

# Trade Remedy Proceeding and WTO Dispute Settlement

Strategic and Substantive Issues

# What WTO Dispute Settlement Can and Cannot Accomplish

- Panels and Appellate Body can only make determinations that certain “measures” taken by WTO Member are or are not in compliance with that Member’s WTO obligations.
- Panels and Appellate Body cannot and do not tell WTO Member how to bring a measure into compliance with WTO obligations – finding is whether measure is consistent with WTO obligations and recommendation, when measure is not consistent with WTO obligations, is to bring it into compliance.
- In addition, WTO dispute settlement proceedings cannot force Members to bring a particular measure into compliance; non-compliance results only in the ability of aggrieved WTO Member to withdraw concessions of equivalent value to the harm from the offending measure.

## What Can Dispute Settlement Accomplish (cont'd)

- Use of threatened withdrawal of concessions by aggrieved party can be used to pressure offending Member to eliminate the offending measure or underlying practice by targeting political sensitive sectors in the offending Member country.
- Bringing offending measure into compliance with WTO obligations is not necessarily clear cut:
  - Contrast elimination of payment of revenues of antidumping duties to petitioning parties (i.e. the only possible way of bringing measure into compliance) with ambiguities arising from “causation” determinations in escape clause panel and Appellate Body reports

## What Can Dispute Settlement Accomplish (cont'd)

- Contrast reports defining when “adverse facts available” determinations can and cannot be used in calculating “all others rate” with when it is appropriate to apply “adverse facts available.”
- Panels and the Appellate Body tend to make decisions on the narrowest possible basis, thereby restricting the impact of a particular decision (e.g. zeroing) and providing Members with the ability to use alternative approaches in bringing a measure into compliance even if the measure is subsequently found WTO inconsistent
- All of these constraints mean that many WTO disputes are incremental in nature and that several proceedings will be required before an issue is finally settled; the most famous is the dispute over the treatment of pre-privatization subsidies after privatization which is still not finally resolved after a decade.

# “As such” and “As Applied” Findings

- Can greatly affect scope and impact of a panel or Appellate Body report.
- As Such violations of WTO obligations mean that the law, regulation or practice underlying a particular measure in effect compel action which is WTO inconsistent
- As Applied violations of WTO obligations mean that the underlying law, regulation or practice could lead to measures which are WTO consistent or inconsistent

# Litigation not Diplomacy

- Distinguish between possible diplomatic aspects of dispute settlement (e.g. consultations, negotiated settlement) and litigation aspects (e.g. panel and appellate body proceedings)
- Countries which don't view these disputes as litigation to be handled by experts and send diplomats in to argue the case are at a major disadvantage in the proceedings.
- U.S., Canada, EC, Australia all have government officials, almost always lawyers, that do almost nothing but handle WTO dispute settlement proceedings; countries without such resources usually retain outside lawyers expert in WTO disputes to advise them and prepare the relevant arguments.

# Issues of Particular Interests to Vietnam

- Practices to date which have not been subject to WTO dispute settlement:
  - application by U.S. of “countrywide” adverse facts available absent demonstration of independence from government control
  - restrictions on sources of surrogate values to publicly available information and whether Article VI and Appendix II apply to determination of surrogate values
  - non-attribution of injury from other causes to imports in injury investigation (heavily litigated in escape clause cases)
  - application of anti-circumvention measures by U.S. and EC
  - overly broad imported “product” and “like” product definitions

# Issues of Particular Interest to Vietnam (cont'd)

- Litigated cases or cases under litigation:
  - zeroing
  - continuous bond



# Issues Unique to U.S. Law and Practice Not Yet Brought to WTO

- CEP Offset Cap
- Targeted dumping to avoid prohibitions on zeroing
- Choice of mandatory respondents and Limitations on the number of mandatory respondents

# Discussion of Specific WTO Reports Relevant to the Antidumping Area

- AD Cases
- Escape Clause Cases Relevant to AD Decisions
- Countervailing Duty Cases Relevant to AD Decisions

## **Anti-dumping Investigations involving Non-Market Economies and the possibility of Market Economy Treatment**

## Introduction

The EC basic Regulation provides that normal value in non-market economies be calculated on the basis of one of the following three ways:

- The price in a market economy third country (the 'analogue' or 'surrogate' (US) country);
- The constructed value in the analogue country;
- The price from the analogue country to other countries, including the Community

OR

- Any other reasonable basis

## Choice of Analogue Country

**‘An appropriate market economy third country shall be selected in a not unreasonable manner...’**

- **No specific guidance in the legislation; in practice the choice is empirical;**
- **Effort to base the choice on consensus – parties given time to comment on initial selection**

## Choice of Analogue Country

**Main selection criteria:**

- **Comparability to product concerned;**
- **Representative domestic sales**
- **Competition conditions;**
- **Cooperation of producers;**
- **Comparable access to raw materials**

## Choice of analogue country

- Many times the choice is limited by practical considerations:

**Few countries produce the product concerned;**

**Producers from candidate analogue countries do not cooperate;**

**Instances where cooperating producers gave unreliable data.**

## Choice of Analogue Country

Any other reasonable basis

On rare occasions (*Dicyandiamide from China* and *Lever Arch Mechanisms from China*), the Community itself has been used as analogue country for lack of an alternative.



## Company-specific Market Economy Treatment

- **Companies from NMEs which are WTO members may claim that they operate in market economy conditions**
- **Claims are examined and the data submitted is verified on-spot**

## Company-specific MET

- **For companies granted MET, dumping margins reflect economic behaviour;**
- **Normal value and export price is based on the data of the company;**
- **If the MET claim is rejected, the company may either request ‘individual treatment’ or be subject to the country-wide duty.**

## Company-specific MET

- Companies claiming MET must show that they satisfy 5 criteria:
  1. Decisions regarding costs and inputs are made in response to market signals and free from State interference;
  2. One clear set of accounting records, independently audited in line with IAS

## Company-specific MET

3. Production costs and financial situation not subject to significant distortions carried over from the NME system;
4. Adequate bankruptcy and property laws;
5. Exchange rate conversions are carried out at market rates

## Company-Specific MET

- Examples:
  - *Criterion 1:* Sales restrictions, obligation to buy inputs domestically, State interference in recruitment decisions, disproportionate influence of State in company decisions
  - *Criterion 2:* no proper audit, disregard of major accounting principles, e.g., accruals

## Company-Specific MET

- *Criterion 3: assets transferred by the State below market value, cheap loans by the State.*
- *Criterion 4: de facto bankrupt company continuing operations*
- *Criterion 5: Conversions not at actual exchange rate on transaction date*

## Individual Treatment (IT)

- **Individual dumping margin based on own export prices with normal value from analogue country**
- **Company must prove that it satisfies the five criteria set out in Article 9(5) Basic Regulation**

## Individual Treatment

1. Free to repatriate capital, if foreign-owned company;
2. Export prices and quantities and conditions of sale freely determined;
3. Majority of shares privately owned. If State officials involved, either (i) clear minority or (ii) demonstration of sufficient independence from State interference;
4. Currency conversions at market rates;
5. No State interference permitting circumvention.





# External Trade

## ANTI-CIRCUMVENTION

## What is circumvention?

**‘[A] change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty and where there is evidence of injury or that the remedial effects of the duty are being undermined and...there is evidence of dumping in relation to the normal values previously established for the like product...’**

**Council Regulation (EC) No384/96, Article 13**

## The problem of anti-circumvention

Anti-circumvention was part of the Uruguay Round, but members were unable to agree on a text

WTO Decision on Anti-Circumvention *adopted by the Trade Negotiations Committee on 15<sup>th</sup> December 1993.*

## The problem of anti-circumvention

The issue was referred to the Committee on Anti-Dumping Practices for resolution; it has now been debated there for over 10 years.

Some Members believe that the fact that no anti-circumvention provision exists in the ADA does not mean that Members cannot apply such provisions; others disagree and claim that anti-dumping measures can only be imposed in accordance with the GATT 1994 and the ADA.

## WTO Members' Views

### Arguments against implementation:

- Mere product modifications are not circumvention; any such issues should be dealt with within the scope of the product concerned;
- The true origin of goods subject to an AD investigation should be solved through customs cooperation, not through anti-circumvention investigation;
- Claims of possible circumvention should be treated as distinct dumping cases and a new investigation should be initiated

## WTO Members' Views

### Arguments for implementation:

- The absence of rules allows Members to implement measures more broadly than necessary and without obeying the rules of procedural fairness set out in the ADA
- If anti-dumping measures are considered to be a valid defensive mechanism against unfair trade practices, then reasonable measures to preserve their integrity should be implemented.

## EC Legislation and Practice

### Necessary elements:

- **change in the pattern of trade**
- **insufficient due cause or economic justification other than the imposition of the duty**
- **evidence of injury or that the remedial effects of the duty are being undermined**
- **evidence of dumping**

## EC Legislation and Practice

- Change in the pattern of trade:

**Increased imports of the product from a third country; increased imports of part of the product – evidence of a clear and consistent trend of substitution**

**Alterations to the product, ‘slight modification’ in order to avoid the AD measures**



## EC Legislation and Practice

- Insufficient due cause or economic justification:

**Are there any quantifiable benefits existing for importers to economically justify the change in the pattern of trade?**

**Weight will be given to the fact that the change occurred only after AD measures were imposed**

## EC Legislation and Practice

- Evidence of Injury and Dumping

There must be evidence of undermining the remedial effect of the duty in terms of either quantities or prices

Imports from the third country must be dumped, but no new normal value need be established.

## EC Legislation and Practice

- Assembly operations: Conditions:

**The operation started or increased since or just prior to the initiation of the AD investigation and the part are from the country subject to measures;**

**The parts constitute 60% or more of the total value of the parts, except where the value added is greater than 25% of the manufacturing cost; and**

**The remedial effects of the duty are being undermined and there is evidence of dumping.**

## EC Legislation and Practice

- **The 60% criterion:**

**Origin of the parts:** The phrase also applies to parts that are exported, consigned or transhipped from the country subject to measures, unless proven otherwise.

**Valuation of the parts:** ‘into-factory, duty-paid’ basis (> custom value).

## EC Legislation and Practice

- **The 25% test**

**Value added to the parts brought in: equals the sum of labour and depreciation costs and other manufacturing overheads incurred, except SGA and profit, expressed as a percentage of the manufacturing cost.**

## EC Legislation and Practice

- **Procedure**: Same procedural rules as ‘normal’ AD investigations, except:
  - Products are registered on initiation;**
  - Must be concluded within 9 months**
  - Complainants are not investigated**
  - No provisional duties**

## EC Legislation and Practice

**Producers who can show that they are not related to any producer subject to the measures and that they are not engaged in circumvention practices can be exempted from the extended duty.**

## EC Legislation and Practice

- **Some statistics over past 6 years:**
  - **3.8 anti-circumvention investigations initiated annually;**
  - **69% of cases result in extension of measures;**
  - **anti-circumvention investigations represent 6.5% of initiations**



## What Next?

- **Anti-circumvention provisions were included in the draft text of the Chairman of the Rules Negotiating Group in the framework of the DDA;**
- **Members were sharply divided.**
- **Uncertainty over the future of the Doha Round means we may not have a resolution to this issue any time soon.**

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## Zeroing

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# BACKGROUND TO ZEROING

- Numerous comparisons between export sales and normal value (NV) are taken into account when calculating overall dumping margin (DM)
- Zeroing - all non-positive margins are regarded as zero rather than a negative number equal to amount by which export price (EP) exceeds NV, in the final weighted-average margin calculation

<b>normal value:</b>	<b>10</b>	<b>8</b>	<b>12</b>
<b><u>export price:</u></b>	<b><u>8</u></b>	<b><u>10</u></b>	<b><u>11</u></b>
<b>margin</b>	<b>2</b>	<b>-2</b>	<b>1</b>

All dumping amounts are added and divided by the aggregate export sales amount to yield the overall dumping margin

$$3/29 = 10.3\% \text{ (zeroing)}$$

$$1/29 = 0.34\% \text{ (no zeroing)}$$

# BACKGROUND TO ZEROING

- 3 methods of calculating a dumping margin in investigations (pursuant to Article 2.4.2 of AD Agreement) in respect of which zeroing may be applied:
  - weighted average-to-weighted average (WA-WA), transaction-to-transaction (T-T), and weighted average-to-transaction (WA-T) under special circumstances of targeted dumping
- Also question as to whether zeroing can be used in different types of antidumping proceedings, including original investigations, administrative reviews, and sunset reviews

# BACKGROUND TO ZEROING

- **Model zeroing**
  - method under which authority makes a WA-WA comparison of export price and NV for each model of the product under investigation and treats as zero the amount by which the WA export price exceeds the WA NV for any model, when aggregating the results of the model-specific comparisons to calculate a weighted average margin of dumping
- **Simple zeroing**
  - method under which authority compares normal value of individual transactions with individual export transactions (T-T) or weighted average normal values with individual export transactions (WA-T), and regards as zero the amount by which the export price exceeds the normal value, when aggregating the results of the comparisons to calculate the margin of dumping

# AD PROVISIONS RELEVANT TO ZEROING

- AD Agreement
  - 2.4
  - 2.4.2 first sentence
  - 2.4.2 second sentence
  - 9.3
  - 9.4
  - 6.10
  - 17.6 (ii)
- GATT 1994
  - VI:1
  - VI:2

# WTO CASES ON ZEROING

- EC – Bed Linen (DS141)
  - India challenged EC’s zeroing in investigations where WA-WA methodology used for different models (“model zeroing”)
  - EC methodology
    - established a WA normal value (NV) and WA export price (EP) for each model and then calculated a model-specific margin of dumping
    - calculated an aggregate margin of dumping for the product as a whole
      - added model specific dumping margins, zeroing negative margins (numerator)
      - added total value of imports of all models including models with negative margins (denominator)

# WTO CASES ON ZEROING

- EC – Bed Linen (DS141) (continued)
  - Panel found EC practice inconsistent with Article 2.4.2
    - determination of dumping could only be made with respect to the product as a whole, not for different models
    - by zeroing EC failed to take into account prices of all comparable export transactions, inconsistent with 2.4.2
  - AB agreed with panel and added that zeroing was also inconsistent the obligation to carry out fair comparison between NV and EP (Article 2 and 2.4.2)



# WTO CASES ON ZEROING

- US – SOFTWOOD LUMBER V (DS264)
  - Original Proceedings
    - same methodology challenged, USDOC calculated margin of dumping for each model, then aggregated margins to determine margin for product as a whole, zeroing negative margins in the numerator
    - Panel found model zeroing to be inconsistent with 2.4.2 on the same grounds as EC- Bed Linen, by not taking into account all comparable export transactions (dissenting panelist)
    - AB upheld panel’s reasoning that dumping and dumping margins only exists for “product as a whole”, not sub-groups of a product
  - Compliance Proceedings under 21.5
    - in implementation USDOC carried out T-T comparisons, then aggregated results to calculate DM, zeroing negative margins of T-T comparisons
    - Panel rejected Canada’s claim that inconsistent with 2.4.2 because NB textual differences with T-T methodology:

# WTO CASES ON ZEROING

- Compliance Proceedings under 21.5 (continued)
  - “all comparable export transactions” in 2.4.2 did not apply to T-T methodology
  - AB’s finding that DM is calculated for “product as a whole” as opposed to separate models did not apply outside context of WA – WA
  - mathematical equivalence argument in connection with third methodology
  - possible implications on prospective normal value mechanism
- panel rejected “fair comparison” claim under 2.4
- AB reversed and held zeroing in context of T –T comparisons inconsistent with 2.4.2 (use of the plural ‘export prices’) as failed to take account of all transaction-specific calculations, which are mere steps in comparison process to establish DM of product for each exporter, absence of phrase ‘all comparable export transactions’ not relevant
- disagreed with “mathematical equivalence argument and reversed panel decision with regard to 2.4, holding zeroing in context of T-T methodology in original investigations inconsistent with fair comparison requirement provision

# WTO CASES ON ZEROING

- US – Zeroing (EC) (DS294)
  - Panel’s findings
    - model zeroing inconsistent with 2.4.2, followed AB reasoning
    - zeroing in administrative reviews where WA-T methodology used not proscribed because obligations under 2.4.2 applied exclusively to investigations (“during the investigation phase”)
    - 9.3 did not require exporter-oriented determination in duty assessment proceedings
    - rejected claim of inconsistency with fair comparison requirement (2.4)

# WTO CASES ON ZEROING

- US – Zeroing (EC) (DS294) (continued)
  - AB findings
    - upheld finding on model zeroing
    - reversed panel finding on simple zeroing in administrative reviews, method inconsistent with 9.3 and Article VI:2 of GATT 1994 (“margins of dumping”)
    - confirmed requirement to determine “dumping” and dumping margins for the product under investigation as a whole (by aggregating all the intermediate values) applicable throughout ADA
    - DM for an exporter limits the AD duties - exporter oriented

# WTO CASES ON ZEROING

- US – Zeroing (Japan) (DS322)
  - Panel findings
    - model zeroing inconsistent with 2.4.2, does not take into account all comparisons between NV and EP “all comparable export transactions”
    - simple zeroing using T-T comparisons in original investigations not in violation of 2.4.2 and 2.4, contrary to AB in US – Zeroing (EC)
      - declined to endorse a broader application of “product as a whole” beyond WA-WA methodology
      - would render second sentence of 2.4.2 a nullity because without zeroing the third methodology would yield the same mathematical result as WA-WA
    - simple zeroing in administrative reviews and new shipper reviews not contrary to WTO
    - did not find an inconsistency in using in sunset reviews of zeroed margins established in previous administrative reviews

# WTO CASES ON ZEROING

- US – Zeroing (Japan) (DS322) (continued)
  - AB findings
    - reversed panel’s finding that simple zeroing in investigations is not prohibited by 2.4.2 (required to calculate DM for product “as a whole”)
    - also held inconsistent with Article 2.4
    - rejected mathematical equivalence argument
    - reversed the panel’s findings regarding simple zeroing in administrative reviews and new shipper reviews, considered to be inconsistent with 9.3, 9.5 and 2.4, stressing calculation of AD duties is exporter-specific and duty paid by importer for a given transaction can not be greater than DM calculated for the exporter from whom the importer buys its products
    - disagreed with panel on sunset reviews, inconsistent with 11.3 to rely on margins calculated through use of simple zeroing in previous administrative reviews

# WTO CASES ON ZEROING

- US – Stainless Steel from Mexico (DS344)
  - Panel Findings
    - model zeroing in investigations inconsistent with 2.4.2, but proscription not applicable outside scope of WA-WA comparisons in investigations
    - simple zeroing in periodic reviews not inconsistent with Article VI:1 and VI:2 of GATT 1994 and 2.1, 9.3 and 2.4 of AD Agreement
      - undesirable results if authorities have to take into account export prices of all importers importing from same exporter, general prohibition would render administration of prospective normal value system impractical
      - mathematical equivalence argument in respect of second sentence of 2.4.2
      - at least a permissible interpretation (17.6 (ii))
    - disagreed with the line of reasoning developed by AB regarding the WTO-consistency of simple zeroing in periodic reviews, felt compelled to depart from AB approach in light of obligation under DSU Article 11 to carry out objective examination of matter before it

# WTO CASES ON ZEROING

- US – Stainless Steel from Mexico (DS344) (continued)
  - AB Findings
    - reversed panel’s finding that simple zeroing in periodic reviews is not inconsistent with VI:1 and VI:2 of GATT 1994 and 2.1, 2.4 and 9.3 of AD Agreement, and found that simple zeroing in periodic reviews is inconsistent with Article VI:2 and 9.3
      - simple zeroing results in a levy that exceeds an exporter’s margin of dumping which operates as a ceiling for AD duty that can be levied in respect of sales made by an exporter
      - Article VI:2 of GATT 1994 and 9.3 of AD Agreement do not admit another interpretation as far as the issue of zeroing and that mindful of standard of review provided in Article 17.6 (ii)
    - did not make a finding in respect of 2.4
    - expressed concern that panel made findings contrary to previous AB reports adopted by DSB



# SIGNIFICANCE OF WTO JURISPRUDENCE

- Japan – Alcoholic Beverages II
  - adopted panel reports are an important part of GATT acquis
  - create “legitimate expectations” and should be taken into account where relevant to any dispute
  - but not binding except to resolve a particular dispute between parties to that dispute (DSU 19.2)
- US – Shrimp (Article 21.5 – Malaysia)
  - reiterated findings in Japan – Alcoholic Beverages II and held same analysis applies to AB reports, expected to follow interpretative guidance provided by AB in original proceedings

# SIGNIFICANCE OF WTO JURISPRUDENCE

- US – Oil Country Tubular Goods Sunset Reviews
  - “following the AB’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially when issues are the same”
  - indicates that even though DSU does not require WTO panels to follow adopted panel or AB reports, the AB de facto expects them to do so to the extent that the legal issues are similar
- US – Zeroing (Japan)
  - panel - while recognizing the need to provide security and predictability to the multilateral trading system through development of consistent line of jurisprudence on similar legal issues, drew attention to the provisions of Articles 11 and 3.2 of DSU - should not override panel’s task to carry out objective examination

# SIGNIFICANCE OF WTO JURISPRUDENCE

- US – Stainless Steel from Mexico (DS344)
  - Panel - felt compelled to depart from AB's approach in light of obligations under Article 11 of DSU to carry out an objective examination of the matter
  - AB
    - ensuring “security and predictability “ in the dispute settlement system as contemplated in 3.2 of DSU implies that, absent, cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case
    - failure to follow previously adopted AB reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence

# ZEROING IN DOHA ROUND NEGOTIATIONS

- First draft of comprehensive texts in the Rules area (bracketed in their entirety) issued by Chair of the Negotiating Group on Rules (November 2007)
  - clearly provides that zeroing prohibited in investigations where WA – WA methodology used, when the authorities aggregate the results of multiple comparisons
  - clearly allows zeroing in original investigations where WA- T and T-T used, and in administrative, new shipper and sunset reviews
- Issued working document regarding negotiations on rules (May 2008)
  - Seeks to convey full spectrum and intensity of reactions to Chair's first draft texts and, to extent possible, to identify the many suggested changes put forward by delegations.

# ZEROING IN DOHA ROUND NEGOTIATIONS

- Chairman commented that numerous delegations considered the text on zeroing was unacceptable
  - 20 delegations co-sponsored Working Paper proposing alternative language that would prohibit zeroing in all proceedings and in respect of all methodologies. Also proposed to require consistency between the methodology used in an original investigation and a subsequent proceeding pursuant to Article 9.3.
  - Some delegations believed that while draft text went too far, zeroing might be permitted in some context, such as, WA-T comparison methodology ("targeted dumping"), while it was also suggested that the same methodology need not necessarily be applied in original investigations as in the context of duty collection.
  - One delegation insisted that a restoration of zeroing in all contexts was necessary to return to the status quo at end of Uruguay Round
  - Delegations on all sides of the issue emphasized how critical the issue was to their delegations

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## Use of Adverse “Facts Available”

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# BACKGROUND TO “FACTS AVAILABLE”

- Administering authority needs cost and sales information of foreign exporters to make dumping assessment usually by data collected in detailed questionnaires and subsequently verified
- If foreign firms don't provide adequate information or are uncooperative, administrators may use information from other sources to conduct the investigation, known as “facts available”
- ADA (and GATT before it) allows administrators to use domestic petitioners' allegations (called “adverse facts available” in some countries) if authorities determine that the foreign firms are deliberately uncooperative
- Regarded by some as critical to encourage respondents to cooperate with authorities

# BACKGROUND TO “FACTS AVAILABLE”

- Prior to Uruguay Round
  - administering authorities allowed to use information provided by domestic petitioners about dumping margins if a foreign respondent did not comply fully with requests for information or provide the information in exactly the prescribed computer format
  - implementation of these procedures criticized
    - stringent requirements in tight time schedules applying equally to MNCs and small enterprises
    - deviation could result in entire data submission being discarded and resort to total reliance on “facts available” with domestic petitioners’ allegations as principle source of information



# BACKGROUND TO “FACTS AVAILABLE”

- Uruguay Round Reform
  - harder for authorities to find non-compliance
  - encouragement of all legitimate information provided by respondents
  - putting limits on use of domestic sources when facts available information invoked
  - requirement to use all verifiable information provided by foreign firms in a timely manner even if other information incomplete
  - generally restricted ability of domestic authorities to set unreasonable barriers to compliance for respondents and encouraged use of partial “facts available”
  - recognized right to use domestic producers’ allegations but administrators expected to use them with special circumspection

# RELEVANT PROVISIONS IN ADA

- Article 6.8
  - authorizes the use of facts available when a party refuses access to or does not provide necessary information within a reasonable period of time or when a party significantly impedes the process of investigation
- Annex II
  - guidelines provided for implementing this provision
  - sets out conditions on the use of facts available
  - considered to be incorporated by reference into Article 6.8 (US – Hot-Rolled Steel) and its provisions which are largely phrased in the conditional tense ('should') are considered to be mandatory (US – Steel Plate)

# APPLICABLE WTO CASE LAW

- Requirement to specify in detail the information required implies authorities not entitled to resort to best information available in a situation where party does not provide certain information, if the authorities failed to specify in detail the information required (Argentina - Ceramic Tiles)
- Conditions under which investigating authorities may resort to “facts available”
  - Where a party (i) refuses access to necessary information (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation  
(Argentina – Ceramic Tiles)

# APPLICABLE WTO CASE LAW

- When not to resort to “facts available”
  - when info is (i) verifiable, (ii) appropriately submitted so can be used in investigation without undue difficulties, (iii) supplied in timely fashion, and, where applicable, (iv) supplied in medium or computer language requested by authorities.
  - AB concluded that if these conditions met, authorities not entitled to reject information submitted (US – Hot-Rolled Steel)
  - No unlimited right to reject all information submitted where some necessary information not provided in terms of Annex II:3, must take into account all information that satisfies criteria provided can be used without undue difficulties in light of relationship with rejected information (US – Steel Plate)

# APPLICABLE WTO CASE LAW

- Info which is “verifiable”
  - when “accuracy and reliability of the information can be assessed by an objective process of examination” - this process does not require an on-the-spot verification (US – Steel Plate)
  - not appropriate to use “facts available” as a result of cancelled verification visit when information ‘verifiable’ and not demonstrated that it could not be used ‘without undue difficulties’ (Guatemala - Cement II)
- Relevance of good faith cooperation
  - In terms of Annex II:3 and 5 (if read together), info of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability (Egypt - Steel Rebar)

# APPLICABLE WTO CASE LAW

- Degree of cooperation: “to best of ability”
  - principle of good faith commands for a balance to be kept by investigating authorities between effort that they can expect interested parties to make in responding to questionnaires, and practical ability of those interested parties to comply fully with all demands made of them by investigating authorities (US - Hot-Rolled Steel)
  - an interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted, and in any case is not the *only* determinant thereof

(Egypt - Steel Rebar )

# APPLICABLE WTO CASE LAW

- Information "appropriately submitted so that it can be used in the investigation without undue difficulties"
  - question of whether info submitted can be used in investigation 'without undue difficulties' is a highly fact-specific issue so considered imperative that authority explain, as required by Annex II:6, the basis of conclusion that info which is verifiable and timely submitted cannot be used in the investigation without undue difficulties (US - Steel Plate)
- Timeliness
  - investigating authorities should not be entitled to reject info as untimely if info submitted within 'reasonable period' of time
    - investigating authorities required to extend deadlines 'upon cause shown', if 'practicable' (6.1.1)

# APPLICABLE WTO CASE LAW

- 'reasonable period' must be interpreted consistently with notions of flexibility and balance inherent in concept of 'reasonableness', and in a manner allowing for account to be taken of particular circumstances of each case
- investigating authorities should consider, in the context of a particular case, factors such as: (i) nature and quantity of info submitted; (ii) difficulties encountered by investigated exporter in obtaining the info; (iii) verifiability of the info and ease with which it can be used by investigating authorities in making determination; (iv) whether other interested parties likely to be prejudiced if info is used; (v) whether acceptance of the info would compromise ability of authorities to conduct investigation expeditiously; and (vi) numbers of days by which investigated exporter missed the applicable time-limit.“
- Deadlines are relevant in determining whether info submitted within reasonable period of time but balance needs to be made between rights of investigating authorities to control and expedite investigation and legitimate interest of the parties to submit info and to have it taken into account:

(US – Hot-Rolled Steel)



# APPLICABLE WTO CASE LAW

- Justification for non-cooperation
  - failure to cooperate does not necessarily constitute a significant impediment, since ADA does not require cooperation at any cost
  - consequences only arise if authority acts in reasonable, objective and impartial manner, not in this case: exporter objected to inclusion of non-governmental expert with conflict of interest in its verification team, verification cancelled (Guatemala – Cement II)
- Cooperation a two way process
  - authorities entitled to expect a very significant degree of effort - to the 'best of their abilities' - from investigated exporters. At same time, however, not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon exporters (US – Hot-Rolled Steel)

# APPLICABLE WTO CASE LAW

- "secondary source ... with special circumspection"
  - even while using special circumspection, authority may have a number of equally credible options in respect of a given question. When no bias or lack of objectivity identified in respect of option selected by authority, the option preferred by the complaining party cannot be preferred by a panel (Egypt - Steel Rebar)
- Authorities' duty to inform on reasons for disregarding information
  - 6.8 read in conjunction with Annex II:6 requires authority to inform party supplying information of reasons why evidence or info not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information (Argentina - Ceramic Tiles)

## **COMPLIANCE WITH PANEL AND APPELLATE BODY DECISIONS**

## Introduction

- Dispute Settlement: the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy – arguably one of WTO's most important successes
- *“prompt compliance with recommendations or rulings of the Dispute Settlement Body is essential in order to ensure effective resolution of disputes to the benefit of all Members”*

- Art 21.1 DSU

## Source of Rules

### WTO:

- the WTO Dispute Settlement Understanding or '**DSU**'
- the WTO Antidumping Agreement or '**ADA**'
  - Art 17 contains provisions on Consultation and Dispute Settlement but no specific rules on compliance

## Compliance Provisions in the DSU

### Article 21.3

*within 30 days from adoption of Panel or AB report, the Member concerned (the party to the dispute to which Panel or AB recommendations are directed) shall inform the Dispute Settlement Body (DSB) of its intentions with regard to implementation of the relevant rulings*

## Reasonable Period of Time

**Compliance** shall be carried out:

- immediately or
- within a ‘reasonable period of time’

**Reasonable period of time** decided by:

- proposal by Member and agreement of DSB; or
- mutual agreement between parties to the dispute; or
- binding arbitration.

## Implementation Panel

### Article 21.5

Possibility of an ‘implementation panel’

– i.e. where compliance with the original Panel or AB report is thought to be insufficient / non-existent – the complaining party can have recourse to dispute settlement – where possible bringing the issue of compliance before the original panel.



## General Provisions

### General Principles and Article 21 – various provisions

- implementation is forward-looking – not retroactive
  - ⇒ no reimbursement/refund given
- the DSB monitors the implementation – any Member may raise the issue - the implementing Member reports on its progress
- special attention / measures may be taken if the dispute involves or affects a developing country

## Compensation / Suspension

### Article 22 DSU

- compensation / suspension of concessions as alternatives to full implementation – temporary
- full implementation within the reasonable period of time is preferred

## EC Legislation and Practice

### General Facts

- EC: ~ 30 TDI cases where EC party to dispute (~ 15 AD, 7 CVD, 8 SFG) since 1995
- TDI – one of the most important subject areas (number of cases)

## EC Legislation and Practice

- WTO cases provide guidance for our TDI policy and have therefore an important impact on our daily case work
- Judicial review guarantees high standards of EC TDI
- EC – (in comparison with some other WTO Members) has a very high level of compliance with WTO rulings

## EC Legislation and Practice

### Legal Bases:

- Council Regulation (EC) No 384/1996 on protection against dumped imports from countries not members of the European Community - the '**EC Basic Regulation**'
- Council **Regulation** (EC) No **1515/2001** on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters

## Regulation 1515/2001

- enacted specifically to enable the EC to bring a measure taken under its Basic Anti-Dumping Regulation into conformity with a WTO ruling
- provides various options:
  - the EC may repeal or amend the measure in question, **or**
  - adopt any other special measures deemed appropriate in the circumstances

## Regulation 1515/2001

**When taking any measures under this Regulation:**

- the Commission may do so with or without a prior review of the relevant measure;
- it may request information from interested parties;
- it may suspend the measure where appropriate.

## Regulation 1515/2001

- Enables measures to be taken also in order to take account of legal interpretations made in a report adopted by the DSB with regard to a **non-disputed measure** (i.e. where the DSB report does not concern an EC anti-dumping or anti-subsidy measure)
- ⇒ allows EC to implement rulings in cases between other parties.
- Rules above apply *mutatis mutandis*.



## EC Legislation and Practice

### Examples of WTO cases against EC

- DS 141 *Bed linen from India*
- DS 219 *Malleable Fittings from Brazil*
- DS 299 *DRAMS from Korea*
- DS 337 *Salmon from Norway*

## Example of EC High Level of Compliance

### *DS 141 Bed linen from India*

- the EC took action not only to **implement the ruling with regard to the specific measure** – by adopting Council Regulation (EC) No 1644/2001 which amended the original bed linen measure

### but also

- published a notice inviting all exporters subject to AD measures who consider that the measures should be reviewed in light of the AB legal interpretations (e.g. zeroing)

## DDA – Discussions on Compliance

- Proposals of **immediate suspension** of measures found to be inconsistent with the ADA – pending implementation.
  - ⇒ Proper balance required – between nature of the violation and consequences (suspension)
    - e.g. substantive violations ⇒ immediate suspension
    - procedural violations ⇒ no immediate suspension

## DDA – Discussions on Compliance

- Proposal on **retroactive remedies** – including refund of duties where appropriate.
- Other delegations – **more cautious** and hesitant to introduce trade-remedy specific rules.

### State of Play:

- Chair's text – **does not include any of the proposals** for amendment with regard to compliance.

## CAUSATION IN INJURY INVESTIGATIONS

## Introduction

4 conditions to be fulfilled before anti-dumping measures may be imposed:

- Dumping
- Injury
- Causality
- Community interest (EC requirement → WTO +)

## Legal Basis

### WTO:

the WTO Antidumping Agreement or 'ADA'

– Article 3.5

### EC:

Council Regulation (EC) No 384/1996 on protection against dumped imports from countries not members of the European Community

(the 'EC Basic Regulation')

– Article 3(6) and (7)

## EC Rules and Practice

### Background Notes

- Community industry (EC rules)  
= Domestic industry (WTO terminology)
- Causation need only be shown for injury to the Community industry – not to producers that have been excluded in accordance with the relevant rules (e.g. where they are related to the exporters or importers)



## Two-Tier Analysis

Injury often caused by variety of factors, therefore:

*Causal link test I:*

negative effect of dumped imports on situation of the Community industry

*Causal link test II:*

other factors also injuring the Community industry breaking the causal link established under test I

## Causal Link Test I – the Law

### Causal link between dumping and injury

*“It must be demonstrated, from all the relevant evidence... that the dumped imports are causing injury. Specifically, this shall entail a demonstration that the volume and/or price levels [of the dumped imports] are responsible for an impact... [injury] and that this impact exists to a degree which enables it to be classified as material.”*

– Article 3(6) EC Basic Regulation

## Causal Link Test I - Notes

- A causal link finding is **not** limited to cases where dumping is the *sole* cause or even where it is the *principal* cause of the injury suffered.
- ⇒ (this ‘principal cause requirement’ was originally present in the Kennedy Round Anti-Dumping Code of 1967 but was dropped in later codes and not included in the WTO ADA)
- The fact that a Community producer is facing difficulties attributable in part to causes other than dumping – **not** a reason to deprive the producer of the protection against the injury caused by dumping.

## Causal Link Test I – the Practice

Negative effect of volume and/or price of dumped imports ?

Coincidence in time between:

- increasing dumped imports **volume**; and/or
- decreasing import **prices** / undercutting

and - increasingly precarious situation of the Community industry

## Causal Link Test II – the Law

### Known other factors

*“Known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6...”*

– Article 3(7) EC Basic Regulation

## Causal Link Test II

### Known factors other than dumped imports

- volume & prices of non dumped imports
- contraction in demand or changes in the patterns of consumption
- restrictive trade practice of third country producers and competition between these and the Community producers
- developments in technology and the export performance of the Community industry
- insufficient productivity/product quality/product range
- self-inflicted injury e.g. misjudging market developments
- exchange rate fluctuation
- others

## Causal Link Test II – the Practice

- Examine whether there are other known factors – apart from the dumped imports - which are also injuring the Community industry;
- ⇒ if so, whether the injury caused by these factors is such as to break the causal link established between dumped imports and the injury suffered by the Community industry (i.e. the link established under Causal link test I).
- Causal link can be considered broken if injury to be attributed to dumping is not material – i.e. a reconsideration of Causal link test I in light of the other known factors – (e.g. this happened in *LORS from Japan, Korea, Malaysia, China – 1999*)

## Causal Link Test II - Principles

- All relevant factors must be investigated fully.
- Must be based on evidence not mere allegations.
- Importance to be attributed to each factor.
- The injurious effects of the other known factors must be *'separated and distinguished'* from the injurious effects of the dumped imports.
  - *AB decision in US - AD measures on Hot-Rolled Steel from Japan*



## DDA - Rules Group Discussions

- Discussion on '*separating and distinguishing*' – whether this terminology helps to clarify the causation standard.
- Discussion on quantitative vs. qualitative analysis of non-attribution. Some Members preferred quantitative methods, whilst others argued that a precise quantification of injury to be attributed to a particular factor – difficult if not impossible.

## DDA – Chair’s Text

- The Chair’s text includes a proposal to amend Article 3.5 of the ADA to state that the examination may be based on a qualitative analysis of evidence concerning, among others:
  - the nature
  - the extent
  - the geographic concentration and
  - the timingof such injurious effects.
  
- No need to quantify or weigh, but should see to separate and distinguish the injurious effects of other factors from the injurious effects of the dumped imports.