

What is Dumping

Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases it is necessary to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (known as the “normal value”) and the appropriate price in the market of the importing country (known as the “export price”) so as to be able to undertake an appropriate comparison.

Article VI of GATT and the Anti-Dumping Agreement

The GATT 1994 sets forth a number of basic principles applicable in trade between Members of the WTO, including the “most favoured nation” principle. It also requires that imported products not be subject to internal taxes or other changes in excess of those imposed on domestic goods, and that imported goods in other respects be accorded treatment no less favourable than domestic goods under domestic laws and regulations, and establishes rules regarding quantitative restrictions, fees and formalities related to importation, and customs valuation. Members of the WTO also agreed to the establishment of schedules of bound tariff rates. Article VI of GATT 1994, on the other hand, explicitly authorizes the imposition of a specific anti-dumping duty on imports from a particular source, in excess of bound rates, in cases where dumping causes or threatens injury to a domestic industry, or materially retards the establishment of a domestic industry.

The Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, provides further elaboration on the basic principles set forth in Article VI itself, to govern the investigation, determination, and application, of anti-dumping duties.

Previous Agreements

As tariff rates were lowered over time following the original GATT agreement, anti-dumping duties were increasingly imposed, and the inadequacy of Article VI to govern their imposition became ever more apparent. For instance, Article VI requires a determination of material injury, but does not contain any guidance as to criteria for determining whether such injury exists, and addresses the methodology for establishing the existence of dumping in only the most general fashion. Consequently, contracting parties to GATT negotiated more detailed Codes relating to anti-dumping. The first such Code, the Agreement on Anti-Dumping Practices, entered into force in 1967 as a result of the Kennedy Round. However, the United States never signed the Kennedy Round Code, and as a result the Code had little practical significance.

The Tokyo Round Code, which entered into force in 1980, represented a quantum leap forward. Substantively, it provided enormously more guidance about the determination of dumping and of injury than did Article VI. Equally important, it set out in substantial detail certain procedural and due process requirements that must be fulfilled in the conduct of investigations. Nevertheless, the

Code still represented no more than a general framework for countries to follow in conducting investigations and imposing duties. It was also marked by ambiguities on numerous controversial points, and was limited by the fact that only the 27 Parties to the Code were bound by its requirements.

Basic principles

Dumping is defined in the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement) as the introduction of a product into the commerce of another country at less than its normal value. Under Article VI of GATT 1994, and the Anti-Dumping Agreement, WTO Members can impose anti-dumping measures, if, after investigation in accordance with the Agreement, a determination is made (a) that dumping is occurring, (b) that the domestic industry producing the like product in the importing country is suffering material injury, and (c) that there is a causal link between the two. In addition to substantive rules governing the determination of dumping, injury, and causal link, the Agreement sets forth detailed procedural rules for the initiation and conduct of investigations, the imposition of measures, and the duration and review of measures.

Committee on Anti-Dumping Practices

The Committee, which meets at least twice a year, provides Members of the WTO the opportunity to discuss any matters relating to the Anti-Dumping Agreement (Article 16). The Committee has undertaken the review of national legislations notified to the WTO. This offers the opportunity to raise questions concerning the operation of national anti-dumping laws and regulations, and also questions concerning the consistency of national practice with the Anti-Dumping Agreement. The Committee also reviews notifications of anti-dumping actions taken by Members, providing the opportunity to discuss issues raised regarding particular cases.

The Committee has created a separate body, the Ad Hoc Group on Implementation, which is open to all Members of the WTO, and which is expected to focus on technical issues of implementation: that is, the “how to” questions that frequently arise in the administration of anti-dumping laws.

Dispute settlement

Disputes in the anti-dumping area are subject to binding dispute settlement before the Dispute Settlement Body of the WTO, in accordance with the provisions of the Dispute Settlement Understanding (“DSU”) (Article 17). Members may challenge the imposition of anti-dumping measures, in some cases may challenge the imposition of preliminary anti-dumping measures, and can raise all issues of compliance with the requirements of the Agreement, before a panel established under the DSU. In disputes under the Anti-Dumping Agreement, a special standard of review is applicable to a panel's review of the determination of the national authorities imposing the measure. The standard provides for a certain amount of deference to national authorities in their establishment of facts and interpretation of law, and is intended to prevent dispute settlement panels from making decisions based purely on their own views. The standard of review is only for anti-dumping disputes, and a Ministerial Decision provides that it shall be

reviewed after three years to determine whether it is capable of general application.

Notifications

All WTO Members are required to bring their anti-dumping legislation into conformity with the Anti-Dumping Agreement, and to notify that legislation to the Committee on Anti-Dumping Practices. While the Committee does not “approve” or “disapprove” any Members' legislation, the legislations are reviewed in the Committee, with questions posed by Members, and discussions about the consistency of a particular Member's implementation in national legislation of the requirements of the Agreement.

In addition, Members are required to notify the Committee twice a year about all anti-dumping investigations, measures, and actions taken. The Committee has adopted a standard format for these notifications, which are subject to review in the Committee.

Finally, Members are required to promptly notify the Committee of preliminary and final anti-dumping actions taken, including in their notification certain minimum information required by Guidelines agreed to by the Committee. These notifications are also subject to review in the Committee.

Determination of dumping

Determination of normal value

General rule

The normal value is generally the price of the product at issue, in the ordinary course of trade, when destined for consumption in the exporting country market. In certain circumstances, for example when there are no sales in the domestic market, it may not be possible to determine normal value on this basis. The Agreement provides alternative methods for the determination of normal value in such cases.

Sales in the ordinary course of trade

One of the most complicated questions in anti-dumping investigations is the determination whether sales in the exporting country market are made in the “ordinary course of trade” or not. One of the bases on which countries may determine that sales are not made in the ordinary course of trade is if sales in the domestic market of the exporter are made below cost. The Agreement defines the specific circumstances in which home market sales at prices below the cost of production may be considered as not made in the ordinary course of trade", and thus may be disregarded in the determination of normal value (Article 2). Those sales must be made at prices that are below per unit fixed and variable costs plus administrative, selling and general costs, they must be made within an extended period of time (normally one year, but in no case less than six

months), and they must be made in substantial quantities. Sales are made in substantial quantities when (a) the weighted average selling price is below the weighted average cost; or (b) 20% of the sales by volume were below cost. Finally, sales made below costs may only be disregarded in the determination of normal value where they do not allow for recovery of costs within a reasonable period of time. If sales are below cost when made but are above the weighted average cost over the period of the investigation, the Agreement provides that they allow for recovery of costs within a reasonable period of time.

Insufficient volume of sales

If there are sales below cost that meet the criteria set out in the Agreement, they can simply be ignored in the calculation of normal value, and normal value will be determined based on the remaining sales. However, exclusion of these below-cost sales may result in a level of sales insufficient to determine normal value based on home market prices. It is obvious that, in the case where there are no sales in the exporting country of the product under investigation, it is not possible to base normal value on such sales, and the Agreement recognizes this. However, it is also possible that, while there are some sales in the exporting country's market, the level of such sales is so low that its significance is questionable. Thus, the Agreement recognizes that in some cases sales in the home market may be so low in volume that they do not permit a proper comparison of home market and export prices. It provides that the level of home market sales is sufficient if home market sales constitute 5 per cent or more of the export sales in the country conducting the investigation, provided that a lower ratio "should" be accepted if the volume of domestic sales nevertheless is "of sufficient magnitude" to provide for a fair comparison.

Alternative bases for calculating normal value

Two alternatives are provided for the determination of normal value if sales in the exporting country market are not an appropriate basis. These are (a) the price at which the product is sold to a third country; and (b) the "constructed value" of the product, which is calculated on the basis of the cost of production, plus selling, general, and administrative expenses, and profits. The Agreement contains detailed and specific rules for the determination of a constructed value, governing the information to be used in determining the amounts for costs, expenses, and profits, the allocation of these elements of constructed value to the specific product in question, and adjustments for particular situations such as start-up costs and non-recurring cost items.

Constructed normal value

The determination of normal value based on cost of production, selling, general and administrative expenses, and profits is referred to as the "constructed normal value" The rules for determining whether sales are made below cost also apply to performing a constructed normal value calculation. The principal difference is the inclusion of a "reasonable amount for profits" in the constructed value.

Third country price as normal value

The other alternative method for determining normal value is to look at the comparable price of the like product when exported to an appropriate third country, provided that price is representative. The Agreement does not specify any criteria for determining what third country is appropriate.

Indirect exports

In the situation where products are not imported directly from the country of manufacture, but are exported from an intermediate country, the Agreement provides that the normal value shall be determined on the basis of sales in the market of the exporting country. However, the Agreement recognizes that this may result in an inappropriate or impossible comparison, for instance if the product is not produced in the exporting country, there is no comparable price for the product in the exporting country, or the product is merely transshipped through the exporting country. In such cases, the normal value may be determined on the basis of the price of the product in the country of origin, and not the price in the exporting country.

Non-market economies

In the particular situation of economies where the government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, GATT 1994 and the Agreement recognize that a strict comparison with home market prices may not be appropriate. Importing countries have thus exercised significant discretion in the calculation of normal value of products exported from non-market economies.

Determination of export price

General rule

The export price will normally be based on the transaction price at which the foreign producer sells the product to an importer in the importing country. However, as is the case with normal value, the Agreement recognizes that this transaction price may not be appropriate for purposes of comparison.

Exceptions

There may be no export price for a given product, for instance, if the export transaction is an internal transfer, or if the product is exchanged in a barter transaction. In addition, the transaction price at which the exporter sells the product to the importing country may be unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party. In such a case, the transaction price may not be an arms-length market price, but may be manipulated, for instance for tax purposes. The Agreement recognizes that, in such cases, an alternative method of determining an appropriate export price for comparison is needed.

Alternative method of calculation

The Agreement provides that in circumstances where there is no export price, or where the export price is unreliable due to an association or compensatory arrangement between the exporter and

the importer or a third party, an alternative method may be used to determine the export price. This results in a “constructed export price”, and is calculated on the basis of the price at which the imported products are first resold in an independent buyer. If the imported product is not resold to an independent buyer, or is not resold as imported, the authorities may determine a reasonable basis on which to calculate the export price.

Fair comparison of normal value and export price

Basic requirements

The Agreement requires that a fair comparison of the export price and the normal value be made. The basic requirements for a fair comparison are that the prices being compared are those of sales made at the same level of trade, normally the ex-factory level, and of sales made as nearly as possible the same time.

As part of the Agreement's requirements regarding transparency and participation, the investigating authorities are required to inform parties of the information needed to ensure a fair comparison, for instance, information regarding adjustments, allowances, and currency conversion, and may not impose an “unreasonable burden of proof” on parties.

Allowance

To ensure that prices are comparable, the Agreement requires that adjustments be made to either the normal value, or the export price, or both, to account for differences in the product, or in the circumstances of sale, in the importing and exporting markets. These allowances must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other differences demonstrated to affect price comparability.

Adjustments in case of constructed export price

The Agreement also provides specific rules on the adjustment to be made if the comparison of normal value is to a constructed export price. In those circumstances, allowance must be made for costs, including duties and taxes, incurred between the importation of the product and the resale to the first independent purchaser, as well as for profits accruing. If price comparability has been affected, the Agreement requires either that the normal value be established at a level of trade equivalent to that of the constructed export price, which is likely to require an adjustment, or allowance must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other matters demonstrated to affect price comparability.

Conversion of currency

Where the comparison of normal value and export price requires conversion of currency, the Agreement provides specific rules governing that conversion (Article 2.4.1). Thus, the exchange rate used should be that in effect on the date of sale (date of contract, invoice, purchase order or order confirmation, whichever establishes material terms of sale). If a forward currency sale is directly linked to export sale, the exchange rate of forward currency sale must be used. Moreover,

the Agreement requires that exchange rate fluctuations be ignored, and that exporters be allowed at least 60 days to adjust export prices for sustained exchange rate movements.

Calculation of dumping margins and duty assessment

Calculation of dumping margins

The Agreement contains rules governing the calculation of dumping margins. In the usual case, the Agreement requires either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a transaction-to-transaction comparison of normal value and export price (Article 2.4.2). A different basis of comparison can be used if there is “targeted dumping”: that is, if a pattern exists of export prices differing significantly among different purchasers, regions or time periods. In this situation, if the investigating authorities provide an explanation as to why such differences cannot be taken into account in weighted average-to-weighted average or transaction-to-transaction comparisons, the weighted average normal value can be compared to the export prices on individual transactions.

Refund or reimbursement

The Agreement requires Members to collect duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except with respect to sources from which a price undertaking has been accepted. Moreover, the amount of the duty collected may not exceed the dumping margin, although it may be a lesser amount. The Agreement specifies two mechanisms to ensure that excessive duties are not collected. The choice of mechanism depends on the nature of the duty collection process. If a Member allows importation and collects an estimated anti-dumping duty, and only later calculates the specific amount of anti-dumping duty to be paid, the Agreement requires that the final determination of the amount must take place as soon as possible, upon request for a final assessment. In both cases, the Agreement provides that the final decision of the authorities must normally be made within 12 months of a request for refund or final assessment, and that any refund should be made within 90 days.

Individual exporter dumping margins

The Agreement requires that, when anti-dumping duties are imposed, a dumping margin be calculated for each exporter. However, it is recognized that this may not be possible in all cases, and thus the Agreement allows investigating authorities to limit the number of exporters, importers, or products individually considered, and impose an anti-dumping duty on uninvestigated sources on the basis of the weighted average dumping margin actually established for the exporters or producers actually examined. The investigating authorities are precluded from including in the calculation of that weighted average dumping margin any dumping margins that are de minimis, zero, or based on the facts available rather than a full investigation, and must calculate an individual margin for any exporter or producer who provides the necessary information during the course of the investigation.

New shippers

The Agreement makes provision for the assessment of anti-dumping duties on exports from producers or exporters who were not sources of imports considered during the period of investigation. In this circumstance, the investigating authorities are required to conduct an expedited review to determine a specific margin of dumping attributable to the exports of such a “new shipper”. While that review is in progress, the authorities may request guarantees or withhold appraisement on imports, but may not actually collect anti-dumping duties on those imports.

Determination of injury and casual link

Like product

Definition (Article 2.6)

An important decision must be made early in each investigation to determine the domestic “like product”. Like product is defined in the Agreement as “a product which is identical, i.e. alike in all respects to the product under consideration or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration”. The determination involves first examining the imported product or products that are alleged to be dumped, and then establishing what domestically produced product or products are the appropriate “like product”. The decision regarding the like product is important because it is the basis of determining which companies constitute the domestic industry, and that determination in turn governs the scope of the investigation and determination of injury and causal link.

Domestic industry

Definition (Article 4)

The Agreement defines the term “domestic industry” to mean “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”.

Related domestic producers

The Agreement recognizes that in certain circumstances, it may not be appropriate to include all producers of the like product in the domestic industry. Thus, Members are permitted to exclude from the domestic industry producers related to the exporters or importers under investigation, and producers who are themselves importers of the allegedly dumped product. The Agreement provides that a producer can be deemed “related” to an exporter or importer of the allegedly dumped product if there is a relationship of control between them, and if there is reason to believe that the relationship causes the domestic producer to behave differently from non-related producers.

Regional domestic industry

The Agreement contains special rules that allow in exceptional circumstances, consideration of injury to producers comprising a “regional industry”. A regional industry may be found to exist in a separate competitive market if producers within that market sell all or almost all of their production of the like product in that market, and demand for the like product in that market is not to any substantial degree supplied by producers of the like product located outside that market. If this is the case, investigating authorities may find that injury exists, even if a major proportion of the entire domestic industry, including producers outside the region, is not materially injured. However, a finding of injury to the regional industry is only allowed if (1) there is a concentration of dumped imports into the market served by the regional industry, and (2) dumped imports are causing injury to the producers of all or almost all of the production within that market.

Imposition of duties in regional industry cases

If an affirmative determination is based on injury to a regional industry, the Agreement requires investigating authorities to limit the duties to products consigned for final consumption in the region in question, if constitutionally possible. If the Constitutional law of a Member precludes the collection of duties on imports to the region, the investigating authorities may levy duties on all imports of the product, without limitation, if anti-dumping duties cannot be limited to the imports from specific producers supplying the region. However, before imposing those duties, the investigating authorities must offer exporters an opportunity to cease dumping in the region or enter a price undertaking.

Injury

Types of injury

The Agreement provides that, in order to impose anti-dumping measures, the investigating authorities of the importing Member must make a determination of injury. The Agreement defines the term “injury” to mean either (i) material injury to a domestic industry, (ii) threat of material injury to a domestic industry, or (iii) material retardation of the establishment of a domestic industry, but is silent on the evaluation of material retardation of the establishment of a domestic industry.

Basic requirements for determination of material injury

The Agreement does not define the notion of “material”. However, it does require that a determination of injury must be based on positive evidence and involve an objective examination of (i) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of the dumped imports on domestic producers of the like product. Article 3 contains some specific additional factors to be considered in the evaluation of these two basic elements, but does not provide detailed guidance

on how these factors are to be evaluated or weighed, or on how the determination of causal link is to be made.

Basic requirements for determination of threat of material injury

The Agreement sets forth factors to be considered in the evaluation of threat of material injury. These include the rate of increase of dumped imports, the capacity of the exporter(s), the likely effects of prices of dumped imports, and inventories. There is no further elaboration on these factors, or on how they are to be evaluated. The Agreement does, however, specify that a determination of threat of material injury shall be based on facts, and not merely on allegation, conjecture, or remote possibility, and moreover, that the change in circumstances which would create a situation where dumped imports caused material injury must be clearly foreseen and imminent.

Elements of analysis

Consideration of volume effects of dumped imports

The Agreement requires investigating authorities to consider whether there has been a significant increase in the dumped imports, either in absolute terms or relative to production or consumption in the domestic industry. Consideration of price effects of dumped imports

Consideration of price effects of dumped imports

In addition, the Agreement requires investigating authorities to consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member. Investigating authorities are also required to consider whether the effect of dumped imports is “otherwise” to depress prices to a significant degree, or to prevent price increases, which otherwise would have occurred, to a significant degree.

Evaluation of volume and price effects of dumped imports

The Agreement provides that no one or several of these factors can necessarily give decisive guidance. It does not specify how the investigating authorities are to evaluate the volume and price effects of dumped imports: merely that consideration of these effects is required. Thus, investigating authorities have to develop analytical methods for undertaking the consideration of these factors. Moreover, since no single factor or combination of factors will necessarily result in either an affirmative or negative determination, in each case investigating authorities have to evaluate which factors are relevant, and which are important, in light of the circumstances of the particular case at issue.

Examination of impact of dumped imports on the domestic industry

The Agreement provides that, in examining the impact of dumped imports on the domestic industry, the authorities are to evaluate all relevant economic factors bearing upon the state of the domestic industry. The Agreement lists a number of factors which must be considered, including actual or potential declines in sales, profits, output, market share, productivity, return on investments, utilization of capacity, actual or potential effects on cash flow, inventories,

employment, wages, growth, ability to raise capital or investments, and the magnitude of the margin of dumping. However, the list is not exhaustive, and other factors may be deemed relevant. In addition, the Agreement again specifies that no single factor or combination of factors will necessarily lead to either an affirmative or negative determination.

Demonstration of causal link

The Agreement requires a demonstration that there is a causal relationship between the dumped imports and the injury to the domestic industry. This demonstration must be based on an examination of all relevant evidence. The Agreement does not specify particular factors or give guidance in how relevant evidence is to be evaluated. Article 3.5 does require, however, that known factors other than dumped imports which may be causing injury must be examined, gives examples of factors (such as changes in the pattern of demand, and developments in technology) which may be relevant, and specifies that injury caused by such “other factors” must not be attributed to dumped imports. Thus, the investigating authorities must develop analytical methods for determining what evidence is or may be relevant in a particular case, and for evaluating that evidence, taking account of other factors which may be causing injury.

Cumulative analysis

Cumulative analysis refers to the consideration of dumped imports from more than one country on a combined basis in assessing whether dumped imports cause injury to the domestic industry. Obviously, since such analysis will increase the volume of imports whose impact is being considered, there is a greater possibility of an affirmative determination in a case involving cumulative analysis. The practice of cumulative analysis was the subject of much controversy under the Tokyo Round Code, and in the negotiations for the Agreement. Article 3.3 of the Agreement establishes the conditions in which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. The authorities must determine that the margin of dumping from each country is not de minimis, that the volume of imports from each country is not negligible, and that a cumulative assessment is appropriate in light of the conditions of competition among the imports and between the imports and the domestic like product. De minimis dumping margins and negligible import volumes are defined in the Agreement.

Procedural requirements

Investigation

Initiation

Agreement Article 5 of the Agreement establishes the requirements for the initiation of investigations. The Agreement specifies that investigations should generally be initiated on the basis of written request submitted “by or on behalf of” a domestic industry. This “standing” requirement includes numerical limits for determining whether there is sufficient support by domestic producers to conclude that the request is made by or on behalf of the domestic industry, and thereby warrants initiation. The Agreement establishes requirements for evidence of

dumping, injury, and causality, as well as other information regarding the product, industry, importers, exporters, and other matters, in written applications for anti-dumping relief, and specifies that, in special circumstances when authorities initiate without a written application from a domestic industry, they shall proceed only if they have sufficient evidence of dumping, injury, and causality. In order to ensure that investigations without merit are not continued, potentially disrupting legitimate trade, Article 5.8 provides for immediate termination of investigations in the event the volume of imports is negligible or the margin of dumping is de minimis, and establishes numeric thresholds for these determinations. In order to minimize the trade-disruptive effect of investigations, Article 5.10 specifies that investigations should be completed within one year, and in no case more than 18 months, after initiation.

Conduct

Article 6 of the Agreement sets forth detailed rules on the process of investigation, including the collection of evidence and the use of sampling techniques. It requires authorities to guarantee the confidentiality of sensitive information and verify the information on which determinations are based. In addition, to ensure the transparency of proceedings, authorities are required to disclose the information on which determinations are to be based to interested parties and provide them with adequate opportunity to comment. The Agreement establishes the rights of parties to participate in the investigation, including the right to meet with parties with adverse interests, for instance in a public hearing. Further guidance on the conduct of investigations is contained in two Annexes to the Agreement, which set forth rules for the on-the-spot investigations to verify information obtained from foreign parties, as well as rules for the use of best information available in the event a party refuses access to, or does not provide, requested information, or significantly impedes the investigation.

Provisional measures and price undertakings

Imposition of provisional measures

Article 7 of the Agreement provides rules relating to the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping. The Agreement also contains time limits for the imposition of provisional measures—generally four months, with a possible extension to six months at the request of exporters. If a Member, in its administration of anti-dumping duties, imposes duties lower than the margin of dumping when these are sufficient to remove injury, the period of provisional measures is generally six months, with a possible extension to nine months at the request of exporters.

Price undertakings

Article 8 of the Agreement contains rules on the offering and acceptance of price undertakings, in lieu of the imposition of anti-dumping duties. It establishes the principle that undertakings between any exporter and the importing Member, to revise prices, or cease exports at dumped prices, may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury and causality has been made. It also establishes that undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the investigation be continued after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.

Collection of duties

Imposition and collection of duties

Article 9 of the Agreement establishes the general principle that imposition of anti-dumping duties is optional, even if all the requirements for imposition have been met. It also states the desirability of application of a “lesser duty” rule. Under a lesser duty rule, authorities impose duties at a level lower than the margin of dumping if this level is adequate to remove injury. In addition, the Agreement contains rules intended to ensure that duties in excess of the dumping margin are not collected, and rules for applying duties to new shippers.

Retroactive application of duties

The Agreement sets forth the general principle that both provisional and final anti-dumping duties may be applied only as of the date on which the determinations of dumping, injury and causality have been made. However, recognizing that injury may have occurred during the period of investigation, or that exporters may have taken actions to avoid the imposition of an anti-dumping duty, Article 10 contains rules for the retroactive imposition of dumping duties in specified circumstances. If the imposition of anti-dumping duties is based on a finding of material injury, as opposed to threat of material injury or material retardation of the establishment of a domestic industry, anti-dumping duties may be collected as of the date provisional measures were imposed. If provisional duties were collected in an amount greater than the amount of the final duty, or if the imposition of duties is based on a finding of threat of material injury or material retardation, a refund of provisional duties is required. Article 10.6 provides for retroactive application of final duties to a date not more than 90 days prior to the application of provisional measures in certain exceptional circumstances involving a history of dumping, massive dumped imports, and potential undermining of the remedial effects of the final duty.

Review and public notice

Duration, termination, and review of anti-dumping measures

Article 11 of the Agreement establishes rules for the duration of anti-dumping duties, and requirements for periodic review of the continuing need, if any, for the imposition of anti-dumping duties or price undertakings. These requirements respond to the concern raised by the

practice of some countries of leaving anti-dumping duties in place indefinitely. The “sunset” requirement establishes that dumping duties shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This five year “sunset” provision also applies to price undertakings. The Agreement requires authorities to review the need for the continued imposition of a duty upon request of an interested party.

Public notice

Article 12 sets forth detailed requirements for public notice by investigating authorities of the initiation of investigations, preliminary and final determinations, and undertakings. The public notice must disclose non-confidential information concerning the parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers. These public notice requirements are intended to increase the transparency of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning.

