corrected by a price correction smaller than the dumping margin. This is the case in the quite extraordinary circumstances similar to those already discussed,[63] where the ▲P1 price difference for the imported product due to dumping has a non-linear effect on Q2, the quantities of the domestic product.[64]

This analysis implies that, in theory, if an economically sound calculation method is applied, the injury threshold should, in the majority of cases, be equal to or higher than the dumping margin.

(f) *Findings of the Sixth Step*

At the end of this step, the investigator must know which injury factors are quantifiable at a global or individual level and can be taken into consideration in the injury threshold calculation at a global or individual level.

The investigator must also know which market equilibrium he is aiming at (target market equilibrium) in his research of the injury threshold: restoring the

[63] See Part B, Section III(a), *supra*.

[64] For example, given brand fidelity maintained by the consumers for 10 percent of the price difference between domestic (G2) and imported product (G1), same starting prices P1 and P2, ▲P1 price effect of dumping of 12 percent, then an injury threshold of 2 percent would be enough to eliminate the injury caused by the dumping.

pre-dumping market equilibrium or increasing the prices on the basis of the [illegible] market equilibrium?

The finding of this step will determine whether a global or an individual [illegible] of calculation is appropriate and which one. The investigator then moves to step [illegible] to examine whether a target price calculation is appropriate.

VII. Seventh Step: Establish Target Prices

(a) *The Concept of Target Prices*

The aim of the injury threshold calculation is to establish the necessary increase [illegible] the export price in order to eliminate the injury. As already explained on several occasions, the investigator would not proceed to an analysis which would allow him to calculate precise direct elasticities between the price of the imported good and the injury factors. It is thus, in practice, very often easier to establish some links first between the injury factors and the price of the domestic goods and then between the latter price and the price of the imported goods, usually on the basis of a simplified relation as mentioned above in Part B, Section VI(a).

Thus, the concept of the target price, as the term indicates, can be defined as follows—the target price is the price that the domestic product should reach in order to have the material injury suffered by the domestic industry eliminated.

The use of target prices for the domestic product is basically justified in cases where the price of the domestic product observed on the market is lower than it would have been without dumping. For example, if the investigator decides to apply a direct undercutting method in order to restore the market prices as they should exist without dumping, the already depressed prices of the domestic product cannot be a sound basis.

However, the use of target prices can be perfectly justifiable, even if the prices are not depressed, by the need to eliminate injury, and provided that a well-justified link can be established between target price and injury factors. Such a link is usually transformed into a mark-up of the market price. All the mark-ups added together result in the calculation of the target price. For example, if the total restoration of the profitability needs a 10 percent mark-up for the same quantities sold and the ability to finance new products needs a further 7 percent mark-up, then the total target price is equal to the market price plus a 17 percent mark-up. Of course, the percentages concerned (10 percent and 17 percent) will have to be justified in an appropriate way.

Target prices are an instrument which, in principle, can take into consideration all aspects of injury, i.e. profitability, market shares, production capacity, etc. In a market economy, every strategy, notably one aiming to eliminate all aspects of material injury, can be expressed as a cost which, subsequently, can be incorporated into the construction of a target price. More particularly, if the elimination of injury means recapturing market shares, the cost of such recapturing can be estimated and incorporated into the construction of target prices. That is a much more business-like

approach than any alternative method used up until this time. In exceptional circumstances, where available information provides reliable data on the necessary price differential to recapture market shares, such differentials could be incorporated into the construction of the target prices as such.

(b) *Findings of the Seventh Step*

The investigator must decide whether a target price is appropriate. If a target price approach is adopted, the investigator will also establish what is the most appropriate method to calculate and translate the injury factors identified in the sixth step into mark-ups of the domestic price which result in the calculation of the appropriate target price for the domestic good.

VIII. Eighth Step: The Calculation of the Injury Threshold

(a) *Direct Undercutting Method*

(i) *The method*

Undercutting of the domestic industry's prices by imports which are lower-priced only because of dumping is probably the clearer case of an unfair situation created by dumping. The anti-dumping investigation should eliminate the undercutting and restore fair competition between the domestic and the imported goods. For each exporter, the dumping margin should be equal to the injury threshold equal to the anti-dumping dumping duty which will restore the market equilibrium which existed before dumping started (if imports existed already before dumping started) or a new "fair" market equilibrium (if the importer started at dumped prices).

The direct undercutting method has the advantage of simplicity. Furthermore it corresponds to a kind of common-sense understanding of dumping and its effect. This is also mainly the reason, in our opinion, that the Code attaches a lot of importance to the undercutting in its section on injury. One would be inclined to conclude that this is the best method to apply in almost the majority of anti-dumping cases. However, some further analysis demonstrates that this method has a real economic meaning only in extremely few cases.

(ii) *Conditions of application of the direct undercutting method*

The main conditions which have to be satisfied in order for this method to be applicable are:

— Physical differences between the domestic and the imported products do not exist or are perfectly eliminated through price adjustments, making the price comparison on which undercutting is established meaningful.

— Undercutting exists or existed in an identifiable way for some time in the beginning of the investigating period. Indeed, the domestic industry might have

reacted to an initial undercutting by adjusting its own prices downwards. Domestic prices can be lower (depressed) than they would have been without dumping. Thus the undercutting observed on the market place can be lower or non-existent. Calculating, under such conditions, an injury threshold on the basis of the observable undercutting would not be enough to remove the injury caused by dumping. One possible solution can be the calculation of a target price for the domestic product as mentioned above. If a target price is established for the domestic product, the injury threshold for each exporter is equal to the difference between the target price of the domestic product and the market (dumped) price of the imported product.

— The market is a mass market with "normal" competitive conditions[65] where the choice of the consumer is not influenced by any factor other than the physical aspects of the product and its price. Particular attention should be paid to that aspect. If the domestic product is, for example, exactly identical to the imported one, but the domestic product clearly has a better brand image/value, then putting the two products at the same price (as does this method) is, in fact, pushing the weaker brand out of the market.

Even if the above conditions are satisfied, at least one additional aspect needs consideration before a direct undercutting method is applied. Implicitly, the application of the direct undercutting method assures that, as far as the injury threshold calculation is concerned, the domestic and the imported products should be sold at the same price (with the adjustment of physical differences) under normal competitive conditions, as mentioned above. However, what happens when price differences are due to differences in industrial competitiveness? We can consider briefly two cases:

— The exporting industry is more efficient than the domestic industry. The efficiency is also reflected in the level of prices in the foreign companies' domestic market. Thus, the price of the imported product should be lower than the price of the domestic product even in the absence of dumping. In that case, the rules of the lesser duty will mean that the anti-dumping duty will be established at the level of the dumping margin, thus the calculation of a higher injury threshold is not unfair to the exporting companies.

— The domestic industry is more efficient and the difference in level of efficiency is also reflected in the level of prices of the two markets concerned. Thus, in the absence of dumping, the imported products should be sold at higher prices than the domestic products. The application of a direct undercutting method in that case would result in an injury threshold, lower than the dumping duty, which would result in an anti-dumping duty lower than the necessary amount to eliminate all the injury caused by dumping. In that case, it can be argued that the direct undercutting method becomes unfair to the domestic industry, thus it should be dropped and

[65] As defined under Part B, Section III *supra*.

another calculation method should be chosen. The investigating authority should use its discretion margins in an appropriate way on a case-by-case basis. In accordance with the letter and the spirit of the Code, some amount of dumping and even injury can be accepted, provided that the injury concerned does not reach the benchmark of the material injury.[66] Thus, the direct undercutting method should not be rejected on those grounds unless it is clearly established that the resulting anti-dumping duty will not be sufficient to remove the material injury suffered by the domestic industry.

(b) *"By-Segment Injury Allocation" Method*

(i) *The method*

This method, applied by the European Commission services in the *Compact Disc Players (CDP)* case,[67] has two important innovations compared with the direct undercutting method described above.

First, it is much more based on the assumption, also developed above,[68] that the observable market equilibrium is an acceptable starting point on which it can be assumed that the same price difference between domestic and imported price will preserve the same market equilibrium as far as quantities are concerned. Thus the correction of the material injury is achieved by an upward correction of the prices, irrespective of whether the prices of the imported goods are lower or higher than the prices of the domestic goods.

In other words, if a target price is established at a level, for example, 10 percent higher than the market price of the domestic good, then this 10 percent increase is also applied on the imported product and becomes the injury threshold for the product concerned, irrespective of the level, lower or higher, of the observable market price of the imported good.

A second important difference with the by-segment injury allocation method is, as its name indicates, that groups of products which are similar enough from the physical point of view to be considered in direct competition are established (alternatively, segments of the market are identified) including imported and domestic models/products, and the method is applied as such on each one of these groups/segments separately.

The injury threshold for each exporter is equal to a weighted average of the price increases established for each group of products/segments on the basis of the necessary increase of each domestic model/product.

(ii) *Conditions of application and comments*

This approach is particularly relevant in cases where:

[66] See Part B, Section I(a), *supra*.
[67] *Compact disc players from Japan, Korea*, O. J. L 205/5 (1989) (provisional), O. J. L 13/21 (1990) (definitive).
[68] See Part B, Section VI(b).

— The dumping has taken place already for long periods (longer than the investigation period), thus it is impossible to evaluate what is the magnitude of the depression of prices, who initiated it and what the market equilibrium was before dumping started.
— There is a strong influence of "brand fidelity" in the consumer's behaviour. Indeed it is relatively easy to quantify, and adjust accordingly, physical differences of the domestic and the imported product. It is much more difficult to evaluate in price terms the brand fidelity of the consumers. It becomes safer, on the basis of the principle of the lesser possible intervention in the market, to work on the observable market equilibrium rather than trying to create a completely new one, based on the equal prices of the two goods concerned (result of the direct undercutting method).
— There are strong and identifiable product groups/market segments. Indeed, a segment-by-segment approach should allow the achievement of much more accurate results than a global method ignoring these segments. The establishment of distinct market segments should be based on physical differences and also on price considerations. For example, when the group of models in direct competition is established, a price difference limit should be introduced. Models sold at, for example, twice the (target) price of the European model should not be considered in direct competition (even if there is sufficient physical resemblance) and the injury caused by them should be considered nil. This price difference should be decided case-by-case on the basis of at least two elements: the accuracy of the physical comparison (which, by definition, is not perfect); and the importance of brand names and fidelity in the consumer's choice for the product concerned.

If it is impossible to distinguish market segments/groups of products in direct competition because all models are very comparable or only one product exists (minerals, etc.) then the global allocation of injury method should be applied which, in fact, is the normal prolongation of the by-segment injury allocation method.

(c) *Global Allocation of Injury*

(i) *The method*

A target price is established for the European products. The injury threshold for each exporter is equal to the average difference between the target price and the market price of the European products (necessary increase). Thus, the injury threshold is identical for all exporters concerned.

(ii) *Conditions of application and comments*

This method should be applied in cases where conditions for applying method (a)—undercutting[69]—are not fulfilled, and conditions for applying method (b)—the

[69] Particularly the first two conditions mentioned in Part B, Section VIII(a)(ii), *supra*.

method used in the *CDP* case—prevail, and where it is impossible to distinguish market segments/groups of models in direct competition.

(d) *Uniformity of the Above Methods*

(i) *Global allocation of injury and individual justice*

All methods used up until now in practice by investigating authorities in order to calculate the individual injury thresholds incorporate a stage of global allocation of injury to individual exporters. This global allocation step is also incorporated, in different forms, in all methods developed in this article.

When a direct undercutting method is applied, it is assumed implicitly that all injury is caused by the undercutting and that every European currency unit (Ecu) of undercutting has caused the same amount of injury. In fact, this is a global allocation of injury in the sense that no attempt was developed to establish individual elasticities for prices/quantities nor to distinguish between commercially acceptable injury and injury due to dumping. However, in the very exceptional and rather theoretical circumstances where every Ecu of undercutting does indeed cause the same amount of injury, the direct undercutting method is the only method which can provide individual justice without a global allocation step.

In the "CDP methodology", there is a global allocation at the level of individual segments or groups of models in direct competition when it is assumed that all the prices in the segment have to be increased by the same amount.

(ii) *Three calculation methods, one approach for all anti-dumping cases*

There is an evident unity of approach in the three methods presented above. They are based on the same economic approach, they all use target prices and the choice of one among the three is clearly motivated by specific and transparent economic conditions. They can cover all anti-dumping cases and, if adopted, they could introduce predictability and a great amount of transparency in an area which, for the time being, lacks a great amount of both. They are widely based upon the experiences and the practices of the European Commission's anti-dumping services which have probably the most developed injury calculation methodologies of all Contracting Parties.

Conclusions

The first national anti-dumping laws were enacted at the beginning of the century. An injury prerequisite for imposition of duties started being inserted into national anti-dumping laws almost twenty years later. The League of Nations became interested in anti-dumping in the 1920s. However, the modern anti-dumping systems and their injury provisions were developed on the basis of Article VI Gatt, which

came into force on 1 January 1948, and later on the basis of the GATT Anti-Dumping Code of 1967. By then, the main concepts related to injury, i.e. material injury, domestic industry, causation and contribution to injury, etc. had been inserted into the Code.

As a result of in-depth discussions, the Code was first revised in the context of the Tokyo Round in 1979 in order to further clarify, among others, the concepts of causation, material injury, industry and regional industry. Since then, the work of experts in the GATT context has continued and several interpretations of the Code were developed, most of which were inserted into the results of the Uruguay Round. Among the main new elements of the Uruguay Round Anti-Dumping Code in the injury area are a better definition of the concept of cumulation and the introduction of *de minimis* import percentage and negligible injury concepts.

Despite these continuing improvements, the injury side of the Anti-Dumping Code remains far less developed than the dumping side. Basic injury-related concepts are not well-enough defined and the practicalities of the Contracting Parties differ greatly. The recent adoption of the Uruguay Round results will not really alter this situation.

This article proposes a method of step-by-step analysis and calculation, which, although widely based on EC experience and practices, can eb applied as a "guide to the investigators" assigned to any anti-dumping case conducted by any Contracting Party.

The guide ot the investigators can be summarized as follows (the basic concepts of each step are also defined in the text where appropriate):

Step 1 Establish that the aggregate effect of all injurious factors is material injury (definition of material and other levels of injury).

Step 2 Establish whether factors other than the dumped imports have caused the material injury (theoretical requirements and practical method).

Step 3 Establish whether dumping itself has caused or has contributed to material injury, considering that:
- it is indeed possible that dumping is not causing any injury (definition of a normal market); and
- the investigator will not, in most cases, be able to distinguish exactly between the effect of dumping and the commercially acceptable effect of the dumped imports.

Step 4 Evaluate the extent of the contribution of dumping to material injury, considering that:
- this contribution can be negligible;
- particular attention should be paid to the concept of cumulation in a wider sense than the one used in the Code—cumulation of exports originating from different countries (country cumulation) but also cumulation of exports of individual exporters from the same country (producer cumulation) and cumulation of injury due to other causes with the injury due to dumped imports.

Step 5 Establish through a step of global allocation of the injury the contribution of the individual exporter to injury, considering that this contribution can be non-existent or negligible even if globally there is a material injury caused by dumping.

Step 6 Identify the injury factors to be considered in the injury threshold calculation on the basis of well-defined concepts concerning:
— economic meaning of injury threshold;
— target market equilibrium;
— elimination of future injury and compensation of past injury; and
— relations between injury threshold, on the one hand, and material injury and level of anti-dumping duty, on the other hand.

Step 7 Establish target prices, if appropriate, for the domestic goods on the basis of the injury factors identified under Step 6.

Step 8 Choose the most appropriate of the three calculation methods: direct undercutting method, by-segment injury allocation and global allocation of injury. These three methods can cover practically all anti-dumping proceedings, they are based on the same economic approach and the choice of one or the other can be motivated by clear and transparent conditions, thus ensuring predictability.

International trade negotiations are certainly a never-ending process. Despite progress at each step, there is always a challenge ahead. In the case of the injury side of the Anti-Dumping Code, the aim cannot only be to respect the existing provisions of the Code. A wide margin of interpretation still exists and transparency and predictability of the national practices are far from guaranteed. It thus becomes urgent that a significant effort is developed jointly and/or in parallel, by the anti-dumping authorities of the Contracting Parties which are the main anti-dumping users, in order to look well beyond the results of the Uruguay Round.

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