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International Economic Law Practicum

BUILDING THE CAPACITY OF ANTI-DUMPING REGIMES IN DEVELOPING COUNTRIES

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Submitted by

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Table of Contents

Executive Summary 1

Anti-Dumping Investigation Timelines 2

Introduction 7

1. How to Reach a WTO-Consistent Preliminary Determination 9

2.1. Overview of the Sequence of a Dumping Investigation 9

2.2. Preparation of the Petition 10

2.2.1. Pre-Petition Assistance 11

2.2.2. Scope 12

2.2.3. Domestic Like Product 15

2.2.4. Domestic Industry 18

2.2.5. Volume and Price Effects 24

2.3. Building a Trade Remedy Bar 24

2.4. The Decision to Initiate 30

2.4.1. Standing of Domestic Industry 31

2.4.2. Sufficient Evidence of Dumping 33

2.4.3. Sufficient Evidence of Injury and Causation 33

2.4.4. Noticing the Decision to Initiate and Opportunity for Withdrawal 34

2.5. Access to Information 35

2.6. Evidence Gathering 37

2.6.1. Foreign Exporters and Producers 38

2.6.2. Domestic Producers/Importers 48

2.7. Analysis of Questionnaire Responses 53

2.7.1. Dumping 53

2.7.2. Injury 60

2.8. Determinations 65

2.8.1. Preliminary Determinations 66
2.8.2. Final Determinations 67
3. Post-order Judicial Events 68
3.1. Administrative and Sunset Reviews 68
3.2. Judicial Review 72
3.3. Defending Determinations Against WTO Challenges 75
Conclusion 76
Bibliography 77
Annex II-A: Guidelines For Decision To Initiate 92
Annex II-B: Guidelines For Determining Export Price 95
Annex II-C: Guidelines For Determining Normal Value Using Respondent's Home Market Sales 101
Annex II-D: Guidelines For Determining The Dumping Margin 108
Annex II-E: Guidelines For Assessing Volume Effects & Cumulation 110
Annex II-F: Guidelines For Assessing Price Effects 115
Annex II-G: Guidelines For Assessing Impact On Domestic Industry 119
Annex II-H: Guidelines For Assessing Causation 128

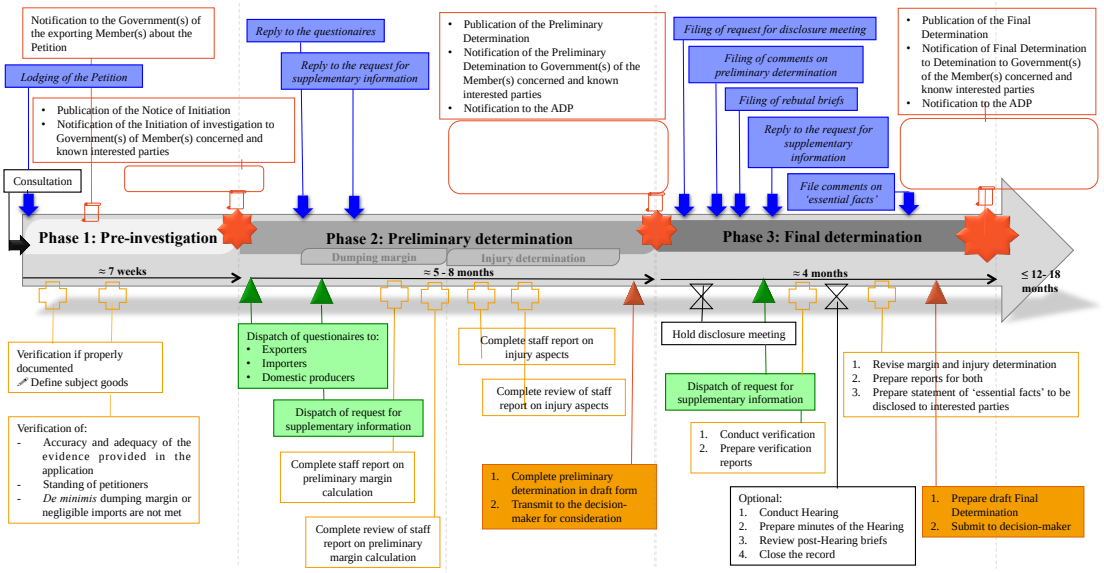
Executive Summary

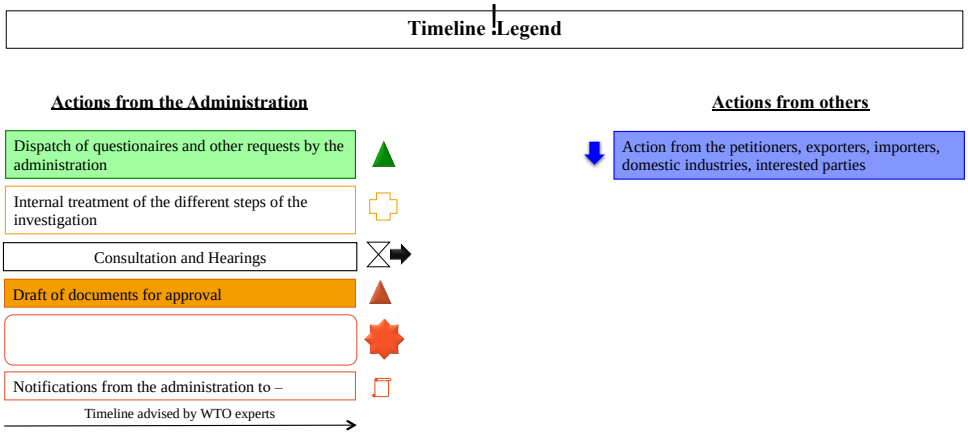
Many developing countries would like to increase their capacity to launch successful anti-dumping investigations that are consistent with their obligations as members of the World Trade Organization ("WTO"). Many of these countries have limited resources to devote to this purpose. Some also have relatively little experience in carrying out anti-dumping investigations and imposing anti-dumping measures. This Memorandum provides these countries with tools to overcome both of these hurdles.

The principal aim is to advise developing countries on how to conduct cost-efficient, minimally burdensome anti-dumping investigations that are still consistent with WTO law and practice. The Anti-Dumping Agreement ("ADA") and relevant WTO jurisprudence, in addition to country-specific practices, inform this memorandum. The memorandum relies on expert advice collected from practitioners, including government officials in national investigating authorities, as well as various anti-dumping handbooks and manuals. Advice is offered in two forms: (1) broader recommendations, which are contained in the body of the Memorandum; and (2) practical, step-by-step guidelines for key stages of an anti-dumping investigation, which are attached to the Memorandum. Beneficiary-specific legal analysis, policy recommendations, practical guidelines, and sources of information have been redacted from the body of the Memorandum, Bibliography, and Annexes.

Anti-Dumping Investigation Timelines

1. Phases covered: all phases of the investigation

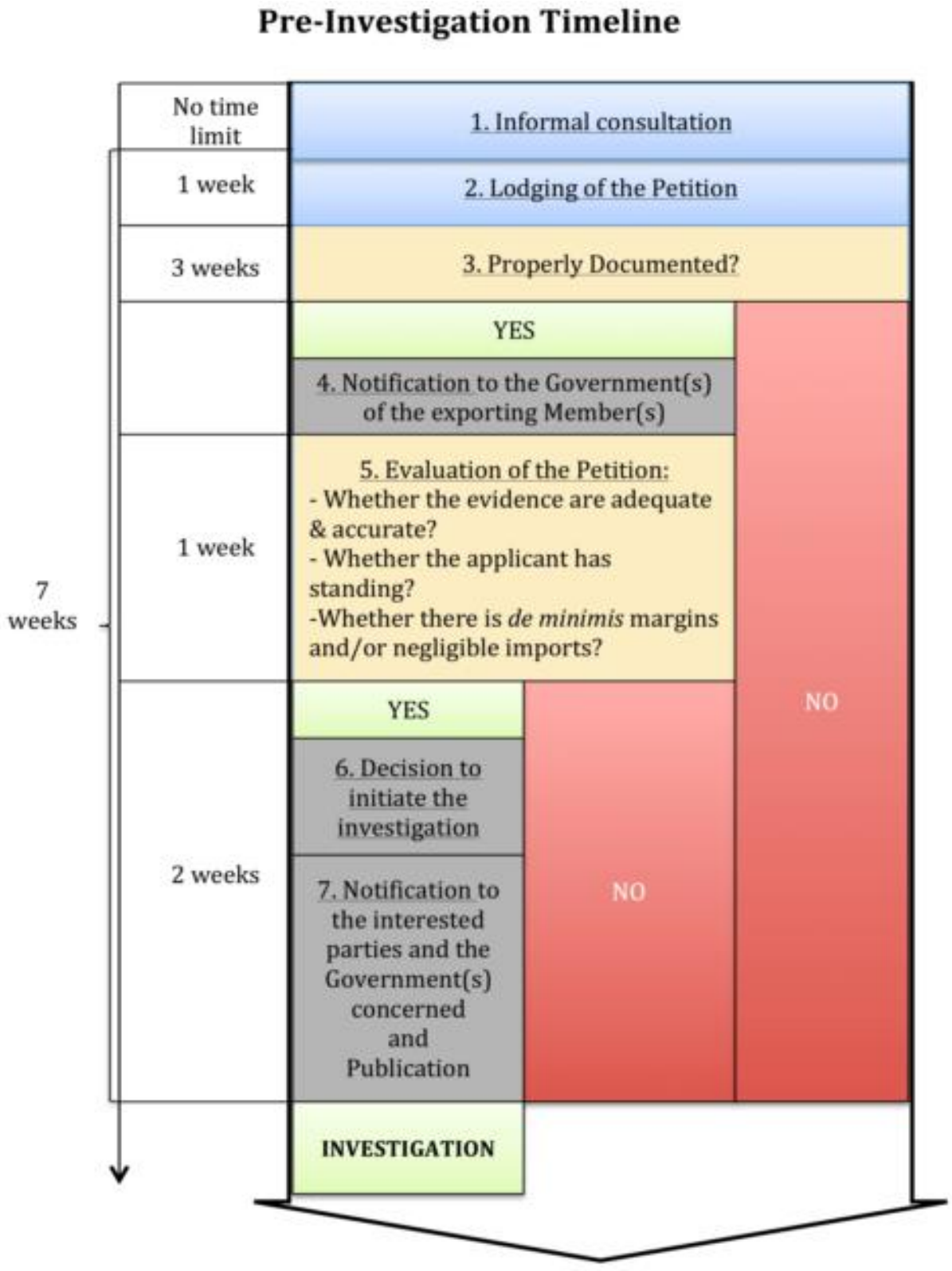




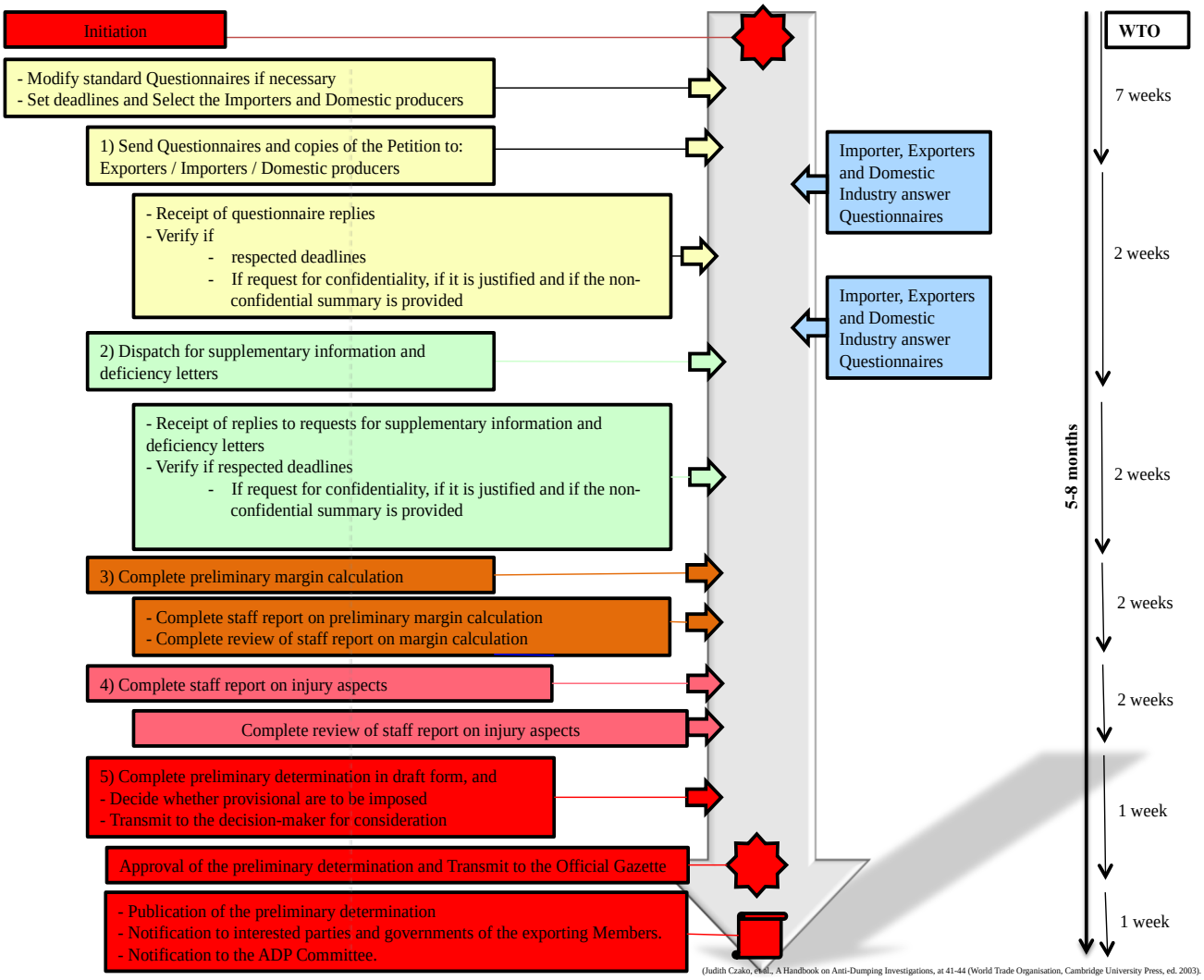
Reference

Judith Czako, et al., A Handbook on Anti-Dumping Investigations, at 10-66 (World Trade Organisation, Cambridge University Press, ed. 2003).

2. Phases covered: pre-initiation to launch of the investigation



3. Phases covered: initiation to preliminary determination



(Judith Czako, et al., A Handbook on Anti-Dumping Investigations, at 41-44 (World Trade Organisation, Cambridge University Press, ed. 2003).

4. Table comparing WTO Member state practices

	Decision to Initiate	Issuance of Questionnaires	Time to answer Questionnaires	Preliminary Determination	Final Determination	Entire Investigation
WTO ADA	no law or gudeline	no law or gudeline	at least 30 days from the receipt of the questionnaires (possible extension of 30 days*)	not less than 60 days from the initation	not more than 4-6 months from the initation (but can be extended to 6 or to 9 months respectively**)	within 12 months from the initation (exception 18 months)
Brazil	within 20 days from submission of the petition	immediately following publication of the decision to initiate	at least 30 days from the receipt of the questionnaire and within 40 days from the date they are sent out (possible extension of 30 days***)	not less than 60 days from the initation	not more than 4-6 months from the initation (but can be extended to 6 or to 9 months respectively****)	within 12 months from the initation (exception 18 months*****)
Mexico	within 30 days from the submission of the petition	immediately following publication of the decision to initiate	within 30 days from the publication of the initation	within 130 days from the publication of the initiation (if impose measures, not less than 45 days)	no law or gudeline	within 260 days from the initiation
Argentina	within 28 days from the acceptance of the petititon	within 10 days from the decision to initiate	within 30 days from the receipt of the questionnaires	within 100 days (dumping) and 110 days (injury) from the initiation	within 220 days (dumping) and 250 days (injury) from initiation (possible extension******)	within 10 months from the initation (possible extension*******)

EXTENSIONS OF TIME

Time is an important factor in anti-dumping investigations. Petitioners often want the speediest resolution possible so that they can get relief quicker, while respondents, who in many ways have the greatest burden in responding to questionnaires issued by the investigative authority for the reasons we describe below, often find themselves hard-pressed to provide the information investigative authorities seek given differences in language, business and accounting practices, and lack of familiarity with anti-dumping law. Investigative authorities, meanwhile, are in the position of balancing efficiency, thoroughness, and due process.

The below language provided the exact wording of the country's regulation provision concerned with regard to the extensions of time to which they are linked above.

* “Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.”

** “When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.”

*** “Interested parties may request an extension of 30 days. Such request must be made before the deadline. The interested party must justify the necessity for more time; DECOM tends to be rather flexible in accepting justifications such as lateness in appointing a legal representative. Despite the flexibility shown by DECOM with regard to requests for additional time, questionnaires submitted after the deadline are not accepted and the answers are not considered in the investigation.”

**** “If requested by exporters accounting for a significant share of the trade involved. Duties may be extended from four to six months, when no ‘lesser duty.’”

******* “In exceptional circumstances, the Secretariat may extend the investigation period in accordance with Article 5.10 of the Anti-Dumping Agreement.”

***** “In exceptional circumstances, the investigation can last up to 18 months when analysis is undertaken, and from six to nine months, when a lesser duty analysis is undertaken.”

****** “When, for reasons of technical complexity, it is necessary to extend the period mentioned in the preceding paragraph, the Secretariat may authorize such an extension on an exceptional basis.”

Introduction

The aim of this memorandum is to inform developing countries that seek to develop anti-dumping policies, procedures, and practices so that they can successfully impose anti-dumping measures consistent with the Anti-Dumping Agreement (ADA) and World Trade Organization (WTO) jurisprudence.

Anti-dumping measures protect importing countries from products imported at a price that is unfairly low.[1] Under the General Agreement on Trade and Tariffs (GATT), dumping is defined as the entry of products "into the commerce of another country at less than the normal value of the products" in the importing country.[2] WTO member states are allowed to impose anti-dumping measures on exporting producers when the dumped imports cause or threaten material injury to an established industry in the importing country.[3] However, in imposing anti-dumping measures, the importing country must devise measures that are consistent with the ADA and take WTO jurisprudence interpreting the ADA into account. The desire to impose anti-dumping measures on dumped imports that threaten or cause their domestic industry material injury is understandable given that dumping allows some exporting producers to unfairly distort markets to their advantage. Imposing anti-dumping measures consistently with the obligations of the ADA is a fair, legal, and increasingly used response by WTO Members at all stages of development to level the global economic playing field. Developing countries can and should confidently exercise their rights under the ADA when necessary.

This memorandum seeks to provide these countries with the tools to successfully impose an antidumping measure by examining not only the ADA and WTO jurisprudence interpreting the ADA, but also the policies, procedures, and practices of five other countries, namely the European Union ("EU"), the United States ("U.S."), Brazil, Mexico, and Argentina. The EU and the U.S. are given the most attention since both states consistently rank in the top five for number of

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[1] *See* Joost Pauwelyn, Andrew T. Guzman and Jennifer Hillman, INTERNATIONAL TRADE LAW 458 (2016) (discussing anti-dumping measures as a legitimate tool at states' disposal that can actually enhance trade by targeting unfair pricing).
[2] *See* General Agreement on Tariffs and Trade (1947), 55 U.N.T.S. 194, at Article VI:1.
[3] *Id.*

measures imposed in a given year.[4] EU and U.S. policies, procedures, and practices are significantly developed, have been subject to multiple challenges at the WTO (some successful, others not), and have been amended as legally and practically required. Much of the information about dumping proceedings in both the EU and the U.S. is publicly available, including records of specific proceedings. With regard to the EU, much of this information is also available in French, Portuguese, and Spanish, as well as several other languages, offering easy access for non-English speaking investigating authorities to those EU materials referenced herein.

However, there is also a very important drawback to focusing on the EU and the U.S.—both regimes have developed policies, procedures, and practices that extend beyond bare minimum legal requirements and practical necessities. To the extent that both regimes now employ hundreds of employees to work on dumping investigations and are able to contribute significant resources toward antidumping processes, some of the policies, procedures, and practices that they have adopted are inapposite to those that may be readily adopted by developing countries. Therefore, in addition to the EU and the U.S., this memorandum examines policies, procedures, and practices in states that have successfully imposed anti-dumping measures despite their relative lack of experience and capacity. There is less WTO jurisprudence evaluating these practices as compared to those of the EU and the U.S.; however, they can still be examined and used to develop simpler and more streamlined policies, procedures, and practices suited to developing countries with more limited resources. If and when more resources are allocated by developing country governments to anti-dumping, these countries can assess whether adopting more robust versions of certain practices is prudent. Another reason for broadening the scope of analysis beyond only one or two countries is that while the anti-dumping law and practices of WTO Members are similar in many respects, they also diverge in important ways. It is by scrutinizing these similarities and divergences that it is possible to

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[4] *See* World Trade Organization, *Anti-Dumping Measures: By Reporting Member 01/01/1995 - 30/06/2016*, ANTI-DUMPING GATEWAY: STATISTICS ON ANTI-DUMPING, *available at* https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf.

determine what is essential for developing countries to do during the course of an anti-dumping investigation.

The memorandum proceeds in two parts. Part I addresses what is required for an investigating authority ("IA") to launch a WTO-consistent, cost-efficient anti-dumping investigation. The analytical focus of the memorandum is on the stages of the investigation from pre-initiation to the preliminary determination. This focus is due to the fact that successfully executing the procedures relating to these stages is imperative to ensuring the success of the overall investigation. Part II focuses on post-order events, namely administrative and sunset reviews and the judicial review of determinations.

1. How to Reach a WTO-Consistent Preliminary Determination

The majority of the analysis in Part I focuses on the evidence that is required in order to render a preliminary determination in an anti-dumping investigation so that provisional measures can be imposed. The emphasis on this preliminary phase of the investigation reflects the fact that investigating authorities' due attention at this phase to issues such as the scope of the product subject to the antidumping order, determination of the like domestic product, and the definition of the domestic industry will support the final phases of the investigation. Investigating authorities' due attention to these issues is the best way to prevent an unwarranted early termination or a negative preliminary or final determination. Detailed timelines of an anti-dumping investigation from the petition stage to the final determination and the preliminary phase specifically can be found prior to the Introduction to this Memorandum.

2.1. Overview of the Sequence of a Dumping Investigation

The stages of a dumping investigation may be broken down into four parts, as diagrammed in the timelines provided prior to the Introduction: (1) the petition phase (including all of the prerequisite preparation); (2) the investigating authority's decision to initiate; (3) the preliminary investigation phase during which the investigating authority begins to gather and analyze facts and issues a preliminary determination, at which point provisional measures may be imposed;

and (4) the final investigation phase, at which point the investigating authority may adjust dumping margins and render a final affirmative or negative finding as to injury. This memorandum proceeds in that order, the sub-sections herein highlighting critical steps along the way that require the investigating authority to develop policies, procedures, and practices.

An important note: some WTO Members bifurcate their investigation process so that different government agencies are responsible for determining dumping and injury, notably the U.S., Canada, and Argentina.[5] Bifurcation is not required by the WTO and the vast majority of Members do not follow this model.[6] Many countries have not adopted a bifurcated model, the costs of creating one can be considerable, and although there are certainly advantages, it is not necessary to do so.

2.2. Preparation of the Petition

The ADA requires that a petition for an anti-dumping measure contain a certain minimum of information.[7] The petition identifies the allegedly dumped product and the domestic like product, in addition to known foreign exporters, foreign producers, and importers of the allegedly dumped project; the domestic producers of which are allegedly being injured as a result of the dumping; and the volume and price effects of the dumped import.[8] In short, petitioners must provide *prima facie* evidence of dumping, injury, and causation. This section addresses issues that petitioners must take into account with regard to (1) identification of the imports allegedly being dumped, i.e. the scope of the anti-dumping measure it is seeking; (2) the domestic like product; (3) the domestic industry; and (4) injury caused by the allegedly dumped imports.

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[5] *See* Judith Czako, Johann Human and Jorge Miranda eds., A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS 5 (2003).
[6] *Id.*
[7] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (1994), Apr. 15, 1994, Annex IA, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 14, Article 5.2 ("Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to [warrant initiation]") at Article 1 [hereinafter Anti-Dumping Agreement].
[8] *Id.*

2.2.1. Pre-Petition Assistance

Authorities in some countries request that potential complainants submit draft complaints for review in order to avoid having to later reject weak, insufficiently documented or otherwise incomplete complaints. The EU's pre-complaint services appear to be the most robust. Potential complainants submit a draft complaint to the EU Office of Complaints within the European Commission, after which there are several rounds of informal consultations with Commission officials. [9] During the consultation period, which may last several months, Commission officials review the draft complaint to see if it will meet the requirements of the EU regulation implementing the ADA.[10]

The U.S. Anti-Dumping/Countervailing Duty Petition Counseling and Analysis Unit within the U.S. Department of Commerce (the U.S. agency charged with investigating dumping) also confidentially reviews draft complaints and advises complainants of any deficiencies.[11] Brazil uses what it terms a "pre-analysis formulary." The formulary is an electronic document available from the Brazilian investigating authorities' website that complainants can fill in online. The information requested by the formulary is similar to that which would be required for a complaint, so petitioners are essentially submitting a draft complaint. Like the U.S. and EU procedures, the formulary is intended to allow domestic producers to gain an understanding of what is required to file a complete petition and reduce the likelihood that authorities are unable to initiate an investigation.[12] Under Brazilian administrative law, petitioners may also submit questions to the Brazilian authorities regarding any aspect of the anti-dumping procedure and must receive a response within 24 hours.[13] Research did not indicate that Mexico provides any

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[9] *See* European Commission, GUIDE ON HOW TO DRAFT AN ANTI-DUMPING COMPLAINT (2009), at 3 [hereinafter EU Complaint Guide]; *see also* European Commission, *Trade Export Help Desk, available at* http://exporthelp.europa.eu/thdapp/display.htm?page=it%2Fit_Antidumping.html&docType=main&languageId=en (last visited: March 1, 2017).

[10] *See* Ivo Van Bael and Jean-François Bellis, EU ANTI-DUMPING AND OTHER TRADE DEFENCE INSTRUMENTS 447 (5th ed.) (2011).

[11] *See* U.S. Department of Commerce, ENFORCEMENT & COMPLIANCE ANTI-DUMPING MANUAL, at Ch.2 [hereinafter Anti-Dumping Manual].

[12] *See* International Trade Centre, BUSINESS GUIDE TO TRADE REMEDIES IN BRAZIL 43 (2008) [hereinafter Trade Remedies in Brazil].

[13] *See* Notes from Expert Meeting, March 31, 2017 (on file with authors).

kind of draft complaint form or that it requires submission of a draft complaint prior to filing. In the past, however, Mexico's practice has been to schedule several meetings with the potential petitioner in order to screen the petition prior to filing.[14]

It is recommended that an individual within the IA be assigned the role of meeting with potential petitioners to learn about their case and advise them on how best to proceed. A single person is sufficient to begin this practice. Additional persons should be added as budgets permit so that the formal filing of petitions is not unduly delayed. The official charged with this responsibility should work with petitioners whose petitions seem viable from the outset; those that seem weak (e.g. those that allege dumping margins and injury volumes that are just above *de minimis*/negligible) should be rejected. The official should be particularly concerned with finding out whether the petition as proposed would cover all the relevant exporters and exporting countries in order to avoid launching an overly narrow investigation, as this will make it harder to show injury and may result in allegations of discrimination by exporters.[15] Contact information for the official assigned to this role should be publicized on the IA's website.

It is imperative that in providing pre-submission assistance, an IA does not compromise its ability to conduct the investigation in an unbiased, objective way, which the ADA obligates it to do. The official who advises petitioners prior to filing should therefore not be involved in later stages of the investigation.[16] Capacity constraints on the IA, however, may not allow for this. Until an IA has sufficient resources to arrange for an IA official to be solely devoted to pre-complaint outreach, it is recommended that the services provided by the IA be limited to alerting petitioners if their draft petition is incomplete or incorrectly filled out.

2.2.2. Scope

Petitioners must determine how to describe the allegedly dumped import that they believe to be causing domestic injury. The description of the allegedly

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[14] *See* Junju Nakagawa, ANTI-DUMPING PRACTICES OF NEW USERS 253 (2007).
[15] *See* Commission Regulation (EC) 1850/2000 of 14 November 2005, Imposing a definitive duty on imports of certain steel fasteners (China, Indonesia, Taiwan, Thailand, and Vietnam), 2005 O.J. (L 128) 19, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32005R1890.
[16] *See* Czako, Human and Miranda, *supra* note 5, at 29.

dumped product is often referred to as the scope. The scope will determine which imports will be subject to examination during the investigation, i.e. it will determine the subject imports. The scope should very closely correspond to the like domestic product, discussed *infra*, which is the product sold by the domestic producers that are being injured.[17]

The scope should be a technical description of the product that will also include HTS numbers. It should refrain from describing the end uses of a particular product, focusing instead on the product's physical characteristics, especially those that would be identifiable to customs authorities.[18] Determining scope will entail use of the Harmonized Tariff Schedule (HTS). While a HTS classification number(s) will not necessarily define the entire scope of the imported goods on which the petitioner is seeking a dumping order, it does provide an easy way to identify and analyze imports of the alleged dumped import. Once an order is put in place, it will also allow customs authorities to identify the subject imports and assess anti-dumping duties. The scope may include a single or multiple HTS numbers. However, note that HTS numbers may not be congruent with the dumped imports causing the injury, in which case the description will become particularly important.[19]

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[17] *See* United Nations Conference on Trade and Development (UNCTAD), WTO TRAINING MODULE 5 (2005), *available at* http://www.unctad.org/en/Docs/ditctncd20046.en.pdf [hereinafter UNCTAD Training Module].

[18] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 2, 12. Descriptions that contain the end use of a particular product may not allow the subject import to be easily identified at customs since it is very difficult for a customs agent to know what the end use of a particular product is at inspection. Thus, it is much better to describe the product by physical attributes that are easily identifiable, such as size, shape, material. *See* Czako, *supra* note 5, at 98-102. For an example of a scope involving an end use that proved problematic, see the U.S. Department of Commerce's struggle with a scope that excluded birthday candles. *See* U.S. Department of Commerce, *Petroleum Wax Candles From the People's Republic of China*, 76 Fed. Reg. 46277 (Aug. 2, 2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-08-02/pdf/2011-19529.pdf.

[19] For instance, in United States practice, the official scope of the subject imports is not necessarily based on a specific HTSUS number, but rather a description. For example, see this description of the scope in the United States' final determination in *Drawn Stainless Steel Sinks from China*: *Final Results of Request for Comments on the Scope of the Antidumping Duty Order*, 76 Fed. Reg. 46277 (Aug. 12, 2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-08-02/pdf/2011-19529.pdf. ("The products covered by the scope of this investigation are drawn stainless steel sinks with single or multiple drawn bowls, with or without drain boards, whether finished or unfinished,

Petitioners may want to make explicit what products are to be excluded from the scope. For instance, in the example of drawn stainless steel sinks presented in note 19, *supra*, the scope explicitly excludes certain kinds of stainless steel sinks from the order (even though they enter under the same HTS number as other sinks that are subject to the order). Exclusion of certain kinds of goods from the scope may be done for strategic reasons, especially if the importer has reason to know that some sinks that would otherwise be caught by the order are either not being dumped or are being dumped at lower margins because their inclusion will dilute the dumping and injury findings. Very importantly, the petitioner will want to be sure to exclude as far as possible products that are not produced by the domestic industry.[20] Broadening the scope of the product will frequently result in expanding the size of the domestic industry to be examined such that petitioners who may not be injured would be included in the injury analysis.[21] However, too narrow a scope could result in the anti-dumping order being easily circumvented

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regardless of type of finish, gauge, or grade of stainless steel. Mounting clips, fasteners, seals, and sound-deadening pads are also covered by the scope of this investigation if they are included within the sales price of the drawn stainless steel sinks.16 For purposes of this scope definition, the term ''drawn'' refers to a manufacturing process using metal forming technology to produce a smooth basin with seamless, smooth, and rounded corners. Drawn stainless steel sinks are available in various shapes and configurations and may be described in a number of ways including flush mount, top mount, or undermount (to indicate the attachment relative to the countertop). Stainless steel sinks with multiple drawn bowls that are joined through a welding operation to form one unit are covered by the scope of the investigations. Drawn stainless steel sinks are covered by the scope of the investigation whether or not they are sold in conjunction with non-subject accessories such as faucets (whether attached or unattached), strainers, strainer sets, rinsing baskets, bottom grids, or other accessories. Excluded from the scope of the investigation are stainless steel sinks with fabricated bowls. Fabricated bowls do not have seamless corners, but rather are made by notching and bending the stainless steel, and then welding and finishing the vertical corners to form the bowls. Stainless steel sinks with fabricated bowls may sometimes be referred to as ''zero radius'' or ''near zero radius'' sinks. The products covered by this investigation are currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under statistical reporting number 7324.10.0000 and 7324.10.00.10. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.").

[20] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 2, 12.

[21] U.S. International Trade Commission, ANTI-DUMPING AND COUNTERVAILING DUTY HANDBOOK, Publication No. 4540, 14th ed. (2015), at I-8 [hereinafter ITC Handbook].

since foreign producers could make slight modifications to the product such that it falls outside the scope of the order.[22]

Lastly, an IA should be mindful that scope can be particularly difficult to ascertain for complex manufactured products that may have specific attributes not captured by a country's HTS and which may be difficult for customs agents to identify.[23] Circumvention can also be challenging to counter with regard to complex products because they can be more easily modified. Circumvention can thus be avoided by ensuring that the scope is sufficiently broad enough to prevent complications posed by such minor modifications. Yet, at the same time, the scope should not be so broad that it includes products which, as discussed above, are not being dumped or the domestic producers of which are not being injured. This balance can be difficult. Thus, if an IA is faced with a particularly difficult scope situation, it may be advisable to seek expert advice from international colleagues who have confronted the challenge of defining the scope for a similarly difficult product.

2.2.3. Domestic Like Product

The petitioner needs to ensure that the scope of the imports subject to investigation aligns very closely with the domestic like product.[24] Like product is defined by Article 2.6 of the ADA as "a product which is identical, i.e. alike in all respects to the product under consideration [the scope of the subject goods], or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration."[25] Ideally, the domestic like

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[22] Examples of such circumvention are common and are often typically dealt with through anti-circumvention proceedings, which are beyond the purview of this memorandum. However, the IA should keep potential circumvention, in its many forms, in mind when it defines the scope of the subject product so that it is able to soundly conclude that a particular product that was intended to be within the scope of the order such that the remedial effects of the duty are being undermined. *See* Van Bael and Bellis, *supra* note 10, at 629-633.

[23] *See, e.g.,* U.S. Department of Commerce, Decision Memorandum, *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Ruling on Certain Aluminum Pallets*, Dec. 7, 2016, *available at* http://enforcement.trade.gov/download/prc-ae/scope/98-aluminum-pallets-7dec16.pdf (ruling that a certain narrow subset of aluminum extrusions made by a particular Chinese manufacturer are imports subject to a past dumping order).

[24] *Id.* at Article 5.2(i).

[25] *Id.* at Article 2.6.

product will be identical to the scope.[26] However, sometimes the domestic like product may be defined slightly differently than the scope. In determining domestic like product, for instance, the United States' International Trade Commission (ITC) turns to six factors: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions; (5) common manufacturing facilities, processes, and employees; and (6) price.[27] In the U.S., the ITC receives Commerce's scope determination, which is typically the same as that provided in the petition, and then decides which products produced in the domestic market are alike using these six factors.[28] As a result, petitioners, sensitive to what portion of domestic industry they want examined, often refer to these factors in the petition to make arguments that certain domestic goods that may seem similar to those in the scope are not like products. For instance, petitioners may seek to legitimately exclude a particular domestic product that would seem similar to the products described in the scope because the producer of this particular domestic product does not seem injured. In so doing, the petitioner may argue that this particular domestic product is not a domestic like product because it is more expensive and consumers do not see it as comparable to cheaper products.

Although an IA should be careful not to define domestic like products too differently than it defines scope, there may be legitimate reasons for so doing.[29] IAs should adopt guidelines that include factors for determining domestic like product similar to those used by the U.S. ITC when determining which domestic products are alike, but avoid straying too far away from the description provided by the scope. In particular, IAs should be wary of including downstream products

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[26] The U.S. Department of Commerce describes this as typically the case. *See* Anti-Dumping Manual, *supra* note 11, at Ch. 2, 8.
[27] *Id.* at 13-14; ITC Handbook, *supra* note 21, at II-34-35.
[28] ITC Handbook, *supra* note 21, at II-34-35.
[29] *See United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (adopted Aug. 31, 2004), para. 7.139-7.158 (rejecting Canada's argument that each individual product within the scope must be identical to each individual product within the domestic like product so long as the overall scope of the imported products subject to the investigation was the same as the overall scope of the domestic like products).

in the definition of domestic like product if those downstream products are not included in the scope.[30]

2.2.4. Foreign Producers/Exporters

The petitioner also needs to determine the country(ies) of origin of the allegedly dumped product and any known exporters, foreign producers, and importers of the product.[31] Petitioners' access to national import data is essential to this endeavor so that the petitioner can identify the exporters and importers of the subject product. It may be possible for developing countries to obtain technical assistance in developing a comprehensive import database from the WTO or other entities, so this option should be explored.

If petitioners cannot obtain this data from their national customs service or another government agency responsible for collecting this information, they will need to rely on data from other sources, such as exporting country(ies)' governments, which may not be easily (if at all) accessible; or from data published by international organizations, which may not be up to date or sufficiently specific. In addition, the petitioner is asked to provide information about the prices at which the allegedly dumped product is sold in the home market, or alternatively, the costs of producing the product in the home market.[32] This information can be difficult to attain. Additionally, the petitioner should provide the names of all known exporters and producers based on "information reasonably available."[33] Guidance on how petitioners may approach gathering this evidence was provided in Annex

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[30] *Id.* at II-35; *see also United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,* WT/DS177/AB/R (adopted May 16, 2001), para. 291.
[31] *See* Anti-Dumping Agreement, *supra* note 7, at Article 5.2(ii).
[32] Anti-Dumping Agreement, *supra* note 7, at Article 5.2(iii). This information may be attained through catalogues or online prices, and should preferably cover a wide range of producers and products and reflect a considerable period of time. *See United States—Softwood Lumber from Canada*, WT/DS264/R, para. 7.105 ("[A] reputable industry price publication, covering a wide range of products, with price data over a period of time, might be preferable as a more representative source of price information than price data sourced from a single exporter or importer.")
[33] *See Mexico—Definitive Anti-Dumping Measures on Beef and Rice from the United States, Complaint with Respect to Rice*, WT/DS295/R (adopted on Aug. 31, 2004), para. 7.186, n. 185 ([t]he "known" exporters are clearly those that according to the information reasonably available to the applicant are those exporters that are known to the applicant.").

II-A, now redacted, therefore interested parties should contact the TradeLab if they are interested in similar guidance being developed for their IA.

2.2.4. Domestic Industry

Once petitioners have established the like product(s) to the dumped imports, they should gather data on the domestic industry that produces those products and that is allegedly suffering from material injury. Petitioners should provide sufficient data to an IA for it to determine whether the ADA's requirements pertaining to domestic industry are met for the purposes of initiation. Data on firm-specific or micro injury indicators is particularly important to include, as government ministries are unlikely to already possess this information.[34] As an IA becomes more familiar with carrying out investigations, it will be able to shoulder more of the burden of collecting injury data and can reduce the burden on domestic industry accordingly.

Regarding data for the purposes of initiation, petitioners must demonstrate (1) the level of support for their application; and (2) *prima facie* evidence of material injury to domestic industry, defined either as the entire domestic industry or a major proportion thereof. Petitioners should be provided with detailed instructions regarding these requirements. The remainder of this section focuses on broader points relating to defining domestic industry that an IA should communicate to petitioners, whether through general outreach to interested industries or during pre-petition counseling provided to specific petitioners when they contact an IA prior to filing.

Petitioners should begin by first casting a wide net that captures the universe of domestic producers of the like product.[35] In some cases, this may be a simple exercise, such as where there is only one petitioner-producer. Petitioners should

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[34] Countries typically rely on the petition to identify domestic producers, supplemented by government data. *See, e.g.,* CAMEX, Resolution No. 51, June 23, 2016, at 1.41 (describing how domestic producers were identified through information from the Brazilian Association of the Flexible Plastic and Foam Rolled Products Industry, and importers and producers / exporters, through the detailed import data provided by Secretariat of the Federal Revenue of Brazil) [CAMEX Res. No. 51].

[35] U.S. practice is to include in domestic industry producers of all domestic production of the like product, including toll-produced, captively consumed, or sold in the domestic merchant market. *See* ITC Handbook, *supra* note 21, at 9.

then consider whether all of the preliminary identified domestic producers are in fact "producers" of the like product. The ADA does not define "domestic producer." IAs therefore typically consider a range of factors when determining whether domestic producers are in fact engaged in domestic production, including value added to the product during domestic production operations, the quality and type of parts sourced domestically, and the firm's domestic employment level.[36] An IA should instruct petitioners that producers that make the like product as part of a tolling agreement can also be considered "domestic producers" and so should not be excluded when establishing the initial parameters of the injured industry for the purposes of the petition.[37] Similarly, production destined for captive use should also be included within the definition of domestic industry. Issues relating to this type of production, such as unreliable transfer prices, can be addressed later, as is discussed in section 2.8.2, *supra*.

Second, petitioners should seek to identify those producers that may be permissibly excluded by an IA because they are "related parties."[38] Related producers may be related to an exporter or importer of the dumped product or they may import the dumped product. Related parties are typically less likely to be injured owing to their links to foreign producers/exporters and therefore are more likely to oppose the petition. An IA should ensure potential petitioners understand that the ADA permits investigating authorities to exclude these parties so that their potential opposition does not discourage petitioners from pursuing their petition.[39]

Once these first steps are completed, petitioners should be able to provide a list of known producers to the IA and flag potential related parties in their petition, allowing them to move on to establish standing. Petitioners should ensure that they will be found to represent domestic industry—that is, that an IA will be able to show that their petition was submitted "by or on behalf" of the domestic industry.[40]

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[36] *See* Czako, Human and Miranda, *supra* note 5, at 317.
[37] *See* UNCTAD Training Module, *supra* note 17, at 67.
[38] *See* Anti-Dumping Agreement, *supra* note 7, at Article 4.1(i). If a party is exercising an element of control over another party that causes that party to behave differently than unrelated party, the parties are related. Control can also be inferred from legal arrangements. *Id.* at n. 11.
[39] *Id.* at Article 4.1
[40] *Id.* at Article 5.4. This is highly likely to be the case where petitioners are producers in a highly fragmented industry.

This two-step requirement is commonly referred to as the "fifty percent-twenty-five percent" test: Step one requires that the petition be supported by domestic producers whose collective output constitutes more than fifty percent of the total production of the like product produced by *the portion of the domestic industry expressing either support for or opposition to the petition*. Step two requires that domestic producers expressly supporting the petition account for no less than twenty-five percent of *total production of the like product produced by the domestic industry*.[41] To ensure their petition will meet the fifty percent test, petitioning domestic producers should canvas other producers to assess their support or opposition. An IA should prepare a standard form that petitioners can submit to domestic producers for this purpose. If petitioners cannot determine the level of support or opposition, they can still file their petition and the IA can use sampling to assess the level of support or opposition.[42] It is much more efficient, however, for domestic producers to address this issue prior to filing. To ensure their petition will meet the twenty-five percent test, petitioning producers should gather data that establishes total domestic production, ideally from independent sources such as public government databases and industry studies, as well as their own output (based on their records) to be included in their petition.[43]

Article 4.1 of the ADA requires IAs to analyze injury to domestic industry, defined either as the entire domestic industry or a "major proportion" of domestic industry. Article 4.1 is a separate threshold from that articulated in ADA Article 5.4, which is addressed through the "fifty percent-twenty-five percent" test. At the petition stage, the exact parameters of domestic industry will not be defined, but petitioners should draft their petition with an understanding Article 4.1. Meeting the "major proportion" threshold can prove challenging for investigating authorities because what constitutes a "major proportion" is not defined by the ADA. The Appellate Body has commented that a "major proportion" can be interpreted as an "important, serious, or significant proportion" of total domestic production,[44] but it

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[41] *Id.* at Article 5.4.
[42] *See* ITC Handbook, *supra* note 21, at I-6.
[43] *See* Czako, Human and Miranda, *supra* note 5, at 31. The importance of ensuring that accessible public databases exist is further discussed in relation to the injury analysis.
[44] *See Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil,* WT/DS241/R, para. 7.341 (adopted May 19, 2003).

has explicitly rejected specific benchmarks.[45] It is therefore helpful, to the extent possible, for petitioners to prepare a petition that contains data that will allow an IA, if necessary, to properly define domestic industry as a "major proportion" without additional research. Such a petition will include total domestic production and the identities of domestic producers whose aggregate output ideally accounts for more than fifty percent of that total.

This recommendation is based on recent WTO jurisprudence. In *EC-Fasteners (China)*, the EU was found to have violated ADA Article 4.1 when it defined domestic industry as 45 out of 300 firms, a proportion that only accounted for twenty-seven percent of total domestic production.[46] In making this finding, the Appellate Body stated that the ADA requires domestic industry to "encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production.[47] The European Commission's error was to assume that any percentage above twenty-five percent constituted a major proportion—put differently, the Commission erred by borrowing the twenty-five percent threshold from the Article 5.4 standing requirement, discussed above, and applying it to determine the Article 4.1 major proportion threshold.

When petitioners submit a petition to the IA supported by and/or identifying producers accounting for fifty percent or more of total domestic production, the IA can safely assume that it will be able to conduct its injury analysis with respect to producers representing a "major proportion" of domestic industry and that petitioners have standing.[48] The Appellate Body has stated that relatively lower

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[45] *See EC—Iron or Steel Fasteners from China,* WT/DS397/AB/R, para. 418.
[46] *See id.* at para. 429. It then proceeded to rely on a sample of 6 producers that accounted for sixty-five percent of that twenty-seven percent proportion and only seventeen and a half percent of total industry output. The importance of ensuring a WTO-consistent "major proportion" for the purposes of sampling is discussed further in section 2.7.2, *infra.*
[47] *See id.* at para. 419. Note that domestic industry can be composed of a single producer if that producer accounts for all or a "major proportion" of domestic production. *See EC—Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India,* WT/DS141/AB/RW, para. 6.72 (adopted Apr. 24, 2003).
[48] *See EC—Iron or Steel Fasteners from China,* WT/DS397/AB/R, para. 5.303 (finding that "[w]hen the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that "substantially reflects the total domestic production" will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1.").

percentages of total domestic production may still constitute a “major proportion” if the domestic industry at issue is highly fragmented. It also did not exclude the possibility that proportion as low as twenty-seven percent might be acceptable.[49] Therefore, if petitioners account for less than fifty percent total domestic production, but provide evidence that their industry is highly fragmented, an IA will still be able to proceed confidently in defining domestic industry as a “major proportion.” The evidence provided should permit an IA to provide a reasonable explanation of why the investigation is based on a lower percentage of domestic production.[50] If petitioners account for less than fifty percent of production volume and their industry is not highly fragmented, we recommend that petitioners delay and the IA discourage filing until petitioners can account for a greater percentage of total domestic production. To reiterate, petitioners and the IA should feel confident regarding the filing and acceptance of an application submitted by domestic producers that account for fifty percent or more of total domestic production, as such an application meets the established numerical thresholds and is almost guaranteed to meet the major proportion threshold.

An IA also has the option of defining domestic industry on a regional basis when the market isolation of one region effectively defines a domestic industry.[51] Petitioners should not overly concern themselves with this exception, as the conditions for it are difficult to meet[52] and it is rarely utilized by Member states.[53] Moreover, duties imposed pursuant to the exception can only be levied on imports destined for final consumption in the regional area, which may not be possible for customs authorities to implement. The European Commission provides instructions to potential petitioners regarding this exception, which include threshold percentages.[54] It is recommended that IAs follow this approach in order

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[49] *See EC—Iron or Steel Fasteners from China,* WT/DS397/AB/R*,* paras. 415-19.
[50] *Id.* para. 429.
[51] *See* Anti-Dumping Agreement, *supra* note 7, at Article 4.1(ii).
[52] *See id.* at Article 4.2.
[53] *See, e.g.*, Gregory W. Bowman, Nick Covelli, David A. Gantz and Ihn Ho Uhm, *Antidumping and Countervailing Duty Law and Practice*: *The Mexican Experience*, 5 GLOBAL TRADE AND CUSTOMS JOURNAL 267, 267-292, 278 (2010)(discussing the lack of any evidence of Mexico’s use of this exception based on final determinations).
[54] *See* EU Complaint Guide, *supra* note 9 (explaining that the conditions for using this exception are “(a) [t]he producers of the product concerned sell all or almost all (generally more than 80%) of their production in that region; (b) [t]he demand in that region is not to

to make the stringent conditions of this exception as clear as possible to petitioners. It is also recommended that IAs make clear that unless these conditions are clearly met at the time of filing and petitioners demonstrate that it will be possible for customs officials to collect duties in the event of an affirmative determination, the probability of initiating an investigation based on a petition relying on this exception is low.

Finally, IAs have the option of cumulating imports from more than one country that are simultaneously subject to anti-dumping investigations, so long as the conditions set out in ADA Article 3.3 are met.[55] Cumulation is a valuable tool for petitioners suffering injury from dumped imports originating from multiple source countries, so petitioners should keep this possibility in mind and include relevant information in their petition. Cumulation is widely used by investigating authorities in the U.S., EU, Brazil, Mexico, and Argentina.[56] The guideline on volume effects annexed to this Memorandum details how to analyze whether the conditions for cumulation are satisfied.

For petitioner and the IA to spend additional time prior to initiation on issues relating to domestic industry is extremely worthwhile. A properly defined domestic industry is critical to the investigation proceeding in a WTO-consistent manner.[57] The Appellate Body has stated that, "a wrongly-defined domestic industry necessarily leads to an injury determination that is inconsistent with the

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any substantial degree covered by supplies of producers located elsewhere in the EU (generally less than 20%);(c) [t]here is a concentration of dumped imports of product concerned into that region (generally more than 80%); and (d) [t]hese dumped imports cause injury to all or almost all the producers in the region (generally more than 80%.").

[55] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.3 (specifying that authorities must determine that dumping margins for each country are not *de minimis* and that cumulatively assessing the effects of the imports is appropriate based on the conditions of competition among them and between them and the domestic like product).

[56] For examples from Mexican practice, see *Final Determination in the Investigation of Ceramic Tableware or Pieces Thereof Imported from Colombia, Ecuador and Indonesia*, Diario Oficial, 16 Jul. 2003 (imposing compensatory duties on imports from Ecuador and Indonesia); *Final Determination in the Investigation of Carbon Steel Tubes from Romania and Russia*, Diario Oficial, 21 Apr. 2004 (imposing compensatory duties on imports from both countries).

[57] *See EC—Anti-Dumping Measures on Farmed Salmon from Norway*, WT/DS337/R (adopted Jan. 8, 2008), para. 7.118.

Agreements."[58] Once the IA has defined the domestic industry as either the entire domestic industry or a "major proportion," domestic producers can only be excluded from that definition pursuant to the related party or regional domestic industry exceptions.

2.2.5. Volume and Price Effects

Petitioners are also expected to include data on the volume and price effects of the allegedly dumped imports, as well as impact on the domestic industry. An IA should require data on the volume and value of all imports of the subject product from the investigated country(ies) and third countries to determine whether to initiate an investigation. Import data can be difficult for domestic producers to attain. However, official government statistics, as discussed above, can and should be made accessible to the public. Data for micro injury indicators should be relatively easier for petitioners to obtain from their internal accounting records, so long as producers have retained such records for the three to five years recommended for determining material injury. Educational outreach conducted by the IA to domestic producers in advance of bringing more anti-dumping investigations should therefore include informing domestic industries of the importance of keeping and maintaining their accounting records.

2.3. Building a Trade Remedy Bar

An important consideration for developing countries as they prepare to bring more anti-dumping investigations is the need for licensed attorneys experienced in trade remedies (anti-dumping and countervailing duties). Countries need a community of trade lawyers—a trade remedy bar—to assist domestic industry and foreign exporters during the investigation process and represent them during judicial, interim, and expiry review proceedings. This is because the more assistance interested parties receive, the more able they will be to respond efficiently and accurately to requests from the IA, which will, in turn, permit the IA to carry out a greater number of investigations.

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[58] *See China — Anti-Dumping And Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R, (adopted May 23, 2014), para. 7.210.

The experiences of other developing countries indicate that it is possible to develop a trade bar relatively quickly.[59] India, for example, built the trade law-related legal capacity it has today remarkably quickly. Starting only in the late 1990s, India grew the impressive capacity it has today for trade agreement negotiations and enforcement through coordinated efforts involving the government bureaucracy, the chamber of commerce, private sector lawyers and consultants, think tanks, and intergovernmental organizations.[60]

There are several ways that governments can support the growth of a trade remedy bar. First, they might publish easily accessible basic information about how their countries' anti-dumping proceedings work online. Their government might also sponsor in-person or online training sessions for lawyers as budgets permit. Online outreach and some initial in-person or webcast trainings on the investigation process should be sufficient to sew the seeds of a trade remedy bar that can grow as cases proceed and lawyers gain experience and ultimately train itself. Training on specific, more complex topics can be provided as budgets permit in response to requests from the trade bar.

The most helpful thing governments can do to grow a trade remedy bar is to generate interest in bringing anti-dumping cases among domestic industries vulnerable to dumping. At least one other developing country has sent government officials from the relevant ministry or ministries on an educational outreach trip around the country, holding sessions over a period of six to nine months, involving private sector participants (employees, management, trade associations), especially those heavily impacted by imports.[61] Governments would ideally send an official familiar with the anti-dumping process on a similar trip to visit manufacturing hubs, national and regional trade associations, economic and policy think tanks, and academic institutions within their country. This government official could also seek to attend regional industry conferences where their countries' industries participate. Providing information to industry representatives

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[59] *See* Dan Wei, *Antidumping in Emerging Countries in the Post-crisis Era: A Case Study on Brazil and China*, J. INTL. ECO. L., 1–38 (2013).
[60] *See* Gregory Shaffer, James J. Nedumpara, and Aseema Sinha eds., *Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity*, LEGAL STUDIES RESEARCH PAPER SERIES, Research Paper No. 14-08.
[61] *See* Notes from Expert Meeting, March 8, 2017 (on file with authors).

should allow for information to trickle down to smaller producers/exporters. The official who goes on this educational outreach trip should provide contact information for the pre-petition counselor within their IA. A trip of this duration need only be conducted once.

Political representatives can also be useful in raising awareness of the availability of the anti-dumping process. Representatives should be instructed to provide contact information for the anti-dumping directorate's pre-petition counselor and encouraged to engage in outreach to potentially interested producers in their constituencies. The pre-petition counselor can also develop a roster of counsel to share with petitioners that want to hire lawyers. Petitioners may choose to hire outside counsel as part of their legal team. We emphasize that this is an option and not a necessary step. Working with foreign lawyers can be an effective way for domestic lawyers to learn how the anti-dumping investigation process works. Government authorities should advise potential petitioners to check relevant rules for foreign legal practitioners practicing in the investigating country before hiring outside counsel.

Government authorities may also take advantage of proceedings at the WTO to learn more about the anti-dumping process and evolving Panel and Appellate Body interpretations of the Anti-Dumping Agreement by participating in disputes as a third party.[62] Other developing countries have utilized this strategy to grow the capacity of their administering authorities and private sector lawyers to great effect.[63] While developing countries' delegations to the WTO have many responsibilities and existing capacity may not permit participation in multiple disputes as a third party, it is generally advisable to seek to participate in as many relevant disputes as possible, taking advantage of the fact that a country can participate as actively or passively as it chooses.[64] It is further recommended that

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[62] *See* Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, at Article 10.2 [hereinafter DSU].
[63] *See* Pasha L. Hsieh, *China-United States Trade Negotiations and Disputes: The WTO and Beyond,* 4 ASIAN J. WTO INTL. HEALTH L. POL. 368-399, 389 (2009).
[64] *See* Fernando Pierola, *Third Party Participation in WTO Dispute Settlement Proceedings or Training Purposes*, 2 GLOBAL TRADE AND CUSTOMS J. 367-368, 367 (2007) (explaining that a party has a right but not an obligation to make submissions to the panel.).

developing countries monitor consultations relating to the Anti-Dumping Agreement and seek to participate in any disputes that appear likely to provide the IA with especially useful insights. A countries' permanent mission may wish to consider inviting their countries' trade lawyers to visit Geneva if and when such an opportunity presents.

While outreach and training of the types described above requires funding, this should not deter developing countries from moving forward. There are multiple sources of support from which a developing country may draw. Governments should first assess the extent to which private firms are willing to fund training sessions for their lawyers, whether in the investigating country or at the WTO. The government of Brazil has been very successful in facilitating the training of lawyers seconded by their law firms to work in Geneva.[65] Private sector support can be supplemented with anti-dumping duties collected following an affirmative determination of dumping. This is also a source of funding for government outreach to interested industries and carrying out investigations. However, in so doing, developing countries must not collect duties and return them to domestic producers, as this practice has been successfully challenged before the WTO.[66] At least one developing country adds on a marginal percentage to dumping duties

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[65] Lawyers can also be invited to intern. Brazil has utilized this approach with much success. *See* Gregory Shaffer, Michelle Ratton Sanchez and Barbara Rosenberg, *Brazil's Response to the Judicialized WTO Regime: Strengthening the State through Diffusing Expertise*, ICTSD South America Dialogue on WTO Dispute Settlement and Sustainable Development, Sao Paolo, Brazil, June 22-23, 2006.

[66] *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-387, §§ 1001–03, 114 Stat. 1549, 1549A-72 to 1549A-75, repealed by Deficit Reduction Act of 2005, Pub. L. No. 109-171, §7601, 120 Stat. 4, 154, *available at* https://usitc.gov/trade_remedy/byrd_amendment.htm. "The Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), commonly referred to as the "Byrd Amendment," provides for the annual distribution of antidumping and countervailing duties assessed on or after October 1, 2000 pursuant to AD and CVD orders in effect on or after January 1, 1999. The distribution is available to "affected domestic producers for qualifying expenditures." An "affected domestic producer" is defined as a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that (1) was a petitioner or interested party in support of a petition with respect to which an AD or CVD order was in effect and (2) remains in operation. Producers that have ceased production of the product covered by the order or that have been acquired by a firm that opposed the petition will not be considered an affected domestic producer."

that it collects and uses to fund investigations, however this practice could be subject to challenge, and therefore, it is not recommended.[67]

Finally, not all capacity-development requires increased funding. Academic institutions within developing countries and international academic networks such as the TradeLab can provide advice on a pro-bono basis. The Advisory Center on WTO Law (ACWL) gives free legal advice and training on WTO law and provides support in WTO dispute settlement proceedings at discounted rates (the latter service is discussed in the penultimate section of this Memorandum). These services are available to the developing country Members of the ACWL.[68] The ACWL also offers an annual course, conducted over eight months, relating to trade remedies.[69] Supplementary sessions for delegates unable to attend or with specific questions can be arranged.[70] Government lawyers can also apply for nine-month secondments.[71] The ACWL welcomes requests by Members for country-specific training courses on particular aspects of WTO law, such as anti-dumping margin calculations. Training can be provided in-person and via video-conference.[72]

Developing countries could ask for a deeper dive on trade remedies generally and/or specific, more complex topics, such as margin calculations. Government officials, private bar and representatives from trade associations should then be encouraged to attend. The WTO also provides training courses as part of its Progressive Learning Strategy (PLS) that may be of interest to government officials involved in anti-dumping. Thus, governments should examine the PLS calendar for 2017, available on the WTO website.[73] Additionally, the WTO may soon make additional interactive online resources relating to anti-dumping available through the WTO E-Learning hub geared specifically toward

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[67] *See* Academic Advisor Meeting Notes, March 8, 2017.
[68] *See* ACWL, ADVICE, SUPPORT AND TRAINING TO DEVELOPING AND LEAST-DEVELOPED COUNTRIES, *available at* http://www.acwl.ch/ (last visited Mar. 15, 2017).
[69] *Id.* at 23.
[70] *Id.*
[71] *Id.* at 24.
[72] *Id.* at 25.
[73] https://www.wto.org/english/tratop_e/devel_e/train_e/course_details_e.htm.

investigating authorities in developing countries, so IAs should monitor this space.[74]

Government officials and private sector lawyers should also be alerted to any opportunities to learn about trade remedies in nearby countries. For example, in November 2015, The *Latin American Dialogue on Managing Trade Remedies* (in Spanish) was held in Santo Domingo, Dominican Republic. The event was a joint effort by the Inter-American Development Bank through the Institute for Integration of Latin America and the Caribbean (INTAL) and the Integration and Trade Sector, the World Trade Organization (WTO), the International Center for Trade and Sustainable Development (ICTSD), and the Advisory Centre on WTO Law (ACWL), in partnership with the Trade Defense Commission of the Dominican Republic (CDC).[75] The focus of the event was on strengthening the institutional capacity of Latin American countries to respond to unfair trade practices and the program was specifically designed for government officials leading trade remedy programs in trade enforcement agencies.[76] The program for this event could be easily adapted to provide training for IA officials.[77]

Developing a trade bar quickly is absolutely feasible. It is important that developing countries' governments marshal resources for this objective. As with many of our recommendations, governments will find that the initial cost results in a significant long-term pay off. Rooting an anti-dumping regime within a wide support network composed of private sector lawyers and industry, as well as political representatives and academic experts, will allow IAs to rely on these stakeholders for assistance, particularly with respect to gathering information.

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[74] The E-Learning hub can be accessed at https://ecampus.wto.org/.
[75] *See* Banco Interamericano de Desarrollo, Latin American Dialogue on the Management of Corrective Trade Measures, Nov. 2, 2015, *available at* http://events.iadb.org/calendar/eventDetail.aspx?lang=es&id=4891 (last visited: April 14, 2017).
[76] *See* IDB, *Training for Negotiators: Trade Remedy Measures***,** *available at* http://www19.iadb.org/intal/conexionintal/2015/12/02/capacitacion-para-negociadores-medidas-comerciales-correctivas-2/?lang=en (last visited: April 14, 2017).
[77] The program is available at: http://idbdocs.iadb.org/WSDocs/getDocument.aspx?DOCNUM=39931196 (last visited: April 14, 2017). The list of speakers is available at: http://idbdocs.iadb.org/WSDocs/getDocument.aspx?DOCNUM=39931195 (last visited: April

Developing countries should therefore avoid a single-pronged approach to building capacity centered on turning a few government officials into specialists, as that will leave their fledgling IA under-equipped when these individuals move on from their positions.

2.4. The Decision to Initiate

Once an investigating authority has received a petition, it has an obligation to "examine the accuracy and adequacy of the evidence provided to determine whether there is sufficient evidence to justify the initiation of an investigation."[78] This standard of "sufficient evidence" is not further defined by the ADA, but has been elaborated on by WTO jurisprudence.[79] Further, once a petition is filed, the investigating authority should notify the exporting WTO Member state.[80] Most states satisfy this requirement by sending a public version of the petition to the embassy of the WTO member state.[81] There is no obligation to notify other parties, and indeed, the ADA instructs that the investigating authorities "shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation."[82]

The initiation decision rests on whether the investigating authority finds that there is sufficient evidence of dumping, injury, and causation. In addition, an IA

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[78] *See* Anti-Dumping Agreement, *supra* note 7, at Article 5.3. Note that the investigating authority has the ability under the Anti-Dumping Agreement to self-initiate a dumping proceeding without an investigation. *See* Anti-Dumping Agreement Article 5.6. This memorandum does not address how this might be done, but if a developing country is interested, a TradeLab group in the future may be able to explore the issue. It is also possible for developing countries to self-initiate an investigation into an additional country if a petition is filed with respect to one country but subject imports are being sourced from an additional country for which there is sufficient evidence of dumping. This example comes from Brazilian practice. *See* CAMEX, Resolution No. 51, *supra* note 34 (imposing a definitive anti-dumping duty for a period of up to five (5) years on Brazilian imports of polyvinyl chloride (PVC) fabrics with textile reinforcement coated on both sides, originating in South Korea and China), *available at* http://www.camex.itamaraty.gov.br/component/content/article/62-resolucoes-da-camex/em-vigor/1650-resolucao-n-51-de-23-de-junho-de-2016.

[79] *See, e.g., Mexico—Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala,* WT/DS331/R (adopted Jul. 24, 2007), para. 7.20; *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico,* WT/DS156/R (adopted Nov. 17, 2000), para. 8.53.

[80] Anti-Dumping Agreement, *supra* note 7, at Article 5.5.

[81] *See* Anti-Dumping Manual, *supra* note 11, at 6.

[82] Anti-Dumping Agreement, *supra* note 7, at Article 5.5

must find that the petitioners have standing, i.e. that the petition is made "by or on behalf of the domestic industry."[83] There is no requirement imposed by the ADA as to how much time the investigating authority may take before deciding whether to initiate. Most investigating authorities typically take no longer than one month.[84] However, once an investigation is initiated, the ADA requires that it be completed within 18 months.[85] An IA should take advantage of the time provided and not unduly commit to any deadlines that are not provided in the ADA.

Guidelines for how an investigating authority should decide whether to initiate a complaint and the notice of initiation it should prepare are found in Annex II-A: Guidelines For Decision To Initiate (Checklist).

2.4.1. Standing of Domestic Industry

In order to have standing, the domestic industry identified as producing the like product must meet the two-step "fifty percent-twenty-five percent" test previously described in section 2.2.4. A lack of standing cannot be cured later in the investigation.[86] Authorities therefore must carefully scrutinize whether the petitioner has provided sufficient information to assess standing. Authorities should verify the list of known domestic producers provided in the complaint using government and industry association databases. If it is not possible to determine the degree of support for the petition from the information provided, statistically

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[83] *Id.* at Article 5.4.

[84] In the United States, investigating authorities typically initiate an investigation within 20 days following the filing of the official petition unless the U.S. Department of Commerce has to poll domestic industry, in which case a decision to initiate is made within 40 days. *See* Anti-Dumping Manual, *supra* note 11, at Ch. 2, 5-6. However, in practice, due to the pre-consultation procedures described *supra* 2.2.1, petitioners will typically not officially file their petition until they are reasonably certain that the U.S. Department of Commerce will initiate an investigation.

[85] Anti-Dumping Agreement, *supra* note 7, at Article 5.10. In fact, the Anti-Dumping Agreement provides that investigations should be concluded within one year from the date of initiation unless "special circumstances" exist. *Id.* In the United States, investigations frequently take more than one year to complete.

[86] *See* UNCTAD Training Module, *supra* note 17, at 66. However, standing requirements need not be met throughout the entire investigation, for example, if a producer drops out or the scope of the investigation changes. This is consistent with EU practice. *See* Commission Implementing Regulation (EU) 2016/2303 of 19 December 2016 imposing a provisional anti-dumping duty on imports of certain concrete reinforcement bars and rods originating in the Republic of Belarus, 2016 O.J. L 345/4.

valid sampling methods can be used.[87] However, as discussed previously with respect to drafting the petition, it is highly recommended that the IA work with petitioners in advance to ensure that the petition establishes that domestic producers accounting for more than fifty percent of total production of the like product support the petition, as this ensures both the Article 4.1 and 5.4 thresholds are met.[88]

In the process of assessing whether a petition has been made by or on behalf of domestic industry, authorities may find that there are domestic producers that qualify as related parties. Authorities then face the question of whether to exclude these parties or not. Authorities may, but need not exclude related parties, so an IA may forego this analysis if resources are too limited. However, given that including related parties may make it harder both for petitioners to meet the standing requirement and harder for an IA to later prove injury, an IA should undertake this analysis if possible. Requesting petitioners identify any known related parties in their complaint and provide at least basic information on the market share and financial performance of those parties can reduce the burden on IAs. The factors that authorities should weigh in making their decision are straightforward.[89] Authorities should additionally consider whether excluding certain related parties will result in an investigation focused on only one sector of domestic industry. Limiting the focus in this way is likely to be found inconsistent with the ADA.[90]

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[87] *See* Anti-Dumping Agreement, *supra* note 7, Article 5.4, n. 13.
[88] U.S. practice is to poll the industry or rely on other information if the complaint fails to establish that domestic producers accounting for more than fifty percent of total production of the domestic like product support the complaint. *See* ITC Handbook, *supra* note 21, at I-6**.**
[89] For example, a related domestic producer that is performing better than similar firms is likely to be benefiting from the dumped imports, in which case, depending on their output and market share of the like product and whether they oppose the complaint, authorities may decide to exclude them. *See* Czako, Human and Miranda, *supra* note 5, at 322. In contrast, if a producer is importing the dumped product, and import shipments are a significant part of their business relative to domestic production, they should consider excluding this producer. In contrast, a producer that is importing the dumped product as part of normal commercial practice to supplement their product range or doing so out of self-defence could be included. *See* Wolfgang Muller, Nicholas Khan and Tibor Scharf eds., EC AND WTO ANTI-DUMPING LAW, A HANDBOOK 368 (2nd ed.) (2009).
[90] *See United States—Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R (adopted Aug. 23, 2001), para. 190 (finding that "investigation

2.4.2. Sufficient Evidence of Dumping

When assessing whether there is sufficient evidence of dumping to justify initiation, investigating authorities do not need all the information that would satisfy a preliminary determination of dumping.[91] However, there should be some factual and verifiable evidence supporting a dumping margin of at least 2 percent (margins under 2 percent are considered *de minimis* and should result in termination of the investigation).[92] Article 5.2 of the ADA places a burden on the complainant to provide "actual evidence of alleged dumping allegedly causing injury," while Article 5.3 of the ADA places the burden on investigating authorities to verify the accuracy and adequacy of the information.[93] Therefore, IAs are able to gather information on their own should the evidence in the petition not be sufficient and have an obligation not to simply rely on the petition without making any attempt whatsoever to verify its sufficiency. With regard to dumping, if there are different types of products within the scope, for instance, different models or product classification numbers, discussed *supra*, it is not necessary that the petition provide evidence that covers every type of product.[94]

2.4.3. Sufficient Evidence of Injury and Causation

When assessing whether there is sufficient evidence of material injury to justify initiation, authorities similarly do not need all the information that would satisfy a preliminary determination of injury. Authorities do however need the same type of evidence as defined in Article 3—including the volume of allegedly dumped

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and examination must focus on the totality of the "domestic industry" and not simply on one part, sector or segment of the domestic industry.").

[91] *See Mexico—Steel Pipes and Tubes from Guatemala*, WT/DS331/R, para. 7.22 (finding it unnecessary for investigating authorities to have irrefutable proof of dumping or injury prior to initiation so long as the evidence presented is verified by investigating authorities to provide "reasonable indications" that dumping is occurring).

[92] *See* Anti-Dumping Agreement, *supra* note 7, at Article 5.8 (providing that if at any point investigating authorities find the margin of dumping to be at less than two percent, the application should be rejected or the investigation terminated).

[93] *Mexico—Steel Pipe and Tubes from Guatemala*, WT/DS331/R, para. 7.24.

[94] This is consistent with EC practice. *See* Council Regulation (EC) No 691/2007 of 18 June 2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain saddles originating in the People's Republic of China, 2007 O.J. (L 160), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007R0691.

imports—so that they are able to conduct an objective examination. [95] Authorities should be able to identify an absolute or relative increase in imports, a margin of price undercutting, and at least some indicators of adverse impact on domestic industry, such as lower quantities of the domestic like product sold or lower prices charged.[96] IAs must not rely solely on the information in the petition if it is incomplete, and they must show that they have at least examined all the Article 3.2 and 3.4 (and 3.7, if applicable) factors.[97]

2.4.4. Noticing the Decision to Initiate and Opportunity for Withdrawal

WTO Member states are obligated to notify subject and interested parties that an investigation has been initiated.[98] Thus, once an investigating authority decides to initiate an investigation, it typically publishes the initiation in its official journal or in another public government record. Placing information about initiated investigations on the IA's webpage is advisable so that the investigation can be seen as being as transparent as possible. Information required to be included in the investigation is detailed in Article 12.1.1 of the ADA and is also listed in Annex II-A: Template for Notice of Initiation alongside other information that we recommend developing countries include but that is not mandated under the ADA.

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[95] *See Mexico — Steel Pipes and Tubes from Guatemala*, WT/DS331/R, para. 7.288 (finding that the methodology applied by Mexico to estimate the volume and price ranges of imports from sources other than Guatemala involving very limited samples of inconsistent sizes was inconsistent with Anti-Dumping Agreement Articles 3.1 and 3.2)

[96] For an example from Brazil, see CAMEX, Resolution No. 04 of February 16, 2017 (imposing a provisional anti-dumping duty, for a period of up to six (6) months on Brazilian imports of acetic esters, originating in the United States of America and Mexico) *available* at http://www.camex.itamaraty.gov.br/component/content/article/62-resolucoes-da-camex/em-vigor/1784-resolucao-n-04-de-16-de-fevereiro-de-2017. For example from the EU, see Commission Implementing Regulation (EU) 2016/2303, *supra* note 86 (imposing a provisional anti-dumping duty on imports of certain concrete reinforcement bars and rods originating in the Republic of Belarus).

[97] In *Guatemala—Cement II,* the Mexican government successfully challenged Guatemala regarding, *inter alia,* the sufficiency of evidence threat of material injury used to justify initiation of the investigation. Guatemala was not able to demonstrate that at the time of initiation, it had any evidence that imports had increased relative to domestic consumption. *See Guatemala—Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, WT/DS156/R (adopted Nov. 17, 2000) para 8.49. Nor was it able to show it had at least considered all the factors listed in Article 3.2 and 3.4 because it relied solely on information provided in the complaint, which did not provide information on all factors. *Id.* at para 8.51.

[98] Anti-Dumping Agreement, *supra* note 7, at Article 12.1.

In the event that the investigating authority decides not to initiate, some investigating authorities give petitioners the opportunity to withdraw their petition.[99] If a petitioner withdraws, the IA is free to decide not to publish the decision not to initiate.[100] This might save domestic industry embarrassment and avoid putting foreign exporters and producers on alert, although they may have learned of the petition after being informed by their own government.

2.5. Access to Information

Dumping investigations necessarily entail disclosure of sensitive business information that is the property of the interested parties. Article 6.4 of the ADA provides that investigating authorities provide all interested parties with "information that is relevant to the presentation of their cases," that is not confidential, and that is used by the investigating authority.[101] Article 6.5 of the ADA provides that confidential information "shall not be disclosed without the specific permission of the party submitting it."[102] Although IAs have an obligation to share *all* non-confidential information with all interested parties, they also have an obligation not to share confidential information when the party requesting that information should be treated confidentially can show good cause.[103] When good cause can be shown, the party still has an obligation to provide a non-confidential

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[99] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 2, 25.
[100] *See id.*
[101] Anti-Dumping Agreement, *supra* note 7, at Article 6.4
[102] *Id.* at Article 6.5. Confidential information includes information disclosure of which "would be of significant competitive advantage to a competitor," information disclosure of which "would have a significantly adverse effect upon the person supplying the information or upon a person from whom that person acquired the information," and information that is "provided on a confidential basis by parties to an investigation." *Id.*
[103] *See* Anti-Dumping Agreement, *supra* note 7, at Article 6.5.1; *EC—Iron or Steel Fasteners from China*, WT/DS397/AB/R, paras. 478-476 (requiring that all interested parties have access to all non-confidential information, that interested parties provide good cause when requesting confidential treatment of information, and requiring parties to provide non-confidential summaries when non-confidential information is susceptible for summary), paras. 478-486; *EC—Farmed Salmon from Norway*, WT/DS337/R at paras. 7.775-7.777; *Mexico—Steel Pipes and Tubes from Guatemala*, WT/DS331/R, at para. 7.379-380 (requiring that "summaries have to permit a reasonable understanding of the substance of the confidential information."). Summaries of non-confidential information must also be provided within a reasonable time. Anti-Dumping Agreement, *supra* note 7, at Article 6.4 (investigating authorities must provide "timely opportunities" to see all "relevant information"); *EC—Iron or Steel Fasteners from China*, WT/DS397/AB/R, para. 483.

summary unless it can provide reasons why the information is not susceptible to summary.[104] Further, IAs cannot restrict access to information provided by the parties unless the party who provided the information explicitly requested confidential treatment.[105] The challenge for IAs is to balance the need to restrict access to confidential information while ensuring that all parties have access to the information so that they can fully participate in the investigation.

WTO member states have provided different means by which interested parties may have access to information. The European Union requires interested parties to inspect even non-confidential files at the Commission's offices, although it is considering providing access to non-confidential information via a closed Internet portal or a CD-ROM.[106] Not even interested parties receive access to confidential information.[107] The United States provides much wider access, releasing a great deal of information not only just to interested parties but also to the general public.[108] Further, some confidential information is available to the legal representatives of interested parties via an administrative protective order but is otherwise restricted.[109] Brazil provides access to information along the same

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[104] *European Union—Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R (adopted Feb. 22, 2012), at paras. 7.514-15 (requiring parties to provide explanations of why information is not susceptible to summary).
[105] *EC—Farmed Salmon from Norway,* WT/DS337/R, paras. 7.768-7.77 (finding that the EC had to provide even government-to-government correspondence when Norway provided information to it without requesting confidential treatment).
[106] Van Bael and Bellis, *supra* note 10, at 499.
[107] *Id.* at 499-503; *see also Dumping en Droit Communautaire*, Jurisclasseur Concurrence-Consommation, Fasc. 665, LexisNexis, Dec. 2012.
[108] The United States deals with confidential information by creating what might be understood as three tiers of information: (1) information that is non-confidential and so available for public release; (2) information that is confidential but that may be shared with other interested parties under existence of an administrative protective order; (3) information that is available only to the investigating authority. *See* Anti-Dumping Manual, *supra* note 11, at Ch. 3, 3-5 (U.S. Department of Commerce procedures refer to these as "categories of information," which for the agency includes public, confidential, privileged, and classified information). In order to determine what information falls into each tier, interested parties typically indicate their desire to place information into Tier 2 by providing it to the investigating authority in brackets. If interested parties desire for the information to be placed in Tier 3, the information is placed in double brackets. *Id.* at 7. Information that is not bracketed is treated as information that the interested party has consented to be released to the public. *Id.* at 7-8.
[109] Typically only lawyers for the interested parties are subject to the administrative protective order and thus receive access to the confidential information. These representatives are legally bound not to reveal confidential information to those they represent and are subject to sanctions if they do. *Id.* at 13-17.

lines as the EU, allowing interested parties to have access only to non-confidential information.[110] Mexico, on the other hand, operates a system very similar to that of the United States.[111]

Developing countries should, at least at the beginning, adopt procedures similar to those of the EU and Brazil. Not only are the EU procedures much simpler, they will also provide comfort to interested parties, particularly foreign exporters and producers, who may otherwise fear that confidential information turned over to an IA and other interested parties will not be properly protected.[112] This is a common concern when foreign exporters and producers are dealing with an unfamiliar investigating authority for the first time and may not have as much confidence in a fledgling investigating authority as it might one with more experience.[113] To ease the burden on interested parties required to present non-confidential summaries and/or reasons why summaries cannot be provided, IAs should develop instructions that make clear what is expected.

2.6. Evidence Gathering

Questionnaires are the primary form by which investigating authorities collect evidence as to both dumping and injury and, once submitted, are provided to all interested parties and the public per the access to information procedures discussed *supra*. This section discusses to whom the investigating authority sends questionnaires (including sampling), the content of the various types of questionnaires, and the timelines for investigating authorities to send and receive the questionnaires. The section will discuss questionnaires in two parts—first, with respect to foreign exporters and producers, including a discussion of investigating authorities' use of facts available when information is not forthcoming; and second, with respect to domestic producers and importers.[114]

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[110] Trade Remedies in Brazil, *supra* note 12, at 81-82, 137-38.
[111] Bowman, Cavelli, Gantz and Uhm, *supra* note 53, at 280 (providing sanctions for disclosure to unauthorized persons and use of the information for personal benefit).
[112] Czako, Human and Miranda, *supra* note 5, at 52-53 (discussing the costs and benefits of an APO system, including the difficulties in implementing one and ensuring sanctions are sufficient to deter release of confidential information).
[113] Notes from Expert Meeting, March 9, 2017 (on file with the authors).
[114] This project does not discuss purchaser questionnaires, as these are not necessary to deploy.

2.6.1. Foreign Exporters and Producers

Procedures for evidence gathering from foreign exporters and producers vary from procedures for evidence gathering from domestic industry and importers. This is a result of the constraints on IAs' conduct when dealing with foreign parties that simply do not exist when dealing with domestic parties. First, IAs have no coercive power to compel foreign exporters and producers to cooperate. Second, IAs are likely to face diplomatic pressure from other states to keep investigations as simple and streamlined as possible. These pressures weigh on the way that the IA should develop procedures with regard to sampling respondents, questionnaire content, timelines, and applying facts available.

2.6.1.1 Sampling

Due to the usually large number of foreign exporters and producers that will have exported some of the subject product during the period of the investigation, it is usually necessary for IAs to collect the full battery of required evidence from only a select number of respondents by conducting a sample. Sampling for the purposes of evaluating dumping is permitted by Article 6.10 of the ADA, which provides that IAs may select a representative sample of foreign exporters and producers where there are so many that individual consideration of each is "impracticable."[115] In other words, when there may be several foreign exporters and producers in an investigation, the ADA acknowledges that determining individual margins for all of them is simply not possible. The alternative is to evaluate only a "statistically valid" sample of them that is representative of the whole.[116] The firms that are evaluated individually will receive their own dumping margin while the firms that are not will receive an "all-others rate" that is typically the weighted average of those firms that are evaluated. The ADA provides some guidance as to what a "statistically valid" sample is, suggesting that IAs might determine which firms to examine individually by identifying those that contribute "to the largest percentage of the volume of the exports from the country in question which can be reasonably investigated."[117]

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[115] Anti-Dumping Agreement, *supra* note 7, at Article 6.10.
[116] *See id.*
[117] *Id.*

WTO Member states have different approaches to determining a "statistically valid" sample for dumping purposes, but most are based on volume. The European Union, for example, often evaluates upward of five foreign exporters, assigning individual rates to each while assigning an all-others rate to those not examined.[118] However, it only commits itself to evaluate the "the largest representative volume of production, sales or exports which can reasonably be investigated within the time available."[119] To determine the companies or groups of companies with the largest representative volume of production, the EU will give all companies that have exported the subject product to the EU within the period of review to respond to the initiation notice. The EU asks foreign exporters/producers to make themselves known and to request a questionnaire within 15 days from the date that the initiation is noticed.[120] To do this, firms complete Annex I of the Initiation, which asks for the exporter/producer's name and contact information, its turnover and sales volume, and information about related companies.[121] Using this data and the import data collected by customs, the EU will then select the respondents that will be subject to individual examination, thus receiving a questionnaire.

The United States, on the other hand, tends almost always to only select the two largest exporters by volume.[122] In U.S. practice, the Department of Commerce

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[118] *See, e.g.*, Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China, 2013 O.J. (L 325), at 10, 15, *available at* http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_151944.def.en.L325-2013.pdf (selecting seven groups of companies for individual examination in an instance where 18 companies or groups of companies were cooperative).

[119] Regulation (EU), 182/2011, 2011 O.J. (L 55), at Article 17(1) [hereinafter EU Anti-Dumping Regulation].

[120] *See, e.g.,* Commission (EU) 2015/C 177/07, Notice of Initiation of an Anti-Dumping Proceeding Concerning Imports of Aspartame Originating in the People's Republic of China as well as Aspartame Originating in the People's Republic of China Contained in Certain Preparations and/or Mixtures (2015/C 177/07), at 5.2.1, *available at* http://trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153501.init.en.C177-2015.pdf.

[121] *See id.*

[122] *See, e.g.,* Memorandum from Amanda Bring, International Trade Compliance Analyst, Office V, to Gary Taverman, Assistant Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, Antidumping Duty Investigation of Certain Hardwood Plyboard Products from the People's Republic of China: Respondent Selection [A-570-051], Jan. 9, 2017, at 7 [hereinafter Memorandum on Respondent Selection].

issues the first part of its questionnaire (Section A) to all known foreign exporters and producers, which asks only for basic firm information and the quantity and value of its sales.[123] It also examines import data gathered by its customs authorities that provides the same information and solicits comments on respondent selection from all interested parties.[124] Commerce typically determines the two largest exporters of the subject merchandise by volume as mandatory respondents (it is these parties that will be required to fill out the remaining sections of the questionnaire) and asks for comments from interested parties.[125] In almost all cases Commerce does not alter its selection based on comments it may receive from the parties.[126] In the instance that a mandatory respondent does not respond, it will typically select the next largest exporter by volume.[127]

Brazil, although its law provides that CAMEX may sample foreign exporters and producers if it so desires, does not typically do so.[128] Rather, it sends questionnaires to all known foreign exporters and producers. This is because CAMEX typically receives only three to four questionnaires from what is usually a much smaller pool of foreign producers and exporters than are affected by an EU or U.S. investigation.[129] Mexico, on the other hand, does sample, although it still tends to examine individually a larger number of respondents than does the United States.[130]

Developing countrues, given their limited resources, should take the United States' approach of sampling only the two largest exporters. The United States has not been challenged as to this practice and is arguably shielded by the ADA, which makes clear that the investigating authority is under no obligation to

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[123] Anti-Dumping Manual, *supra* note 11, at Ch. 4, 14.
[124] *Id.*
[125] *See, e.g.,* Memorandum on Respondent Selection, *supra* note 122. This satisfies the requirement of Article 6.10.1 of the Anti-Dumping Agreement that the sample "shall preferably be in consultation with and with the consent of the [interested parties] concerned." Anti-Dumping Agreement, *supra* note 7, at Article 6.10.1.
[126] *See* Memorandum on Respondent Selection, *supra* note 122.
[127] Anti-Dumping Manual, *supra* note 11, at 15-16.
[128] *See* Trade Remedies in Brazil, *supra* note 12, at 112.
[129] *Id.*
[130] *See* Bowman, Covelli, Gantz and Uhm, *supra* note 53, at 281; NAFTA Binational Panel, *Mexico—Bovine Carcasses from the United States* (March 15, 2004), MEX-USA-00-1904-02, paras. 12-12.5,

individually examine respondents when doing so "would be unduly burdensome to the authorities and prevent the timely completion of the investigation."[131] However, a developing country should provide a clear explanation when limiting the number of respondents, similar to that of the United States.[132] This should prevent a challenge that an IA has not provided a sufficient explanation as to why it cannot provide an individual rate to all respondents.[133] If an IA does conduct a sample, it should provide an individualized rate to everyone in the sample unless it concludes that the information is not reliable and resorts to facts available.[134] In addition, no respondent that is not individually examined should receive a rate higher than the weighted average of the selected exporters/producers examined.[135]

2.6.1.2 Content

Questionnaires drafted for foreign exporters and producers should contain several categories of information, including basic data about the firm, the merchandise under review that it is producing, the quantity and value of its sales in all markets, and its costs of production.[136] Information collected is used primarily

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[131] Anti-Dumping Agreement, *supra* note 7, at Article 6.10.2.

[132] The following sentence is typical of the language that the U.S. Department of Commerce uses in explaining why it cannot individually examine all respondents: "We believe that at individual examination of the companies accounting for the largest volume of the subject merchandise shipments allows the U.S. Department to take into account is resource constraints, i.e. its current and anticipated workload and any deadlines coinciding with the segment of the proceeding in question, while capturing the largest amount of exports of subject merchandise from the PRC during the POI. *See* Memorandum on Respondent Selection, *supra* note 122, at 4. Commerce will then often provide a very detailed accounting of its current workload and the deadlines that it has to meet. *See id.* at 4-5.

[133] *See Argentina—Definitive Anti-Dumping Measures on Ceramic Floor Tiles from Italy*, WT/DS189/R (adopted on Nov. 5, 2001), paras. 6.86-6.101 (finding that Argentina violated Article 6.10 when it failed to provide individual rates to four respondents that it did choose to individually examine, but did not sufficiently explain why it could not individually examine them or why it could not provide them an individual rate when it did individually examine them).

[134] *Id.*

[135] Anti-Dumping Agreement, *supra* note 7, at Article 9.4. Zero and *de minimis* margins of those exporters examined and those calculated using facts available must be disregarded. *Id.*

[136] Oftentimes investigating authorities divide the foreign exporter/producer questionnaire into distinct sections. For instance, both Brazil and the United States use Section A of the questionnaire to collect information about the firm, including its accounting practices; the products it sells, including quantity and value information; and the markets in which it

for determining the dumping margin, but questions relevant to defining domestic industry and assessing threat of material injury may be asked as well.[137] Questionnaires should also provide information regarding questionnaire procedures, such as confidentiality and deadlines. The most important point regarding questionnaires is that while they need to be tailored to the specific industry being investigated, the majority of the content can remain the same.[138] Developing questionnaire templates is thus a one-time cost that results in savings in all future investigations.

An important issue that developing countries face is deciding for how much information to ask. The calculus governing this decision is different than it is for domestic producers, purchasers, and importers. This is because states are under less pressure to make the questionnaire easy for foreign exporters and producers because these firms are not their constituents.[139] Even more importantly, IAs do not have the same power to compel foreign exporters/producers to produce information as they are likely to have over domestic producers. Although a developing country may face considerable pushback from foreign governments if it makes foreign exporter and producer questionnaires too cumbersome, the EU and the U.S. both request very long and detailed questionnaires. If necessary

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sells them. Section B of the questionnaire is used to report information about the sales of the exporter/producer in its home market. Section C is used to report information about the sales of the exporter/producer to the investigating countries' market. Section D is use to collect cost of production data and other information necessary to construct a normal value. The United States uses Section E to collect additional information required to construct an export price. *See* Trade Remedies in Brazil, *supra* note 12, 67-72, Appendix VII (Sample Questionnaire for Exporters (Anti-Dumping Investigation); Anti-Dumping Manual, *supra* note 11, Ch. 4, 5-7. The EU takes a similar approach, using Section A to collect basic information about the firm; Section B to collect information about the product; Section C to collect operating information about the firm, including quantity and value information; Section D to calculate home market sales; Section E to collect sales to the EU; Section F to collect cost of production data; Section G to collect information about profitability; and Section H to collect information about adjustments, which the exporter may voluntarily but is in no way required to provide. *See* European Commission, Directorate General for Trade, Anti-Dumping Questionnaire, *available at* http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_151932.pdf.

[137] *See, e.g.,* U.S. International Trade Commission, Foreign Producer's/Exporters' Questionnaire – Large Residential Washers from China, *available at* https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2015/Large%20Residential%20Washers%20from%20China/Preliminary/foreign_producer_washers_prelim.doc.

[138] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 4, 9-11.

[139] Notes from Expert Meeting, March 9, 2017 (on file with the authors).

information is not forthcoming, IAs may apply facts available to replace this missing information, discussed *infra*. However, an IA should attempt, at least in its first few years, to keep questionnaires as simple as possible, which will facilitate the cooperation of foreign exporters and producers and be less likely to raise the rancor of other countries.

2.6.1.3 Timelines

WTO Member states vary as to when they dispatch foreign exporter/producer questionnaires, but it is good practice to identify interested parties and issue questionnaires as soon as possible after initiation.[140] Once a sample of foreign exporters/producers is determined as to which foreign exporters/producers will receive questionnaires, investigating authorities must allow at least thirty days for a reply.[141] Questionnaires are typically then received 37-40 days from date of dispatch.[142] A scheduled opportunity for interested parties to submit information and make comments in person may be provided as early as three weeks into the preliminary phase.[143] However, the thirty-day requirement does not apply to supplemental requests for information such as supplemental questionnaires that

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[140] WTO Member states vary as to when they send questionnaires, but most do so as soon as possible following the initiation. The United States, for instance, does not issues questionnaires until the U.S. International Trade Commission has issued an affirmative preliminary determination of injury, which usually occurs two months after initiation. Anti-Dumping Manual, *supra* note 11, at Ch. 4, 4; ITC Handbook, *supra* note 21, at II-3.
[141] Anti-Dumping Agreement, *supra* note 7, at Article 6.1.1; *Mexico—Beef and Rice from the United States*, WT/DS295/R, para. 7.220 (clarifying that the 30-day requirement applies not only to those exporters and producers that were known at the time questionnaires were originally sent but also those identified later).
[142] This is consistent with the Anti-Dumping Agreement. *See* Anti-Dumping Agreement, *supra* note 7, Article 6.1.1. It is also consistent with EC practice. *See* Muller, Khan and Scharf, *supra* note 89, at 412. It is also consistent with U.S. practice, which provides 21 days to complete Section A and 37 days to those respondents selected to complete the full questionnaire. *See* Anti-Dumping Manual, *supra* note 11, at Ch. 4, 17. It is also consistent with Brazilian practice of permitting 40 days from date that the questionnaire is sent out. *See* Trade Remedies in Brazil, *supra* note 12, at 79.
[143] This is consistent with U.S. practice. *See* ITC Handbook, *supra* note 21, at II-10. This is also consistent with the Anti-Dumping Agreement's requirements. Article 6.2 requires that "throughout the anti-dumping investigation, all interested parties shall have a full opportunity for the defence of their interests" and that "[t]o this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered…Interested parties shall also have the right, on justification, to present other information orally." *See* Anti-Dumping Agreement *supra* note 7, at Article 6.2.

IAs may send out after concluding that responses to the initial questionnaire are incomplete, deficient, or that more information is required.[144] Most investigating authorities allow extensions to be granted on a case-by-case basis if the exporter/producer provides reasons for the request, sometimes up to two or three weeks, though investigating authorities, such as the EU, have become increasingly strict in order to ensure that the IA is able to complete the investigation within the eighteen months after initiation required by the ADA.[145] One reason for the EU's strictness is that it has passed a domestic law requiring investigations to be completed within just fifteen months following initiation.[146]

Developing countries should give foreign exporters/producers at least 40 days to complete the questionnaire and grant extensions of at least fourteen days. They should not follow the EU's example of limiting the total time the investigating authority has to conclude an investigation to less than the eighteen months required by the ADA. Because questionnaires are often cumbersome to complete and because supplemental questionnaires are frequently necessary, it is better that IAs not submit themselves or foreign exporters/producers to tighter deadlines than necessary and instead focus on insuring as cooperative a relationship with foreign exporters/producers as possible.

2.6.1.4 Facts Available

Where foreign exporters and producers are not able to provide "necessary information within a reasonable period or significantly impede[] the investigation," the investigating authority may make determinations "on the basis of facts available" if it provides notice to the respondent that it will be subject to a facts

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[144] *See Egypt—Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (adopted on Oct. 1, 2002), paras. 2.70-79. The United States typically allows no more than 14 days for respondents to complete supplemental questionnaires, but may allow more if there is sufficient time for the U.S. Department of Commerce to review the information before verification. *See* Anti-Dumping Manual, *supra* note 11, at Ch. 4, 17. In any case, it requires that all information be submitted at least 7 days before verification. *Id.* As developing countries may not wish to conduct verifications in their first setoff investigations, they should understand that they are not required to do so under the ADA.

[145] *See* Van Bael and Bellis, *supra* note 10, at 468; Anti-Dumping Agreement, *supra* note 7, at Article 5.10. The United States typically grants extensions for no more than 14 days. Anti-Dumping Manual, *supra* note 11, at Ch. 4, 17.

[146] EU Anti-Dumping Regulation, *supra* note 119, Article 6(9).

available rate if it does not cooperate.[147] Investigating authorities are forced to resort to facts available in two circumstances: (1) when exporters/producers fail to respond to the questionnaires at all, at which point there is no evidence that can be used to determine a dumping margin; and (2) when exporters/producers produce some or even most of the responses to questionnaires, but fail to provide specific data or provide data that is not reliable.[148] In the first circumstance, where refusal to cooperate is clear, investigating authorities may choose to assign the respondent the rate calculated by the petition or the highest rate calculated for any respondent who did cooperate in the investigation.[149] The second circumstance is more complicated.

When respondents provide partial information, there follows an obligation to let the respondent know of the deficiency and provide it with an opportunity to remedy it even if this means extending deadlines.[150] Further, the investigating authority may not simply resort to the petition or highest rate calculated in an investigation without concluding that the information missing is indeed necessary

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[147] Anti-Dumping Agreement, *supra* note 7, at Article 6.8, Annex II; *see also Mexico—Definitive Anti-Dumping Measures on Beef and Rice from the United States,* WT/DS295/AB/R (adopted Dec. 20, 2005), at paras. 235-38 (finding that Mexico had a right to apply the highest rate assigned to any respondent in the investigation as facts available where a respondent completely failed to respond but only if it provided notice to the respondent that it would be subject to a facts available rate if it did not cooperate).
[148] Czako, Human and Miranda, *supra* note 5, at 16-17.
[149] This is in accordance with EU, U.S., and Brazilian practice. In the EU, where the respondent has failed to submit any data, it is common to simply resort to the rate alleged in the petition. *See* Van Bael and Bellis, *supra* note 10, at 474.The United States frequently also resorts to the highest rate calculated in the investigation, which may be higher or lower than the rate alleged in the petition. *See* Anti-Dumping Manual, *supra* note 11, at 12-13, 15. Brazil will typically resort to the rate alleged in the petition. Trade Remedies in Brazil, *supra* note 12, at 3.
[150] *See Mexico—Steel Pipes and Tubes from Guatemala*, WT/DS331/R, paras. 7.196-97 (finding Mexico to have violated Annex II Article 6.8 when it failed to inform Guatemalan respondents that their data was being rejected and provide an opportunity for respondents to submit further explanation); *Egypt—Steel Rebar from Turkey*, WT/DS211/R (finding Egypt to have violate Article 6.8 when it failed to inform two respondents that their information was rejected and because they did not provide the respondents an opportunity to remedy the deficiency); Panel Report, *Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy*, WTO/DS189/R (adopted Nov. 5, 2001), at paras. 6.21-24 (finding that Argentina violated Article 6.8 when it failed to provide respondents not only information as to what was requested but what was missing once they submitted a response).

and that the respondent did not act to the best of its ability.[151] There is no clear answer as to which facts are necessary since information that is necessary in one investigation may not be necessary in another.[152] Thus, when information is missing, IAs should make clear why the information is necessary and use supplemental questionnaires to provide the respondent with an opportunity to remedy the deficiency.

Further, when replacing this information with information from a secondary source, IAs should exercise what the ADA refers to as "special circumspection" such that they, "where practicable, check the information from other sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation."[153] The EU, for instance, often resorts to publicly available information gleaned from a variety of sources, including Eurostat, to replace missing information.[154] Even when relying on information provided in the petition to replace information where the respondent completely failed to respond to the questionnaire, it still attempted to find alternative sources of information to cross-check the complaint data.[155]

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[151] *See* Appellate Body Report, *Mexico—Beef and Rice from the United States*, WT/DS295/AB/R, para 294; *see Guatemala—Grey Portland Cement from Mexico* WT/DS156/R, paras. 8.250-55 (finding that an investigating authority may not apply facts available for the entire investigation period when data is missing for only part of the period) ("Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner.)

[152] *Korea—Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R (adopted Nov. 28, 2005), paras. 7.42-43.

[153] Anti-Dumping Agreement, *supra* note 7, at Annex II(7). It is good practice not to use information submitted by other investigated foreign producers and exporters as secondary sources since this may provide incentive to some respondents not to cooperate. *See* Czako, Human and Miranda, *supra* note 5, at 17. This is because the data of the uncooperative respondents may result in a lesser margin than the data of those respondents who did cooperate.

[154] Van Bael and Bellis, *supra* note 10, at 482-85.

[155] *See* Council Regulation (EC) No 976/2002 of 4 June 2002 imposing a definitive anti-dumping duty on imports of certain ring binder mechanisms (RBM) originating in Indonesia and terminating the anti-dumping proceeding in respect of imports of certain RBM originating in India, at recital 37, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2002.150.01.0001.01.ENG&toc=OJ:L:2002:150:TOC/

While using facts available will be necessary, less experienced IAs should be judicious as to both when and how they use facts available. In instances where respondents completely fail to cooperate by not responding to the questionnaire, they should not hesitate to apply either the petition rate or the highest rate assigned to another cooperating respondent, though in either circumstance they should explain the non-cooperation, make clear that they provided notice to the non-cooperating respondent, and that they have "exercised special circumspection" by attempting to cross-check the data that is at their disposal. When such a cross-check is not possible, they need merely explain that they could not find data to conduct the cross-check. In instances where respondents fail to provide necessary information, IAs should attempt to replace the information with publicly available data and explain why the missing data was necessary. IAs should also make and explain all attempts to receive the missing data from the respondent. In general, IAs should refrain from drawing conclusions that a respondent has not cooperated when it provides partial information, and thus, as is the practice of some countries, such as the U.S and China, treat it as if it had not cooperated in all.[156] However, in all, because applying facts available is necessary to the work of an IA and because WTO member states enjoy relatively wide latitude in applying facts available to information missing from foreign exporter and producer questionnaires, IAs should do so confidently and without

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[156] While the WTO has upheld the United States use of adverse facts available as a means to deter non-cooperation, it has been sceptical of the practice and made clear that facts available cannot be applied to punish a non-cooperative respondent. *See, e.g.,* Request for Consultations, *United States—Countervailing Measures on Cold and Hot-Rolled Steel Products from Brazil*, WT/DS514, Nov. 17, 2016; Request for Consultations by Canada, *United States—Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505, March 30, 2016; *United States—Certain Countervailing Duty Measures on Products from China*, WT/DS437/AB/R (adopted Jan. 16, 2015), at para. 4.205-208; Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (adopted Dec. 19, 2014), at para. 4.426-434; Panel Report *China—Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R (adopted Sept. 25, 2013); Panel Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States (China—GOES),* WT/DS414/R (adopted Nov. 16, 2012). Because the line between deterrence and punishment is difficult to legally distinguish and because the practice is quite controversial, it is recommended that the IA, at least in its inception, refrain from using facts available in a similar way. Such treatment may be more appropriate when it is clear that the respondent has intentionally provided inaccurate information, thus defrauding the IA, but even then the IA should proceed with great care.

hesitation so long as they explain themselves and refrain from some of the more aggressive applications of facts available that have earned other WTO Member states considerable legal headaches and political scrutiny.

2.6.2. Domestic Producers/Importers

As mentioned, procedures for gathering evidence from domestic producers and importers vary from those for foreign producers and exporters. The constraints on gathering evidence from domestic parties are primarily related to the structure of the industry and the limited resources of the IA, as domestic producers supporting the petition are typically eager to cooperate. Developing countries' law may also require business entities over which they have jurisdiction to collaborate with the IA.

2.6.2.1. Sampling

Sampling in the injury context is permitted by the ADA, so long as the pool of domestic producers from which the sample is drawn includes all domestic producers or domestic producers whose output constitutes a "major proportion" of total domestic production, as the injury analysis must be conducted in relation to domestic industry defined in accordance with ADA Article 4.1. The issues surrounding the definition of a "major proportion" are discussed in section 2.2.4 on domestic industry. No particular methodology for sampling domestic producers for the purposes of determining injury is specified by the ADA, but this should not deter the IA from developing and utilizing sampling procedures. Sampling of domestic producers limits the number of questionnaires that need to be sent out and verification visits to be conducted, so it is recommended the IA take advantage of this option, particularly when the domestic industry is highly fragmented.

Domestic producers should be selected for the sample based on highest production volume or sales volume while ensuring a geographical spread.[157] This data should be available from the petition or other governmental or public

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[157] *See* Commission Implementing Regulation (EU) 2016/2303 of 19 December 2016, *supra* note 86 (selecting as sample of 5 EU producers accounting for 22.4% of total EU production and 24.4% of total EU sales, located in 5 different countries).

sources. IAs should state that they conducted reasonable research to identify producer volumes for the purposes of sampling.[158] IAs have considerable discretion as to the amount of total production or sales volume covered by the sample.[159] Where the only sample that can be reasonably obtained accounts for a relatively small percentage of total domestic production, an IA should provide additional explanation as to how they ensured that the sample was representative in terms of geographic spread and production process.[160] It is also recommended that sampling be used for importers, again selected based on largest volume of imports into the investigating country.

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[158] This recommendation is based on Brazilian practice. *See* CAMEX, Resolution No. 121 of November 23, 2016 (imposing a definitive anti-dumping duty for a period of up to five (5) years on Brazilian imports of PET resin with intrinsic viscosity between 0.7 and 0.88 dl / g, originating in China, Chinese Taipei, India and Indonesia) para 1.4.

[159] This is consistent with European practice. *See* Commission Implementing Regulation (EU) 2016/2005 of 16 November 2016, imposing a provisional anti-dumping duty on imports of certain lightweight thermal paper originating in the Republic of Korea, 2016 O.J. (L 310) (relying on a sample based on the highest representative sales volume while ensuring a geographical spread consisting of 3 Union producers in 2 different Member States accounting for between 75% and 95% of the sales volumes to unrelated customers in the EU); *see also* Commission Regulation (EU) 2016/1977 of 11 November 2016 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes of iron (other than cast iron) or steel (other than stainless steel), of circular cross-section, of an external diameter exceeding 406,4 mm, originating in the People's Republic of China, 2016 O.J. (L 305) (relying on a sample of 4 union producers responsible for 51% of domestic production); *see also* European Commission Implementing Regulation (EU) 2016/181 of 10 February 2016 imposing a provisional anti-dumping duty on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation, 2016 O.J. (L 37) (relying on a sample of 5 union producers responsible for 35% of domestic production); *see also* Commission Implementing Regulation (EU) 2015/501 of 24 March 2015 imposing a provisional anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan (relying on a sample of 4 union producers responsible for 50% of domestic production).

[160] *See* Commission Implementing Regulation (EU) 1195/2014 of 29 October 2014 imposing a provisional countervailing duty on imports of certain rainbow trout originating in Turkey, 2014 O.J. (L 310) (stating that, "[the Commission] had provisionally selected a sample of Union producers. In accordance with Article 27(1) of the basic Regulation and in view of the Union industry being highly fragmented with more than 700 small and medium enterprises producers (SMEs), the Commission selected the sample on the basis of the largest representative volume of production which could reasonably be investigated within the time available, considering also the geographical spread and sufficient coverage of different steps and types of production (production of live, fresh, frozen, fillets and smoked trout). This sample consisted of nine Union producers. The sampled Union producers accounted for more than 12% of the total Union production, based on complaint data.").

In the event that sampling is not used, it is still possible to limit the number of questionnaires that need to be dispatched by sending questionnaires only to parties either known at the time of initiation or that make themselves known by coming forward within a specified time period provided in the notice of initiation. When taking this approach, it is imperative that an IA make producer and importer questionnaires available for download on their website, regardless of whether an IA believes non-petitioning domestic producers not previously identified will view the notice and download and return the questionnaires. Failing to ensure questionnaires are made easily accessible to all domestic producers will leave the IA vulnerable to challenge for having effectively excluded certain domestic producers and conducted their analysis using a "materially distorted" definition of domestic industry.[161] This approach has been affirmed by the Appellate Body as consistent with the ADA, but it should be emphasized that sending questionnaires only to petitioners and producers identified in the petition is not ideal and is much less preferable than sending questionnaires to all domestic producers, as is standard practice for the United States and the EU.[162]

The period for domestic producers to make themselves known specified in the notice of initiation must be reasonable and, in any event, should not be less than fifteen days. This is consistent with EU practice[163] and has been upheld by the Appellate Body.[164] The IA should also provide a limited opportunity for parties to comment on any sample selected before the sample list is finalized, as this reduces the likelihood of the IA facing legal challenges relating to flaws in the

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[161] *See China — Broiler Products from the United States*, WT/DS427/R, para. 7.428 (finding that MOFCOM's providing of public notices of initiation, the requirement to register, and containing information about how to contact the responsible MOFCOM officials, as well as MOFCOM's placing information about the investigation and the questionnaire itself on its website weighed against the United States' arguments that MOFCOM's Notices effectively excluded producers from participating in the investigation).

[162] See *China — Certain Automobiles from the United* States, WT/DS440/R, paras. 7.214-7.215.

[163] *See, e.g.,* Commission Implementing Regulation (EU) 2016/181, *supra* note 159, at para. 17.

[164] *See EC — Iron or Steel Fasteners from China*, WT/DS397/AB/R, para. 468.

sample. The EU typically provides for fifteen days from the date of publication of the notices of initiation.[165]

2.6.2.2. Content

Questionnaires are typically drafted for domestic producers, importers, and sometimes purchasers as well.[166] There are different approaches to questionnaire formats. One approach is to keep the questionnaire relatively short and request parties provide data in attached excel tables that correspond to particular questions. Another approach is to integrate data tables into the body of the questionnaire. The EU adopts the former approach; the U.S. opts for the latter. Less experienced IAs may prefer to follow the U.S. approach, as keeping the data tables in the questionnaire is more user-friendly—producers will not need to keep referring back to instructions and will only have to submit one document. The drawback is that the questionnaire is lengthened.

Questionnaires drafted for domestic producers should contain several categories of questions, such as firm-related questions (location, contact-information, organization, information on related firms) volume and production-related information, financial data, price-related information, and questions specific to the particular industry (unique conditions of competition, supply/demand issues, seasonal industry issues).[167] The latter category is particularly important, as there may be aspects of the way the domestic industry functions that obscure whether injury is occurring. For example, if the product is a perishable good, the injury suffered will be different than for a non-perishable good that can be stockpiled when market conditions deteriorate, so questions regarding inventory should reflect this fact.[168] Similarly, if an industry is cyclical, questionnaires will need to request data over a sufficiently long period to capture

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[165] *See* European Commission, Notice of initiation of an anti-dumping proceeding concerning imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation, (2015/C 161/07), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.161.01.0009.01.ENG&toc=OJ:C:2015:161:TOC

[166] This project does not discuss purchaser questionnaires, as these are not crucial for developing countries to deploy.

[167] *See* Czako, Human and Miranda, *supra* note 5, at 247-8.

[168] *See id.* at 237.

the entire cycle so that peaks and downturns can be analyzed in their proper context.[169] Questionnaires drafted for importers should similarly contain firm-related questions, requests for data on imports (internal consumption, inventories, channels of distribution, prices of import sales), and questions specific to the particular industry.[170] Questionnaires should also request some information previously requested from petitioners. For example, asking whether recipients support the application and/or still support the application may alert authorities to the presence of related parties.[171]

A key recommendation for developing countries in regard to the contents of their questionnaires for producers and importers is to structure as many questions as possible as "yes/no" type questions. For example, consider "return on investment" or the ratio of profits to assets invested. This is one of the indicators of injury that questionnaires should cover. To understand whether dumped imports are causing return on investment to suffer, the questionnaire should include a list of yes/no questions, such as, "did you cancel, postpone, or reject any expansion projects during the period of investigation? Yes/No." The answers to these questions can then be tabulated and quantified.[172]

2.6.2.3. Timelines

The EU dispatches questionnaires within days of publishing the notice of initiation, unless a sample needs to be selected. The EU has different procedures regarding exporting producers, importers, and domestic producers, which affect the date of dispatch for each group's questionnaires. For example, the EU requests that unrelated importers make themselves known to the Commission within fifteen days of the date of publication of the Notice of Initiation. A sample is then selected, after which questionnaires are sent out to the sampled importers.

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[169] *Id*. at 238.
[170] *See* Czako, Human and Miranda, *supra* note 5, at 249.
[171] Czako, Human and Miranda, *supra* note 5, at 251.
[172] *See* U.S. International Trade Commission, *Steel Concrete Reinforcing Bar from Japan, Taiwan, and Turkey Investigation Nos. 701-TA-564 and 731-TA-1338-1340 (Preliminary),* Pub. 4748 (Nov. 2016) p. VI-10, *available at* https://www.usitc.gov/publications/701_731/pub4648.pdf.

The same procedure is used for foreign exporting producers.[173] For Union producers, the EU selects a provisional sample and then requests that other Union producers that want to be included in the sample come forward within fifteen days from the Notice of Initiation, after which questionnaires are transmitted.[174] The EU also provides interested parties with an opportunity to submit comments on the proposed sample.[175] All parties are given thirty-seven days from the date of publication of the notice of initiation or date of notification of the sample selection to submit completed questionnaires.[176]

2.7. Analysis of Questionnaire Responses

After the questionnaires are received, it is then up to the investigating authorities to analyze them and render preliminary determinations of dumping and injury. To effectively operationalize the ADA's provisions in making these determinations, developing countries should select methodologies that are within the scope of the discretion afforded to them by the ADA and WTO jurisprudence. This section considers dumping and injury separately and is supplemented by the guidelines provided in the Annexes.

2.7.1. Dumping

The following elements are crucial to a determination of dumping: (a) export price, (b) normal value, and (c) calculation of the actual dumping margin. Detailed analysis of calculations for normal value and export price can be found in Annex II-B-E. This section therefore concentrates on several overarching issues that should be kept in mind by IAs when approaching each of these elements. It also

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[173] *See, e.g.,* Commission (EU) 2015/C 177/07, Notice of Initiation of an Anti-Dumping Proceeding Concerning Imports of Aspartame Originating in the People's Republic of China as well as Aspartame Originating in the People's Republic of China Contained in Certain Preparations and/or Mixtures (2015/C 177/07).
[174] *See, e.g.,* Commission (EU), 2016/C 62/07, Notice of initiation of an anti-dumping proceeding concerning imports of certain lightweight thermal paper originating in South Korea.
[175] This is recommended by the Anti-Dumping Agreement. *See* Anti-Dumping Agreement, *supra* note 7, at Article 6.10.1. It is also consistent with EU practice. *See, e.g.,* Commission Implementing Regulation (EU) 2016/181, *supra* note 159.
[176] *See, e.g.,* Commission (EU), Notice of initiation of an anti-dumping proceeding concerning imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India, 2017 O.J. (C 461).

provides recommendations to the investigating authority related to keeping calculations simple and avoiding some of the more controversial practices that the investigations of some Member states have used to inflate margins.

The first issue pertains to the officials charged with conducting the dumping investigation. Dumping calculations be can be extremely complicated, but do not necessarily need to be. In fact, since the burden of a cumbersome dumping procedure is not only on an IA but also on foreign respondent exporters and producers, there may be important political considerations for keeping the dumping investigation, including the questionnaire, as streamlined and simple as possible. Over time as an IA develops more expertise, it may always add procedures and sections to the questionnaire.

Further, several of the procedures that will be developed will emerge as a result of experience and creatively solving challenges as they present themselves. At the beginning of the process, training of employees is a must. Employees should either have or be trained on how to use Excel spreadsheets and work basic mathematical formulas within them. Further, prior experience working with an/or training on general accounting principles will prove very useful. Lastly to this point, IAs should adopt clear guidelines and Excel tables that are easy to train investigating authority officials how to use. This memorandum provides guidelines for determining export price when the respondent and importer are unaffiliated (Annex II-B), for determining normal value based on the respondent's sales in its home market (Annex II-C), and for determining a weighted average dumping calculation using multiple product classification numbers (Annex II-D). However, it does not provide other guidelines that an IA may one day want to develop, but that were intentionally not developed here due to the complexity in their calculation and their use as alternative, rather than primary methods, to calculate export price and normal value.[177]

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[177] For instance, not included here are guidelines for determining a constructed export price, which the investigating authority may desire to use if the vast majority of sales to the investigating country are to importers affiliated with the respondent. This memorandum also does not contain guidelines for basing normal value on the respondent's sales in an appropriate third country or on a constructed value, one or both of which will be necessary should the investigating authority come across a situation in which basing normal value on a respondent's home market sales is not viable. *See*

A second issue pertains to an IA's calculation of export price. Although export price is a relatively uncomplicated calculation to perform, there may be instances in which an export analysis warrants the investigating authority to construct an export price, which is a more complicated calculation. Neither the ADA nor WTO case law ever requires a CEP analysis to be performed.[178] Yet in circumstances when most of the sales are to an affiliated importer, a constructed export price is more reliable. In order to conduct a CEP analysis, the investigating authority does not have to make a conclusive factual determination of association or compensatory agreement beforehand since the appearance of association is enough to trigger the CEP analysis.[179] Additionally, because the investigating authority has more discretion to adjust sales when using a CEP analysis, it typically yields higher margins. Some IAs, such as the United States' Department of Commerce, will determine whether to do an export price or constructed export price analysis based on the first unaffiliated sale that the respondent makes to a buyer in the investigating country.[180] Other countries, like the EU, will automatically do a constructed export price analysis when the importer is a subsidiary of the exporter.[181]

A third issue pertains to the method that an IA uses to calculate normal value. Normal value for exporters is determined according to one of the following

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Annex II—C, Step 1. Due to the complicated analysis under the CEP and CV, and the likelihood that a fledgling investigating authority may be better off spending its time on ensuring the primary and preferred methods of analysis are correctly performed, we recommend that developing guidelines for CEP and CV methods of analysis be developed at a later stage possibly with the assistance of another TradeLab project.

[178] WTO case law has not required that the constructed export price be adjusted, reading the word "should" to be permissive rather than mandatory. *See United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R (adopted May 20, 2008), paras. 6.95-6.99.

[179] Van Bael and Bellis, *supra* note 10, at 92; *see* Case T-51/96, *Miwon Co. v. Council*, 2000 E.C.R. II-1841 (General Court), at paras. 46-53 (holding that importers who had consistently and systematically resold at a loss provided evidence establishing the unreliability of the export price and/or the existence of a compensatory arrangement).

[180] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 7, 7-8. If the first sale is made after importation, a constructed export price analysis is used; if the first sale is made before importation, than an export price analysis is used. *Id.* Mexico uses a similar first sale rule. *See* Bowman, Covellu, Gantz and Uhm, *supra* note 53, at 275.

[181] *See* Van Bael and Bellis*, supra* note 10, at 92-93. A constructed export price takes on particular significance considering that approximately forty percent of world trade occurs between affiliated parties. Bowman, Covellu, Gantz, and Uhm, *supra* note 53, at 275.

methods: (1) the respondent's sales in its home market; (2) the constructed value (CV), i.e. using the respondent's cost of production; (3) the respondent's sales to an appropriate third country; or (4) the prices of other sellers or producers in the respondents' home market.[182] The first method is preferred by the ADA and should be applied unless it is determined that insufficient sales of the like product in the ordinary course of trade in the domestic market (i.e., typically when the quantity of the like product sold in domestic markets is less than five percent of exports by volume) such that a proper comparison cannot be made.[183] When this is the case, one of the other three methods may be used. However, whenever possible IAs should base normal value on the respondent's sales in its home market whenever possible. Annex II-C provides step-by-step instructions on how to do this calculation.

IAs may desire to develop procedures for determining normal value using CV or the respondent's sales in an appropriate third country. In a CV analysis, investigating authorities are left considerable room to adjust costs of production reported by exporters that may not be reliable by using costs of production data derived from other producers or exporters in the same country, or, "where such information is not available and cannot be used," based on costs of production in "other representative markets."[184] Under this mandate, an IA may adjust prices reported by exporters upward to reflect what it believes is the actual cost paid by

[182] Anti-Dumping Agreement, *supra* note 7, Art. 2.2.
[183] *Id.* at Art. 2.2. Article 2.2. The Anti-Dumping Agreement does provide that "a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned." *See id.* at n. 2. A detailed calculation for how this determination is made using what is often called the "home market viability" test appears in Step One of Annex II-B.
[184] *Id.*

the foreign producer.[185] Thus, the result, like the result of a CEP analysis, tends to yield higher margins.[186]

Questionnaires issued to exporting producers typically break the cost of production into three categories: materials, direct labor, and manufacturing overheads.[187] In addition, the investigating authority must exclude selling, general, and administrative (SGA) costs, which are incurred in connection with sales of the like product in the domestic market.[188] While investigating authorities should rely on the actual data when possible, there are circumstances in which it may depart from the actual data in calculating SGA. A wide variety of alternative methods for determining the SGA may be used when those circumstances exist.[189] When calculating reasonable profits to add to the cost of production, investigating authorities should use the same method that it uses for SGA.[190] That method coheres with Article 2.2.2 of the ADA and WTO case law and avoids complications that may arise if the investigating authority were to impose a separate reasonability test.[191]

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[185] This is consistent with EU practice. *See* Van Bael and Bellis, *supra* note 10, at 61-62; *see, e.g.,* Commission Decision (EC) 94/293 of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, 1994 O.J. (L 129), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994D0293&from=EN.

[186] Both the EU and United States use CEP extensively, reducing the invoice price of the first arms-length transaction in the investigating country by subtracting from it all allowable costs provided for in Article 2.4 of the Anti-Dumping Agreement. Doing so will result in higher dumping margins and the calculations should be relatively straightforward for investigating authorities.

[187] *See* Van Bael and Bellis, *supra* note 10, at 66-70.

[188] *See id.* at 70; *see, e.g.,* Commission Regulation (ECC) 3643/84 of 20 December 1984, Imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, 1984 *O.J. (L 335)*, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31984R3643&from=EN.

[189] Van Bael and Bellis, *supra* note 10, at 72-79.

[190] *Id.* at 79.

[191] *Id.*; *see Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DS122/R (adopted Sep. 28, 2000), paras. 7.119-7.128; *see also EC—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (adopted Mar. 1, 2001), paras. 6.94-6.101.

Fledgling IAs may also later wish to base normal value on sales to an appropriate third country.[192] This approach is not widely used by Member states save for the United States when the market viability test fails.[193] The reasons why IAs tend not to use this method is that they cannot be sure that the respondent is not also dumping in the appropriate third country.[194] In fact, the EU has never used this method despite its availability to EU authorities under the country's antidumping regulation.[195] However, this method does have the advantage of freeing investigating authorities from the burden of gathering cost of production data, and as a result, may be easier for less experienced IAs. However, on the other hand, it may be argued that CV, while difficult to calculate, relies on information that the investigating authority may already want to collect in order to disregard sales at less than cost of production under the preferred method of basing normal values on the respondent's sales in its home market.[196] As both arguments are persuasive, IAs should give serious thought as to which method they would prefer to use as their alternative to calculating normal value based on the respondent's sales in its home market.

IAs may establish normal value on the basis of prices of other sellers or producers.[197] The problem with this method is that if normal value is based on just a few other sellers or producers in the domestic market, it may be impossible to disclose how normal value was calculated without disclosing confidential information about the companies on which normal value was based.[198]

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[192] Anti-Dumping Agreement, *supra* note 7, at Article 2.2.
[193] Edwin Vermulst, THE WTO ANTI-DUMPING AGREEMENT: A COMMENTARY 34 (2005).
[194] Van Bael and Bellis*, supra* note 10, at 83.
[195] *Id.*
[196] *Id.* at 59.
[197] Anti-Dumping Agreement, *supra* note 7, at Art. 2.1.
[198] Van Bael and Bellis, *supra* note 10, at 58-59. For instance, in *Urea* (Russia), the EU stated that information on normal value could not be disclosed in detail because it was determined using information from just two companies, one of which was affiliated with the company for which normal value was established such that it would have been possible to reconstruct confidential business data of the other company. *See* Council Regulation (EC) No 907/2007 of 23 July 2007 repealing the anti-dumping duty on imports of urea originating in Russia, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 384/96, and terminating the partial interim reviews pursuant to Article 11(3) of such imports originating in Russia, 2007 O.J. (L 198), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0907&from=EN.

Lastly, IAs should be careful in their use of adjustments and disregard of sales.[199] Article 2.4 of the ADA governs how investigating authorities should conduct a "fair comparison" between normal value and export price, the goal of which is to compare product pricing at ex-factory level.[200] It is recommended that fledgling IAs make these adjustments during the course of calculating export price and normal value. Several of these adjustments are named in Article 2.4, but none of them are required so long as they do not "affect price comparability."[201] The list of adjustments is not exhaustive. Some IAs, like the EU, do not require that the respondent provide data on the related adjustment unless the respondent desires to do so.[202] This approach is consistent with WTO case law, which puts the burden of proof on the interested party "to substantiate their assertions concerning claimed adjustments,"[203] while making clear that this burden does not remove the investigating authorities requirement to ensure a fair comparison under Article 2.4 of the ADA.[204] Thus, in order to be WTO compliant, IAs should not feel compelled to make adjustments unless the respondent asks it to do so. However, as some adjustments usually result in higher dumping margins, it is in the interest of domestic producers to make those adjustments that result in higher margins. Both Annex II-B and Annex II-C provide guidance as to what these adjustments tend to be.

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[199] Article 2.2.1 of the Anti-Dumping Agreement allows the investigating authority to disregard sales not in the ordinary course of trade when calculating normal value, which it may determine to be the case for a variety of reasons. *See* Annex II—D, Step 2. Additionally, in analyzing export price, the investigating authority may also disregard some of the respondent's sales in the investigating countries' market. *See* Annex II—C, Step 1.3.

[200] Anti-Dumping Agreement, *supra* note 7, at Art. 2.4

[201] *Id.*

[202] In the EU, these adjustments are made on the basis of claims put forward by interested parties who are able to demonstrate that the normal value and export price are not comparable due to one of these bases. *See* EU Regulation, *supra* note 15, at Article 2(10).

[203] *See EC—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R (adopted Aug. 18, 2003), paras. 7.157-58.

[204] *See United States—Anti-Dumping Measures on Hot-Rolled Steel from Japan*, WT/DS184/AB/R (adopted Aug. 23, 2001), at para. 178. The European General Court has elucidated that this duty requires the investigating authority to inform the interested parties what information is necessary to ensure a fair comparison and not to impose an unreasonable burden of proof on them. *See* Case T-221/05, *Havis Corp. v. Council*, 2008 E.C.R. II-124 (General Court), at para. 77.

More so, when conducting a fair comparison, it is standard practice to divide the like product into categories or models that reflect unique differences that may be important to buyers. This ensures that an IA may make more accurate comparisons when significant differences do exist. These categories or models are often referred to as Product Classification Numbers (PCNs).[205] When a like product is broken into PCNs, sales of each PCN are grouped together and separate export price and normal value calculations are made.[206] Dumping margins are then calculated for each PCN to determine a weighted average dumping margin for the entire like product.[207]

2.7.2. Injury

Once questionnaires have been drafted, transmitted to domestic producers and importers, and responses have been processed, a factual report should be drafted summarizing the data obtained.[208] Ideally, data will have been provided in Excel tables so as to permit easy manipulation. Authorities can then proceed to analyze this data for the purposes of determining whether there is material injury. The injury analysis is based on (1) volume effects (2) price effects and (3) impact on domestic industry, and (4) that these three factors are causing the injury and it is not being wrongly attributed to other known factors.[209] Detailed analysis of each component of the injury analysis is provided in Annex II. This section therefore, concentrates on several overarching issues that should be kept in mind by IAs when approaching and conducting the injury analysis.

The first issue pertains to the officials charged with conducting the injury investigation. Injury analysis involves assessing trends in macro and microeconomic indicators over a specified period. In light of this, officials charged with conducting the injury analysis should be familiar with basic macroeconomic

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[205] In European and Brazilian practice, product control numbers (PCNs) are used to distinguish among different types that may exist for a single product. *Id.* at 39. For instance, if the invoice documents sales of multiple products, the invoice will contain a number of transactions equal to the number of PCNs sold. *Id.* The U.S. Department of Commerce uses a very similar system in which control numbers called CONNUMs are employed. *See* Anti-Dumping Manual, *supra* note 11, at Ch. 4, 10.
[206] *See* Annex II—B-D.
[207] *See* Annex II—D.
[208] *See* Czako, Human and Miranda, *supra* note 5, at 308.
[209] *See* Anti-Dumping Agreement, *supra* note 7, at Articles 3.1-3.4.

concepts and general accounting principles. Officials should also be proficient in using Excel if authorities decide to request injury data in that form (see discussion of injury questionnaire format, above). Alternatively, private accountants can be hired if the Directorate's budget permits.[210] It would be more cost-efficient in the long run, however, to provide training in basic accounting and macroeconomic analysis for any officials that will be involved in collecting and analyzing injury data that do not already have this knowledge. The emphasis here should be on providing *basic* training. There is no need to use complex econometric models to analyze impact on domestic industry, as has been U.S. practice.[211] For example, all of the data for impact on domestic industry can be included in a single Excel sheet from which trends can be easily identified.[212] It is unnecessary for officials to learn the math and spreadsheet manipulation skills necessary to construct and run economic models.

A second issue relates to the scope of the injury analysis. The ultimate determination of injury must be based on the entire domestic industry—the domestic industry cannot be analyzed on a selective basis for the purpose of determining injury. If a portion of the domestic industry is devoted to captive production, authorities may want to isolate that segment and analyze the remaining free market segment for injury. Typically, an IA will find this where an industry is vertically integrated and the subject product is regarded as a primary material for the production of value-added downstream products. This approach is risky, however. The WTO Appellate Body has found that authorities may isolate the captive market in order to compare the performance of the captive market and

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[210] *See* UNCTAD Training Module, *supra* note 17, at 66.

[211] *See* Anti-Dumping Manual, *supra* note 11, Ch.18 (explaining that the ITC developed the "Commercial Policy Analysis System (COMPAS) computer model, which utilizes spread sheets to estimate the effect of dumped imports on the domestic industry, but that "the ITC no longer regularly relies upon COMPAS."). Research does not indicate that the EU has relied on a compas-like model in the past or does so presently). *See also* U.S. ITC, *COMPAS—Commercial Policy Analysis System Documentation Version 1.4: May 1993,* Office of Economics Working Paper, No. 2007-12-A (2007), *available at* https://www.usitc.gov/publications/332/ec200712a.pdf (describing the COMPAS model) (last visited: Feb. 2, 2017).

[212] *See* Czako, Human and Miranda, *supra* note 5, at 373. (Row headings: Sales & Profits; Output; Market Share; Productivity; Capacity Utilization; Return on Investments; Inventories; Employment; Wages; and Capital & Investments. Columns: 6 total: Years 1-3; Percentage change between years 1-3.

free market segments, but it has clarified that authorities cannot isolate captive production and then *only* consider the free market segment.[213] If the domestic industry seeking protection has a large captive market that authorities believe must be analyzed separately because it is skewing the overall injury data, they should make any findings resulting from this analysis explicit—both the captive and free market findings.[214]

A third issue relates to what findings officials analyzing injury must make and the methodologies they may deploy. As is explained in the Annex II guideline "Injury—Causation," it is unnecessary for all injury indicators to trend in a negative direction in order make an affirmative determination.[215] It is also unnecessary for an IA to have complete data for every indicator for every product type because indicators can be assessed relative to representative product types or a range of products containing the product.[216] Relatedly, an IA does not need data on all indicators from all producers, as it can consider data collected from sampled firms as well as for the domestic industry as a whole.[217] For example, typical EU practice is to examine "micro-indicators" (i.e. price, profitability, cash flow, ability to raise capital, investment, stocks, capacity, capacity utilization, return on investment, and wages) from sampled companies, and to examine "macro-indicators" (i.e. production, production capacity, capacity utilization, sales volume, stock, growth, market share, employment, productivity and magnitude of dumping margins) on the basis of industry-wide data.[218] An IA may not consider data from firms outside of domestic industry.[219] Regarding causation and non-attribution, as is explained in detail in the Annex II guideline, "Injury – Causation," the IA should focus on third country imports and other known factors raised by interested parties.

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[213] *See United States—Hot Rolled Steel from Japan*, WT/DS184/AB/R, at para. 211.
[214] *See id.* at paras. 212-213
[215] *See EC—Cotton-Type Bed Linen from India,* WT/DS141/R, para. 6.163.
[216] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.6.
[217] *See id.* at para. 6.181.
[218] *See EC –Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R (adopted Jan.8, 2008), at para. 7.390.
[219] *See EC—Cotton-Type Bed Linen from India,* WT/DS141/R, para. 6.182. This approach is only relevant of course if authorities decide to sample domestic producers.

A fourth and final issue is the requirement that the analysis be based on "positive evidence."[220] This requirement has been interpreted by the Appellate body to mean that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[221] In *Mexico—Anti-Dumping Duties on Rice*, the Appellate Body upheld the Panel's finding that Mexico's injury analysis was not "objective" because it was based on data covering only six months of each of the three years examined and because the authorities accepted a period of investigation proposed by the applicants that "allegedly represented the period of highest import penetration and would thus show the most negative side of the state of the domestic industry."[222] Also in *Mexico—Anti-Dumping Duties on Rice*, Mexico's analysis of volume and price effects was found not to be based on an objective examination of positive evidence because Mexico did not substantiate certain assumptions regarding volume and prices, notably the assumption that because prices for a broader category of the product had declined, the price for a subset of that category – the dumped imports – must also have declined.[223] Mexico's methodology was motivated at least in part by the lack of data provided by exporters in response to the authorities' request.[224]

The findings in this case indicate that IAs should be very careful not to intentionally or unintentionally structure the injury investigation or carry out their analysis in a way that favors the complainant or attempts to gloss over weak data. Consequently it is recommended that IAs adopt and publicize guidelines on the injury investigation period and methodologies. Guidelines will limit IAs' discretion (especially with respect to deciding to adopt the complainant's preferred approach) without denying officials flexibility to response to particular investigation contexts. Guidelines can be updated as institutional memory deepens. It is also recommended that IAs disclose, explain, and justify any assumptions made due to

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[220] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.1.
[221] *See United States—Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, at para. 192.
[222] *See Mexico—Beef and Rice from the United States,* WT/DS295/AB/R, para. 185.
[223] *Id.* at para. 188.
[224] *Id.* at para. 191.

lack of data in the preliminary and final injury determinations to reduce the likelihood of being found to have violated the "positive evidence" requirement.[225]

In sum, analyzing injury may be a straightforward exercise, and one that will often lead the IA to find injury or threat of injury. It is essential that all indicators listed in Articles 3.2 and 3.4, as well as the most important of the non-attribution factors in Article 3.5—imports from third countries—be assessed, and that the findings for each be described, even if only in 1-2 lines for least or non-relevant indicators. IAs may find injury in cases where only some core indicators such as market share, prices, and profitability show a negative development trajectory therefore officials should begin their analysis by examining these core indicators.[226] IAs should therefore approach the injury analysis confident that they have considerable discretion in how they conduct this branch of the investigation, so long as they are objective. [227] It is crucial that officials provide reasonable explanations in their preliminary and final determination reports for steps that favor or may be perceived as unfairly advantaging domestic industry, as a failure to do so will incentivize litigation. It is similarly important that in trying to reduce costs and save time by streamlining the substantive injury analysis, authorities do not compromise the procedural rights, particularly of foreign exporters, relating to the injury investigation.[228] Prioritizing reasonableness and transparency throughout the injury investigation—and stating explicitly in the determination that

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[225] *Id.* at para. 205 (emphasizing that it agreed with the Panel's assessment that Mexico's assumptions were unsubstantiated because Mexico did not "explain why these assumptions were appropriate and credible in the analysis of the volume and price effects of the dumped imports, or how they would contribute to providing an accurate picture" of those effects.)

[226] *See* Notes from Expert Meeting, Feb. 2, 2017 (notes on file with author).

[227] *See Mexico—Beef and Rice from the United States*, WT/DS295/AB/R, at para. 204.

[228] Resource should be allocated for holding opportunities for oral submissions. The ITC provides to opportunities for hearings, one in the preliminary and one in the final phase. *See* ITC Handbook, *supra* note 21, at II-6. Brazil practice is to provide hearings at the request of interested parties throughout out the process. *See* Trade Remedies in Brazil, *supra* note 12; *see also* CAMEX, Resolution No. 05 of February 16, 2017, Imposing a definitive anti-dumping duty for a period of up to five (5) years on Brazilian imports of tempered and rolled automotive glass originating in the People's Republic of China, *available at* http://www.camex.itamaraty.gov.br/component/content/article/62-resolucoes-da-camex/em-vigor/1785-resolucao-n-05-de-16-de-fevereiro-de-2017, at para. 2.9. Resources should also be allocated for responding to requests by interested parties to meet with adverse parties throughout the injury investigation period. This is consistent with EC practice. *See* Muller, Khan and Scharf, *supra* note 89, at 417.

the IA has done so—is the best way to preempt legal challenges and avoid concomitant costs.

2.8. Determinations

The preliminary and final phases of a dumping investigation are marked, respectively, by the investigating authorities' issuance of preliminary and final determinations. The ADA requires that public notice be given of both "the preliminary and final determination, whether affirmative or negative."[229] The ADA requires that public notice be given of any preliminary determination along with a "sufficiently detailed explanation" for the decision, but it does not provide a precise legal standard for authorities to apply when preliminarily determining that dumping and material injury exist.[230] Those standards are discussed further below. The ADA also requires that IAs deliver the determination to the government of the WTO Member state the products of which are subject to the investigation.[231]

Some states set deadlines for the preliminary determination, although no timeline is set by the ADA so long as the final determination is rendered within 18 months from the initiation, *see supra* 2.4. For instance, the U.S. provides that preliminary determinations of dumping be made within 140 days from the date the investigation was initiated.[232] Preliminary determinations of injury are made within 45 days from filing the petition (typically just two weeks after initiation).[233]

Both preliminary and final determinations are typically accompanied by a report that details the investigating authorities' reasoning and legal conclusions. IAs typically adopt formal processes to ensure that everyone in the agency concurs as to the conclusions of the report and the public notice of determination.[234] We recommend that fledgling IAs adopt similar processes when drafting determination documents. In drafting determinations, IAs should be encouraged by the deferential stance of the ADA articulated in Article 17.6, which

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[229] Anti-Dumping Manual, *supra* note 11, at Article 12.2.
[230] *See id.*
[231] *Id.*
[232] 19 U.S.C. §733(b)(1)(A).
[233] *See* ITC Handbook, *supra* note 21, at II-3.
[234] *See, e.g.,* Anti-Dumping Manual, *supra* note 11, at 3-12 (describing the concurrence process followed by the U.S. Department of Commerce).

states that, "[i]f the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."[235] Article 17.6 thereby gives deference to a multitude of permissible interpretations.

2.8.1. Preliminary Determinations

The investigating authority must preliminarily find dumping and injury in order to issue a preliminary determination. In order to find dumping, IAs must determine that dumping margins of two percent or more exist for at least one of the exporters examined.[236] In order to find injury, the legal standard is less precise. U.S. law requires the ITC to determine, based upon the information available at the time of the preliminary determination, whether there is a "reasonable indication" that a domestic industry is materially injured by the allegedly dumped imports.[237] In applying this standard, the agency evaluates the record as a whole and determines whether it "contains clear and convincing evidence that there is no reasonable indication of material injury or threat of such injury" and "no likelihood exists that contrary evidence will arise in a final investigation." [238] Similarly, the EU does not provide a precise standard and the Commission enjoys wide discretion as to what constitutes sufficient evidence for the imposition of provisional measures.[239] We recommend developing countries adopt a petition-friendly standard similar to that of the U.S. so that domestic producers understand that a preliminary determination does not require a high standard of proof.

The prime importance of preliminary determinations is that it is at this point when the investigating state may impose provisional measures.[240] Article 7.2 of the ADA stipulates that provisional measures "may take the form of either a provisional duty or, preferably, a security—by cash deposit or bond—equal to the

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[235] *See* Anti-Dumping Agreement, *supra* note 7, at Article 17.6.
[236] *See* Anti-Dumping Agreement, *supra* note 7, at Article 5.8.
[237] 19 U.S.C. §§ 1671b(a); 1673b(a).
[238] *See* American Lamb Co., 785 F.2d at 1001; *see also* Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).
[239] *See* Van Bael and Bellis, *supra* note 10, at 51.
[240] *See* Anti-Dumping Agreement, *supra* note 7, at Article 7.1. Article 7.3 provides that WTO Member states may not apply provisional measures sooner than 60 days from the initiation date.

amount of the anti-dumping duty provisionally estimated, being not greater then the provisionally estimated margin of dumping."[241] Both the EU and the U.S. allow importers to post bonds. Soon after the preliminary determination, IAs typically issue instructions to customs authorities to implement the measures. In the case of the United States, the Department of Commerce issues instructions suspending liquidation on all goods subject to the order, meaning that the payment of duties on entries will not be reconciled until after issuance of the final determination.[242]

2.8.2. Final Determinations

Final determinations mark the conclusion of the investigation.[243] Before a final determination is rendered, IAs frequently give interested parties an opportunity to be heard at an in-person hearing on the preliminary determination before which briefs are filed. Although an in-person hearing is not required by the ADA, Article 6.9 requires the investigating authority to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures."[244] After having considered issues presented by the interested parties in briefing and at the hearing, IAs typically issue a final decision memorandum and final dumping margins to accompany their public notice of the final determination.

Instructions are sent to customs authorities of the new rates at which duties are to be collected. In retrospective customs regimes like that of the United States, the liquidation suspension order is lifted. Most Member states collect duties from the issuance of these instructions onward in the form of payable duties or cash deposits. Importers are no longer able to post bonds. In the event that the anti-dumping rate changes because the margin of dumping in the final determination is lower than that preliminarily determined, the importer is entitled to

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[241] *Id.* at Article 7.2.
[242] *See* Anti-Dumping Manual, *supra* note 11, at 8-10; *see also* Valerie A. Slater and Jarrod M. Goldfeder, *"Show Me the Money": A Practitioner's Guide to the Intersection of Customs and AD/CVD Law*, 28 U. PA. J. INT'L L. 51 (2007), *available at* http://scholarship.law.upenn.edu/jil/vol28/iss1/3/.
[243] As discussed previously, the focus of this memorandum is on the preliminary stages of the investigation; therefore, the discussion of final determinations that follows is not intended to be comprehensive and is included only to provide a foundation for further research.
[244] *See* Anti-Dumping Agreement, *supra* note 7, at Article 6.9.

a refund within 90 days following the final determination where duties are assessed on a retrospective basis and within 18 months of a request for a refund if duties are assessed prospectively.[245]

3. Post-order Judicial Events

Although the focus of this memorandum is on events up to the point that the investigating authority issues a preliminary determination of dumping, developing countries should keep in mind events that occur once the final determination has been put in place. The following section is not meant to be exhaustive of all post-order events that may occur post-determination such as anti-circumvention proceedings, scope rulings, etc., but rather as an introduction to two necessary sets of post-order events that are required by the ADA. This section also addresses steps that a developing country may take to defend itself at the WTO should it be challenged.

3.1. Administrative and Sunset Reviews

The following section provides a brief overview of some of the issues IAs can expect to encounter when conducting interim and expiry or "sunset" reviews. Detailed recommendations regarding the procedure of these reviews, including notification, period of investigation, and use of questionnaires, are not provided but could be generated through additional research. States use policies, procedures, and practices for reviews that differ significantly from those used in investigations in order to advantage their investigating authorities, so IAs should not simply transpose their investigation practices to the review stage.[246]

Article 11 of the ADA covers administrative and sunset reviews. Administrative reviews may be initiated by investigating authorities or at the request of interested parties,[247] provided that a "reasonable period of time" since the imposition of the

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[245] *Id.* at Article 9.3.1-2.

[246] To better understand how practices change from the investigation stage to the review stage, we recommend developing counties look at U.S. Department of Commerce's Analytic and Procedural Comparison Chart. *See* Anti-Dumping Manual, *supra* note 11, at Ch. 21,10-13.

[247] The key difference between the scope of an administrative review initiated at the request of a party and that of an automatically initiated expiry review is that the former is company specific, while the latter is order-wide. This means that if an IA finds even one

definitive anti-dumping duty" has past and the parties have "positive evidence substantiating the need for a review." [248] When these conditions are met, investigating authorities must initiate a review; the Appellate Body has found that imposing additional conditions violates Article 11.4.[249] Fledgling IAs should follow the U.S. practice of limiting the time period in which administrative reviews can be requested to the anniversary month of the publication of the anti-dumping order, as this will save resources in terms of processing requests.[250] They should also follow U.S. practice of using sampling in the event that multiple companies are named in the administrative review request and resources do not permit examining all companies.[251]

During an administrative review, authorities examine (1) "whether the continued imposition of the duty is necessary to offset dumping," and (2) "whether the injury would be likely to continue or recur if the duty were removed or varied, or both."[252] On the first point, the investigating authorities must calculate the dumping margin, as discussed in earlier sections of this Memorandum, with a focus on whether the level of dumping duties are proving effective at removing injury or if changed circumstances require an adjustment.[253] On the second point, the investigating authorities should examine past trends to project future likelihood

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company is likely to continue or recur dumping during an expiry review, it can make an affirmative likelihood determination.

[248] *See* Anti-Dumping Agreement, *supra* note 7, at Article 11.2. The U.S. has sufficient personnel to appoint "sunset coordinators" responsible for overseeing the progress of the sunset reviews. *See* Anti-Dumping Manual, *supra* note 11, at Ch.25, 3. Given limitedpersonnel, it is unlikely that individuals can be appointed to this role, so it is critical that IAs not overload themselves.

[249] *See Mexico—Anti-Dumping Measures on Beef and Rice from the United States*, WT/DS295/R, at paras. 314-315 (finding an additional provision to be inconsistent with the Anti-Dumping Agreement, where the provision provided that interested parties, e.g. an exporter, seeking a changed circumstances review had to satisfy the authorities that the volume of their exports to Mexico during the review period were representative).

[250] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 21, 2.

[251] *Id.* at 4 (stating that "the Department may choose to limit its review to: 1) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the Department at the time of selection, or 2) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.").

[252] *See* Anti-Dumping Agreement, *supra* note 7, at Article 11.2.

[253] *See* Van Bael and Bellis, *supra* note 10, at 329.

of injury, a process that is described in more detail below in the context of expiry reviews.

Sunset reviews must occur no later than five years after the issuance of an anti-dumping order or a prior five-year review and require authorities to determine whether expiry of the duty "would be likely to lead to continuation or recurrence of dumping and injury."[254] In determining the likelihood of continued or a recurrence of dumping authorities may rely on margins from the final determination or a more recently calculated margin, depending on the circumstances.[255] The choice of margin warrants the development of guidance for IA officials. Similarly important is the development of general guidance regarding identifying situations in which anti-dumping measures should be maintained. The U.S. provides such guidance in the Department of Commerce's Anti-Dumping Manual. For example, it defines specific scenarios that are "highly probative of a likelihood of continued or recurred dumping."[256]

In determining whether injury is likely to continue or recur, investigating authorities should first focus on the three to five years prior the to the initiation of the expiry review and consider the trend for the overall state of domestic industry, volume and prices of dumped imports, domestic industry exports, and volume and prices of dumped imports from third countries.[257] IAs should also consider the situation of the exporting industry: whether there is unused production capacity, a possibility for rapid expansion of capacity, or a possibility of expanding production of the subject product by reallocating capacity; or whether the foreign industry is heavily dependent on exports to third countries, including their own.[258] Similarly to the initial injury investigation, even if all or some of the trends are positive, authorities may still find that injury is likely to recur if domestic industry is shown to

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[254] *See* Anti-Dumping Agreement, *supra* note 7, Article 11.3.
[255] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 25, 7.
[256] *Id*. at Ch. 25, 8. (stating that the following scenarios are highly probative of a likelihood of continued or recurred dumping: "1) dumping continued at any level above *de minimis* after the issuance of the order (or suspension agreement); 2) imports of the subject merchandise ceased after issuance of the order (or suspension agreement); or 3) dumping was eliminated after the issuance of the order (or suspension agreement), and import volumes for the subject merchandise declined.").
[257] *See* Van Bael and Bellis, *supra* note 10, at 326-327.
[258] *Id.*

be “vulnerable” based on factors such as slow growth in consumption, profit margins below the original investigation period, spare capacity, or decreasing investments.[259] Regarding causation, authorities demonstrate a causal link between the expiry of the duty and the likelihood that dumping and injury will continue or recur; they do not need to reestablish the causal link between the dumped imports and injury.[260] If developing countries enact law laying out expiry review procedures, they should reserve the right to modify the duty if they decide to extend the anti-dumping order rather than limit themselves to continuing or rescinding the order.[261]

At this early stage, we recommend that developing countries not overly concern themselves with interim and expiry reviews and focus instead on developing WTO-consistent anti-dumping investigation practices using the tools and advice provided in this Memorandum. The most important aspect of reviews for developing countries to bear in mind at this stage is that reviews require further resource expenditures and should be concluded within twelve months of the date of initiation.[262] Therefore, it is important for developing countries to only launch the largest number of anti-dumping investigations for which officials can handle administrative and expiry reviews, in the event that reviews are requested for all orders in effect and/or multiple orders expire in quick succession.[263]

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[259] *See* European Union, COMMISSION IMPLEMENTING REGULATION 2015/519 of 26 March 2015 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009.
[260] *See United States—Anti-Dumping Measures on Oil Country Tubular Goods (OCG) from Mexico,* WT/DS282/AB/R, (adopted Nov. 28, 2005) paras.103-125.
[261] This is consistent with Mexican practice. *See* Bowman, Covelli, Gantz, and Uhm, *supra* note 53, at 286.
[262] As with all issues relating to timelines, IAs must weigh preserving the flexibility of the IA against the need to encourage expeditious review. Argentina has opted for the latter, requiring that administrative and sunset reviews be concluded within eight months of initiation. *See* Decree 1393/2008 - Rules and regulations for the effective implementation of Law No. 24.425, Articles 53; 56. Brazil is similarly, proiding that reviews must be completed within 10 months, extended to 12 only under exceptional circumstances. *See* DECRETO Nº 8.058, DE 26 DE JULHO DE 2013, at Articles 105; 112.
[263] Anti-Dumping Agreement, *supra* note 7, at Article 11.4

3.2. Judicial Review

Article 13 of the ADA requires that WTO Member states establish "judicial, arbitral or administrative tribunals or procedures" to review "administrative actions relating to final determination and review of determinations…"[264] The tribunal or procedures responsible for review must be "independent of the authorities responsible for the determination of the review in question."[265] The ADA is silent on whether investigation authorities' decisions whether to initiate an investigation or to terminate an investigation before a final determination is rendered are also reviewable and member state practices in this regard are varied.[266] This section briefly surveys review systems set up by the U.S., EU, Mexico, Brazil, and Argentina in order to provide developing countries with a sample of the mechanisms provided by experienced anti-dumping users.

In the EU, final dumping determinations reached in investigations and administrative reviews are subject to judicial review in EU national courts and before the Court of First Instance (CFI) and the European Court of Justice (ECJ).[267] Because the EU Anti-Dumping Regulation does not contain special provisions for providing for judicial review, the Lisbon Treaty applies.[268] There is no specialized court at the EU level dedicated to reviewing trade decisions. In the United States, however, final dumping determinations are reviewable by a federal court (the Court of International Trade) in which the United States Congress has vested exclusive jurisdiction to review final dumping determinations, the decisions of which may be appealed to the United States Court of Appeals for the Federal Circuit and then to the Supreme Court of the United States.[269] Both EU and the United States provide availability of review to all interested parties within at least thirty days of the publication of the final determination.[270] Further, both the EU and

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[264] *Id.* at Article 13.
[265] *Id.*
[266] *See generally* Muslum Yılmaz, ed., DOMESTIC JUDICIAL REVIEW OF TRADE REMEDIES, EXPERIENCES OF THE MOST ACTIVE WTO MEMBERS 59 (2013).
[267] *See* Edwin Vermulst and Davide Rovetta*, Judicial Review of Anti-dumping Determinations in the EU*, 7 GLOBAL TRADE AND CUSTOMS J. 240 (2012).
[268] *Id.*
[269] 31 U.S.C. § 1516a(2); *see* Anti-Dumping Manual, *supra* note 11, at Ch. 28.
[270] Vermulst and Rovetta, *supra* note 267, at 241; 31 U.S.C. § 1516a(5).

the United States allow courts to review IAs' decisions to initiate and terminate investigations, going beyond what is required of the ADA.

In Mexico, interested parties may challenge affirmative final determinations; negative preliminary and final determinations; and administrative and sunset reviews via an administrative review, all of which are conducted by the Ministry of the Economy.[271] The process for these reviews has been criticized for lack of transparency.[272] Appeals from the decisions of these administrative reviews can be challenged on constitutional grounds in the form of a "*jucio de amp*aro" before a District Court. The outcome of the *amparo* proceeding can be appealed to a Circuit Court and then to the Supreme Court.[273] The Tax Court or "Tribunal Fiscal de la Federacion" hears challenges on non-constitutional grounds and reviews for enumerated procedural and substantive issues.[274] The Tax Court has the power to confirm or vacate the determination, in whole or in part, or instruct the authorities as to how to proceed with regards to the determination upon remand. Similarly to *amparo* decisions, Tax Court decisions can be appealed to a Circuit court.[275]

In Brazil, decisions taken by the decision-making body for anti-dumping investigations (CAMEX) are subject to administrative review, which takes the form of a request for reconsideration by the Ministries Council that oversees CAMEX.[276] There is no specialized court charged with reviewing these decisions; therefore, any appeals must be filed in accordance with procedures for all administrative law challenges, which are heard by the federal courts.[277] Decisions regarding initiation, imposition of provisional duties, price undertakings, termination of investigations, and administrative reviews are all subject to judicial review.[278] The standard of review is not provided by law, as for Mexico, but is effectively limited to procedural issues owing to the general rule of granting deference to the factual conclusions of the investigating and decision-making authorities.[279] Brazil's

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[271] *See* Bowman, Covelli, Gantz and Uhm, *supra* note 53, at 287.
[272] *See* Yılmaz, *supra* note 266, at 59.
[273] *Id.* at 63.
[274] *See* Bowman, Covelli, Gantz and Uhm, *supra* note 53, at 287.
[275] *See* Yılmaz, *supra* note 266, at 64-66.
[276] *Id.* at 116.
[277] *Ibid.*
[278] *Id.* at 117.
[279] *Id.* at 118.

system has been criticized for failing to provide a trade remedy-specific judicial review mechanism that assures a level of familiarity by judges with the relevant rules and concepts.[280]

In Argentina, interested parties may also seek judicial review only following a request for and conclusion of an administrative review of an anti-dumping determination.[281] Thus, in Argentina, administrative remedies must be exhausted prior to seeking judicial review, subject to the very narrow exception for "flagrant irregularity" by the administering agency.[282] Judicial review is available by filing a case, either as an ordinary lawsuit subject to the requirements of the National Law and Regulations on Administrative Procedures,[283] or as an *amparo* (requiring allegations of manifest arbitrariness or illegality injuring or threatening to injure constitutional rights and limited to power to remand) before the Court of First Instance on Federal Administrative Litigation Matters. Appeals go to the National Court of Appeals, and thereafter, may be appealed to the Supreme Court.[284] Determinations subject to judicial review include the imposition of provisional or definitive measures, decisions not to initiate an investigation, negative final determinations, and price undertakings.[285] The standard of judicial review is constrained by the deference granted to the investigating authorities determinations, and similarly to Brazil, courts typically limit their examination to procedural issues.[286]

As is evidenced by the varied mechanisms and practices of other WTO members, developing countries have discretion as to how they comply with ADA Article 13. They have multiple important considerations to weigh in exercising that discretion, such as whether to direct administrative appeals to a specialized administrative court. It is recommended that developing countries first concentrate on ensuring that IAs' mechanisms for administrative review are expeditious and in conformity with applicable constitutional and administrative law requirements.

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[280] *Id.* at 126.
[281] *Id.* at 136.
[282] *See* Decree 1393/2008, *supra* note 262, at Article 67.
[283] *Id.* at Article 70.
[284] *See* Yılmaz, *supra* note 266, at 137.
[285] *Id.* at 141.
[286] *Id.* at 149.

Developing countries should then seek advice, either from the TradeLab or another entity, as to what type of judicial review mechanism accords best with its administrative law system while also effectively preventing domestic challenges from escalating into full-fledged WTO challenges. When developing countries consider their judicial review mechanism options, they should check whether the Anti-Dumping Committee's Working Group on Implementation has published records of the Working Group's discussions on Article 13 and consider any recommendations contained therein.[287] If no records have been published, they should still consider the general questions posed by the Working Group.[288]

3.3. Defending Determinations Against WTO Challenges

In the event that a developing country's IA errs in the course of conducting an anti-dumping investigation, the government of one or more interested parties may decide to utilize the dispute settlement understanding at the WTO. If consultations do not resolve the dispute and a panel is ultimately convened, developing countries have ample resources with which to defend themselves. As discussed previously, duties collected from anti-dumping measures can help fund defence expenses. More importantly, developing countries can engage the services of the ACWL, referenced earlier with respect to growing a trade remedy bar. If a "C"

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[287] *See* WTO Doc. G/ADP/AHG/R/37 (Summary Report Of The Meeting Of The Working Group On Implementation Of The Committee On Antidumping Practices 28 October 2015).

[288] Such questions include: what type of issues will be subject to internal review within the IA; whether recourse to the IA's internal mechanism is required before continuing in judicial review (i.e. exhaustion of administrative remedies); whether the internal review mechanism provides participatory rights to select or all interested parties; whether the internal review mechanism is paper-based and/or any oral and/or public hearings will be conducted; possible outcomes and types of relief following an internal review; whether a judicial, administrative or arbitral or other review mechanism should review the actions of the investigating authorities in the internal review or only the outcome; whether the court charged with judicial review is one of general jurisdiction or a specialized body; how many layers will be included in the judicial review mechanism; whether the WTO or other treaty laws will have any effect on the courts' decisions; the types of actions that will be reviewed by the judicial review mechanism versus the types of decisions that will be non-reviewable; the parties that will have standing to request and/or participate in a judicial review; access to confidential information submitted to the investigating authorities for the purposes of judicial review; the standard of review that will be applied by the courts; the status of the action/measure subject to review while judicial review is in progress; the duration of the judicial review process; and the mechanisms for implementation of judicial review decisions. *See* WTO Doc. G/ADP/AHG/R/37, *supra* note 287.

Member of the ACWL, a country will be charged a reduced hourly rate (160.24 USD per hour).[289] Even if ACWL has a conflict of interest, developing countries can still get support via the ACWL, as the Center will arrange for the developing country to select outside counsel from a standing roster (the fees in this case will be twenty percent higher). Developing countries can also determine the maximum fees charged by the ACWL in dispute settlement proceedings in advance based on a published a schedule of maximum charges available for download.[290] In light of these resources and the low probability that developing countries will face a challenge that cannot be resolved prior to the panel stage, developing countries ought not be deterred from imposing anti-dumping measures for fear of possible challenges at the WTO. In the unlikely event that they must litigate a full challenge in Geneva, the experiences of developing countries that have already built successful anti-dumping regimes demonstrate that the growth of a developing country's trade remedy bar will be greatly expedited by the experience.[291]

Conclusion

Developing countries that would like to increase their capacity to launch successful anti-dumping investigations that are consistent with their obligations as members of the WTO can overcome the twin hurdles of lack of experience and limited resources. This Memorandum offered general and specific tools for this purpose.

Developing countries should feel confident in their ability to conduct cost-efficient, minimally burdensome anti-dumping investigations that are still consistent with WTO law and practice. As evinced by the analysis in this Memorandum, the ADA, relevant WTO jurisprudence, and country-specific practices provide ample guidance for less experienced IAs to grow their expertise. Developing countries interested in recommendations specific to their domestic regime or guidelines tailored to their needs, as were prepared for the beneficiary of this Memorandum, should contact the TradeLab.

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[289] *See* ACWL, THE SERVICES OF THE ACWL http://www.acwl.ch/download/ql/Services_of_the_ACWL.pdf (last visited Mar. 22, 2017).
[290] *Id.* at 21.
[291] *See* Shaffer, Nedumpara and Sinha, *supra* note 60, at 5.

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c. Mexico

a. NAFTA

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b. Anti-Dumping Determinations

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d. United States

a. Domestic Law, Regulations, and Policy Guidance

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c. Anti-Dumping Decision Memoranda and Determinations

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Annex II-A: Guidelines For Decision To Initiate

This Annex is based on a similar set of guidelines that the United States Department of Commerce provides to its staff.[292]

I. Is the information in the petition complete?

Note that petitioners should also be required to provide information that is reasonably available to them. The investigating authority should work with petitioners as much as possible, preferably before formally filing a petition, to ensure that information is complete. The investigating authority should furthermore be understanding of deficits in the information, particularly when that information is not required by the ADA.

1. Information on Scope:

(a) Does the petition also contain the following:

- a clear and detailed description of the merchandise to be investigated, including the appropriate HTSUS numbers? YES NO
- the name of each country in which the merchandise originates or from which the merchandise is exported? YES NO

2. Information on Domestic Producers

(a) Does the petition contain the following:

- the name and address of the petitioner? YES NO
- the names and addresses of all known domestic producers of the domestic like product? YES NO
- the volume and value of the domestic like product produced by the petitioner and each domestic producer identified for the most recently completed 12-month period for which data is available? YES NO

(b) Was the entire domestic industry identified in the petition? YES NO

3. Information on Foreign Exporters, Producers, and Importers

(a) Does the petition contain the following:

- the names of known foreign exporters, producers, and importers? YES NO
- information about prices at which the subject imports sell in the investigating country? YES NO
- information about prices at which the subject imports sell in the exporting country's home market? YES NO

[292] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 2, 20-24.

(b) Is the statistical data on imports in the petition corroborated by records kept by customs authorities? YES NO

II. Is there standing for domestic industry?

(a) Does the petitioner(s) account for more than 50% of production of the domestic like product? YES NO

(b) If No, do those expressing support account for the majority of those expressing an opinion and at least 25% of domestic production? YES NO

(c) Describe how industry support was established - specifically, describe the nature of any polling or other step undertaken to determine the level of domestic industry support.

(d) Was there opposition to the petition? YES NO

(e) Are any of the parties who have expressed opposition to the petition either importers or domestic producers affiliated with foreign producers? YES NO

III. Is there sufficient evidence to support the dumping allegation?

1. Normal Value

(a) Does the petition contain the following information about prices at which the subject merchandise is sold in the exporter's home market? YES NO

(b) Provide an explanation on how the NV was derived (include in your description the source of the pricing information and any adjustments necessary to calculate an ex-factory price; reference the pages in the petition that contain this information; if the information is based on a market research report or affidavit, explain why you believe that these sources are appropriate).

2. Export Price

Provide an explanation on how the EP and/or CEP was derived (including the description the source of the pricing information and any adjustments necessary to calculate an ex-factory price; reference the pages in the petition that contain this information; if the information is based on a market research report or affidavit, explain why you believe that these sources are appropriate).

3. Estimated Margins
Insert the range of estimated dumping margins.

IV. Is there sufficient evidence to support the injury and causation allegation?

(a) Does the petition contain information on the volume and value of imports of the domestic market share over the past three years (i.e., the ratio of imports to consumption)? YES NO

(b) Does the petition contain information of domestic industry pricing that shows that actual prices have declined over the past three years? YES NO

(c) Does the petition contain information that imports have been sold at lower prices than domestic industry prices (i.e., evidence of underselling) over the past three years? YES NO

(d) Does the petition contain evidence of causation? YES NO

V. Does the petition properly deal with proprietary data?

(a) Was an adequate summary of the proprietary data was provided (bracketed if proprietary and so not suitable for public release / double-bracketed if not suitable for release under the APO)? YES NO

(b) Did the petitioner agree to release proprietary information under administrative protective order? YES NO

VI. Is the petition properly certified?

(a) Was there a certification of the facts contained in the petition by an official of the petitioning firm(s) and its legal representative (if applicable)?

ESTIMATED MARGINS: (insert the range of estimated dumping margins)

RECOMMENDATION: Based on sources readily available to the Investigating Authority, we have examined the accuracy and adequacy of the evidence provided in the petition, and recommend determining that the evidence is sufficient to justify the initiation of an antidumping investigation. We also recommend determining that the petition has been filed by or on behalf of the domestic industry.

Annex II-B: Guidelines For Determining Export Price

For each respondent, complete the following steps. Note that a spreadsheet may be used to perform many of these calculations once the data is received from the respondent. The goal of the calculation is to reach the *ex-factory export price per unit.*[293]

The guidelines are to be used for unaffiliated sales only. Affiliated sales should be analyzed using constructed export price.[294]

Step 1: *Disregarding Sales*

1. Identify the sales by using the sequential identification number that the respondent provided for each sale. If a sale can be disregarded, simply do not analyze the data provided in that sequential identification number.
2. Sales outside the period of review should be disregarded.
3. Disregard sales where:
    a. There is a lack of evidence that the investigating countries' market is the ultimate destination of the product;[295]
    b. Sales where the export price may not have actually been paid;[296]

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[293] *See* Anti-Dumping Agreement, *supra* note 7, at Article 2.4 (providing that a fair comparison between normal value and export price shall normally be made at the ex-factory level). The UNCTAD's Training Module on the WTO Agreement on Anti-Dumping is particularly helpful to familiarize trainees with the calculations and, along with other sources, informs these guidelines. *See* UNCTAD Training Module, *supra* note 17, at 6-18, 72-76, 81-111. The last set of pages provides numerous tables of fields containing data that is relevant to all elements of the dumping calculation and walks the trainee through a simple example of how to conduct an export price analysis, a normal value analysis, a cost of production analysis, and the final margin calculation. It is highly recommended.

[294] *See* Anti-Dumping Agreement, *supra* note 7, Article 2.3 (permitting investigating authorities to construct an export price when it is "unreliable because of association or a compensatory agreement between the exporter and the importer or a third party").

[295] *See* Council Regulation (EC) No 1786/97 of 15 September 1997 amending Regulation (EC) No 821/94 imposing a definitive anti-dumping duty on imports of silicon carbide originating, inter alia, in the Ukraine, 1997 O.J. (L 254) 6, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1997.254.01.0006.01.ENG&toc=OJ:L:1997:254:TOC, at recital at 17 (disregarding sales to a trader in the EC when there was no evidence provided that these sales were actually destined to the EC and Eurostat revealed that the sales were never even entered).

[296] *See* Commission Regulation (EC) No 1620/2006 of 30 October 2006 imposing a provisional anti-dumping duty on imports of ironing boards originating in the People's Republic of China and Ukraine*,* 2006 O.J. (L 300) 13, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2006.300.01.0013.01.ENG&toc=OJ:L:2006:300:

c. Sales in which the product is sold to an affiliated importer and undergoes some transformation before being sold in an arms-length transaction;[297]
d. Consignment sales;[298]
e. Sample or demonstration sales used for marketing purposes;[299]
f. Sales to affiliated importers.[300]

FULL, at recital 56 (disregarding sales where a Hong Kong exporter's accounting records did not document that buyers in the EC actually paid the exporter and the exporter and verification revealed discrepancies in the exporter's records).

[297] *See* Council Regulation (EC) No 1890/97 of 26 September 1997 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway, 1997 O.J. (L 267) 1, *available* at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1997.267.01.0001.01.ENG&toc=OJ:L:1997:267:TOC, at recital 23 (disregarding sales where salmon shipped from Norway to affiliated importers in the EC was then smoked by the affiliated importer before being sold in an arms-length transaction).

[298] *See* Commission Regulation (EC) No 2563/1999 of 3 December 1999 imposing a provisional anti-dumping duty on imports of compact discs boxes originating in the People's Republic of China, 1999 O.J. (L 310) 17, *available* at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1999.310.01.0017.01.ENG&toc=OJ:L:1999:310:TOC, at recital 27 (disregarding sales made on a consignment basis where "the goods were destined for a warehouse located in the EC and not invoiced until the customer took delivery of these at some later date" and those sales constituted merely 6.5% of the exporter's total sales to the EC).

[299] *See* Council Regulation (EC) No 2380/95 of 2 October 1995 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, 1995 O.J. (L 244) 1, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1995.244.01.0001.01.ENG&toc=OJ:L:1995:244:TOC, at recital 71 (disregarding sales at lower costs made to demonstrate the product to the buyer as the cost of demonstration should normally be borne by the buyer).

[300] *See* Council Regulation (EC) No 1784/2000 of 11 August 2000 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand, 2000 O.J. (L 208) 8, *available* at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2000.208.01.0008.01.ENG&toc=OJ:L:2000:208:TOC, at recitals 38-39 (disregarding sales to an affiliated importer when those sales constituted only 3% of the total sales of the exporter to the EC). In the case of sales to affiliated importers, it is possible to simply disregard these sales. However, if the majority of sales are to affiliated importers, a constructed export price may be more appropriate. *See supra* at 2.7.1 (discussing constructed export price). If an export price is used, the investigating authority may simply disregard sales so long as they are not so great in number that their being disregarded renders the export price unreliable. When this is a case, a constructed export price should most certainly be used. For a discussion of how to determine affiliation, *see supra* at 2.7.1.

Step 2: ***Determine whether it may be possible to use a sample of the export sales.***

1. Of the sales remaining, determine whether it may be desirable to analyze them using a representative sample.[301] This may be desirable if a large majority of the sales are of only one product classification number (PCN) such that excluding sales of products under that PCN would ease the burden of the investigating authority. To be representative, the sample should include at least 70 percent of the total volume of sales remaining after Step 1.[302]
2. Those sales not included in the sample may then be set aside. Steps 3 to 5 are then performed for the remaining sales.

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[301] Rather than investigating all sales during the period of investigation, some investigating authorities, like the EU, sometimes restrict the volume of transactions investigated to seventy percent of all export sales of each particular exporting producer covered. *See* EU Regulation, at Article 17(1); Van Bael and Bellis, *supra* note 10, at 84-85. Doing this allows the investigating authority to limit the number of transactions it examines, reducing workload. Subsets of transactions to which the investigating authority may limit its examination include sales made in particular regions or sales of particular models (tracked by product control numbers). For EU examples, see, e.g., Commission Regulation (EC) No 967/2000 of 8 May 2000 imposing a provisional anti-dumping duty on imports of hairbrushes originating in the People's Republic of China, the Republic of Korea, Taiwan and Thailand, and terminating the proceeding concerning imports of hairbrushes originating in Hong Kong, 2000 O.J. (L111) 4, *available* at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2000.111.01.0004.01.ENG&toc=OJ:L:2000:111:TOC, at recital 28 (export price determined by sampling sales of the four best selling models sold by the two largest exporters, which together represented seventy-five percent of the total export sales of cooperating exporters); *Outer Rings of Tapered Roller Bearings* (Japan), 1992 O.J. (L 199) 8 (limiting analysis of export price to sales made in France, Germany, and the United Kingdom, which accounted for approximately ninety percent of all sales of the like product made to the EU); *Microwave Ovens* (China, Korea, Thailand, and Malaysia), 1995 O.J. (L 156) 5 (limiting analysis of export price to sales of the most frequently sold models of microwaves, which accounted for eighty-five percent of all sales of the like product made to the EU).

[302] The EU Regulation does not require that a particular volume of total sales not disregarded be represented in the sample. However, Van Bael and Bellis provide that at least seventy percent of the total volume of sales should be included. *See* Van Bael and Bellis, *supra* note 10, at 84 n. 219.

*****Steps 3-5: These steps are to be performed on each sale that has not been disregarded or set aside due to sampling. While the analysis has to be performed for each sale, it is advisable that the sales be grouped according to PCN in the event that multiple PCNs are being analyzed. This will ensure that the sales are already grouped by PCN when it comes time to calculate the dumping margin (see Annex II-E).**

Step 3: *Determining the net sales value (in respondent's currency)*

1. Find the gross invoice value and subtract any sales discounts. The total is the *net invoice value*.
2. Find any credit value that respondent extended through credit notes and subtract it from the net invoice value. The total is the *net sales value*.[303]
3. Convert the net invoice value to the currency of the respondent's country by multiplying it by the currency exchange rate in effect on the day of the sale.[304] The total is the *net sales value (in respondent's currency)*.

Step 4: *Determining the net sales quantity*

1. Take the net invoice value (Step 1.4) and divide it by the invoice quantity. The total is the *net sales price per unit*.
2. Find the quantity of units sold and subtract the quantity of units to which any credit applied. The total is the *net sales quantity*.

Step 5: *Determining the total ex-factory per export price per unit*

Remember that the end-result of this export price exercise is to arrive at the ex-factory price. To do this, several adjustments are made, which are detailed below.

1. Add up the following adjustments:
    a. Quantity discounts that were not included on the invoice.
    b. Any other discounts that were not included on the invoice. When discounts, rebates, and post-sale adjustments are not specific to a particular sale, determining how to apply the discount or rebate to each transaction can be difficult. This may be due to the way that the discount or rebate is structured in the terms of

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[303] This is quite simply credit that the seller may have extended to the buyer that results in a price reduction. *See* Czako, Human, and Miranda, *supra* note 5, at 385.
[304] Note that some investigating authorities use the average exchange rate for the month when the sale took place. UNCTAD Training Manual, *supra* note 17, at 73. For a discussion of the complications posed by currency rate conversions when the exchange rate is subject to significant fluctuation and Article 2.4.1 of the Anti-Dumping Agreement, see Czako, Human, and Miranda, *supra* note 5, at 146-148. Significant fluctuation may mean that the exchange rate should be disregarded such that if the IA finds this to be the case, it should consult experts who have experience dealing with similar cases.

sale between the buyer and the seller.[305] It may also be due to inadequacies in the exporters' accounting system. It is recommended that developing countries consult with other investigating authorities if it comes across such a situation.

c. Other post-sale adjustments such as billing errors that may have been made or rebates

d. The cost of ocean freight in the instance of CF and CIF sales

e. The cost of marine insurance in the instance of CIF sales

f. The cost of inland freight in the respondent's country

g. The cost of packing the product for delivery to the investigating country.[306]

- **i.** If for some reason packing is not included in the net sales value, then there is no reason to make this adjustment.

h. Credit costs to account for the cost of time incurred by the respondent when the buyer is given time to pay for the goods.[307]

- **i.** To calculate, take the net sales value (Step 1.5) and multiply it by the interest rate in effect for the time allowed
- **ii.** Then take number of days that the respondent allowed the seller to pay it and divide by 365
- **iii.** Then multiply the results in (i) and (ii) to arrive at the total credit cost

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[305] *See* Anti-Dumping Manual, *supra* note 11, at 15-17; *see also* Czako, Human, and Miranda, *supra* note 5, at 114-118 for a discussion of how to break down aggregate discounts across sales.

[306] Packing costs are rarely contentious, and in fact, some Members, such as the EU, do not normally adjust for differences in packing costs when the product is packed in the same way in both the respondents' home market and that to which it imports. *See* Van Bael and Bellis, *supra* note 10, at 117-18. For instance, like with credit, the EU's questionnaire only asks for this data if the respondent wants to provide it. However, both Brazil and the United States require this data. *See* Trade Remedies in Brazil, *supra* note 12, at Appendix VIII, Field 35.0; U.S. Department of Commerce, United States Standard Questionnaire, B-25, Field 41.0, *available at* http://enforcement.trade.gov/questionnaires/questionnaires-ad.html. It is recommended that IAs require this information since the burden is on the exporter to provide it, it is generally not particularly difficult to figure, and doing so will bring both the export price and normal value down to as close an ex-factory level as possible. *See* Notes from Expert Meeting, March 9, 2017 (on file with the authors).

[307] This adjustment is for the opportunity cost based on the payment terms at the time of sale. For a discussion of how interest is compounded for determining this credit, see Czako, Human, and Miranda, *supra* note 5, at 108-110.

[307] Note that some investigating authorities use the average exchange rate for the month when the sale took place. UNCTAD Training Manual, *supra* note 17, at 73. For a discussion of the complications posed by currency rate conversions when the exchange rate is subject to significant fluctuation and Article 2.4.1 of the Anti-Dumping Agreement, see Czako, Human, and Miranda, *supra* note 5, at 146-148. Significant fluctuation may mean that the exchange rate should be disregarded such that if the IA finds this to be the case, it should consult experts who have experience dealing with similar cases. For the EU's treatment of currency conversion, including cases in which there is significant fluctuation, *see* Van Bael and Bellis, *supra* note 10, at 22-124.

   i. Warranties, including guarantees or technical assistance and services agreements under which costs are borne by the respondent
   j. Other after sales costs
   k. Commissions paid by the respondent
   l. Currency conversion adjustments to account for any sustained periods of currency fluctuation during the period of investigation
2. Take the net sales value (in respondent's currency) (Step 1.4) and subtract the sum of the adjustments. The result is the *total ex-factory export price*.
3. Take the total ex-factory price and divide it by the net sales quantity (Step 2.2). The result is the *ex-factory export price per unit*.

Annex II-C: Guidelines For Determining Normal Value Using Respondent's Home Market Sales

The goal of the calculation is to reach the *ex-factory normal value per unit*.[308]

Step 1: ***Determine viability of an analysis based on a respondent's home market sales***

The IA must determine whether the sales of the like product of the exporting country are of sufficient quantity to allow for a proper comparison.[309] The general rule is that domestic sales in the exporting country are sufficient if their total volume is five percent or more than the sales of the imported product during the period of investigation.[310] This is sometimes referred to as the "five percent viability test" or "five percent rule"[311] If the respondent's sales in its own country are less than five percent of its sales in the investigating country's market, then another method should be used to calculate normal value.[312]

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[308] *See* Anti-Dumping Agreement, *supra* note 7, at Article 2.4 (providing that a fair comparison between normal value and export price shall normally be made at the ex-factory level). The UNCTAD's Training Module on the WTO Agreement on Anti-Dumping is particularly helpful to familiarize trainees with the calculations and, along with other sources, informs these guidelines. *See* UNCTAD Training Module, *supra* note 17, at 6-18, 72-76, 81-111. The last set of pages provides numerous tables of fields containing data that is relevant to all elements of the dumping calculation and walks the trainee through a simple example of how to conduct an export price analysis, a normal value analysis, a cost of production analysis, and the final margin calculation. It is highly recommended.

[309] Anti-Dumping Agreement, *supra* note 7, at Article 2.2.

[310] *Id.* at n. 2.

[311] Anti-Dumping Manual, *supra* note 11, at Ch. 8, 3; Van Bael and Bellis, *supra* note 10, at 45-46.

[312] For instance, sales to an appropriate third country to which the exporter also exports may be used or normal value may be based on constructed value. Anti-Dumping Agreement, *supra* note 7, at Article 2.2. Although the Anti-Dumping Agreement allows the investigating authority to base normal value on the respondent's sales in its own market even when the five percent viability test is not met, doing so still requires a showing that the domestic sales are of "sufficient magnitude to provide for a proper comparison." *Id.* at n. 2. Given the difficulties of making this showing and possibilities of it being challenged, it is recommended that the investigating authority not base normal value on the respondent's sales in its home market when the volume of those sales is below the five percent threshold. For example of a case where respondents' sales in the domestic market were used despite being under five percent of its sales to the importing country, see the EU's determination in Council Regulation (EC) No 1890/97 of 26 September 1997 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway, 1997 O.J. (L 267) 1, *available* at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1997.267.01.0001.01.ENG&toc=OJ:L:1997:267:TOC, at recital 15 (although sales of salmon in Norway were only four percent of sales to the EU, the EU allowed for normal value to be based on the respondents'

1. Determine the aggregate quantity of the respondent's sales in its domestic market. You may count sales to both affiliated and unaffiliated buyers.[313] Note that quantity rather than value is to be used for the calculation.
2. Determine the aggregate quantity of the exporter's sales in the investigating country's market. Count only the sales to unaffiliated buyers.
3. Perform the following calculation: (Exporters' Domestic Market Sales x 100) / Sales in the Investigating Country's Market)
4. If the number is greater than 5, then continue to the next step. If it is not, another method must be used.

**NOTE: If the five percent viability test is met, but it would not be if the respondent's sales in its domestic market not in the ordinary course of trade were excluded, then another method should be used.[314] You may not know that this is the case until you have disregarded sales not in the ordinary course of trade per Step 3. As a result, if there is reason to believe that the respondents' sales in its home market may no longer viable because so many sales have been disregarded, then Step 1 should be repeated to ensure that the home market is still viable.

Step 2: *Fixing the dates of sales in the period of investigation*
The dates of sales made in the exporters' home market are important to insure that the sale is made within the period of investigation. Further, the dates of sale may be important should some of the sales occur at a period of price volatility in the home market (i.e., substantial inflation or deflation) that would prevent a fair comparison. The date of the sale can generally be considered to be the date on which parties agree to all of the material terms of sale, i.e., price, quantity, delivery, and payment terms.[315] The investigating authority should determine the date for all sales submitted within the period of review.

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sales in Norway because domestic consumption of salmon in Norway represented 5.2 percent of its exports to the EU).

[313] This accords with U.S. practice. *See* Anti-Dumping Manual, *supra* note 11, Ch. 8, at 3. Counting all sales (affiliated and unaffiliated) in the exporters' domestic market and only the unaffiliated sales in the investigating country will make it more likely that the percentage is above five percent, which would save the IA from resorting to another method.

[314] This accords with U.S. and EU practice. *See* Anti-Dumping Manual, *supra* note 11, Ch. 8, at 5; Van Bael and Bellis, *supra* note 10, at 47-56. Both the U.S. and the EU resort to constructed values when analyzing data submitted from respondents in Members they have designated to have non-market economies or, even sometimes in the absence of a non-market economy, in which the home market is subject to another "particular market situation." *See* Van Bael and Bellis, *supra* note 10, at 56-59. For the reasons in Part IIII(F)(1), it is recommended that IAs not use "particular market situation" as a ground for using another method.

[315] Anti-Dumping Agreement, *supra* note 7, at Article 2.4.1, n. 8.

1. Presume for each sale that the date of the sale is the invoice date. The sale invoice date should be provided for each sale reported on the questionnaire, making this task particularly easy.
2. When there is evidence that the invoice date may not be the date of sale, the investigating authority may adjust the sale. This often occurs with a long-term contract or when there is a long period of time between conclusion of the contract and the delivery of the goods, in which case the investigating authority may use the contract date or the order-acknowledgement date.[316]
3. In the instance sales are reported outside the period of review, they should be disregarded.

Step 3: ***Disregarding sales not in the ordinary course of trade***
IAs may disregard sales in the exporters' home market that are not in the ordinary course of trade by reason of price.[317] These sales include sales that are below the cost of production, sales to affiliated buyers at non-arms length prices, and sales of products that are so physically different from those sold in the investigating country that comparison is not reasonable.[318]

1. Sales Below the Cost of Production[319]
   - Sales below the cost of production, i.e. are not profitable to the respondent, may be disregarded.[320]
2. Sales to Affiliates Buyers at Non-Arms Length Prices

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[316] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 8, 10.
[317] Anti-Dumping Agreement, *supra* note 7, at Article 2.2.1. The Anti-Dumping provides no exact definition of "in the ordinary course of trade." The United States has defined the term to encompass those sales made under "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. § 1677(10). *See also United States—Hot-Rolled Steel from Japan*, WT/DS184/AB/R, at para. 140-42 (providing that investigating authorities must disregard all sales in the exporters' home market that "are not compatible with 'normal' commercial practice," regardless of whether they are higher or lower than whatever is thought to be the ordinary course price).
[318] This accords with EU and U.S. practice. *See* Ant-Dumping Manual, *supra* note 26, Ch, 8, 9; Van Bael and Bellis, *supra* note 10, at 47-56.
[319] *Id.* at 59. In order to exclude these sales, the IA must collect cost of production data, which it must then analyse to determine cost of production. As this is a fairly significant calculation, we do not include it here nor, per the discussion at *supra* 2.7.1 per constructed value, do we advise the IA prioritize developing it. The United States does not disregard sales below the cost of production unless it issues Section D of the questionnaire, which it typically does only if it is doing a constructed value analysis. *See* Anti-Dumping Manual, *supra* note 11, at Ch. 9, 2-3. However, it will disregard prices that it considers aberrational. *See id.* at Ch. 8, 12-14. The EU does exclude those sales made below cost at the time of sale even when it does not construct a value. *See* Van Bael and Bellis, *supra* note 10, at 48-51. Brazil also requires cost of production information even when it is not constructing a value. *See* Trade Remedies in Brazil, *supra* note 12, at Appendix VII 289-90 (Sample Questionnaire for Exporters (Anti-Dumping Investigation).
[320] For the Anti-Dumping provision allowing this adjustment, see Anti-Dumping Agreement, *supra* note 7, at Article 2.2.1.

- Sales between affiliated buyers, i.e. related sales, may be disregarded. The investigating authority has considerable discretion when determining affiliation such that as much as one company having a five percent share in the other company may result in the investigating authority considering the two companies affiliated.[321]

3. Sales of Products So Physically Different They Cannot Be Physically Compared
   - Sales of products where the DIF-MER (see Step 6.1) is greater than 20% may be disregarded. As this calculation is typically not performed until the adjustments phase, it may be fine to wait to disregard these sales until Step 6.1. However, if it is thought that the sales of these products may be so numerous as to render a home market sales analysis unviable, it is advisable to do the DIF-MER calculation first.[322]

The following steps (4-6) are then to be completed for each sale under the same PCN. If there are multiple PCNs, the steps need to be repeated for every PCN. Please note that a spreadsheet may be used to perform many of these calculations once the data is received from the respondent.

Step 4: *Determining the net sales value*

1. Using the sequential identification numbers for each sale reported on the questionnaire, identify those sales of the PCN under consideration.
2. Find the gross invoice value and subtract any sales discounts. The total is the *net invoice value*.
3. Find any credit value that respondent extended through credit notes and subtract it from the net invoice value. The total is the *net sales value*.

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[321] *Id.* at 44; EU Anti-Dumping Regulation, *supra* note 119, at Art. 2(1) (providing that prices between affiliated parties may not be considered in the ordinary course of trade, and thus may be disregarded "unless it is determined that they are unaffected by the relationship); *see* Commission Regulation (EC) No 1628/2003 of 17 September 2003 imposing a provisional anti-dumping duty on imports of large rainbow trout originating in Norway and the Faeroe Islands, 2003 O.J. (L 232) 29, *available* at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2003.232.01.0029.01.ENG&toc=OJ:L:2003:232:TOC, at recital 30 (disregarding sales by customers known to them as traders as in most of these cases the traders were receiving trout at very low costs and where there was evidence that the trout was not destined for consumption in the EC).

[322] DIF-MER calculations are based on manufacturing costs, and therefore, require cost of production data. DIF-MER calculations can easily become very complicated, but for discussion of a basic approach to the calculation, see Czako, Human, and Miranda, *supra* note 5, at 185. In a limited number of cases, the United States has used differences in market prices to calculate the DIF-MER, but the practice is controversial such that developing countries should avoid using it. *See* Anti-Dumping Manual, *supra* note 11, at 63-64. For a sample calculation of the usual way in which DIF-MER is normally calculated using cost of manufacture and the twenty percent guideline, see *id.* at 65-68.

Step 5: ***Determining the net sales quantity***

1. Take the net invoice value (Step 1.2) and divide it by the invoice quantity. The total is the *net sales price per unit*.
2. Find the quantity of units sold and subtract the quantity of units to which any credit applied. The total is the *net sales quantity*.

Step 6: ***Determining the total ex-factory normal value per unit***
Remember that the end-result of this export price exercise is to arrive at the ex-factory price. To do this, several adjustments are made, which are detailed below.

1. Account for any physical differences in the merchandise sold in the respondents' home market and that sold in the investigating country. This adjustment is sometimes called a DIF-MER (differences in merchandise) adjustment. If the physical difference makes the product less valuable in the respondents' home market than in the investigating country, add the value of the difference to the net sales value (Step 4.3). If it is more valuable, subtract the value of the difference from the net sales value. The result is the *net sales value subject to DIF-MER*.[323]
2. Add up the following adjustments:
    a. Quantity discounts that were not included on the invoice.
    b. Any other discounts that were not included on the invoice
    c. Other post-sale adjustments, such as billing errors that may have been made or rebates
    d. The cost of inland freight
    e. The cost of packing the product.[324] The packing cost incurred to import the product to the investigating country does not include additional packing that may be done while the product is in the inventory of an affiliated firm in the investigating country. Rather, this cost, considered "repacking," is subtracted from constructed export price. This is consistent with U.S. practice.[325]

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[323] If the two products are identical or the physical difference does not result in any change in how the product would be valued, then the net salves value per the DIF-MER adjustment will be the same as the net sales value.
[324] Packing costs are rarely contentious, and in fact, some Members, such as the EU, do not normally adjust for differences in packing costs when the product is packed in the same way in both the respondents' home market and that to which it imports. *See* Van Bael and Bellis, *supra* note 10, at 117-18. For instance, like with credit, the EU's questionnaire only asks for this data if the respondent wants to provide it. However, both Brazil and the United States require this data. *See* Trade Remedies in Brazil, *supra* note 12, at Appendix VIII, Field 35.0; U.S. Department of Commerce, United States Standard Questionnaire, B-25, Field 41.0, *available at* http://enforcement.trade.gov/questionnaires/questionnaires-ad.html. We are recommending that IAs require this information since the burden is on the exporter to provide it, it is generally not particularly difficult to figure, and doing so will bring both the export price and normal value down to as close an ex-factory level as possible. *See* Notes from Expert Meeting, March 9, 2017 (on file with the authors).
[325] *See* Anti-Dumping Manual, *supra* note 11, at Ch. 8, 18.

f. Credit costs to account for the cost of time incurred by the respondent when the buyer is given to pay for the goods[326]
    i. To calculate, take the net sales value (Step 2.3) and multiply it by the interest rate in effect for the time allowed
    ii. Then take number of days that the respondent allowed the seller to pay it and divide by 365
    iii. Then multiply the results in (i) and (ii) to arrive at the total credit cost
g. Warranties, including guarantees or technical assistance and services agreements under which costs are borne by the respondent
h. Commissions paid by the respondent
i. Other charges that the respondent may be able to demonstrate that relate to domestic transaction
j. Level of trade
    i. This adjustment is only used if the respondent can demonstrate that the sale was made at a level of trade which is different than the level of the export sale and that the difference affects price comparability.
k. Currency conversion adjustments to account for any sustained periods of currency fluctuation during the period of investigation.[327]

3. Take the net sales value subject to DIF-MER and subtract the sum of the adjustments. The result is the *total ex-factory normal value.*
4. Take the total ex-factory price and divide it by the net sales quantity (Step 5.2). The result is the *ex-factory normal value per unit.*

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[326] This adjustment is for the opportunity cost based on the payment terms at the time of sale. For a discussion of how interest is compounded for determining this credit, see Czako, Human, and Miranda, *supra* note 5, at 108-110. The EU treats this as a voluntary adjustment that an interested party may request. *See* Van Bael and Bellis, *supra* note 10, at 118-119. In EU practice, the adjustment is only made if the respondent can provide that the credit terms were agreed in writing and prior to the date of sale. *See id.* at 119. Further the EU will only calculate the adjustment based on the net invoice value, meaning that credit is not calculated if sales tax is included in the invoice price. *See* Commission Regulation (EC) No 575/2002 of 3 March 2002 imposing a provisional anti-dumping duty on imports of sulphanilic acid originating in the People's Republic of China and in India, 2002 O.J. (L 87) 28, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2002.087.01.0028.01.ENG&toc=OJ:L:2002:087:TOC, at recital 26.

[327] Note that some investigating authorities use the average exchange rate for the month when the sale took place. UNCTAD Training Manual, *supra* note 17, at 73. For a discussion of the complications posed by currency rate conversions when the exchange rate is subject to significant fluctuation and Article 2.4.1 of the Anti-Dumping Agreement, see Czako, Human, and Miranda, *supra* note 5, at 146-148. Significant fluctuation may mean that the exchange rate should be disregarded such that if the IA finds this to be the case, it should consult experts who have experience dealing with similar cases. For the EU's treatment of currency conversion, including cases in which there is significant fluctuation, *see* Van Bael and Bellis, *supra* note 10, at 22-124.

Annex II-D: Guidelines For Determining The Dumping Margin

For the sake of simplicity, developing countries should use a weighted-average-to-weighted-average comparison when determining the margin of dumping. This is also the preference of the ADA.[328] Most Members use this approach unless the contract is for specially ordered manufacturing products. Developing countries should avoid using controversial asymmetrical methods of comparison or calculation practices like zeroing, which have been subject to substantial challenge at the WTO.

As with the other dumping calculations, a spreadsheet may be used to make calculations easier.

The goal of the calculation is to reach the *dumping margin*. [329]

Complete Steps 1 and 2 for each respondent. Step 2 only needs to be completed if the respondent has sold products under multiple PCNs such that multiple export prices and normal values have been determined per the Steps in Annex II-C and D. If a respondent has only sold products under one PCN, then Step 1 will reveal that respondent's dumping margin. If the respondent has sold products under multiple PCNs in both the investigating country and its home market, then Step 2 needs to be performed. Step 3 determines an all-other rates by taking a weighted average of those respondents sampled.

Step 1: ***Determining the dumping margin per PCN***

1. For each transaction, take the ex-factory normal value per unit and subtract the ex-factory export price per unit. The result is *the total dumping amount per unit*.
2. Take the total dumping amount per unit and multiply it by the export net sales quantity (see Annex II-#2, Step 2.2). The result is the *total dumping amount per transaction*.
3. Add the total dumping amounts per transaction for every transaction. The result is the *total dumping amount per PCN.*
4. Determine the CIF value per transaction by taking the *net sales value in respondent's currency* (see Annex II-#2, Step 1.4) and adding ocean

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[328] Anti-Dumping Agreement, *supra* note 7, at 2.4.2.

[329] The UNCTAD's Training Module on the WTO Agreement on Anti-Dumping is particularly helpful to familiarize trainees with the calculations and, along with other sources, informs these guidelines. *See* UNCTAD Training Module, *supra* note 17, at 6-18, 72-76, 81-111. The last set of pages provides numerous tables of fields containing data that is relevant to all elements of the dumping calculation and walks the trainee through a simple example of how to conduct an export price analysis, a normal value analysis, a cost of production analysis, and the final margin calculation. It is highly recommended.

freight and insurance costs in the instance that the sale is not a CIF sale. The result is the *CIF value per transaction*.

5. Add the total CIF values per transaction for every transaction. The result is the *total CIF value per PCN*.
6. Take the total dumping amount per PCN and divide by the total CIF value per PCN. The result is the *dumping margin per PCN*.
    - **NOTE:** The same dumping margin will be reached if you (1) take the total dumping amount per transaction, (2) divide each dumping amount per transaction by the CIF value per transaction to arrive at a transaction-specific dumping margin; (3) add up the transaction-specific margins, including any that may be negative (to not include the negative margins would be to zero, which developing countries should not do); (4) divide the sum of the transaction-specific margins by the total of the number of transactions.

Step Two: *Determining the dumping margin when more than one PCN is used*

1. Take the dumping margin per PCN for each PCN and multiply it by the total quantity of sales made of that PCN in the domestic market.
2. Add the total quantity of sales made under all of the PCNs in the domestic market.
3. Divide the result of Step One by the result in Step Two. The result is the dumping margin.

Step Three: *Determining the all-others rate*

1. To determine the all-others rate, add together the margins of all cooperating mandatory respondents that are above two percent.
2. Divide this number by the total number by the total number of cooperating respondents with margins above two percent.

Annex II-E: Guidelines For Assessing Volume Effects & Cumulation

Step 1: ***Decide on the injury investigation period***

1. The ADA does not mandate a specific investigation period,[330] but the Anti-Dumping Committee recommends a period of at least three years, "unless a party from whom data is being gathered has existed for a lesser period," in which case they "should include the entirety of the period of data collection for the dumping investigation."[331] U.S. practice is to gather injury data for the most recent three complete calendar years and the year-to-date periods of the current and preceding year.[332] EU practice is similarly to gather data for most indicators for 3-5 years. In light of the Anti-Dumping Committee's recommendation and U.S. and EU practice, IAs should aim to gather 3-5 years of data if analytical capacity and domestic industry records permit. Authorities should not be deterred if they cannot meet this standard. A single year of data has been found to be sufficient by a WTO panel.[333] Mexico has considered a period of four years on at least three occasions from 2010-2012.[334] The IA should weigh their ability to show injury if they opt to collect less data.
2. The IA should adjust the period of investigation based on the financial reporting practices of the domestic industry. For example, for a seasonal industry, it may make sense to extend the period of investigation in order to avoid collecting unrepresentative data. The injury period can end later than the dumping investigation period.[335]

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[330] *See Egypt — Steel Rebar from Turkey,* WT/DS211/R, paras. 7.130–7.131. Note that the volume of dumped imports for the purpose of determining negligibility under Anti-Dumping Agreement Article 5.8 is to be evaluated using one of three time periods: (a) the period of data collection for the dumping investigation; (b) the most recent 12 consecutive months prior to initiation for which data are available; or (c) the most recent 12 consecutive months It is recommended that authorities use the same period of data collection as for the dumping investigation so as to minimize the amount of data that needs to be collected. *See* Anti-Dumping Committee Recommendation Concerning The Time-Period To Be Considered In Making A Determination Of Negligible Import Volumes For Purposes Of Article 5.8 Of The Agreement (2002), G/ADP/10.

[331] *See* Recommendation Concerning the Periods of Data Collection For Anti-Dumping Investigations*,* Adopted by the Committee on 5 May 2000, G/ADP/6.

[332] *See* ITC Handbook, *supra* note 21, at I-11.

[333] *See Guatemala — Grey Portland Cement from Mexico,* WT/DS156/R, para. 8.266 (finding that a one year collection period was not *a priori* inconsistent with Article 3.2 where the subject imports, according to Guatemala, had not become significant before the one year period began).

[334] *See* Preliminary Resolution of the anti-dumping investigation on imports of cold rolled sheet originating in the Republic of Korea, regardless of country of origin, DOF:06/03/2013, *available at* http://www.dof.gob.mx/nota_detalle.php?codigo=5301077&fecha=03/06/2013**.**

[335] *See Argentina—Poultry from Bazil*, WT/DS241/R, at para. 7.287.

3. Whatever period is chosen, the IA should "set and make known in advance to interested parties the periods of time covered by the data collection," [336] and if the period selected does not comply with the ADA's recommendation, the IA should "include in public notices or in the separate reports provided pursuant to Article 12.2 of the [Anti-dumping] Agreement, an explanation of the reason" for the time period selected.[337]

Step 2: ***Gather import volume and domestic production and consumption data***

1. Import volumes are analyzed on an absolute basis or relative to production or domestic consumption. It is therefore possible to show injury *even if there has been an absolute decrease in the total number of units imported* during the investigation period. We recommend the IA examine the share of dumped imports relative to domestic consumption. [338]Data on volume effects for the purposes can be gathered from the petition and from questionnaires – domestic producer, importer, and foreign exporter.[339] Data can also be gathered from the investigating country's Central Bank and National Customs Service. Depending on the scope of the investigation, there may not be data on the specific product or products available, so information regarding a broader category of products containing the like product may be used, adjusted based on data from other sources.[340] For example, export statistics from the origin country government(s), if publically available, could be used. The IA needs to gather the following data in order to analyze volume effects:
    - **a.** Total domestic production of the like product (quantity or value) based on production data of all known producers.
    - **b.** Total domestic consumption based on (a) sales of the product of all known producers in the home country + (b) sales of imports of the subject product from the subject country and third countries.
    - **c.** Quantity or value of domestic producers' share of total consumption, separated into captive market consumption (quantity or value) and free market consumption (quantity or value), if applicable.
    - **d.** Quantity or value of subject import share of domestic consumption during the investigation period (annual or quarterly basis) established by comparing the volume of

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[336] *See* G/ADP/6, *supra* note 331.
[337] *Id.*
[338] This is the more commonly relied upon metric. *See* Van Bael and Bellis, *supra* note 10, at 282.
[339] If authorities find that any exporters have *not* been dumping, imports from that company must be excluded. Imports from unexamined exporters can be considered dumped if all sampled exporters have been found to be dumping. *See EC—Iron or Steel Fasteners from China,* WT/DS397/R, at paras. 7.364–7.365.
[340] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.6.

imports with total domestic market consumption (or only free market consumption only if applicable)

e. Quantity or value of imports from third countries share of domestic consumption (annual or quarterly basis) by comparing the volume of third country imports with total domestic market consumption (or free market consumption only, if applicable).

Step 3: ***Decide whether to cumulate import volumes***

1. In deciding on whether to cumulate imports, authorities should ask the following questions:

a. Are several anti-dumping investigations simultaneously underway into the same product originating in different countries? If YES, proceed to the next step, if NO, cumulation is not permitted.

b. Is the volume of dumped imports from each country being investigated not negligible and are dumping margins all more than *de minimis*? If YES, proceed to the next step. If NO, ask the following question:

i. Do negligible import volumes from any one country collectively amount to more than 7 percent? If YES, proceed to next step. If NO, the negligible imports cannot be investigated.

- There is no mandatory period for measuring negligibility, but we recommend the IA use the same period as is adopted for volume effects generally, i.e. the period of the dumping investigation, which is one of the three options recommended by the Anti-Dumping Committee. Note that dumped imports can only be cumulated with other dumped imports, not other subsidized imports.[341]
- Cumulation can be used in expiry reviews. In this context, the negligibility requirement is not applicable.[342]

c. Is a cumulative assessment of the effects of the imports appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product? More specifically,

i. Are there "broadly" similar volume and price trends?[343]

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[341] *See United States—Hot-Rolled Carbon Flat Steel from India*, WT/DS436/R, para. 7.343.

[342] *See* Panel Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan,* WT/DS244/R (adopted Jan. 9, 2004), paras. 7.89-105.

[343] *Id.* at para. 7.242.

ii. Is there a demonstrable degree of fungibility between the imports from different countries and between imports and the domestic like product, including when specific customer requirements and other quality related questions re considered?
iii. Are there sales or offers to sell in the same geographic markets of imports from different countries and the domestic like product?
iv. Are there common or similar channels of distribution for imports from different countries and the domestic like product?
v. Are the imports simultaneously present in the market?[344]
- The IA has discretion regarding whether the conditions of competition requirement is met.[345] If the answers to questions (a)-(c) are YES, proceed to cumulate. If the answer is NO to more than one factor, cumulation is very likely to be subject to challenge and is not recommended.

2. The IA should also note that when cumulation is used, analysis of volume and price effects (see Guideline #2) can be done on a cumulative basis – country-specific analyses are not required.[346]

Step 4: ***Analyze volume effects***

1. Aggregate the data collected into two tables. The first year of the period of investigation serves as the index year (i.e. Year 1 = 100). Data can be provided in terms of units and percentage. Sample tables are below.

Table 1: Total Domestic Consumption

	2012	2013	2014	2015	2016
Consumption					
Index (2012=100)	100				

Table 2: Import volume and market share

	2012	2013	2014	2015	2016
Volume of imports					

[344] This is consistent with U.S. practice. *See* ITC Handbook, *supra* note 21, at II-41.
[345] *See EC—Iron Tube or Pipe Fittings from Brazil,* WT/DS219/R, at para. 7.241. U.S. practice is to only require a "reasonable overlap" of competition. *See Goss Graphic Sys., Inc. v. United States*, 33 F. Supp. 2d 1082, 1087 (Ct. Int'l Trade 1998) (stating that "cumulation does not require two products to be highly fungible"); *see also Wieland Werke, AG*, 718 F. Supp. at 52 (noting that "completely overlapping markets are not required.").
[346] *See EC—Iron Tube or Pipe Fittings from Brazil,* WT/DS219/R**,** at para. 7.231.

from subject country					
Index (2012=100)	100				
Market share (%)					

2. Consider the trend in absolute volume of imports and market share in across the investigation period. Is there an absolute increase in volume of imports or in relative market share of imports?
    a. If YES, this is a potential sign of injury.
3. Tip: Authorities do not need to find a steady increase through the entire period of investigation. For example, if there is a quarter where import volume trends negatively, this does not negate an injury finding. Authorities should try to show in this case that domestic producers were still suffering injury, as their market share was still lower than it should have been due to the imports, based on past trends.

Step 5: *Explain findings*

1. ADA Article 3.2 instructs authorities to consider whether there has been a "significant increase in dumped imports."[347] The IA should refer to the increase in imports as "significant" if doing so is at all justifiable based on the data. A "significant" increase is not required to appear in a preliminary or final determination report, but a WTO panel has stated that, "it would certainly be preferable for a Member explicitly to characterize whether any increase in imports is 'significant', and to give a reasoned explanation of that characterization…"[348]
2. Note if and how volume effects correlate with price effects for inclusion in section of the determination addressing causation (see Guideline #4). Ideally, there will be an absolute or relative increase in the volume of imports simultaneously to a declining trend in the prices of the imports, as this is a strong indicator of injury and causal link (i.e. that imports are gaining market share by outcompeting domestic producers on price).

[347] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.2
[348] *See Thailand—H Beams from Poland,* WT/DS122/R, at para. 7.161.

Annex II-F: Guidelines For Assessing Price Effects

Step 1: *Select period of investigation for price effects*

1. It is recommended that investigating authorities collect data for pricing effects over the same period of investigating as for dumping, as recommended by the Anti-Dumping Committee.[349]

Step 2: *Select pricing products*

1. To evaluate whether there is price undercutting/underselling or overselling, the prices of the domestic like product and the imported subject product must be compared. The prices used must be "actually comparable[350] but in contrast to calculating the dumping margin, methodologies for this purpose are not specified by the ADA. The most efficient way to do this when the scope of the investigation is large is to select "pricing product" pairs: each pair is composed of one model produced and sold by domestic producers and one comparable model sold by foreign producers. The domestic models selected should be representative of the scope of the investigation. For example, if the scope of the investigation includes 2 different categories of product types, and each of those categories has 5 different subtypes, rather than comparing prices for all 10 subtypes, 4 different pricing products could be selected; 2 subtypes from category 1 and two subtypes from category 2. The pricing products should account for at least fifty percent of domestic producer and importer commercial shipments. It is best to avoid selecting products that have significantly different market shares and prices, as this may provoke challenges to the IA's findings.[351] Authorities should be careful when selecting pricing products that it will be possible to find price undercutting in the aggregate; pricing products that may show high margins but only for that category will not permit a finding of price effects for the industry as a whole. [352]
2. The selection of pricing products should be made prior to when questionnaires are drafted (see discussion of scope above) so that the questionnaires can include requests for data on the selected pricing products. To ensure the foreign product is comparable, adjustments should be made for physical differences and level of trade. For

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[349] *See* Recommendation Concerning the Periods of Data Collection For Anti-Dumping Investigations*, supra* note 331. Price undercutting must be assessed over a more recent period of time, when dumped imports were entering the investigating country, rather than the 3-5 year period used for other impact on domestic industry.
[350] *See China—Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, (adopted April 24, 2013) paras. 7.55-60.
[351] *See China—Measures Imposing Anti-Dumping Duties On High-Performance Stainless Steel Seamless Tubes,* WT/DS454/AB/R, (adopted Oct. 28, 2015), paras. 5.143-182.
[352] *See Whirlpool Corporation v. United States*, 144 F.Supp.3d 1296 (CIT, 2016).

example, the price of a model with an additional feature should be reduced by the amount it costs to produce that feature and the additional amount of profit. Note however that authorities do not need to meet the requirements of Article 2.4 in making these adjustments.[353] Requests for information that will facilitate adjustments should be included in questionnaires i.e. descriptions of the product, production and manufacturing costs.

3. If questionnaires ask foreign exporters which products they consider comparable, authorities should consider this information in making their pricing product selection and highlight having done so in their determination report.

Step 3: *Calculate price-undercutting margin*

1. Aggregate pricing data into a single table to determine the overall trend in prices of dumped imports by value and on average. A sample table is below.

Table 1 (USD/ton)

	2012	2013	2014	2015	2016
Average price of dumped imports					
Index (2012 =100)	100				

2. Two main formulas for calculating price undercutting are available. The U.S. formula requires less adjustments, so is recommended, but the EU one may be necessary if authorities are relying on price data provided by foreign exporters. The formulas used by Mexico and Brazil appear to be fundamentally similar to the U.S. and EU approaches, only the descriptive language differs.
    a. U.S. formula: Compare weighted average Free on Board (FOB) domestic sales prices and weighted average FOB import prices.
    b. EU formula: Compare weighted average sales prices per product type of the Union producers charged to unrelated customers on the domestic market, adjusted to an ex-works level; and corresponding weighted average prices per product type of the imports from the cooperating foreign producers to the first independent customer on the domestic market, established on a Cost, Insurance, Freight (CIF) basis, with appropriate adjustments for post-importation costs (E.g. SG&A; profit).[354] The comparison should be made after deducting rebates and discounts.

[353] *See EC—Iron or Steel Fasteners from China*, WT/DS397/AB/R, at para. 7.328.
[354] *See* Muller, Khan and Scharf, *supra* note 89, at 291.

c. Brazil formula: Compare average domestic sales price of the domestic industry in the Brazilian domestic market and the CIF price of the export operations of the foreign industry upon entry in to the Brazilian market.[355]

d. Mexico formula: Compare average price of dumped import product types (adjusted by adding tariff, customs agent, and other expenses) with FOB price of domestically produced like products types.[356]

3. Tip: A low price undercutting margin i.e. 3 percent or lower may still be indicative of injury if the domestic producer prices have been previously depressed by the dumped imports – check whether prices are below cost of production (see Guideline #4).[357]

Step 4: *Calculate price-underselling (price suppression) margin*

1. This formula should be used when dumped imports may have depressed or suppressed domestic prices. The IA should be able to point to evidence of selling below cost if they decide to use a price underselling methodology as part of the injury determination. The formula is the same as EC or U.S. formula for price undercutting, only the domestic industry's target price is used instead of actual prices.[358] Target prices consist of the full costs of production of the domestic producers, including SGA, and a reasonable or target profit. To calculate the target price:

a. Calculate the cost of production, including selling, general, and administrative expenses (SGA) for each of the domestic models.

b. Calculate a reasonable target profit for each of the domestic models. To determine what is reasonable, examine the trend for profits before the increase in imports.

c. Sum the cost of production and target profit to get the target price for each model.

d. Calculate the weighted average target price.

2. Brazil's formula is to calculate an adjusted domestic industry price to reflect a "non-injury scenario" and then divide this price by the average selling price from the injury period. This amount is then added to the average price in the injury period, already converted to US dollars, in

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[355] *See* CAMEX, Resolution No. 04 of February 16, 2017, *supra* note 96.

[356] *See* Preliminary Resolution of the anti-dumping investigation on imports of cold rolled sheet originating in the Republic of Korea, regardless of country of origin, DOF:06/03/2013, paras. 376-382, *available at* http://www.dof.gob.mx/nota_detalle.php?codigo=5301077&fecha=03/06/2013**.**

[357] *See, e.g.* Commission Implementing Regulation (EU) 2015/1081, Imposing a provisional anti-dumping duty on imports of certain aluminium foils originating in Russia, O.J. 2015 (L 175), *available at* http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153593.prov.en.L175-2015.pdf.

[358] *See* Muller, Khan and Scharf, *supra* note 89, at 292.

order to reflect the price in the absence of the dumped imports. This price is then compared to the price of the imports.[359]

Step 5: *Explain findings*

1. The IA should explain both their evidence that the subject imports and domestic like product compete on the basis of price and how this finding supports their price effect findings, as well as the findings themselves i.e. the margin of undercutting or underselling.[360]
2. Authorities are not required to find price effects are significant,[361] but we recommend that authorities characterize their price effects findings as significant if doing so is at all justifiable.[362]

[359] *See* CAMEX, Resolution No. 04 Of February 16, 2017, *supra* note 96.
[360] *See China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States,* WT/DS414/AB/R (adopted Nov. 16, 2012), para. 210.
[361] *See Korea—Paper from Indonesia,* WT/DS312/R, para. 7.253.
[362] *See China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/R, (adopted Oct. 28, 2015), paras. 5.143-182.

Annex II-G: Guidelines For Assessing Impact On Domestic Industry

Step 1: ***Assess indicator trends***

Similarly to volume effects, indicator data should be aggregated into tables for easy comparison of absolute and relative trends. Indicators 1-15 below must be examined for a material injury determination and should also be the starting point for analyzing threat of material injury.[363] A decline in any particular indicator may be evidence of injury. Specific tips for analyzing each indicator are provided below.

1. **Market share and sales volume:**
    - **a.** The failure of domestic producers to increase market share when total domestic consumption increases may be a sign of injury.[364]
    - **b.** The failure of domestic producers to maintain market share when total domestic consumption increases may be a sign of injury.[365]
    - **c.** A decline in market share held by domestic producers greater than the decline in consumption may be a sign of injury.
    - **d.** An increase in sales by domestic producers below what would normally be expected for the type of industry could be a sign of injury.[366]
    - **e.** A decline in sales orders may be a sign of injury.
    - **f.** An increase in sales value only achieved by shifting to produce more products within a higher value range accompanied by a decrease in total sales volume may be a sign of injury.[367]

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[363] *See EC—Cotton-Type Bed Linen from India,* WT/DS141/R, paras. 6.154–6.159*; see also Thailand—H Beams,* WT/DS122/AB/R, (adopted April 5, 2001), paras. 121-128. Regarding threat of material injury determination, see *United States—Softwood Lumber from Canada*, WT/DS257/R, para 7.105 (pointing out that these factors "establish the background against which the impact of future dumped/subsidized imports must be assessed.").

[364] *See* ITC, Steel Concrete Reinforcing Bar from Japan, Taiwan, and Turkey, *supra* note 172, at 24.

[365] *See id*.

[366] *See* Council Regulation (EEC) 55/93 of 8 January 1993, Imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, 1993 O.J. (L 9), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993R0055&from=EN.

[367] *See* Council Regulation (EEC) 55/93 of 8 January 1993, Imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, 1993 O.J. (L 9), available at http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31993R0055&from=EN

2. **Profitability**
    - **a.** This indicator refers to actual profits, not all factors affecting profits.[368]
    - **b.** Profitability is a critical indicator; if a negative development in profits can be shown, this can outweigh the positive development of other indicators.[369]
    - **c.** Profit trends should be examined on a quarterly basis if analysis on an annual basis does not indicate injury.[370]
    - **d.** If profitability is only maintained by decreasing market share, this may be a sign of injury.
    - **e.** If profitability is only maintained because other domestic producers are forced out of the industry, this may be a sign of injury.
    - **f.** If profitability is only maintained by cutting wages, this may be a sign of injury.[371]
    - **g.** If profitability mainly increases due to lower raw material costs, injury may still be occurring.[372]

3. **Output**
    - **a.** A relatively small decline in output may still indicate material injury. The EC has consistently viewed declines of 2-10 percent as signs of material injury.[373]
    - **b.** A relatively small increase in output could still indicate material injury if production volume has been suppressed by imports.[374]
    - **c.** An increase in output over the medium-term may still be a sign of injury if there were periods when production declined due to imports, for example, if competition from imports caused producers to temporarily halt production.[375]

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[368] *See Egypt—Steel Rebar from Turkey,* WT/DS211/R, para. 7.60.
[369] *See* Van Bael and Bellis, *supra* note 10, at 311.
[370] This is consistent with EU practice. *See* Van Bael and Bellis, *supra* note 10, at 312.
[371] *See Ironing boards from China and Ukraine* (China, Ukraine)*,* 2006 O.J. (L 300) 13..
[372] See *Polyester staple fibres* (India, Korea), 2000 O.J. (L 166), *available at* http://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32000R1899&from=en
[373] *See, e.g., Wire rod* (China, Moldova, Turkey), 2009 O.J., *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0703&from=EN (finding a three percent decrease in production to be a sign of material injury).
[374] *See Polyester staple fibres* (Australia, Taiwan, Korea, Thailand)*,* 2002 O.J. (L 16), available at http://eur-lex.europa.eu/legalcontent/ES/TXT/PDF/?uri=CELEX:32000R0123&from=EN
[375] *See Ammonium nitrate* (Russia) *supra* note 185.

4. **Market share**
    a. Relatively small market share decreases or market share stagnation may still be a sign of injury.[376]

5. **Productivity**
    a. Decline in production of units of the like product per hour may be a sign of injury.

6. **Return on investment**
    a. This factor is typically defined as the ratio of profits (defined as Earnings Before Interest and Tax (EBIT)) to assets employed.
    b. Decline in domestic industry's return on assets used in production of the like product may be a sign injury.

7. **Capacity utilization**
    a. Assess whether there was any decision to increase capacity during the investigation period and if so, whether the decision was justified on the basis of market conditions.[377]
    b. Assess whether any increase in capacity utilization was due to a switch in production toward more profitable products because imports made production of the like product less profitable.
    c. Assess whether any increase in capacity utilization was due to a reduction in production capacity implemented in order to cut costs and better compete with imports.
    d. Determine if the firm has high fixed costs. High fixed costs may mean that even a slight decrease in capacity utilization results in material injury.[378]
    e. If producer facilities are also used for production of other products, estimates of capacity normally devoted to the like product should be used, but this indicator should be treated as less relevant.[379]
    f. Authorities are not required to give more weight to the evolution of capacity in absolute as opposed to relative terms.[380]

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[376] The EC has found a market share decrease of only 1.6 percent to be a sign of injury. *See Wire Rod* (China, Moldova, Turkey), *supra* note 373. The EC has also found stagnating market share to be a sign of injury where producers only kept market share by reducing sales prices to compete with imports. *See Magnesia bricks (China)*, 2005 O.J. (L 93), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:267:0001:0014:EN:PDF.
[377] *See* Van Bael and Bellis*, supra* note 10, at 447.
[378] *See Coke of coal in pieces with a diameter of more than 80 mm (China),* 2000 O.J (L 141) 9.
[379] *See Polyester staple fibres (Australia, Taiwan, Korea, Thailand), supra* note 374.
[380] *See EU—Anti-Dumping Measures on Biodiesel From Argentina*, WT/DS473/R (adopted Oct. 26, 2016), paras. 6.114-148.

8. **Factors affecting domestic prices**
    - **a.** This indicator include changes in the cost structure of domestic industry, such as changes in raw material prices and labour, which affect the cost of goods sold.
    - **b.** If prices have not risen fast enough to cover domestic producer costs of raw materials or labour, this may be a sign of injury.[381]
    - **c.** If prices have risen because the domestic producers shifted production to higher-end market segments, this may be a sign of injury.[382]
    - **d.** If average prices have decreased more for certain product types than others, consider the relative importance of each product type to the domestic industry.[383] A steeper decline in a more important product type may be a sign of a greater injury.
    - **e.** If data permits, examine price trends on a quarterly as well as an annual basis as some changes in prices may not be visible except in the shorter-term.[384]
    - **f.** If there is a captive market involving different pricing policies (cost, cost plus, etc.), do not determine injury on the basis of the evolution of captive prices or captive cost of production.

9. **Magnitude of margin of dumping**
    - **a.** This is not typically a critical injury indicator for the U.S. and EU. EU practice is to simply refer to this factor by stating that, "given the volume and price of the imports, the impact of dumping cannot be considered negligible."[385] Brazil typically devotes considerable space to examining this factor, so if investigating authorities want to emphasize this factor, they should look to Brazilian determinations.[386]

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[381] *See Wire rod* (China, Moldova, Turkey), *supra* note 373.
[382] *Id.* at 3.
[383] *See Magnesia bricks* (China), *supra* note 376.
[384] *See* Commission Decision (EC) 1758/2000 of 9 August 2000, Imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of non-alloy steel originating in the People's Republic of China, India and Romania, accepting an undertaking with regard to India and Romania and collecting definitively the provisional duties imposed, 2000 O.J. (L 36), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000S1758&from=EN.
[385] *See, e.g.,* Commission Regulation (EC) 627/2005 of 22 April 2005 revoking Regulation (EC) 206/2005, Imposing definitive safeguard measures against imports of farmed salmon, 2005 O.J. (L 104), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005R0627&qid=1490893927970&from=en.
[386] *See, e.g.,* CAMEX, Resolution No. 121 of November 23, 2016, *supra* 158, para. 6.1.7.4, *available at* http://www.camex.itamaraty.gov.br/component/content/article/62-resolucoes-da-camex/em-vigor/1752-resolucao-n-121-de-23-de-novembro-de-2016.

b. There is no requirement to compare the dumping margin to the margin of price undercutting.[387]

10. Cash flow

a. Reduced operating cash flow (typically due to loss of sales, reduced investment, or reduced financing) may be a sign of injury. If no negative effect on cash flow appears on an annual basis, the IA should examine cash flow over a shorter period.

b. An increase in cash flow may be mainly due to lower inventories, not an increased ability to self-finance.

11. Inventories

a. Determine if the product is produced to order. If this is the case, a lack of stock build-up could indicate injury.[388]

b. Determine if sales are made based on anticipated orders. If this is the case, a stock build-up could be a sign of injury.[389]

c. Determine if there is a gap between sales recorded and actual consumption. If this is the case, injurious build up of inventory could be occurring despite records of profits.[390]

d. If the like product is perishable, this indicator is unlikely to be relevant.[391]

12. Employment

a. Declining employment may be a sign of injury. For example, a decline in employment may not reflect increased productivity if the drop in production volume is greater than the reduction in employment.[392]

b. An increase in employment does not preclude a finding of material injury if other indicators signal injury.

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[387] *See* Case T-35/01, *Shanghai Teraoka Electronic Co. Ltd v. Council* 2004 E.C.R II-3663 (General Court), at para 182.

[388] *See Ammonium nitrate* (Russia) *supra* note 185.

[389] *See* Council Regulation (EC) 1644/2001 of 7 August 2001, Amending Regulation (EC) 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, 2001 O.J. (L 219), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2001:219:TOC.

[390] *See* Corrigendum to Commission Decision (EC) 283/2000/ECSC of 4 February 2000, Imposing a definitive anti-dumping duty on imports of certain flat rolled products of iron or non-alloy steel, of a width of 600 mm or more, not clad, plated or coated, in coils, not further worked than hot-rolled, originating in Bulgaria, India, South Africa, Taiwan and the Federal Republic of Yugoslavia and accepting undertakings offered by certain exporting producers and terminating the proceeding concerning imports originating in Iran, 2000 O.J. (L 119), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000S0283R(02)&from=EN.

[391] *See, e.g., Farmed Salmon* (Norway) 1997 O.J. (L 267), *supra* note 312.

[392] *See* Commission Implementing Regulation (EU) 2016/2303 of 19 December 2016, *supra* note 86.

c. If there has been no decline, examine whether domestic producers have announced possible future layoffs or increased part-time employment, as this may be a sign of injury.[393]

13. Wages

a. Declining wages may be a sign of injury. This is not typically a critical indicator.

b. The IA should consider the trend in average wages per employee relative to inflation rates in their country; if inflation is rising but wages are stagnant or declining, this may be a sign of injury.

14. Growth

a. This indicator can be addressed by considering sales volume and market share.[394]

b. The IA should consider how domestic industry's market share developed over the period of investigation as compared to that of the subject country(ies). A decrease in sales volume as total consumption increases, holds steady, or declines (relatively less than sales volume) may be a sign of injury.

15. Investment levels / ability to raise capital

a. Declining investment levels may be a sign of injury

b. An increase in investment during the investigation period does not preclude a finding of material injury. Consider the rationale for investments and type of industry (e.g. investments made to reduce costs as opposed to expand production may be a sign of injury; less capital/R&D-intensive industries may be less likely to suffer injury from lack of investment).[395]

c. A lack of plans to invest could be a sign of injury.[396]

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[393] *See* Commission Regulation (EC) 1251/2003 of 14 July 2003, Imposing a provisional anti-dumping duty on imports of hollow sections originating in Turkey, 2003 O.J. (L 175), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2003:175:TOC.

[394] *See EC—Iron Tube or Pipe Fittings from Brazil,* WT/DS219/R, at para. 7.335.

[395] *See* Van Bael and Bellis *supra* note 10, at 316.

[396] *See* Council Implementing Regulation (EU) 190/2014 of 24 February 2014, Amending Implementing Regulation (EU) 461/2013 imposing a definitive countervailing duty on imports of certain polyethylene terephthalate (PET) originating in India following an expiry review pursuant to Article 18 of Regulation (EC) 597/2009, 2000 O.J. (L 301), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0190&from=EN.

d. Failure to raise capital may be sign of injury, especially if domestic producers belong to large corporate groups that would normally have ample financial resources. [397]

16. Imports of the subject product(s) by domestic industry

a. The IA should determine the reason for these imports. An increase in imports in order to compete (i.e. importing out of self-defence) is a sign of injury.

17. Any other factors raised by interested parties.

a. Examples include plant closures; consolidations of operations; prolonged shutdowns or production curtailments, and relocation of production to a third country.[398]

Step 2: ***Explain findings.***

1. The IA should explain that all the factors listed in ADA Article 3.4 have been examined and reiterate findings regarding price effects. The IA should also list and highlight any case-specific factors raised by the parties that have also been examined. If any indicator shows a positive trend, the IA must explain why it does preclude an overall finding of material injury.[399] The IA must not ignore indicators that undermine an affirmative determination of material injury.[400]
2. The IA should summarize findings by stating that in the context of this particular investigation, the IA found a *significant* material injury to domestic industry and that this finding was based on *positive evidence*. The IA should also state that any assumptions made in order to conduct the inquiry were reasonably inferred from positive evidence.[401]

General Tips:

1. An injury finding does not require all indicators to be present – even the absence of a major indicator such as price undercutting is not

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[397] *See* Commission Regulation (EC) 2479/2001 of 17 December 2001, Imposing a provisional anti-dumping duty on imports of recordable compact disks originating in Taiwan, 2001 O.J. (L 334), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2001:334:TOC.

[398] *See* U.S. Dep't of Commerce, Sample Domestic Producer Questionnaire, *available at* https://www.usitc.gov/documents/us_producer_questionnaire.pdf.

[399] *See Thailand—H Beams from Poland*, WT/DS122/R, at paras. 7.245-7.256.

[400] *Id.* at paras. 121-128.

[401] *See, e.g., Mexico—Beef and Rice from the United States,* WT/DS295/AB/R, paras. 204-205 (emphasizing that "assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified" and stating an expectation that "an investigating authority [] substantiate the reasonableness and credibility of particular assumptions.").

dispositive. The IA has discretion to weigh certain factors more heavily as long as they can reasonably explain why.[402]

2. It is EU practice to analyse some indicators with respect to only the free market (i.e. excluding captive market sales/output) and for other indicators, to consider both captive and free market consumption. Aspects of this approach as used by the U.S. have been challenged at the WTO.[403] If there is a captive market and the IA believes that they will be unable to show injury without separating the captive and free markets, the IA must examine the same indicators with respect to both markets, publishing the specific findings for both markets, and explain that their determination regarding injury was based on the entire market. For example, the IA should state, if adopting this approach, that "on the basis of the above analysis, it can be concluded that the domestic industry, analyzed in its two segments (free market and captive) and as a whole, suffered material injury in the main injury indicators.[404]
3. Analysis of impact on domestic industry requires more than stating that a certain factor is relevant or irrelevant – the IA should explain at least briefly why they found certain indicators were not relevant to analysing the state of domestic industry.[405] For any factor not specifically addressed, the IA should explain how their analysis of other factors implicitly addresses this factor and include this information in the public explanation of their determination.[406] Relevant indicators should be discussed at greater length but the entire portion of the determination devoted to injury can still be as short as approximately 4-5 pages, including data tables. The objective should be to provide a persuasive explanation,[407] not one that proves injury based on all indicators.
4. Keeping a record of each indicator examined, even those deemed irrelevant, is not required by the ADA, but doing so is recommended as it will help authorities keep track of their evaluation. It will also help pre-empt any challenge that a certain indicator was not evaluated.[408]

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[402] *See EC—Cotton-Type Bed Linen from India,* WT/DS141/AB/RW, para. 6.163.
[403] *See United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (adopted Aug. 23, 2001), para. 7.204-7.215.
[404] *See* Commission Implementing Regulation (EU) 2016/181, *supra* note 159.
[405] *See Thailand—H Beams from Poland*, WT/DS122/R, para. 7.236. fn. 147.
[406] *See European Communities—Iron Tube or Pipe Fittings from Brazil*, WT/DS291/AB/R, at paras. 151-166.
[407] *Id.*
[408] *See European Communities —Cotton-Type Bed Linen from India (Article 21.5)*, WT/DS141/AB/RW, para. 6.163 (pointing out that checklist approach could increase a reviewing panel's confidence that Article3.4's requirements have been satisfied); *see also Egypt—Steel Rebar from Turkey,* WT/DS211/R, para. 7.49 (emphasizing the importance of a written record for Members seeking to rebut claims that their authorities did not adequately evaluate certain factors).

5. If no data on specific to the like product can be obtained for certain impact indicators, investigating authorities can look at data for a broader range of products that contains the like product.[409]

Note on Threat of Material Injury and Material Retardation

Threat of Material Injury

If the IA is examining threat of material injury instead of material injury (these are alternative sources of injury[410]), they must examine all the factors listed in ADA Articles 3.7 (rate of increase of dumped imports; capacity; price suppressing/depressing effects; inventories). The IA must also examine the Article 3.4 indicators listed in Step 1 of this guideline. The IA can weigh different indicators differently, so long as they explicitly examine all indicators and carefully describe the weight assigned to each in their analysis. In making an affirmative threat determination, authorities should state that they have a found a significant increase in the volume of dumped or subsidized imports that shows a probability that such imports will substantially increase and sufficient foreign production capacity of dumped imports[411] to make increased exports likely, and that these findings are based on "facts and not simply allegations, conjecture, or remote possibilities."[412]

Material Retardation

It is not recommended that the IA seek to find material retardation to the establishment of a domestic industry unless other options are foreclosed, owing to the evidentiary challenges involved and dearth of state practice.[413] For example, determining whether a domestic industry is or is not yet "established" is a significant evidentiary challenge.[414] If the IA pursues this avenue, they should be careful to ensure that indicators of material retardation and indicators of volume and price effects are not considered over time frames that will make it hard to prove causation.

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[409] *See European Communities—Iron Tube or Pipe Fittings from Brazil,* WT/DS219/R, at para. 7.327.
[410] *See* Czako, Human and Miranda, *supra* note 5, at 274.
[411] The capacity at issue is that of producers/exporters of dumped imports, not all exporters of the subject product. *See Mexico—High Fructose Corn Syrup (HFCS) from the United States,* WT/DS132/R.
[412] *See Mexico—High Fructose Corn Syrup (HFCS) from the United States,* WT/DS132/R.
[413] The EC has not based a measure on this for over 20 years. *See* Muller, Khan and Scharf, *supra* note 89, at 347.
[414] *See* Czako, Human and Miranda, *supra* note 5, at 276.

Annex II-H: Guidelines For Assessing Causation

Step 1: *Identify the causal link*

The following scenarios are examples of how to demonstrate the dumped imports are causing material injury to the domestic industry:

1. An increase in total domestic consumption over the same period that the volume of dumped imports increased, coinciding with a drop in the market share of domestic producers.
2. An increase in the absolute volume of dumped imports and/or market share of dumped imports, coinciding with undercutting of domestic producer prices.
3. A period of price undercutting coinciding with a period of unprofitability for domestic producers.
4. An increase in the volume of dumped imports following the imposition of duties on the same product from third countries.[415]

Step 2: *Explain causal link findings*

1. The ADA does not mandate a certain methodology for establishing a casual link, so authorities should focus on providing a reasonable explanation.
2. The IA should refer to the "clearly established coincidence in time between the dumped imports and the effect on domestic prices and injury indicators and describe the imports as "imports causing injury to domestic industry to a degree sufficient to be considered material" or domestic industry as "being materially injured by reason of merchandise."[416]
3. The IA does not need to establish causal links for individual exporters.[417]

Step 3: *Analyze other known factors*

1. Identify and briefly analyze whether "other known factors" are present at the same time as the dumped imports. [418] The factors listed below are examples – it is not mandatory to examine whether each of these factors is present. At minimum, the IA should examine any (1) imports

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[415] *See* Muller, Khan and Scharf, *supra* note 89, at 323.
[416] This is consistent with EC and U.S. practice. *See, e.g.,* Commission Implementing Regulation (EU) 2016/113 of 28 January 2016, Imposing a provisional anti-dumping duty on imports of high fatigue performance steel concrete reinforcement bars originating in the People's Republic of China, 2016 O.J. (L 23), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0113&from=EN; *see also* Anti-Dumping Manual, *supra* note 11, Ch.18, p.6.
[417] This is consistent with EU practice. *See* Muller, Khan and Scharf *supra* note 89 at 313.
[418] *See United States — Hot Rolled Steel from Japan*, WT/DS184/AB/R, at para. 223.

of the subject product from third countries and (2) issues raised by the parties to the investigation.[419]

- **a.** Volume & prices of imports not dumped[420]
- **b.** Demand changes[421]
- **c.** Changes in patterns of consumption[422]
- **d.** Restrictive trade practices[423]
- **e.** Competition between foreign and domestic producers.
- **f.** Developments in technology[424]
- **g.** Poor export performance[425]
- **h.** Productivity of domestic industry.
- **i.** Volume & prices of imports from third countries
- **j.** Cyclical downturn (industry specific or economy-wide)
- **k.** Strong competition within domestic industry[426]
- **l.** Expiry of patent protection[427]
- **m.** Increase in cost of production
- **n.** Insufficient productivity[428]
- **o.** Wrong assessment of market development by domestic producers
- **p.** Poor marketing performance/after sale services
- **q.** Insufficient product quality/range
- **r.** Threatened prohibition of products/obligation to comply with cost-raising domestic regulations (e.g. environmental).
- **s.** Exchange rate fluctuations
- **t.** Domestic industry relocation of production
- **u.** Decreases in captive consumption.
- **v.** Other factors raised by the parties[429]

2. The most important aspect of the non-attribution analysis is to make explicit what factors are being considered and provide an explanation of why the dumped imports are still causing injury to domestic industry. The ADA does not specify how the non-attribution analysis is to be

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[419] This is consistent with the practice of the U.S., EU, Argentina, Mexico, and Brazil.
[420] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.5; *see also Guatemala—Grey Portland Cement from Mexico,* WT/DS156/R, paras. 8.268-8.272.
[421] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.5
[422] *Id.*
[423] *Id.*
[424] *Id.*
[425] *Id*. *See also Mexico—Steel Pipes and Tubes from Guatemala,* WT/DS331/R, at para. 7.372 (finding that Mexico had failed to reasonably explain why a decline in exports was not a determinative factor in the impact on domestic industry).
[426] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.5.
[427] *See* notes from meeting with ITC official of 2/10/2017 (on file with author).
[428] *See* Anti-Dumping Agreement, *supra* note 7, at Article 3.5
[429] If a party raises an argument to an investigating authority, the authority should explicitly consider it and explain why it is not causing injury to domestic injury or if it is, why it is not sufficient to break the causal link. *See European Communities — Farmed Salmon from Norway*, WT/DS337/R, para. 7.656. Additionally, the list of factors provided in Article 3.5 are only illustrative. *See Thailand—H-Beams,* WT/DS211/R, at para. 2.724.

conducted.[430] There is no methodology that can indisputably separate and calculate the effect of dumped imports versus other known factors.

3. The IA does not need to have examined other factors raised subsequent to the proceedings, such as during judicial review. Only "known" factors, that is, those factors that become known at some prior stage of the investigation, need be considered.[431] Factors are "known" with respect to causality even if raised in regards to a different aspect of the investigation.[432]

4. The IA should not assume that the presence of one or more other known factors is problematic. In most cases, these factors can be explained as insufficient to account for the extent of the injury or exacerbating injury caused by the dumped imports. For example:

- **i.** *Third country imports.* If there are imports of the subject product from third countries at low prices, possibly even with increasing market share, so long as the dumped imports have a greater market share, the IA can state that third country imports do not break the causal link.[433]
- **ii.** *Contraction in market demand.* If there is a downturn in the market that contributes to a decrease in sales and production volume of domestic industry but over the entire period of investigation, imports of the investigated product (as opposed to sales of the domestic industry) increased, authorities may conclude that imports still contributed significantly to the deterioration of domestic industry indicators such that the causal link remains intact.[434]
- **iii.** *Wrong assessment of market development by domestic producers*: If domestic producers invested in significant new capacity, this suggests that they may be responsible for their injury by wrongly assessing the market situation. However, dumped imports may be the reason that they were unable to successfully exploit that new capacity. Further analysis would be warranted.
- **iv.** *Poor marketing performance/after sale services*: Evidence of poor marketing performance suggests domestic producers might be responsible for their injury because they are providing services of lesser quality. However, the reason they are unable to provide better

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[430] *See European Communities —Iron Tube or Pipe Fittings from Brazil,* WT/DS219/AB/R, at para. 189.
[431] *See Thailand—H-Beams*, WT/DS211/R, at para 7.104.
[432] *See European Communities —Iron Tube or Pipe Fittings from Brazil,* WT/DS219/AB/R, at para. 178.
[433] *See* Commission Implementing Regulation (EU) 2016/181, *supra* note 159.
[434] *See, e.g.,* CAMEX, Resolution No. 05 of February 16, 2017, *supra* note 228, at 8.4 (concluding that "even if the market reduction observed in the final segment of the period of investigation could have impacted domestic industry indicators, the damage observed during the analyzed period was mainly caused by the imports under analysis.").

after sale services may be because they were forced to cut costs in order to compete with the dumped imports. Further analysis would be warranted.[435]

Step 4: ***Explain non-attribution findings***

1. The IA should describe its non-attribution analysis as having involved "fully investigating all relevant factors" and as having "distinguished and separated the effects of all known factors on the situation of the [domestic] industry from the injurious effects of the dumped imports."[436]
2. The determination's section on non-attribution should conclude using language such as "examination of all other known factors revealed they did not break the causal link established between the dumped imports and the injury suffered domestic industry." The IA should state explicitly that that any injuries caused by other known factors were not attributed to the dumped imports.
3. When dealing with multiple product types for which different price effects have been shown, the IA should not conduct its non-attribution analysis without acknowledging these differences.[437]

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[435] These examples are from EC practice. *See* Muller, Khan and Scharf, *supra* note 89, at 336-337.

[436] This is consistent with EC practice. *See, e.g.,* Commission Implementing Regulation (EU) 2016/1246, of July 2016, Imposing a definitive anti-dumping duty on imports of high fatigue performance steel concrete reinforcement bars originating in the People's Republic of China, 2016 O.J. (L 204), *available at* http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154825.def.en.L204-2016.pdf. *See also United States — Hot Rolled Steel from Japan,* WT/DS184/AB/R, at para. 226 (explaining that investigating authorities must separate and distinguish the injurious effects of dumped imports from the injurious effects of other factors).

[437] *See, e.g., China — Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/R (adopted Feb. 13, 2015), para. 7.203.