

# An introduction to Anti-dumping law of EU and US as it applies to seafood

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## *Course Handbook*

*Training course organised by POSMA with support from Danida (FSPS). Prepared and delivered by John Hambrey and David Blandford*

*Hambrey Consulting 2010 - [www.hambreyconsulting.co.uk](http://www.hambreyconsulting.co.uk)*

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## 1. Introduction

This training material has been prepared by Dr John Hambrey (fishery economist) and Prof David Blandford (international trade specialist), supplemented with material generated during three one week courses in Vietnam – in Dosun, Binh Dinh and Cantho. The courses were supported by POSMA under the Danida funded FSPS Programme.

Dumping occurs when the products of one country are sold in another (exported) at “less than fair value” - which is usually taken to mean the production cost plus reasonable profit. Selling at an unreasonably low price may threaten the financial viability of producers in the country to which the product is being exported. Many countries have developed anti-dumping laws to counter this threat. Under such laws producers in the importing country may raise a complaint to the national authorities, alleging dumping and injury to their businesses, and to petition for action to be taken. If the allegation of dumping is proven this may result in a duty being levied on the exports, equivalent to the dumping margin, or sufficient to prevent injury.

Vietnam’s seafood industry suffered from anti-dumping lawsuits brought by producers in the US against imports of catfish (2002/3) and shrimp (2003/4). The resulting duties were substantial, ranging from 37% to 64% for catfish and 4% to 26% for shrimp – significantly higher than a normal healthy profit margin.

In times of recession countries tend to become more willing to protect domestic industries from foreign competition, and as Vietnam seafood exports continue to penetrate US and EU markets, the potential for further cases is significant.

Anti-dumping actions, although in theory meant to address unfairness in trade, are actually used as a barrier to fair competition, especially against efficient/low labour cost developing countries. They are commonly discriminatory, undermine the principle of comparative advantage, and result in higher prices to consumers in importing countries and/or lower profits for producers and exporters in developing countries. Most economists consider anti-dumping legislation to be a bad thing.

Anti-dumping duties are not usually based on hard objective calculations. They are heavily influenced by approaches, methodologies,

## What is dumping?

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*Dumping occurs when the products of one country are sold in another at “less than fair value” (LTFV) - which is usually taken to mean production cost plus reasonable profit*

and data sources. This means they can be readily influenced by lobbying and politics; but it also means that a robust response or challenge is possible at many points in the process. And while the process is often heavily biased against countries such as Vietnam, and a case is unlikely to be dropped, with effective strategic interventions it should be possible to get a better deal.

Vietnam is in a particularly weak position because of its non-market economy (NME) status, agreed to upon accession to the WTO in 2007. This status allows countries or trading groups such as the US and EU to estimate fair value using costs and prices in 3<sup>rd</sup> countries - similar in developmental status but recognised as market economies. This fails to fully account for the efficiencies of Vietnamese production.

Anti-dumping is a multi-dimensional issue and an effective response requires an understanding of politics, economics, law, institutions, and communications.

This course offers a broad overview with a view to assisting key players in Vietnam to develop an effective strategy to avoid or mitigate the effects of anti-dumping actions.

### ***Exercise 1: The importance of anti-dumping***

- 1. List the main threats to the long term profitability and sustainability of the Vietnamese seafood export industry*
- 2. Rank (prioritise) these threats in terms of*
  - a) historic impact*
  - b) potential future impact*
- 3. How important is anti-dumping compared with other risks and threats?*

## 1. A brief history of anti-dumping

Laws were enacted in the early Twentieth Century as a defense against so-called “predatory dumping”. This is where firms whose domestic markets are protected from competition use proceeds from sales at high domestic prices to subsidize sales in foreign markets and thus eliminate competition in those markets. They are then able to achieve a monopolistic position and subsequently charge high prices.

The first antidumping law was passed in Canada in 1904 to keep out steel entering the country from the U.S., followed by laws in New Zealand (1905), Australia (1906) and South Africa (1914). In all cases customs officials were to determine whether dumping was occurring and levy a duty to increase the price of imports to a “fair” or “normal” value.

Soon the purpose of the laws shifted from preventing uncompetitive practices (i.e. “predatory dumping”) to limiting competition from imports, i.e., to protecting a domestic industry from foreign competition.

However, amendments to Canada’s law in 1921 and 1930 meant that “fair market value” could in no case be “less than the actual costs of production of similar goods...plus a reasonable advance for selling cost and profit.”

For most countries existing import tariffs were the principal way of limiting foreign competition (e.g., US) but antidumping legislation was widely used by Australia, Canada and S. Africa. Use of antidumping laws began to increase in the 1960s as reductions in tariffs negotiated under the General Agreement on Tariffs and Trade (GATT) became increasingly significant.

Since then antidumping laws have been used extensively by both developed and developing countries.

## A shift from anti-competitive to protectionist legislation

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*“The dominant concern is to protect U.S. industry from foreign producers that have genuinely lower costs, whether because they pay lower wages, incur fewer pollution-control and regulatory costs, are better managed, have better workers, or have more modern plants and equipment.”*

*(Richard Posner, Economic Analysis of the Law, 1992, pages 310-311.)*

**Figure 1: Top ten users of anti-dumping actions (1965-2008) (source WTO)**

| Country                | Investigations | Actions     |
|------------------------|----------------|-------------|
| India                  | 564            | 386         |
| United States          | 418            | 268         |
| European Community     | 391            | 258         |
| Argentina              | 241            | 167         |
| South Africa           | 206            | 124         |
| Australia              | 197            | 75          |
| Brazil                 | 170            | 86          |
| China, P_R_            | 151            | 108         |
| Canada                 | 145            | 90          |
| Turkey                 | 137            | 124         |
| <b>All WTO members</b> | <b>3427</b>    | <b>2190</b> |

It is notable that a developing country – India - is a major user of anti-dumping laws and has brought significantly more actions than either the US or the EU.

**Figure 2: Leading countries targeted by anti-dumping actions (1965-2008) (source WTO)**

| Country                | Investigations | Actions     |
|------------------------|----------------|-------------|
| China, P.R.            | 677            | 479         |
| Korea, Rep. of         | 252            | 150         |
| United States          | 189            | 115         |
| Chinese Taipei         | 187            | 120         |
| Indonesia              | 145            | 82          |
| Japan                  | 144            | 106         |
| Thailand               | 142            | 84          |
| India                  | 137            | 84          |
| Russia                 | 109            | 90          |
| <b>All WTO members</b> | <b>3427</b>    | <b>2190</b> |

Not surprisingly China, an efficient low wage and rapidly developing economy has been the target for the greatest number of anti-dumping actions by far. However the US has also been a significant target.

**Figure 3: Leading product categories in anti-dumping actions (1965-2008)** (Source WTO)

| Product category               | Investigations | Actions     |
|--------------------------------|----------------|-------------|
| Base metals (XV)               | 948            | 642         |
| Chemicals (VI)                 | 690            | 453         |
| Plastics and rubber (VII)      | 440            | 286         |
| Machinery (XVI)                | 313            | 173         |
| Textiles (XI)                  | 271            | 183         |
| Pulp and Paper (X)             | 163            | 95          |
| Cement, ceramics, glass (XIII) | 114            | 60          |
| <b>All products</b>            | <b>3427</b>    | <b>2190</b> |

It is notable that agriculture and seafood does not figure in this table. This reflects the fact that until recently agriculture has been highly protected in many parts of the world, and the “need” for anti-dumping actions to reduce competition has been limited. This is likely to change as agricultural tariffs are slowly reduced.

Vietnam’s seafood sector has however been the target of anti-dumping actions: by the U.S. against Tra and Basa in 2002/3, and by the U.S. against shrimp in 2003/4.

**Key messages: Is it fair? No**

- *It is protectionist*
- *It tends to penalize efficient producers*
- *The process is stacked against developing countries and “non-market” economies*

**Will it happen? Probably**

- *Seafood production in Vietnam is developing rapidly in a favourable environment*
- *Rapid increases in productivity and production*
- *Relatively low wages*
- *“Like product has been produced in more developed, higher wage economies for many years.*
- *Developed economies are likely to experience slow growth*

## 2. Basic features of anti-dumping proceedings

Proceedings are normally initiated by means of an **complaint or petition** filed by or on behalf of a domestic industry, presenting evidence of dumping, injury to the domestic industry, and a causal connection between the two.

Investigations are carried out by government agencies (**authorities** in WTO terminology). Investigation determines whether or not dumping is occurring based on whether the **export price** is below **normal value** (typically the price of the **like product** in the home market). Where a home market price cannot be used, normal value may be based on prices of sales to **third countries** or **constructed value**, which is usually calculated as the cost of production plus profit.

A determination is made of whether dumped exports have caused or threaten to cause **material injury** to a **domestic industry** producing the like product.

If the dumping and injury determinations are both affirmative a **definitive antidumping duty** is imposed on future imports. In some countries (e.g., US) duty is assessed on a **retrospective** basis – imports must be accompanied by estimated duties in the form of cash deposits with the actual duty being determined annually. In other countries (e.g., EU) duties are imposed on a **prospective basis**, i.e., collected at the time of importation at a rate determined during the investigation.

**Provisional measures** may be imposed during the course of an investigation – after preliminary determination of dumping and injury. These are usually bonds or cash deposits accompanying future imports.

Investigations may be suspended or terminated if the exporter gives a **price undertaking**, i.e., agrees to increase its prices to eliminate the injurious effects of the dumping.

There is usually a time limit on antidumping measures.

### Some key concepts and definitions

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**Like product:** “A product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to an investigation”

Section 771(4)(A) of the US Tariff Act 1930

**The domestic (impacted) industry:** “producers as a whole of a domestic like product, or those producers whose collective output of a like product constitutes a major proportion of the total domestic production of the product”

Section 771(4)(A) of the US Tariff Act 1930

### ***Issues for discussion***

- 1. Who gains if an AD action is successful?*
- 2. Who loses?*
- 3. What is “unfair” competition?*
- 4. Do AD actions address unfair competition? If they do not, what is their purpose?*

## 3. The antidumping process in the United States of America

### Legislation

The key legislation is Title VII of the Tariff Act of 1930 as amended by the Uruguay Round Agreements Act <http://ia.ita.doc.gov/regs/title7.html>. Requirements for filing an antidumping duty petition are listed in Section 732(b) of the Act.

### The authorities

1. The **US Department of Commerce (DOC)** has responsibility for administering US trade laws. It is mandated to advance economic growth and employment in the US. The import Administration Operations Unit is composed of 9 offices. The *Office of China/Non-market Economy Compliance* is dedicated to dealing with China and other “non-market economies” (NMEs).
2. The **US International Trade Commission (ITC)** has broad investigative responsibilities on matters of trade.

Anti-dumping procedures are set out in the Antidumping and Countervailing Duty Handbook (Publication 4056) [http://www.usitc.gov/publications/by\\_type.htm](http://www.usitc.gov/publications/by_type.htm)

### Participants in antidumping procedures

There are two classes of person involved in AD proceedings – those with rights to legal representation (interested parties) and others, who have no such rights.

**Interested parties** include:

- Foreign manufacturer, producer or exporter, or the US importer or trade or business association with a majority of producers, exporters or importers of the merchandise
- Government of producing/exporting country
- US manufacturer, producer or wholesaler of the domestic like product
- US union or group of workers engaged in manufacturing, producing or wholesaling of the like product
- US trade or business association with majority engaged in manufacturing, producing or wholesaling of the like product.

**Others** include U.S. consumers and industrial users.

### Access to information

*Public information* is available in the public records room at DOC (1401 Constitution Avenue, NW, Washington, DC). *Business Proprietary Information* can only be reviewed under the terms of an *administrative protective order* (APO). Only the legal representative of an interested party can apply for APO access.

## Overview of the anti-dumping (AD) process

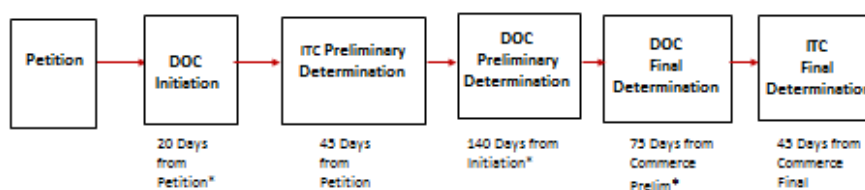
Anti-dumping lawsuits in the US are normally brought on behalf of domestic (US) producers (*“the petitioners”*) against foreign producers or exporters (*the respondents*). DOC can also self-initiate an AD investigation, but this is rare (3 cases in last 20 years).

The DOC and ITC receive petitions from an affected U.S. industry simultaneously. However, the DOC may be involved at an earlier stage, offering advice and guidance to potential petitioners.

The DOC has the sole authority to initiate or not initiate an investigation. It determines whether and to what extent dumping is occurring – i.e. the extent to which an imported product which is similar to one produced in the US (i.e. “like product”) is being sold in the US at “less than fair value”. The ITC on the other hand determines whether the US industry competing with the allegedly dumped product has been materially *injured* or threatened by the imports.

Together these authorities make an assessment of both dumping and injury, and if both are found then the ITC makes a final determination that dumping is taking place and authorizes the levy of anti-dumping duty as calculated by the DOC.

Figure 1: Sequence of events in AD investigations



\* May be extended under certain circumstances

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## Material injury

The Act defines “material injury” as harm which is not inconsequential, immaterial, or unimportant.

## Dumping margin

This is the difference between the price paid for Vietnamese product in the US (sometimes known as the US price, or export price) and the normal or fair value of the product (based on price in the exporting country’s own domestic market, or an estimate based on production costs plus profit).

## Initiation procedures

The petitioners must fill in a petition form with 5 main sections:

- Section A. General information – Requires a description of the *scope* of the investigation (e.g., technical characteristics and use of the product, tariff classification).
- Section B. Requires a description of the “*like product*”; i.e. the nature of the imported and domestically produced product, their similarities, and the extent of their interaction in the market place. It also requires information on exporters and importers.
- Section C. Solicits *price information and evidence of dumping*. Data is required on the U.S. price of the merchandise, and the estimated *normal or fair value* of the foreign like product.
- Section D. This seeks evidence of *critical circumstances* such as strategic dumping to offload product before duty can be applied.
- Section E. This is concerned with evidence of *injury* to domestic producers – actual or threatened.

US law mandates that the following requirements be met to initiate a case:

1. There must be evidence of dumping.
2. There must be evidence that U.S. industry is either
  - *materially injured*
  - *threatened with material injury* or
  - the establishment of an industry in the US is *materially retarded* because of the imports.

DOC’s assessment of the evidence for injury may be based on:

- declining domestic prices
- reduced domestic production
- reduced capacity utilization
- declining net sales and market share
- sales lost to imports
- declining profitability
- reduced employment
- bankruptcy.

In addition, there must be evidence for an adequate level of support for the anti-dumping action:

- petitioners and their supporters must account for at least 25% of the total volume of domestic production

## Success rate of petitions in the U.S.A.

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*Affirmative preliminary determinations are found in roughly 80% of cases.*

## Cumulation

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*When assessing injury the petitioners and authorities may add together or “cumulate” like product from more than one country. This increases the likelihood of a positive determination of injury, and means relatively low volume exporters may nonetheless be required to pay duty.*

- those opposed must represent less than 50 percent of the output of all those expressing an opinion.

In order to initiate an investigation, DOC must also determine the nature and scope of the *like product*, and estimate the *dumping margin* (see side bar).

DOC has 20 calendar days to evaluate the petition and to determine whether to initiate an investigation. If DOC determines that there are grounds for investigation, a *Notice of Initiation* is published in the Federal Register (the official journal of the Federal Government). An initiation checklist is provided to allow information on the petition to be located.

## ***Exercise 2: How might petitioning have been avoided in the case of Tra/Basa in 2002***

*Discuss the following. Summarize your conclusions on the flip-chart*

1. *What were the stimuli which first upset the catfish farmers of America?*
2. *More specifically, discuss why the catfish exporters from Vietnam were underselling the equivalent product in the US by such a large margin. Was this related to:*
  - a) *Low production costs in Vietnam?*
  - b) *Low profit margins (Vietnamese catfish farmers)?*
  - c) *Unequal bargaining relationships between farmers and processors?*
  - d) *Unequal bargaining relationships between exporters and importers?*
  - e) *Other reasons?*
3. *How can the threat to foreign producers be reduced – without losing healthy export growth?*

### Key messages: avoiding anti-dumping

- *Better market intelligence*- sellers (producers and exporters) will be better able to negotiate the best possible price- “what the market will take”- and therefore undersell by a lesser margin
- *Sellers identify and approach more buyers* - to increase competition between buyers/importers and strengthen their bargaining position
- *Product diversification and development of added value products (e.g., more processed)* – leading to less competition, and less impact on other producers
- *Market diversification* – resulting in less impact on any one market; less vulnerable to any problems arising in any one market
- *Farmer – processor – government coordination/information sharing*
- *Reduce effective number of smaller farms* - (through e.g. marketing groups or rationalisation) leading to reduced competition and higher prices

*In practice Vietnam is already doing many of these things (e.g. marketing of Tra from mainly US to more than 60 countries – Europe, Russia, middle East etc.; VASEP market info etc.)*

### ITC Determination

The primary focus of the ITC investigation is on information relevant to the determination of injury, threat of injury, or material retardation as defined in the legislation. While DOC assesses the quality of the evidence for injury, ITC determines whether there is *actual* material injury, or a threat of material injury. ITC also makes its own separate *like product* determination.

In its assessment of injury ITC will undertake a *cumulative* assessment of impact related to like product from several countries. Thus in the case of the US-Vietnam shrimp anti-dumping lawsuit, ITC “cumulated” warm-water shrimp imports from Vietnam, China, Brazil, Thailand and Indonesia.

ITC consults widely prior to its determinations. It issues *initial questionnaires* to producers, importers and foreign producers represented by counsel. Although response is not required, the consequences of non-response are likely to be costly.

A *public conference* in the preliminary phase provides for presentation of arguments. *Post-conference briefs* are encouraged. A staff report is then prepared, and the Commission votes on the investigation. It should be noted that an ITC staff economist is involved in the investigation, and economic arguments may be effective at this stage.

A **Preliminary Determination** is made within 45 days of the filing of a petition, or 25 days of initiation of an AD investigation by DOC. A **Final Determination** is normally made within 280 days of the filing of the petition.

## DOC preliminary determination

Following an affirmative decision by ITC (i.e. it establishes grounds for investigation) DOC prepares a detailed questionnaire for *mandatory respondents* – i.e. the producers/exporters of the “like product”. Where it is not practicable to examine each known producer or exporter, the DOC may limit its examination to a random sample, or to those companies accounting for the largest volume of export product. Companies not selected can request to be *voluntary respondents*, although DOC decides whether or not to examine their submissions.

The *period of investigation* for NMEs is two most recently completed fiscal quarters prior to the month in which the petition was filed.

The dumping calculation is based on comparison of selling price in the US and fair or normal value. For market economies (MEs) normal value is based on either:

- a) sales price of the same or similar product in a comparison market, or
- b) “constructed value” based on the cost of production plus profit.

For non-market economies (NMEs) such as Vietnam, the constructed normal value is based on the use of factors of production in the NME coupled with price data, overhead and profit ratios from a “surrogate” market economy (such as India or Bangladesh).

## DOC questionnaire

The DOC questionnaire to companies (respondents) in a non-market economy is structured as follows:

- Separate Rate Application/Certification
- Section A: General Information
- Section B: Not Applicable (Comparison market sales information for an ME)
- Section C: U.S. Market Sales
- Section D: Factors-of-Production Data
- Section E: Further Manufacturing in the United States
- Appendices: (e.g., Scope)

## Non-market economy (NME) treatment

NME treatment is specified in the Trade Act. The term ‘nonmarket economy country’ means:

*“any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise”*

“Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority”.

Foreign companies in AD cases can apply for a separate rate (i.e., calculation of their own dumping margin). NME companies can only do this if they can demonstrate both *de jure* (in law) and *de facto* (in fact) absence of government control.

*De jure* evidence:

- no restrictive stipulations on business and export licenses
- legislative enactment of decentralized control
- any other evidence of decentralized control.

*De facto* evidence:

- company sets export prices independent of government control or approval
- exporter retains sales proceeds and makes independent decisions on allocation of profits/financing losses
- exporter has authority to negotiate and sign contracts and other agreements
- exporter has autonomy in selecting management.

## **DOC final determination**

After the preliminary determination DOC conducts on-site verification of questionnaire data. It considers legal and factual arguments submitted by petitioners and respondents. Participants may request open or closed hearings to discuss information in the case. It then makes a final determination on whether dumping allegation is supported (95 percent of rulings are positive!) and what the dumping margin should be. An affirmative determination triggers the final phase of the ITC investigation.

## **ITC final investigation and determination**

A questionnaire is issued for the final phase of the investigation. This includes all interested parties, including purchasers of the imported goods.

A public hearing is organized. Pre-hearing briefs are received. A schedule of persons to appear, appropriate witnesses etc. is established in advance. The parties present their cases under sworn testimony. Commissioners question interested parties as they see fit.

This is followed by post-hearing briefs (additions, rebuttals etc.). Staff of the ITC then develop a draft final report and solicit comments from parties. There follows a final public briefing and vote by the commissioners. The decision is then passed on to the DOC.

### **Key messages: understanding the organisations**

- *Two key organisations: ITC, DOC operating independently.*
- *There will be opportunities to make legal and technical representations to both organisations*
  - through presentations at conferences/hearings
  - legal-technical briefs
  - questionnaires issued by both organisations
  - annual administrative reviews and special reviews (DOC).
- *ITC focuses on evidence of injury to domestic producer; DOC focuses on dumping margin.*
- *ITC is probably less biased in favour of domestic industry than DOC.*

## **Key messages: getting the right information to the right people ASAP**

- *Need to collect strong evidence on “fair value”. This must demonstrate genuinely low production costs related to low wages and/or the efficiency of your production, and a competitive sector.*
- *This information must get to the right people at the right time:*
  - Department of Commerce looks specifically at likely dumping margins in its preliminary 20 day assessment
  - there should be an opportunity to present arguments before the preliminary determination by the International Trade Commission
  - if..nonetheless... a full investigation is launched, good information may still influence the DOC calculation of dumping margin.
  - even if this fails, it may generate a sound basis for a complaint to WTO.
- *To have impact, information submitted must be timely, relevant, concise and accurate.*
- *You will need good legal advice, coupled with thorough understanding of production and market issues in:*
  - your country
  - petitioner country
  - countries that may be used for surrogate prices.
- *Failure to assemble relevant and favourable information will be very costly.*
- *You need to weaken the argument that your exports are causing the problem, or are a major part of a bigger problem:*
  - differentiate your products as far as possible from domestic “like product” (use ITC criteria)
  - differentiate your products as far as possible from imports from other countries.
- *You (who?) need to make representation as early as possible and at key points throughout the process to influence scope and methodology and feed into investigation.*
- *Have technical information prepared in support of a fair normal value at beginning of DOC investigation.*
- *Share and coordinate - better coordination results in:*
  - better information
  - more cost effective inputs
  - more consistent information –probably seen as more reliable.

### **Exercise 3: Informing and influencing the investigation**

Discuss the following. Summarize your conclusions on the flip-chart or computer

1. *Why is the definition of the relevant “producer industry” in the importing country important in terms of assessing “injury”?*
2. *Why is the definition of “like product” important?*
3. *Do you think the products included in the list used in the US shrimp anti-dumping case can be defined as like products? Use the criteria used by the US International Trade Commission.*
4. *Should some of these products, or particular forms of these products, be excluded?*
5. *If so justify their exclusion using the U.S. criteria.*

*US shrimp AD like product list:*

*“prawns, whether frozen or canned, wild caught, farmed, head on or head off, shell on or peeled, tail on or tail off, deveined or not deveined, cooked or raw or otherwise processed in canned or frozen form ”.*

*Criteria used by the ITC to determine “like product”:*

- *Physical similarity (size, species etc)*
- *Interchangeability/substitutability (as final consumer product; as input to processor; seasonality)*
- *Channels of distribution (e.g. to retail, food service, restaurant)*
- *Production processes and facilities*
- *Producer and customer perceptions (e.g. national standard definition).*

### **Exercise 4: Like Product and cumulation**

Discuss the following. Summarize your conclusions on the flip-chart or computer

1. *Would you characterize Vietnam’s export shrimp product as distinct from that of other cited countries (China, Brazil, Ecuador, India, Thailand and Vietnam). In what ways?*
2. *Does that have any implications for normal value calculations?*
3. *Is it in your interests to show that your product or products are distinct from those being exported by other countries such as China and Thailand?*
4. *If so....how would you do this in a brief to the ITC or DOC?*

## Calculation of the dumping margin for non-market economy (NME)

### Normal or fair value

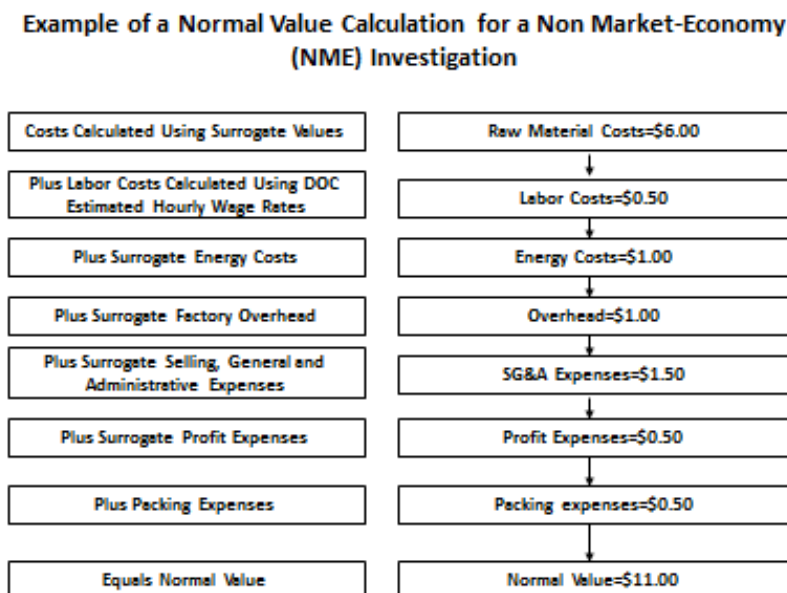
The calculation of normal value for an NME is based on prices and other values taken from a surrogate country – one at a similar level of development to the NME that is also a significant producer of comparable merchandise.

DOC uses factors of production information from respondents (i.e. the quantity of inputs used to generate a unit of output during the period of investigation), and multiplies these input factors by surrogate prices from publically available trade data, publications and financial statements from producers in the surrogate country. DOC also uses data on overhead and profit ratios from surrogate countries.

Bangladesh was the surrogate country used for AD investigations for Vietnam in frozen fish fillets (supplemented by data from India and Indonesia) and for warm water shrimp.

An example is given in Figure 2 below

**Figure 2: Calculation of normal value**



## Factors of production

*DOC uses factors of production information from respondents coupled with prices from a surrogate market economy country to construct normal value for a non-market economy country.*

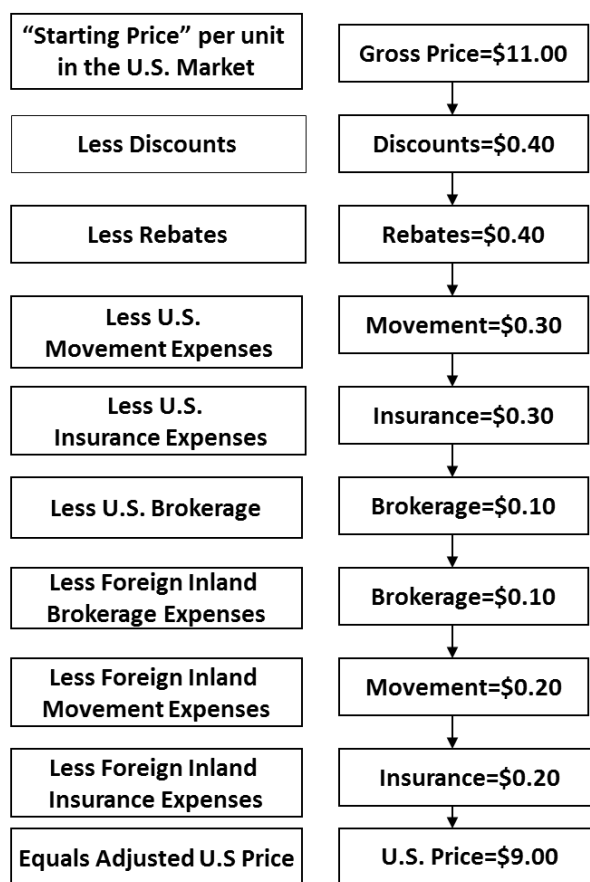
*A factor of production is the total quantity of input (raw material, labour, energy etc.) required to produce one unit of product (i.e. input/output), measured over the period of investigation.*

### Adjusted US price

In order to make a fair comparison between the *US (or export) price* of the Vietnamese product and the *fair or normal value* as calculated above, the US price must be adjusted to take account of the various freight and selling costs involved in getting the product from Vietnam to the US market.

Figure 3 below shows the types of adjustment made, though not all these may be relevant to Vietnamese seafood exports.

**Figure 3: NME adjustment of US price**



### Calculation of the dumping margin

The dumping margin can then be calculated simply as the difference between the estimated normal value or fair price and the adjusted US price, divided by the US price, i.e.

$$\text{Dumping margin (\%)} = (\text{normal value-US price})/\text{US price}$$

## Facts available

*If DOC considers that the information submitted by respondents is inadequate or unreliable it may ignore it, and resort to "facts available" – i.e. any source it considers appropriate. If there is any evidence that respondents have been unhelpful or misleading, it may use "adverse" facts available – in other words a worst case scenario. In effect this punishes uncooperative behaviour.*

### Exercise 5: Fair or normal value

Using your own knowledge, or data available on the internet (e.g. government data, research institute data, VIFEP data, VASEP data) make an estimate of fair or normal value for either shrimp or catfish in terms of US\$/kg.

Your calculations should include estimates of production cost and profit for producers (i.e. farmers or fishermen) and also for processors/exporters.

Your calculations should be based on both price of inputs and efficiency of input use (productivity or factors of production).

Work together in groups or in a single group if class composition is appropriate.

| item   |                              |                    |                    |
|--|------------------------------|--------------------|--------------------|
| <b>1. Raw material production costs</b>      | quantity used per kg product | price /kg of input | cost/kg production |
| land (rent/right)                            |                              |                    |                    |
| water  |                              |                    |                    |
| food   |                              |                    |                    |
| chemicals                                    |                              |                    |                    |
| energy/fuel                                  |                              |                    |                    |
| labour                                       |                              |                    |                    |
| overhead*                                    |                              |                    |                    |
| selling, general and administrative expenses |                              |                    |                    |
| other?                                       |                              |                    |                    |
| <i>total cost of production (COP)</i>        |                              |                    |                    |
| plus profit                                  |                              |                    |                    |
| <b>Total fair price per kg</b>               |                              |                    |                    |
|  |                              |                    |                    |
| <b>2. Processing costs</b>                   |                              |                    |                    |
| land/rent                                    |                              |                    |                    |
| water  |                              |                    |                    |
| raw material (fish/shrimp)                   |                              |                    |                    |
| chemicals                                    |                              |                    |                    |
| energy/fuel                                  |                              |                    |                    |
| labour                                       |                              |                    |                    |
| factory overhead *                           |                              |                    |                    |
| selling, general and administrative expenses |                              |                    |                    |
| other?                                       |                              |                    |                    |
| <i>total cost of production/kg</i>           |                              |                    |                    |
| plus profit                                  |                              |                    |                    |
| <b>Total fair price per kg</b>               |                              |                    |                    |

\*list these – e.g. maintenance, insurance, depreciation, general management etc

### Key messages: dumping margin calculation

- *For a non-market economy (NME) domestic prices are deemed unreliable. Authorities use constructed “normal value” minus adjusted US price.*
- *This may result in serious inaccuracies:*
  - estimation of raw materials prices based on surrogate country – often inappropriate comparisons
  - arbitrary high profit margin, or industry average applied to all products.
- *A company specific calculation is possible (and desirable) if the company can demonstrate independence from government (de jure and de facto evidence),*
- *Assessment is likely to be rigorous – with on site verification.*

### Key messages: a fair hearing?

- *Although DOC may ignore protestations from exporters, or reject information submitted as unreliable:*
  - there is a presumption that the best information available should be used
  - DOC/ITC well aware of WTO Dispute Settlement process which may rule against them if relevant information not taken into account.
- *On the other hand...if incomplete/inadequate/inconsistent or unreliable information is presented the authorities may use “adverse” facts available leading to a higher dumping margin.*
- *Overall the process is .... biased and stacked against you. It’s a question of damage limitation. But there are many opportunities at many stages in the process to avoid or influence the anti-dumping process: intelligence, information, analysis, representation, influence.*

## The US investigation and determination process – some key issues

### Defining the scope of the terms

Petitions are normally brought by producers, often with the help and advice of DOC. The petition usually defines the early nature and scope of the investigation. The petition usually includes an early statement of the “like product”, “domestic industry” and may address “cumulation” issues. It is vital that respondents/potential respondents begin to develop their arguments in relation to these issues at the earliest opportunity.

A broad definition of like product will tend to increase the likelihood of finding injury. It will also tend to result in more “cumulation” of product from different countries, which in turn will strengthen the argument for injury. It will normally be in the interests of Vietnamese producers to demonstrate that their product is varied and most if not all cannot be classified as like product (see criteria used by ITC in exercise 3).

Mismatching of home and U.S. market products can lead to higher margins (e.g., lower-priced products only sold in the US; differences in price related to seasonal demand; differences in the structure of costs of production).

A broad definition of the domestic industry may be an advantage or disadvantage to Vietnam and the respondents (i.e. companies affected). A broad definition may increase support for the petition; but it may be more difficult to demonstrate injury. Equally a broad definition may weaken support if it includes (e.g.) processors who may benefit from the availability of cheaper product.

### Avoiding resort to (adverse) facts available

A large number of determinations are based on “facts available” rather than actual data or on “constructed value”. It is essential that respondents do not give DOC an excuse to use adverse facts available – i.e. they must ensure data is timely, sufficient, accurate and consistent.

### Exaggerating the dumping margin

Petitioners and DOC may exaggerate the dumping margin by using a variety of questionable methods.

*Above cost sales:* Where home-market sales data are used to calculate normal value (in the case of market economies) DOC employs only “above cost” sales, not those sold below cost. Dumping margins can be exaggerated by comparing U.S. sales only to above-cost.

*Constructed value:* DOC may substitute “constructed value” for actual price data if these are considered to be unreliable.

*Profit ratios:* Cost-based determinations do not measure whether U.S. sales are below cost - only whether they are below cost plus profit. DOC may use an industry-average profit rate for different product types which skews the calculation in favor of higher dumping margins (the supplier can make an industry average profit across its product lines, but not necessarily on all of them). Equally, when estimating a “constructed” value, DOC uses consistently high profit ratios.

*Zeroing* is a notorious technique which effectively guarantees a positive dumping margin. When averaging the dumping margin through time or across products, DOC often ignores “negative”

dumping margin values, i.e., instances when the price of the imported product in the US is higher than the home-market price. This is clearly biased data manipulation and has been the subject of several complaints to the World Trade Organization (WTO).

### Rules of the game

- Failure to respond to requests for information can be very costly. Provision of accurate information is very important to avoid penalties
- Good legal counsel is required
- AD actions are costly
- The US system is very complex, the rules are strict, but the process and the legal requirements are relatively transparent. But this does not mean that the system is fair!

### Application of dumping duties

After *preliminary determination* by DOC (*prelim*) “liquidation” (i.e., the final determination of duties owed to the Customs Service) is suspended for all future imports. A cash deposit or bond must be posted by importers to cover possible AD duties on further imports during the period of review (POR) at the rate announced in the prelim.

Following an affirmative *final determination* respondents must pay cash deposits for possible antidumping duties on imports at the rate announced in the final.

The ITC has 45 days to make its final injury finding. If affirmative future imports are subject to AD duty deposits equal to the calculated rate of dumping.

Final financial liability for importers is determined by administrative reviews conducted by DOC. These determine the actual amount of duty owed for the POR

Figure 4: Example of a First Review

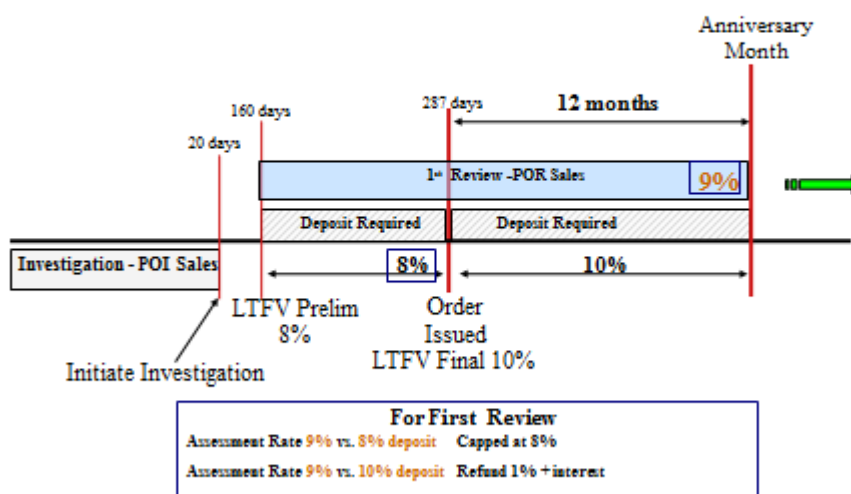
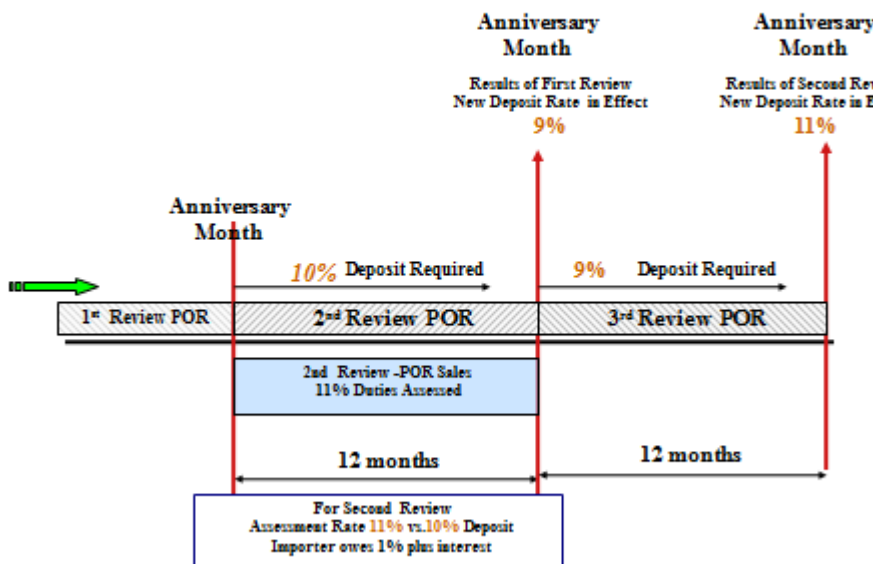


Figure 5: Example of Subsequent Reviews



## Summary of application and review of duties

Exporters are liable to pay AD duty from the preliminary determination by DOC. A deposit or bond must be posted at the time of preliminary determination to cover duty at preliminary rate for imports over the period to the final determination. Rates are adjusted at final determination and thereafter at annual reviews, administrative reviews or sunset reviews. The liability of an exporter (additional payment or refund) is adjusted at each review based on the difference between the previous rate and the new rate. This is an incentive to increase prices

## Recourse following final determination

1. Seek correction for Ministerial Errors – i.e., check the figures to see if the dumping margin calculation is correct (must be done within 5 days after disclosure of materials by DOC).
2. Appeal decision to US Court of International Trade in New York – provides a judicial review of administrative actions of government agencies dealing with imports.
3. Seek redress through the WTO dispute settlement procedure.
4. Request an administrative review during the anniversary month of the AD order with a view to obtaining lower AD duty rates

### ***Exercise 6: Non-market economy status***

Non-market economy status is a problem for Vietnam, and probably leads to higher anti-dumping duties. It allows the US authorities to use prices from 3<sup>rd</sup> or surrogate country such as Bangladesh in order to estimate fair or normal value. Since production and distribution systems are different and often less efficient in Bangladesh this may lead to a higher dumping margin.

The criteria used by the US Government to determine market economy status include the following:

1. The extent to which the currency of the foreign country is convertible into the currency of other countries.
2. The extent to which wage rates in the foreign country are determined by free bargaining between labour and management.
3. The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country.
4. The extent of government ownership or control of the means of production.
5. The extent of government control over the allocation of resources and over the price and output decisions of enterprises.
6. Such other factors as the administering authority considers appropriate.

Additional criteria are applied by the EU:

7. The production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts.
8. The firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms.

Vietnam agreed to NME status when it joined the WTO in 2007. It is important that the status of Vietnam is changed to ME as soon as possible.

#### ***Exercise: Develop a case for Market Economy Status for:***

- a) Vietnam
- b) the Vietnam seafood sector
- c) a Vietnamese seafood company.

*Use the criteria listed above as the basis for your case.*

*Groups should be allocated to one of these three tasks according to their particular role and interests.*

*The facilitator will take on the role of the EU Trade Commissioner or the DOC – listen to the case, question the proponents, and make a judgement!*

## 4. The EU anti-dumping process

### Legislation

The relevant legislation is Council Regulation (EC) No 384/96 as amended  
[http://europa.eu/legislation\\_summaries/external\\_trade/r11005\\_en.htm](http://europa.eu/legislation_summaries/external_trade/r11005_en.htm)

AD actions can apply to all imports from outside the EU except for members of the European Economic Area (Iceland, Liechtenstein and Norway) and in that case except for products that are excluded under the EEA agreement (e.g., fisheries products).

### The authorities

The *Directorate-General for Trade* (DG Trade) in the European Commission receives complaints and carries out investigations.

Representatives of EU Member States constitute a *committee* that decides whether there is sufficient evidence to pursue a complaint.

The *Council of Ministers* is responsible for formal adoption of Commission proposals.

The *General Court* (formerly the Court of First Instance) – has jurisdiction over AD cases – i.e. ensures that determinations are implemented.

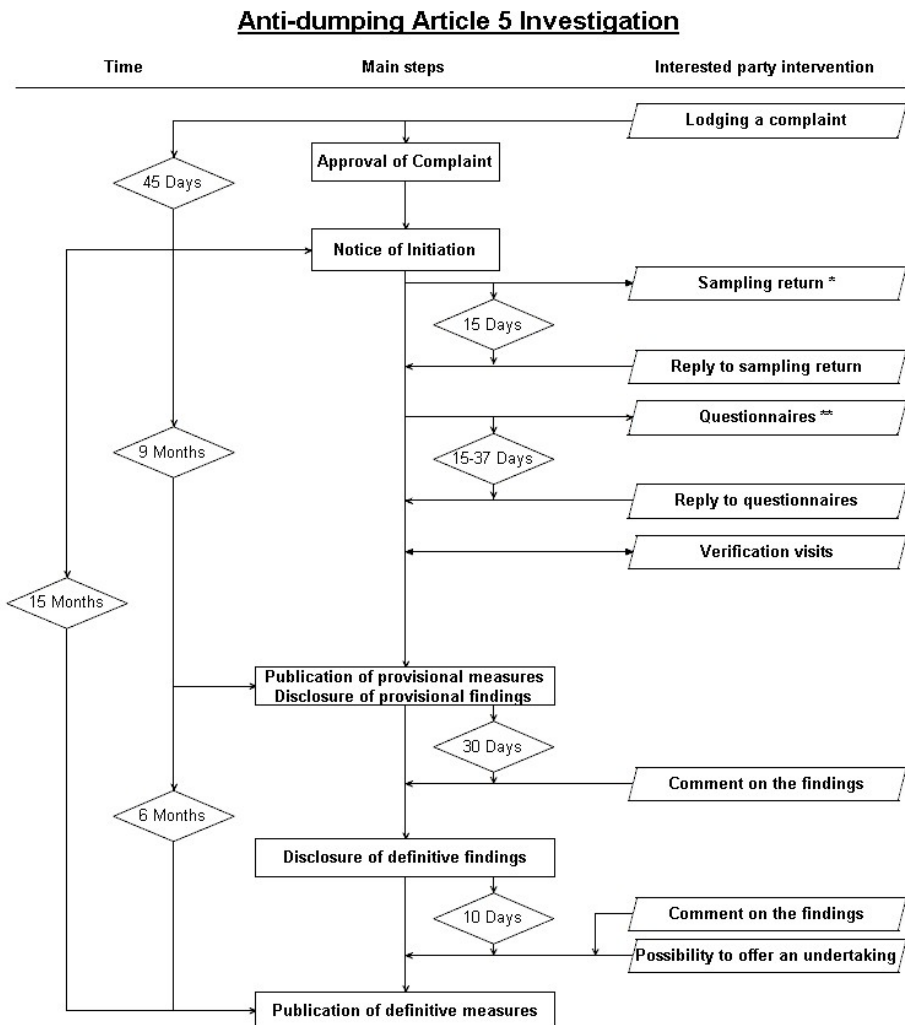
The *European Court of Justice* (ECJ) serves as the court of appeal for cases falling within the domain of the General Court (i.e., whether the law was followed).

### The procedure

The procedure is summarized in Figure 6. The main features or elements include:

- Complaint is lodged by affected industry with DG Trade
- EU Committee determines grounds for investigation by DG Trade
- Investigation carried out: sampling procedure initiated; questionnaires distributed and returned; verification visits/calls
- Provisional findings and measures published
- Comment/consultation period
- Definitive findings published
- Comment/consultation period; opportunity to discuss price undertaking
- Definitive measures

Figure 6: The EU anti-dumping procedure



\* Sampling may be applied where the number of complainants, exporters and importers is large in order to limit the investigation to a reasonable number of parties.

\*\* Questionnaires to exporters, EU producers, importers and EU users. Deadline for reply is minimum 37 days.

MET/IT questionnaire for exporting producers in countries considered as countries with economy in transition. Deadline for reply of MET/IT questionnaires is minimum 15 days.

For exporting producers not granted MET an analogue country will be applied for the purpose of establishing the normal value.

Producers in the analogue country will also receive questionnaires and be subject to verification visits.

Countries with economy in transition are China, Kazakhstan and Vietnam.

## Key differences from US practice

### Simultaneous treatment of injury and dumping

The EC assesses in detail whether there is sufficient evidence of both dumping and injury before initiating an investigation. However, the injury threshold may be lower than that applied by the ITC in the US.

### Documentary evidence

The EC requires firm documentary evidence on prices (usually invoices) whereas the US is more flexible (e.g., affidavits attesting to oral quotations will suffice). However, the overall amount of documentation required of complainants and respondents is lower in the EU than in the US. This is related to the highly legalistic procedures (and high legal costs) associated with the US process.

### Review and assessment of injury arguments

EU process involves a later review of injury arguments (9-15 months) than the US process (reviewed during initial 45 days).

### Fewer, less demanding questionnaires

The EU system involves a single questionnaire whereas the US system involves different questionnaires from DOC & ITC, and these are more onerous for exporters than the EU version.

### Legal procedures and costs

The EU system does not require the use of legal counsel whereas the nature of the US system makes this essential. This also means that the EU process is less costly, with less involvement of lawyers and fewer appeals.

### Data verification

The EC verifies all information from complainants whereas the ITC typically verifies this only for large producers. However, the EC is more tolerant of incorrect information (small errors and omissions) than the DOC, and verification of exporter information is more rapid in the EU (2-3 days compared to 2 weeks for the DOC).

### Data access and transparency

The EU system makes less information publically available – only registered interested parties have access. Furthermore, the EU system allows less access to confidential information by the parties than US system, such that much less detailed information (e.g., on calculation of dumping margin) is available in EU cases.

There is less warning of an investigation in the EU. The EC does not reveal a complaint until the day of initiation, whereas the US DOC does this before a decision to initiate is made.

EC calculations are less open to checking by participants. The software is less “user friendly” than in the US and exporters can only check their own calculations, not those for competitors.

### Timing of provisional measures

Provisional measures are implemented later in the EU than the US. EU participants do not know what to expect until 9 months from the start of the process. In the US this is usually clear after the preliminary ITC determination (25 days).

## Price undertakings

The EC will adopt price undertakings without the agreement of the complainants. This is not the case in the US.

## Lesser duty rule

The EC often applies the lesser duty rule (see side bar) whereas the DOC does not do this.

## Judicial review

Judicial review is less common in the EU, probably related to the more legalistic culture in the US.

## Application and review of duty

EC calculated dumping margins are usually lower. This is due to differences in the methodology for calculating normal value and export price.

However, duty rates are only changed through interim reviews. In the US these can also be changed through administrative reviews which take into account special or changed circumstances.

Non continuation(after 5 years have elapsed) is higher in the EU than the US. Over 50% of cases expire without a review compared to less than 20% in the US. Roughly 50% of cases reviewed result in continuation compared to roughly 90% in the US.

## Treatment of Non-market economies

For normal value the EC selects an analogue country and bases all its calculations on questionnaire results for that country. The DOC analyses the production process of the NME (factors of production) and uses imputed price values from a surrogate market economy.

Companies can apply for full market economy treatment under EU procedures. In the US they can apply for separate treatment, but will still be assessed using the NME methodology.

## Zeroing

The EC has less aggressive use of zeroing. The US use of zeroing continues to be highly controversial.

## The public interest

The EC process allows for the broader public interest to be taken into account in determining whether to impose AD duties. The US system does not (users and consumers can comment, but do not have access to confidential information and normally only make comments relating to injury).

## The lesser duty rule

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*Anti-dumping duty may be estimated on two bases:*

a) *The duty required to reduce or eliminate injury or threat of injury to domestic producers, or*

b) *A duty based on the calculated dumping margin.*

*The lesser duty rule, referred to in the WTO Anti-dumping agreement suggests that the lesser of these two rates should normally be chosen.*

## Overall

The EC system is centralized (DG trade is the lead agency) whereas two key agencies are involved in the US (DOC and ITC), but decision making is more complex due to the involvement of Member States in the review process.

The EC system is less transparent – less information is provided to participants, but more flexible (e.g., public interest test and use of the lesser duty rule).

### Key messages: the European process

- *The European antidumping process is broadly similar to that of the US. However:*
  - *It is less transparent*
  - *It is simpler, more flexible*
  - *It is less legalistic*
  - *It allows formal consideration of the public interest*
  - *It often applies the “lesser duty” rule*
  - *Overall duties applied have tended to be at a lower rate than those of the U.S.*
  - *Duties are more often avoided through agreements.*

## 5. The World Trade Organization (WTO) Anti-dumping Agreement (ADA)

### Origins of the ADA

The GATT made no attempt to regulate dumping since this relates to the action of a private entity rather than a government, and therefore is not subject to GATT rules. However, there was concern that overzealous enforcement of antidumping might restrict fairly-priced imports. **Article VI** of GATT 1947 therefore authorized the use of antidumping and set down some basic rules. The Uruguay Round negotiations resulted in a more comprehensive agreement on the implementation of Article VI as part of GATT 1994. The following summarizes the key provisions of this 1994 Anti-dumping Agreement (ADA).

### Key provisions of the ADA

#### Article 1 – Principles

- AD measures can only be applied when export price is less than normal value and dumping causes or threatens to cause material injury or material retardation.

#### Article 2 – Determination of Dumping

- Dumping occurs when the product is sold at less than its normal value – usually the comparable price of the product in the domestic market of the exporter.
- If domestic prices are not used normal value can be based on:
  - Export price to a third country, or
  - cost of production in the country of origin plus a reasonable amount for selling costs and profit
- *Costs and profits should normally be calculated on the basis of exporters' records.*
- A “fair comparison” must be made between the export price and normal value. Allowances should be made for all differences that affect price comparability (e.g., taxes).
- Currency conversions should be made using the exchange rate on the date of sale.
- Dumping margin should be established on the basis of comparison of weighted averages of prices, or on a transaction-to-transaction basis.

#### Article 3 – Determination of Injury

- It must be demonstrated that dumped imports are causing injury .
- It must be demonstrated that further dumped exports are imminent, and likely to cause material injury.

#### Article 4 – Definition of domestic industry

- Companies can be excluded from the definition of the domestic industry if they are related to exporters or are importing the product concerned.

### Article 5 – Initiation and subsequent investigation

- Investigations should be initiated on the basis of written application by or on behalf of the domestic industry, or by the authorities concerned if there is sufficient evidence of dumping, injury and causal linkage between the two.
- The Government of the exporting country must be notified before an investigation is initiated.
- A complaint shall be rejected if dumping is *de minimis* (with less than a 2% dumping margin) or injury is negligible (less than 3% share of imports).
- Customs clearance cannot be hindered during an AD proceeding.
- Investigations should normally be concluded within 1 year, and no case more than 18 months after initiation.

### Article 6 – Evidence

- All interested parties should:
  - be given notice of information required and ample opportunity to provide this in writing
  - have full access to non-confidential information
  - have full opportunity to defend their interests.
- Authorities must satisfy themselves as to the accuracy of information provided.
- Where information is not provided, authorities may use “the facts available” to make determination.
- Authorities should disclose their findings before a final determination is made.
- Dumping margins should normally be calculated for individual companies. Sampling may be used “*preferably in consultation with and the consent of those concerned*”.

### Article 7 – Provisional measures

- Specifies the nature of provisional duties and time limits.

### Article 8 – Price undertakings

- Allows for the termination of AD investigations/actions through price undertakings by exporters.

### Article 9 – Imposition and collection of duties

- Indicates the desirability of applying the lesser duty rule (duty less than the dumping margin if sufficient to remove the injury to the domestic industry).
- Determination of final liabilities and refunds should be made promptly (time limits are specified).

### **Article 10 – Retroactivity**

- Provisional measures and duties should only apply to products imported after the measure is adopted.
- Any difference (increase) between the provisional and final duty cannot be collected retrospectively for the provisional period, and any refunds (i.e. where final duty is less than provisional) must be paid promptly.
- Definitive duties can be levied retroactively for up to 90 days prior to provisional measures in certain circumstances (e.g., repeat offenders, massive dumping).

### **Article 11 – Duration and review of duties and undertakings**

- Duties should only remain in force as long as and to the extent necessary to counteract dumping that is causing injury.
- Duties should be reviewed where interested parties show the need for a review (providing at least one year has passed).
- AD duties should only last five years, unless an expiry review determines that the duty should be continued.

### **Article 12 – Public notice and explanation of determinations**

- A public notice and explanation of determinations must be provided.

### **Article 13 – Judicial review**

- An independent body must be maintained to review determinations.

### **Article 15 – Developing country members**

- This article calls for “constructive” remedies where developing countries are involved.

### **Article 16 – Committee on anti-dumping practices**

- A committee on anti-dumping practices must be established and should meet twice per year.

### **Article 17 – Consultation and dispute settlement**

- The WTO dispute settlement understanding is applicable to consultations and settlement of disputes under the ADA.
- Members can request consultations with other WTO members if they feel that any benefit under the ADA is being “nullified or impaired”.
- If a mutually agreed solution is not reached, the matter can be referred to the Dispute Settlement Body (DSB) which will establish a panel to examine the matter.

### **Article 18 – Final provisions**

- WTO members must take the necessary steps to ensure conformity of laws with the ADA.
- There is a requirement for notification by members of any changes in laws, regulations, and administrative procedures relating to anti-dumping.

- A Committee will undertake an annual review of the implementation and operation of the ADA.

#### Annexes:

- Procedures for on-the-spot investigations.
- Procedures for obtaining the “best information available”.

## ADA – current and future developments

A new round of trade negotiations was launched at **Doha Ministerial Conference** in November 2001. Paragraph 28 of the Doha Ministerial Declaration states:

*“[Members] agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of GATT 1994 [antidumping]... **while preserving the basic concepts, principles and objectives...**”* (emphasis added)

The Chairman’s draft of a Doha Round ADA appeared in November 2007. Some proposed changes would clarify and tighten up terms and procedures (e.g., some restrictions on the use of zeroing, greater clarity on factors to be taken into account in determining injury). Some proposed changes would weaken the agreement (e.g., removal of references to lesser duty rule). Whatever happens AD actions will not be prohibited!

## Overall assessment of the ADA

The agreement largely codifies existing AD practices in the EU and US.

The Agreement is more specific on many points than many other WTO agreements – with less focus on general principles. However, the agreement still leaves considerable flexibility in terms of methodology for determining injury and for calculating AD duties.

The agreement is weak on special and differential treatment for developing countries.

Some improvements are possible under the current Doha Round, especially relating to the methodologies used for determination and calculation of dumping margin.

## Strengthening the ADA: some options

The basic concepts, principles and objectives of the AD Agreement have never been defined, so a wholesale restructuring is unlikely.

### Technical modifications

What are some technical modifications that could be made to the Agreement that would eliminate some of the unfair aspects of the system?

1. Require complainants to provide economic evidence of underlying market distortions and dumping behavior, e.g.:
  - Trade measures that permit higher selling prices in the domestic market than in the export market
  - Credible price or cost of production data.
2. Require AD Authorities to determine credible evidence of price discrimination across markets.
3. Allow respondents to present evidence that pricing practices are due to factors other than distortions in the home market.
4. Allow exclusion of home market sales from the calculation of normal value only if these are aberrational (this would allow inclusion of sales below costs of production).
5. Exclude profit from the calculation of the cost of production (constructed value).
6. Prohibit “zeroing” – i.e. include negative dumping amounts in the calculation of the overall dumping margin.
7. Prohibit the comparison of individual export prices to average normal values (only compare prices at same level of aggregation).
8. Tighten rules for injury determination:
  - a. Require proof of substantial correlation between imports and declining industry profits
  - b. Require clear separation of effects of other known causal factors.
9. Increase *de minimis* thresholds.
10. Require application of the lesser duty rule.
11. Require the application of a public interest test before duties are imposed.
12. Make termination of duties mandatory after 5 years.

## 6. The WTO Dispute Settlement Process (DSP)

### Background

This is the process through which Members can try to resolve disputes over the implementation of GATT/WTO agreements. It has existed from the beginnings of the GATT, but the system was originally very weak. This was due to the fact that decisions on disputes were made by consensus so they could easily be blocked. The Dispute Settlement Understanding was therefore adopted as Annex 2 of GATT in 1994.

### Overview of the process

The process begins with a request for consultations between parties. A response is required within 10 days; consultations begin within 30 days; and 60 days are allowed to settle the dispute. If these conditions are not met or no resolution is achieved, the complainant can request establishment of a panel.

A panel can be established within 45 days of the end of consultations. It normally takes 6 months for the panel to prepare a report for the parties; 3 weeks are then allowed for circulation of the report to WTO Members. The report must be adopted within 60 days unless there is an appeal. If the latter, the appellate (appeal) body reports within 60 to 90 days, following which the SDB the appellate body report.

The overall process is shown in figure 7.

### Key features

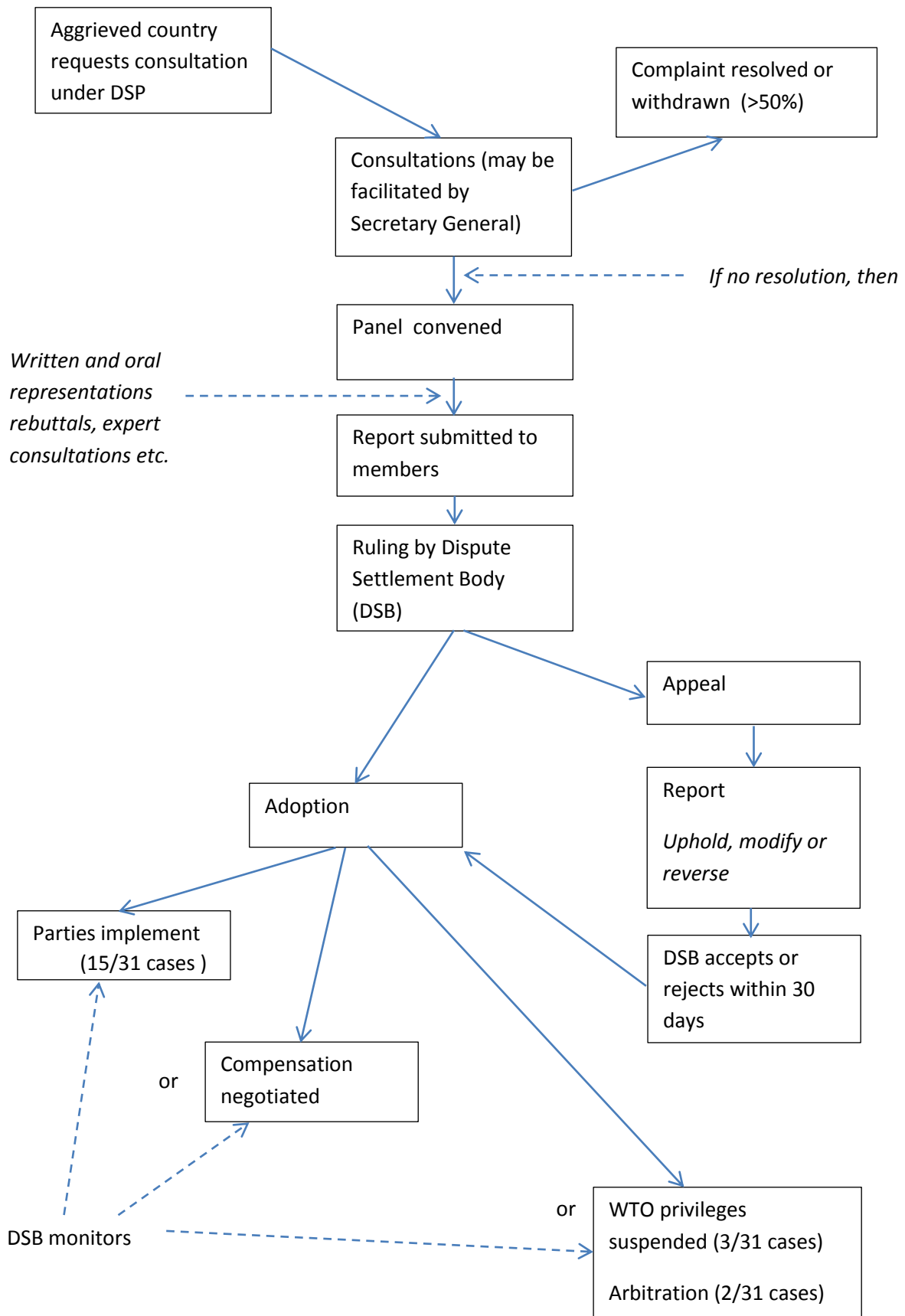
- Roughly 20 percent of cases are solved through consultation.
- The creation of a panel can be blocked once by the defending country.
- Panel members (3-5) are chosen in consultation with the parties, although they may be appointed by the Secretary General if there is no agreement.
- The members may come from any country, but are expected to serve in an independent capacity.
- A Panel report can only be rejected through consensus.

### The work of the panel

Before the first hearing each side presents its case in writing. At the first hearing both sides present their case. This is followed by a second meeting, at which both sides present rebuttals and oral arguments. Experts can be consulted by the panel on scientific or technical matters.

A first draft is written, and the facts and arguments sections of the report are presented to the parties. They then have 2 weeks to comment. An interim report presents findings and conclusions. The parties have one week to ask for a review, which would involve two weeks for additional meetings.

**Figure 7. World Trade Organisation Dispute Settlement Process**



The final report including the Panel's recommendation on measures to conform is then submitted to the parties, and circulated to all Members 3 weeks later. The Dispute Settlement Body (General Council) formally adopts the findings (ruling) within 60 days.

## Appeals

Either side can appeal a ruling, but this must be based on points of law - not existing or new evidence. The process takes 60-90 days.

The appeal is heard by 3 members of a permanent 7-member Appellate Body. This is comprised of individuals who serve a 4-year term and have recognized standing in the field of law and international trade. The Appellate body can uphold, modify or reverse the panel's findings and conclusions. The DSB has to accept or reject the Appellate body's report within 30 days

## Implementation

A member must state its intention to follow the recommendations within 30 days to the DSB. Failure to act within a "reasonable period of time" triggers negotiations with the complaining country on mutually acceptable compensation (e.g., tariff reductions for the complaining party). If there is no agreement after 20 days, the DSB may be requested to "suspend concessions or obligations". It has 30 days to decide. The determination of the measures to be taken may be referred to arbitration.

The DSB monitors how adopted rulings are implemented.

## DSP cases

As of end July 2010, there have been a total of 411 dispute settlement cases, of which 83 cases involved the ADA. Often other WTO agreements are cited in these cases and the primary basis of the complaint may not be an alleged violation of conditions in the ADA.

40 cases were complaints against the US and 8 against the EU, 5 against Mexico, and 4 against Argentina.

12 cases have been brought by the EC (1 shared) and 11 by Mexico. India has brought 8 and China 4 cases since joining the WTO in 2001 (2 against the EU and 2 against the US).

30 of the 83 cases did not proceed beyond the consultation phase. 16 additional cases did not involve the creation of a panel since the complaint was withdrawn, there was mutual agreement, settlement was reached, or AD measures were removed or brought into compliance

15 of 31 cases for which a panel was formed and the process was completed resulted in compliance or notification of intent to do so. 3 of the cases resulted in the suspension of concessions. 2 of the cases are in arbitration. Panels have not completed work in the remaining cases.

## Types of cases and their implications

There have been three main types of case relevant to the ADA:

- **Procedural issues** – the procedures followed are alleged to be inconsistent with those set out in the ADA.
- **Methodological issues** – the methodology used in the calculation of dumping margins and duties applied are alleged to be inconsistent with the ADA.
- **Legislative challenge** - legislation in WTO member states is alleged to be inconsistent with the ADA.

### Case examples

Table 1 offers an insight into the nature of some of the cases brought and the outcomes achieved. The cases include examples of complaints relating to procedure, methodology and legislation.

**Table 1: Selected anti-dumping cases**

| Case   | Countries           | Product  | Ruling/outcome  |
|--|---------------------|--|---|
| <b>DS99 - Failure to remove AD duties</b>    | Korea v US          | AD duties on DRAMS (Random Access Memory Chips). | The panel ruled that the US decision not to remove AD duties was inconsistent with the ADA since there was no evidence of continued dumping or likelihood of resumption. The US eventually agreed to eliminate AD duties as a result of a sunset review.  |
| <b>DS331. Conduct of an AD investigation</b> | Guatemala v. Mexico | AD duties on steel pipes and tubes.              | The Panel ruled that the conduct of the AD investigation was inconsistent with obligations under the ADA (multiple provisions). Mexico eventually agreed to eliminate AD duties.  |
| <b>DS206. Use of respondents' data.</b>      | India v. US         | AD duties on steel plate.                        | Panel ruled that US decision to use " <i>facts available</i> " rather than information provided by the Steel Authority of India was inconsistent with the ADA.  |
| <b>DS179: price comparisons</b>              | Korea v US          | Calculation of AD duties on stainless steel.     | Panel ruled that: <ol style="list-style-type: none"> <li>1. Because export price and normal price were both in US dollars the use of a currency conversion by the US was inconsistent with the ADA.</li> <li>2. Additional adjustments applied in calculating the "constructed export price" were found to be not permissible.</li> <li>3. The use of multiple averaging periods rather than a single period in comparing a weighted average value normal value with a weighted average of comparable export</li> </ol> |

|   |  |   |  |
|---|--|---|--|
|   |  |   | transactions was found to be inconsistent with the ADA.  |
| <b>DS141: Zeroing</b>                   | India v. EU                              | AD duties on bed-linen – use of zeroing.  | The panel and appellate body ruled that the use of zeroing was inconsistent with the ADA - the EC agreed to amend its dumping regulation.  |
| <b>DS343; DS344; DS350. Zeroing</b>     | Cases brought by Thailand, Mexico and EC | Use of zeroing in relation to AD duties on shrimp, stainless steel, and misc. products.   | Differences in panel and appellate body determinations among these cases render the status of zeroing unclear.   |
| <b>DS136/162. Legislative challenge</b> | EC and Japan v US                        | The US Anti-dumping Act of 1916 providing for treble damages through private actions and possible criminal penalties.                       | Panel ruled that the Act could be challenged under Article VI of the GATT and the ADA even if the provisions of the Act have not been applied. The Act was repealed in 2004 with on-going cases allowed to be completed. |
| <b>DS217/234. Legislative challenge</b> |  | The US Continued Dumping and Subsidy Act of 2000 (the Byrd Amendment) provided for the distribution of AD/CVD duties to domestic producers. | DSB found that this legislation nullified or impaired benefits to complainants, and authorization to retaliate was granted. The Act was repealed in 2006 - its provisions remained in force until 2007.                  |

#### **Lessons from the cases:**

Procedural and methodological issues, and even domestic legislation can be challenged successfully through the DSP. Challenges have led to changes which have been quite significant in some cases, e.g., elimination of duties. Further successful challenges might be possible, e.g., zeroing.

However, DSP alone cannot eliminate all the problems with AD actions since it is constrained by what is in the ADA and other WTO agreements.

### **Key messages: the Dispute Settlement Procedure (DSP)**

- *The Dispute settlement procedure offers a real opportunity to address unfairness (though limited to the interpretation of ADA)*
- *Cases have successfully addressed*
  - Procedural issues
  - Methodology
  - Legislation
- *China and Vietnam are both currently active with cases in DSP*
- *Special assistance is available to developing countries*
- *Key issues addressed in recent cases relevant to Vietnam*
  - NME status (particularly in EU)
  - Transparency (esp.EU)
  - Zeroing
  - Fair benchmarking and fair calculation of constructed value
- *This illustrates advantage of WTO membership. It is in Vietnam's interest to try to strengthen ADA*

### ***Exercise 7: Dispute issues for Vietnam***

Make a prioritised list of those anti-dumping procedures, methods or legislation (law) used by the US and EU which are unfair to Vietnam.

- Which of these might be brought to the WTO?
- What arguments would be used to demonstrate their unfairness?
- Under which article of the ADA would these complaints be brought?

## 7. Strategy and action

This section sets down some key elements for an effective response to the threat of anti-dumping. However it is suggested that *exercise 8* be used as the main way to develop and exchange ideas on strategy and action. The trainer/facilitator should introduce the ideas set down in this section as an integral part of the exercise.

### ***Exercise 8 : Strategy and actions***

1. *List the information and action required in order to avoid, and respond effectively to, antidumping action at each stage of the product development and anti-dumping process.*
2. *Include the following:*
  - *Information required*
  - *Analysis required*
  - *Specific actions or representations*
  - *Responsibilities for action**i.e. what should be done, when, by whom, how?*
3. *Summarize your findings on the large chart.*

### **Key elements**

There are three key elements in an effective strategy to counter and respond to the threat of antidumping:

- 1. Avoid and prepare (change from reactive to pro-active)**
- 2. Develop a coordinated and effective response (adapt; damage limitation)**
- 3. Improve the rules through WTO.**

For all of these there needs to be:

- The right information; at the right time; in the right place/channel
- Coordinated technical and legal expertise
- Allies and influence; effective communications.

Almost everything that is required to meet these needs is also required for a successful export market development strategy.

## Avoid and prepare

### Improve market intelligence:

Understand pricing in potential export markets:

- Demand – consumer trends etc
- Supply – producer industry structure, financial structure, institutional structure.

*Sources:* media, commercial attaché, academics, sector performance surveys

*Responsible:* companies, VASEP, other representative organisations

### Diversify

- Markets – sell product to different countries, different regions
- Products – produce different products; develop value added products.

*Responsible:* companies

### Develop strategic alliances

- With importers, processors, value added companies
- Consumers
- TV chefs etc.

*Responsible:* companies, representative organizations

## Effective response

### Be prepared

- Routine collection and analysis of high quality cost of production data including factor inputs (productivity) and prices
- Where possible data collected should be consistent with accounting standards in export market countries
- Particular attention should be paid to recording quantities and costs associated with land and water use, depreciation, sales and general administration costs, interest rates
- Keep a watching brief on market and economic characteristics and performance of producers in other “similar” (potential surrogate) countries
- Build strong and informed producer representative organisations.

*Responsible:* companies, representative organisations, research institutions/universities, government departments

### Be aware

- Intelligence: know what is coming

*Source:* seafood press; fishermen and fish farmer magazines and websites; Vietnam Embassy commercial attaché; importers

### Respond rapidly (as soon as petition appears likely)

- Appoint task force (large companies, producer/processor representative organisations; government)
- Appoint and coordinate and legal, technical and economic advisors (expert team).

*Responsible:* task force

### **Develop your case**

- Question petitioners arguments relating to:
  - Like product (seek to reduce scope)
  - Cumulation (seek to differentiate your product)
  - Definition of producer (impacted) industry (seek to broaden scope)
  - Dumping margin (provide your own estimates of fair value and adjusted export (US/EU) price; where appropriate criticise initial petitioner estimates)
  - Surrogate values (argue for Market Economy treatment of companies and sector; demonstrate differences between production systems and markets in Vietnam compared with surrogate countries).

*Responsible:* task force (expert team)

- Provide training workshops for smaller companies, and deploy assistance in filling out questionnaires.

### **Present your case at all opportunities to DOC/ITC/EC/potential allies**

- Prior to initiation
- Prior to preliminary determinations
- Prior to final determinations
- Prior to reviews.

### **Gain support for your case, from e.g.:**

- Independent pro-free trade economists
- Politicians with sympathies for developing countries
- Importers and value added manufacturers
- Consumer and popular press and magazine articles
- TV chefs.

### **Create opportunities to present your case**

- Request administrative reviews
- Threaten WTO Dispute Settlement procedure.

### **Use the WTO dispute settlement procedure**

- Request consultations with AD country.

### **Consolidation and adaptation**

- Diversify markets and products.....
- Refine and focus intelligence (markets, producers, surrogates etc).

## Promoting fair trade – improving the rules: WTO and the ADA

### Strengthen alliances with:

- Other NMEs and developing countries
- Free trade economists
- Development aid organisations
- NGOs.

### Raise awareness of injustice

- TV – regional and global news and current affairs programmes
- International journals and papers (the Economist; Wall Street Journal; Financial Times; Figaro etc).

### Effective input to WTO negotiations and revision to the ADA

- Joint representation – effective coordination and input to ASEAN and other country groupings to maximise impact
- Professional legal-technical economic teams to coordinate and synthesise relevant evidence.

## Non market economy (NME) status

### Work to gain market economy status (recognition by EU and US) at

- Company level
- Seafood sector level
- National Vietnam level

...through the repeated presentation of the case for ME status by reference to EU and US criteria.

Demonstration at company level should be routine; recognition at seafood sector level will be more difficult but nonetheless possible in the medium term. Recognition at national level will be more difficult for political reasons and should be a medium-long term objective.

## Annex 1: key terms and definitions

### Dumping

*The selling of a product in an export market at a price lower than normal or fair value*

### Normal or fair value

Either:

*a) the price of the exported product in the exporter's home market or if it is not sold in the home market, or if the country is classified as a non-market economy (NME) then:*

*b) an estimate of cost of production plus a reasonable margin for profit b) is also known as the "constructed value or price".*

*Data from 3<sup>rd</sup> or "surrogate" countries may be used for estimating b).*

### Starting export price (e.g. "US price"; "EU price")

the price paid by the US/EU buyer or importer to the Vietnamese exporter.

There is variation in the terms used here. Import price is sometimes used. The key is to understand that the term refers to the price paid by the US/EU buyer or importer to the Vietnamese exporter.

### Adjusted (US/EU) price

Starting (US/EU) price less (minus) the estimated costs incurred moving the product from the exporting country (i.e. from Vietnam) and more specifically from the point in Vietnam at which normal value has been estimated.

### Dumping margin

Normal value minus adjusted price

Usually expressed as a percentage:  $(\text{Normal value} - \text{adjusted price}) / \text{adjusted price}$

### Like product

Like product is the imported product, or group of products, which is causing injury to producers in the country which is importing the product. These must be sufficiently similar to be deemed to be competing with each other (i.e. significantly influencing each other's price).

**Petitioner or complainant**

Representatives of producers in the importing country who file a petition or complaint under US or EU anti-dumping legislation.

**Respondent**

Person or organisation which represents the interests of the exporting company or group of companies.

**Injury**

Injury to the producers in the importing country in terms of reduced financial viability (loss of financial viability, profitability, loss of market share, loss of opportunity, loss of employment etc).

**The (impacted) industry in the US**

“producers as a whole of a domestic like product, or those producers whose collective output of a like product constitutes a major proportion of the total domestic production of the product” (Section 771(4)(A) of the US Tariff Act 1930)

**Under selling**

Selling a product in a market at a price significantly lower than that charged by other producers.

**Cumulation**

Adding together all the “like product” being imported at a low price from several exporting countries.

**Zeroing**

Prices vary significantly through time. The dumping margin therefore also varies, and may be positive or negative. Zeroing is when all negative dumping margins (corresponding to no dumping) are excluded from the calculation of the average dumping margin.

**Non Market economy**

Both Europe and the US use a list of criteria to judge the status of an economy as market or non-market.

**Factors of production**

The inputs to the production process:

e.g feed, chemicals, water, labour, energy, packaging materials, ice etc.

**Production parameters**

Efficiency of conversion of factors of production into final product

e.g. kg food/kg of product (also known as FCR)

e.g. output production/unit of labour(labour productivity).

### **Facts available and adverse facts available**

Where the Department of Commerce in the US considers data supplied by respondents to be inadequate or unreliable, it can choose to use its own data or assumptions (often that supplied by petitioners). Furthermore in order to encourage full submission it can penalise respondents by using *adverse* facts available (AFA) – ie selecting punitive rates and estimates.

## **Annex 2: Current WTO Dispute Settlement Cases of Particular Relevance for Vietnam**

### **1. DS379 - US — Anti-Dumping and Countervailing Duties (China)**

Case initiated (request for consultations) September 2008

China requested consultations concerning the definitive anti-dumping and countervailing duties imposed by the United States pursuant to the final anti-dumping and countervailing duty determinations and orders issued by the US Department of Commerce in several investigations. Panel was composed by Secretary General in March 2009. Delivery of panel report has been delayed twice due to complexity of the case. This case relates to both procedures specified under the Subsidies and Countervailing Measures Agreement (SCM) as well as the Anti-dumping Agreement (ADA).

Some of the major points of relevance in China's case:

1. Contests the determination that State Owned Enterprises (SOEs) are public bodies for which the government determines the level of output.
2. Contests the determination that land rights are provided at less than adequate remuneration.
3. Contests the treatment of loans provided by State owned banks leading to the rejection of Chinese data and the use of benchmark information obtained from outside China.
4. Challenges inflated AD duties applied as a result of the methods used and the unfair comparison of export price and normal value.
5. Raises a number of challenges to the AD procedure, including:
  - a. Failure to invite affected parties to consultations and to allow sufficient time for preparation of response to questionnaires
  - b. Failure to take into account special difficulties in supplying requested information
  - c. Failure to notify affected parties of the information needed to make a determination on the status of public bodies and the facts to be taken into account in making that determination
  - d. Failure to inform the parties of the simultaneous consideration being given to both AD and CVD actions and the essential facts under consideration for implementing these
  - e. Use of adverse inferences and facts available in an adverse manner without notifying parties of the factual issues in question.

### **DS397 EC — Anti-Dumping Measures on Fasteners (China)**

Case initiated (request for consultations) July 2009. Panel composed December 2009.

This case concerns Article 9(5) of Council Regulation (EC) No. 384/96 (the EC's Basic Anti Dumping Regulation) which provides that in case of imports from non-market economy countries, the duty shall be specified for the supplying country concerned and not for each supplier and that an individual duty will only be specified for exporters that demonstrate that they fulfill the criteria listed in that provision. China claims that the European Communities acted inconsistently with various

procedural obligations in the Anti Dumping Agreement. China also claims that the European Communities has acted inconsistently with its obligations under the Anti-Dumping Agreement relating to, inter alia, the scope of the like product, the extent of the domestic industry, the conduct of the injury analysis and the lack of price comparability adjustments made in the calculation of the anti-dumping margin.

This case, therefore, involves challenges to EC legislation, procedures, and the determination of duties. Some key issues of relevance to Vietnam are:

1. Determination of non-market economy status (NME) unreasonable, not objective and discriminatory.
2. Separate determination (individual treatment of a party) inconsistent
3. Insufficient time allowed for response to NME treatment/individual treatment questionnaires
4. Failure to demonstrate sufficient domestic support for AD initiation
5. Failure to take into account all appropriate adjustments affecting the comparability of prices
6. Injury determination – several issues, e.g.:
  - a. Use of a sample of domestic producers
  - b. Failure to exclude non-dumped imports
  - c. Failure to consider evidence on other factors causing decline in domestic market share etc.
  - d. Failure to disclose relevant information to interested parties.

#### **DS405 - EU — Anti-Dumping Measures on Footwear (China)**

Case initiated (request for consultations) February 2010.

China is challenging as WTO-inconsistent the Basic EC Anti Dumping Regulation, which provides that, in case of imports from NME countries, the anti dumping duty shall be specified for the supplying country concerned and not for each individual supplier. According to China, applicable WTO rules require that an individual margin and duty be determined and specified for each known exporter and producer and not for the supplying country as a whole. China states that the Basic regulation provides that an individual duty will only be specified for exporters that demonstrate that they fulfill the criteria set forth in its Market Economy Treatment and Individual Treatment rules. China alleges that the criteria to obtain an individual duty are unreasonable, not objective and a violation of the Most Favored Nation (MFN) principle of the GATT. A panel to examine this case was composed by the DG of the WTO in July 2010.

This case reflects a continued challenge against the basic EU legislation on anti-dumping, specifically the modified version (2009) of Article 9(5) (NME determination) and the duties imposed as a result of this legislation.

Some of the challenges raised against the duty calculation are:

1. Failure to consider non-sampled submissions of data by exporters.
2. Unreasonable allowances for administrative, selling and general costs and profits for a company granted an individual determination.

3. Inappropriate use of Brazil as an analogue country and the fact that this did not allow for the proper establishment of facts and for an unbiased evaluation.
4. The like product definition.
5. Issues in the conduct of the investigation with respect to injury, including the use of unverified data provided by complainants, the lack of an objective examination of the impact of imports on domestic prices, the inappropriate cumulation of imports from China and Vietnam (unlike products), and the failure to consider all relevant factors.
6. Failure to ensure prompt availability of written evidence to the parties and to provide prompt access to non-confidential information.
7. Failure to disclose all relevant non-confidential information.
8. Provision of inadequate time for the parties to respond to NME treatment and to questionnaires.
9. Insufficient time allowed for defense against the final disclosure.
10. The sampling procedure used for exporters and the lack of consultation on this.
11. Discriminatory application of duties – these are higher for China than for Vietnam even though the dumping margins calculated for Vietnam were higher.
12. Denial of the granting of individual duty margins to cooperating exporters.
13. Insufficient explanation of fact and law underlying the imposition of final duties.

#### **DS404 US — Anti-Dumping Measures on Shrimp (Vietnam)(Current).**

The request for consultations by Vietnam was received at the beginning of February 2010. In addition to several administrative and new shipper reviews, the request for consultations concerns several US laws, regulations, administrative proceedings and practices, including zeroing.

At its meeting on 18 May 2010, the Dispute Settlement Body established a panel. The European Union, Japan, Korea, Mexico and Thailand reserved their third-party rights. Subsequently, China and India reserved their third-party rights. This means that the interests of these countries will be taken into consideration by the panel in considering the dispute and they will have the opportunity to be heard by the panel and to make written submissions that will be reflected in the final report.

Vietnam alleges that the United States has acted inconsistent with its WTO obligations by applying "zeroing" in the determination of the margins of dumping, by repeatedly and consistently, failing to provide most Vietnamese respondents seeking a review an opportunity to demonstrate the absence of dumping by being permitted to participate in a review, and by requiring companies to demonstrate their independence from government control and applying an adverse facts available rate to companies failing to do so in all reviews. Vietnam argues that the US has an established practice with respect to each of these issues and will continue to act in a manner inconsistent with its WTO obligations relating to these issues in ongoing and future reviews.

## Annex 3: Some key issues arising from experience of antidumping procedures taken by the US against imports of catfish and shrimp from Vietnam

In 2002 the catfish Farmers of America filed a petition against Vietnamese Companies exporting Tra and Basa to the US. This ultimately resulted in high dumping rates being applied to Vietnamese Companies. Could it have been avoided, or the rates reduced?

### The stimulus

*What was the stimulus or trigger in the case of Basa/Tra? Export/import volume and price trends .*

Between 1999 and 2003 there was a rapid increase in exports of Tra and Basa to the U.S. This probably caused, and was certainly correlated with a rapid fall in price. Catfish price declined from \$2.88/lb in 2000 down to \$2.37/lb in 2002, and the percentage price fall between 2000 and 2003 was 21%. Not only is this a striking fall, it was “bucking” the more general trend: the price of most other seafood products was going up at that time.

Furthermore, the Vietnamese product was “underselling” the American grown catfish by between 9.2% and 38.6%. It was also considered high quality. In other words Vietnamese catfish was as good or better than its American counterpart - and much cheaper.

The Vietnamese were probably able to achieve this remarkable volume and low price because of a variety of production changes and other factors:

- Rapid expansion of production as processors expanded and the channels to the American market opened up
- Substantially lower and decreasing production costs related to a rapid increase in productivity (per unit labour; per unit area)
- Falling value of the Dong against the US dollar.

(Despite this...it is notable that in its anti-dumping Determination the US International Trade Commission (ITC) stated that “the evidence of increased efficiency is poor”. )

The catfish farmers of America, being used to only limited competition within their own production sector, and at a disadvantage in terms of wage rates and natural conditions, were seriously threatened by this rapid price fall and loss of market share, and profitability was almost certainly compromised for many.

Their initial response was to launch a campaign against the Vietnam product suggesting it was foreign, dirty, and not a real catfish. In several States they were able to achieve a ban on labelling Vietnamese sourced *Pangasius* as “catfish”. Unfortunately for them this campaign failed (because consumers and processors recognised that the Vietnamese product was very similar (if not better), high quality, and low price.

## The petition

So the Catfish Farmers of America resorted to anti-dumping legislation. At that time this offered a particularly attractive way forward because under the “Byrd Amendment” ant-dumping levies could be redistributed to the complainants who had filed the AD petition. They therefore spent heavily on legal aid and associated investigations and prepared a highly punitive and effective petition.

The main issues addressed in the petition as required under US law included the scope of the problem (the nature of the affected industry; the nature of the “like product; evidence that the US price of the Vietnamese product was unrealistically low (less than fair value); and evidence of the damage the low priced imports were causing to US producers.

It is ironic that the American catfish farmers spent a large amount of money on a campaign to prove that Vietnamese catfish was not catfish at all and unlike the American product; and then spent much money on proving that Vietnamese Tra and Basa was a “like product”. In other words...games were being played.

## US Department of Commerce Investigation

The US Department of Commerce determined that there were grounds for launching an investigation. Questionnaires were sent to 25 major exporting companies in Vietnam, similar companies in Bangladesh and India (chosen as a comparable “surrogate” market economies producing the “like product”), and producers in the US to ascertain injury or threat of injury to US producers.

They received responses from 7 Vietnamese companies (“respondents”) corresponding to 23% of exports to the US from Vietnam. This comprised data for the two fiscal quarters (6 months) prior to the petition.

On Jan 31<sup>st</sup> 2003 DOC made its preliminary determination (PD) and requested comments. The consultation process (briefs and representations, hearings, rebuttals of arguments etc) then took place while DOC continued its investigations, including on site verification of data provided by the respondents. It should be noted that the representations made by the petitioners (Catfish Farmers of America) were detailed and supported by substantial legal arguments.

Events then moved forward as follows:

- March 5<sup>th</sup> PD amended
- March 17-24<sup>th</sup> : respondent sales and factors of production verification
- May 5<sup>th</sup>: Respondents and petitioners filed comments
- May 12<sup>th</sup> : Respondents and petitioners filed rebuttals
- May 23<sup>rd</sup> : public hearing
- May 28<sup>th</sup>: critical circumstances determination.

The key issues covered in these exchanges are illuminating in terms of opportunities to change the estimates for normal value and US (adjusted) price. They included<sup>1</sup>:

### **Facts available and “adverse facts available.”**

The petitioners argued that the data received from Vietnam was inadequate, inaccurate and unreliable and that the DOC should therefore use “facts available” rather than data from respondents. Further, since in some cases there had been a lack of cooperation, DOC should implement its powers to use “adverse facts available” to discourage further non-compliance. In effect this meant assuming the worst, or using data which would tend to inflate normal value and increase the dumping margin.

In this case DOC concluded that the data was usable – but in some instances , because of inadequacies or discrepancies, the use of “partial facts available” was warranted. Thus for example one company had omitted to include the use of rice husk, and another the use of ice in its production process (though it argued it had included water). DOC simply took the highest monthly figure for these inputs from other producers and used them for the full period for these companies. There were several other examples of inputs which respondents had failed to include which were then estimated on this “adverse facts available” (AFA) basis – effectively inflating the calculated dumping margin.

*“Our general policy, consistent with section 773(c)(1)(B) of the Act, is to value the factors of production that a respondent uses to produce the subject merchandise. If the NME respondent is an integrated producer, we take into account the factors utilized in each stage of the production process.”*

### **By products**

There was much technical debate over whether and the extent to which sales of by-products (such as fish skin) should be set against the costs of production.

### **Net weight and gross weight**

Some inconsistencies between gross weight (including glazing) and net weight of product were found and investigated, but resolved finally.

### **Surrogate country profit rate**

The profit rate used to estimate normal or fair value was taken from 2 Bangladesh companies with (purportedly) similar characteristics. The comparability and fairness of this was subject to some scrutiny, but DOC stuck with these ratios.

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<sup>1</sup> <http://ia.ita.doc.gov/frn/summary/vietnam/03-15794-1.pdf>

## Connections with Government

The petitioners made much of lack of information about links between senior managers and government or other exporting companies. On the whole DOC found in favour of the respondents – i.e. their information was adequate and no evidence of government or improper industry links was found.

## Valuing live fish inputs to the production process

Despite strong representations from respondents, the DOC decided that it would not consider factors of production in upstream growing operations – in other words it would use a surrogate price for live fish as input to the processing factories, rather than construct a value for the live fish based on Vietnam inputs and surrogate prices.

*Given that live fish comprises a major proportion of production costs, this is a major issue, and meant that the efficiencies of production in the Vietnamese catfish growing system were not reflected in the estimated normal or fair price.*

DOC's decision was based on the argument that the upstream data was too varied and unreliable, and that producers were not genuinely vertically integrated. They argued in particular that the quantification and valuation of water input to Tra and Basa growing would be unreliable.

Although the respondents mounted a strong rationale for the use of upstream inputs the unreliability of upstream data represented a weakness. What the respondents did not argue was that the market value of catfish in Bangladesh was even less reliable – and there is much evidence to show this to be the case. Ironically the petitioners and DOC argued that the differences between Bangladesh and Vietnam growing

## Facts available

*The US AD Law authorizes the Department of Commerce to use "facts available" when*

*Respondents:*

*(1) withhold requested information,*

*(2) fail to provide information in a timely manner and in the form requested by the Department,*

*(3) significantly impede the department's investigation, or*

*(4) submit information that cannot be verified.*

### **DOC determination on the valuation methodology for live fish**

*After careful consideration of the complete record of evidence gathered in this investigation, we have determined that, in the instant case, valuing the whole fish as a direct input for the production of subject merchandise would lead to a more accurate result than valuing the inputs that were used for the production of the whole fish. These considerations are: (1) surrogate company financial information, and (2) the actual level of integration of the Respondents, and (3) certain problems with the upstream information on the record.*

systems were an argument against using upstream values. The same arguments could have been deployed to undermine the fairness of using the Bangladesh price of catfish as an input to the processing operations.

*What lessons can be learned from an examination of the arguments used in this case and the determinations by the DOC in respect of these issues?*

For a full review of the representations and rebuttals see <http://ia.ita.doc.gov/frn/summary/vietnam/03-15794-1.pdf>

### **Requirement to consider submitted information**

*Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met:*

*(1) the information is submitted by the established deadline*

*(2) the information can be verified*

*(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination*

*(4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.*

## **Adverse inference**

*“The Department shall use, subject to sections 782(d) and (e) of the Tariff Act of 1930, as amended (“the Act”), facts otherwise available in reaching the applicable determination. Adverse inferences are appropriate “to ensure that the party does not obtain a more favourable result by failing to cooperate than if it had cooperated fully.”*

*Furthermore, “affirmative evidence of bad faith on the part of the respondent is not required before the Department may make an adverse inference.” An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record.*

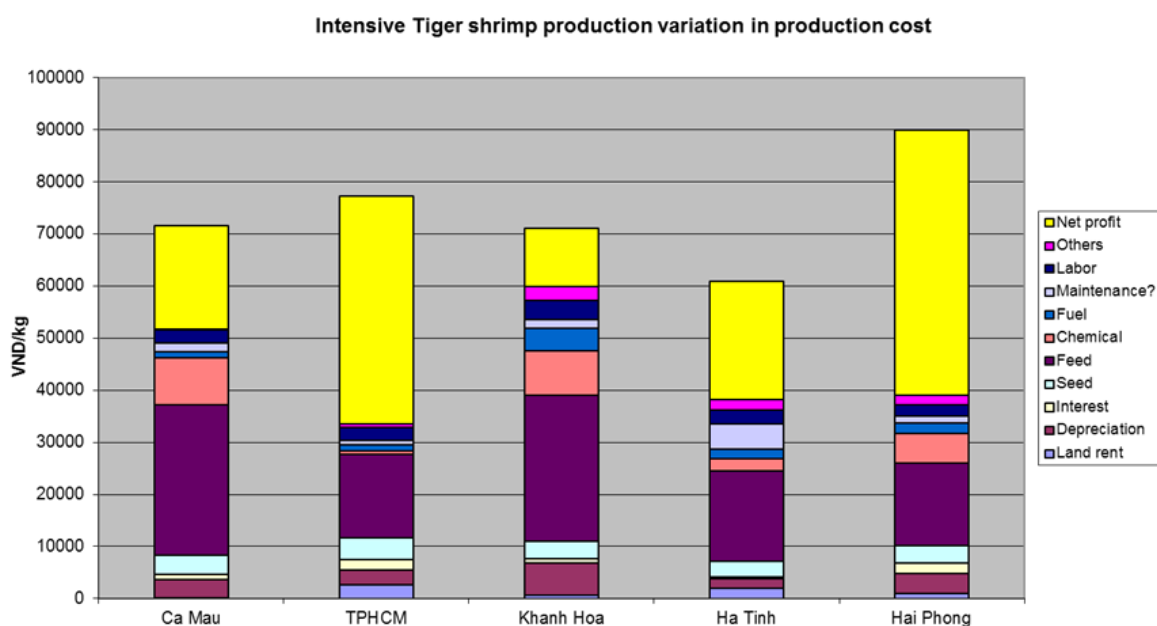


## Annex 4: Some data presentation issues

### National data on production costs

We have stressed repeatedly in this course the need for relevant, reliable, and consistent data and information in support of any response to the threat of AD actions. In practice Vietnam is relatively well placed in terms of the quality and frequency of data collection relating to seafood production costs. However, the way in which data is aggregated and presented will be crucial.

The following graph shows data on production costs and profitability of intensive tiger shrimp production in different parts of Vietnam collected by VIFEP/SUMA in 2005.



Two things are immediately striking about the data. First they are extremely variable – reflecting the differences in growing conditions, size of shrimp grown and market demand. Some variation could also be due to variations between survey teams and methodology – though this is unlikely where a single research organisation is involved.

Second this appears to be a highly profitable activity – although it is probable that periodic major loss from disease is not taken into account in these figures.

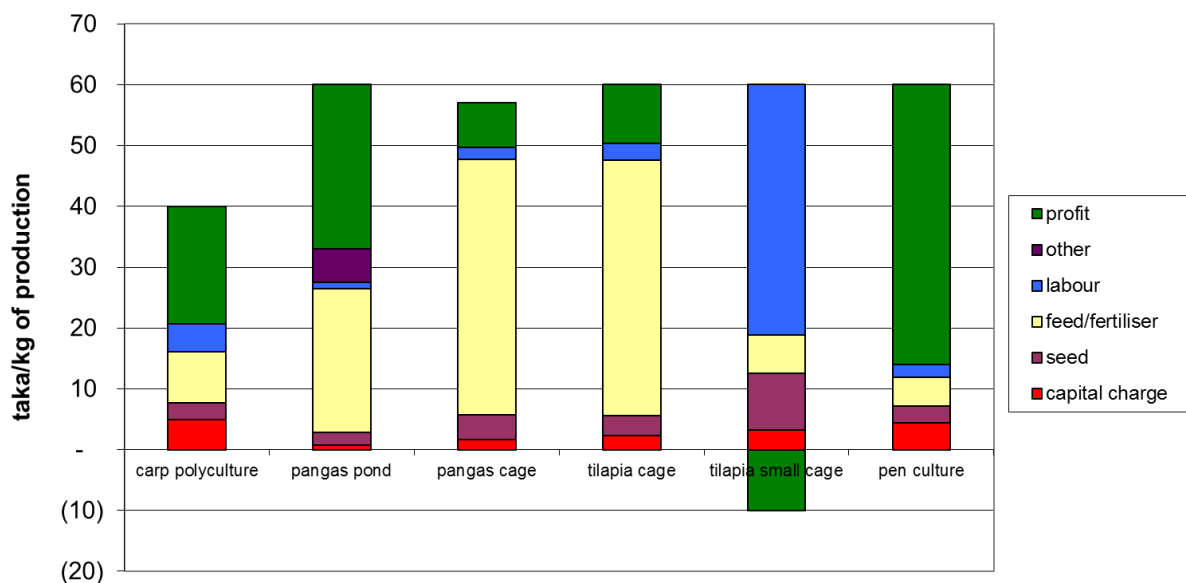
Great care must therefore be taken when presenting such data to the American or European authorities. The sampling must be carefully explained. The reasons for the differences must be carefully explained. If it is to be aggregated or averaged, data should be weighted appropriately. If there is any suggestion of inconsistency or unreliability – this will provide the excuse for use of “facts available” (i.e. ignore your data). While variability is usually a genuine reflection of reality, if it is not well explained it will be interpreted as a sign of unreliability.

## Use of surrogate data

We have noted above how easy it may be for the US or EU authorities to find fault with data provided by Vietnam. Equally however, the Vietnamese respondents should be well placed to criticise any surrogate data used. Indeed, surrogate data used by the US authorities in the past has been very limited and arguably very poor.

Bangladesh has been used as a surrogate in the case of both catfish and shrimp. The following graph shows productions costs and profitability of various aquaculture enterprises in Bangladesh. This data was collected as part of a comprehensive Bangladesh Fisheries Sector review in 2003, funded by several aid organisations including *US AID*, DFID, SIDA and the World Bank. Of particular interest are the bars relating to Pangas cage culture and Pangas pond culture. The former was relatively well established, but small scale production. This technology was still dominant in terms of total production. Costs were relatively high and profit margins slim. Highly intensive pond culture on the other hand was relatively new and entry (access to suitable land/ponds) limited. Production costs were significantly lower, and these enterprises were therefore highly profitable.

**Cost structure and profitability of aquaculture enterprises in Bangladesh 2003: indicative values**



The market price for Pangas in Bangladesh at that time largely reflected productions costs in the older still dominant and less efficient system. Vietnam on the other hand had a typical cost structure more akin to intensive pond culture – and correspondingly lower market price. For the purposes of estimating fair or normal value of the raw material – live Pangas - the situation in Bangladesh in terms of both production technology and markets was not comparable to the more intensive export-oriented industry in Vietnam – and data was available to demonstrate this.

## **Annex 5: Useful Web links**

### **UNITED STATES**

Legislation

<http://ia.ita.doc.gov/regs/title7.html>

Department of Commerce International Trade Administration

<http://www.trade.gov/ia/>

Department of Commerce Anti-dumping Manual

<http://ia.ita.doc.gov/admanual/index.html>

US International Trade Commission (ITC)

<http://www.usitc.gov/>

ITC Anti-dumping and Countervailing Duty Handbook

[www.usitc.gov/publications/year\\_in\\_review/documents/handbook.pdf](http://www.usitc.gov/publications/year_in_review/documents/handbook.pdf)

### **EUROPEAN UNION**

Legislation

[http://europa.eu/legislation\\_summaries/external\\_trade/r11005\\_en.htm](http://europa.eu/legislation_summaries/external_trade/r11005_en.htm)

EU antidumping page

[http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/index\\_en.htm](http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/index_en.htm)

### **WTO**

Anti-dumping gateway

[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)

## Annex 6: Course outline

### An introduction to anti-dumping law of the EU and US as it applies to seafood

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*A training course for key players in the seafood production and trade industry in Vietnam*

#### Overall objective:

To increase the capacity of key players in the seafood production and trade business in Vietnam to respond to the challenge of anti-dumping cases brought by producers and others in the US and Europe, and thereby to ensure a more stable and sustainable future for seafood exports.

#### Learning outcomes

##### Awareness of the issues

Participants will complete the course with a broad understanding of the nature and importance of anti-dumping legislation:

- Why anti-dumping lawsuits are gaining in popularity.
- Why an understanding of anti-dumping law is important for the long-term development of seafood enterprises in Vietnam.
- The nature and impact of cases where fisheries products of Vietnam were targeted through anti-dumping legislation.
- The opportunity for Vietnam to avoid or respond effectively to anti-dumping actions.

##### Knowledge and understanding

By the end of the course participants will have greater knowledge and understanding of the following:

- Relevant agreements, regulations and procedures in the WTO relating to alleged dumping
- Legislation and procedures in the EU and US concerning alleged dumping, as they relate specifically to the fisheries sector.
- Historical and potential impact of anti-dumping actions on the Vietnamese Fisheries sector.
- Experience from other countries.

##### Skills and capacity to respond to anti-dumping and dumping threats

By the end of the course participants should have a thorough grasp of how to avoid anti-dumping lawsuits, and how to cope/respond should such lawsuits nonetheless be brought.

- Understanding and assessment of the risk of anti-dumping cases being brought.
- Role of government and government agencies in assisting enterprises to avoid/cope with anti-dumping lawsuits, including training needs.
- Development of policies to reduce the risk of anti-dumping lawsuits.
- Development of a plan for enterprises aimed at maximising market access while avoiding or coping with anti-dumping lawsuits.

- Co-ordination among enterprises to avoid price manipulation leading to anti-dumping lawsuits.
- Collection, analysis and provision of financial and technical information in response to anti-dumping lawsuits.
- Developing a database of experience/precedents for use in case of anti-dumping lawsuits.

## Course topics

The course is broadly structured around the above learning outcomes. The course is divided into 10 sessions or modules, each with Powerpoint presentations, discussion/mutual learning sessions, exercises and in some instances, case studies. Each module corresponds to a morning or afternoon session.

The following summarizes main content, exercises and some key messages

### Session 1: Introduction

- Introduction to the course – objectives, topics, structure, outcomes, trainers, sponsors
  - *Introduction of participants*
  - *Questionnaire – participants’ understanding of antidumping*
- Introduction to key issues to be addressed in the course – an economist’s perspective; the opportunity to respond; Vietnam’s experience; non-market economy status; a multidimensional problem
  - *Exercise – ranking of threats to producers and exporters*

### Session 2: History

- History and basic characteristics of anti-dumping lawsuits; who uses anti-dumping legislation and why?
  - *Discussion – exchange of experience*
  - *Exercise: relative importance of anti-dumping as a threat to sustainable development of seafood production and exports*

Session 3: Review of the US anti-dumping process

- A highly structured process
- Petitioning
  - *Exercise: Tra/Basa case: Review of opportunities to prevent or influence petitioning; discussion of reasons for “under-selling”; finding allies*
- Investigations and determination
  - *Exercise: essential information and analysis to provide in an investigation; “like product” and “injury” to producers in importing country; “cumulation” and injury*
- Dumping duty calculation
  - *Exercise: comparison of “normal value” of catfish and shrimp calculated using a) Vietnam data and b) Bangladesh prices*
  - *Effect of “cumulation” and “like product” definition on calculation of “normal value”*
- Duty application, review and challenges

### Session 4: EU Anti-dumping

- Agencies involved
- Process
- Key differences from US system
- Dumping duty calculation
  - *Exercise: opportunities to influence the EU process (large flow chart): comparison*

*with US*

### **Session 5: The GATT/WTO anti-dumping agreement**

- Overview of the agreement
- Key provisions of the anti-dumping agreement (ADA) – articles 1-18
- Overall assessment
  - *Exercise: limitations of the ADA – priorities for change; allies for change*
- Doha round – strengths and weaknesses
- Needs and opportunities for further strengthening the ADA

### **Session 6: Anti-dumping disputes and dispute settlement in the WTO**

- Overview of the dispute settlement process
- Dispute settlement procedure (DSP) in AD cases
- Case examples and implications: procedural issues (reduced threat; use of facts available; price comparisons; non-market economy (NME) status); methodological issues (zeroing); challenges to national legislation
- Scope and limitations of DSP

*Exercise: a case for market economy status for the seafood industry and Vietnam as a whole*

### **Session 7: Bringing it all together**

- Right information; right time; right place/channel
- Coordinated technical and legal expertise
- Allies and influence; communications
- Strengthening the sector more generally to meet AD and other threats
- Changing the system (NME treatment, ADA)

*Exercise: The overview flowchart, developed throughout the training, will be used to develop a strategy and actions to prevent or reduce damage to the Vietnam seafood sector based on the following principles:*

Changing from a reactive to a proactive approach:

*Avoid – Respond – Limit damage – Adapt or change*

## Annex 7: Sample agenda

In practice our experience was that it is possible to complete the course by mid-day Friday.

|                  |   |
|------------------|---|
| <b>Monday</b>    |   |
| 08:00            | Registration  |
| 08.30            | Opening and introduction  |
| 08:45            | Introduction to the course and some key issues                    |
| 09:15            | Introduction of participants and participant questionnaire        |
| 10:15            | Tea/coffee break  |
| 10:30            | Session 2: History of anti-dumping legislation                    |
| 11:30            | Lunch   |
| 13:30            | Exercise 1 – relative importance of anti-dumping                  |
| 14:30            | US anti-dumping process. Part 1. Petitioning                      |
| 15:15            | Clarification/Discussion  |
| 15:30            | Tea break   |
| 15:45            | Group exercise 2: How to avoid a petition                         |
| 16:30            | Introducing the big flow chart                                    |
| 17:00            | close   |
|                  |   |
| <b>Tuesday</b>   |   |
| 08:00            | U/S anti-dumping process. Part 2. Investigation and determination |
| 08.30            | Discussion/clarification  |
| 08:45            | Exercise 3: informing and influencing the investigation           |
| 09:45            | Tea/coffee break  |
| 10:00            | U/S anti-dumping process. Part 3. Dumping calculation             |
| 11:00            | Discussion/clarification  |
| 11:30            | Lunch   |
| 13:30            | Exercise: estimation of normal value in Vietnam                   |
| 14:45            | Presentation/Clarification/Discussion                             |
| 15:00            | Tea break   |
| 15:15            | US antidumping process Part 4: application of duties              |
| 16:00            | Discussion: review and challenges – work with flowchart           |
|                  |   |
| <b>Wednesday</b> |   |
| 08:00            | EU antidumping process – differences relative to US. Presentation |
| 09.00            | Discussion/clarification  |
| 09:30            | Ex 3 & 4  |
| 10:00            | Tea/coffee break  |
| 10:15            | GATT agreement: overview and key provisions                       |
| 11:15            | Discussion/clarification  |
| 11:30            | Lunch   |
| 13:30            | GATT agreement: limitations, opportunities for strengthening      |
| 14:30            | Discussion/clarification  |
| 14:45            | Exercise: NME   |
| 15:45            | Tea break   |
| 16:00            | Feedback; update flow chart/action planReview                     |
|                  |   |

|                 |  |
|-----------------|--|
| <b>Thursday</b> |  |
| 08:00           | GATT/WTO dispute resolution. Overview. Presentation                          |
| 08:45           | Discussion/clarification   |
| 09:00           | Exercise: Dispute issues for Vietnam   |
| 10:00           | Tea/coffee break   |
| 10:15           | GATT/WTO dispute resolution: results. Presentation                           |
| 11:00           | Discussion/clarification   |
| 11:30           | Lunch  |
| 13:30           | Exercise: making the case for ME status (Vietnam; seafood sector; companies) |
| 15:00           | Tea break  |
| 15:15           | Feedback; updating the flowchart   |
|                 |  |
| <b>Friday</b>   |  |
| 08:00           | Trainers' recap on course  |
| 09:00           | Discussion/clarification   |
| 09:30           | Presentation: major cross cutting themes                                     |
| 10:00           | Tea/coffee break   |
| 10:15           | Completing the strategy/flowchart  |
| 11:30           | Lunch  |
| 13:30           | Completing the strategy/flowchart  |
| 14:30           | Course feedback questionnaire  |
| 15:00           | Tea break  |
| 15:15           | Summing up   |
| 15:30           | Presentation of certificates   |