

**WTO Agreement on Anti
Dumping: Overview Part II
(Injury, Causal Link, Duty
Imposition and Review: Practice
and WTO Jurisprudence)**

Injury

- Injury explained in footnote 9 to article 3.
- Means material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry

Determination of injury

Injury:

A determination of injury for purposes of Article VI of the GATT 1994 shall be based on

1. Positive evidence.
2. And involve an objective examination of both
 - (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products,
 - (b) and the consequent impact of these imports on domestic producers of such products.

Determination of injury: POI

- Concept of POI and injury period.
- *Argentina — Poultry Anti-Dumping Duties* :
- *Mexico – rice*:

Recommendation by the Committee on Anti-Dumping Practices

- POI for dumping determination not to be less than 6 months, ideally should be 12 months, ending as close to the date of initiation as is practicable;
- The injury period should be at least three years including POI for dumping.
- In establishing the POI and injury period, practices of firms from which data will be sought be taken into account and also the characteristics of the product in question, including seasonality and cyclicity, and the existence of special order or customized sales.
- A reasoned explanation to be provided if the POI and injury period differs from above.

Determination of injury

- *Choice of analytical methodology*: Not defined or fixed: *Thailand — H-Beams*
- *Frequency of analysis*:
- *Length of period of investigation*: even one year : *Guatemala cement II-Panel*.

Injury : Positive evidence

- Meaning of positive evidence
- In *US — Hot-Rolled Steel* :
- Concerned with the investigating procedure itself.
- Scope of positive evidence
- In *Thailand — H-Beams*

Injury: “Objective examination”

- In *US — Hot-Rolled Steel*”
- AB: Effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.
- Captive production provision : Panel and AB
- *Argentina — Poultry Anti-Dumping Duties* :
- *EC bed linen* case : dumping transactions.
- *EC bed linen* case: AB : all imports from non-examined exporters or producers as dumped not “objective examination.
- In *Guatemala — Cement II*.

Determination of injury: Domestic Industry

- *Mexico — Corn Syrup*
- *EC-Bed linen* case: 3.4 examination not outside producers not part of domestic industry.

Determination of injury

Volume effect : Significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member.

Price effect: the effect of the dumped imports on prices: to be determined under

Price undercutting:

Price depression:

Price suppression

VOLUME EFFECT

Volume of dumped imports

- Rise absolutely
- rise relative to production or consumption

Import Volume to total Consumption/Demand

Particulars	Unit	Base year	2 nd Year	3 rd Year	POI
Imports from					
Subject countries	MT	2,989	2,906	4,389	4,815
Other Countries	MT	-	-	-	-
Total Imports	MT	2,989	2,906	4,389	4,815
Domestic Sales	MT	700	600	500	400
Total Demand/ Consumption	MT	3,689	3,506	4,889	5,215
Share of Import to total demand	%	81	83	90	92
Share of domestic to total demand	%	19	17	10	8

Particulars	Units	2007-08	2008-09	2009-10	POI
Sales of HOCL	MT	43,723	40,924	37,671	40858
Sale of SI Industries*	MT	29247	31451	31958	33754
Total Sales of Indian Domestic producers	MT	72970	72375	69629	74609
Trend	%	100	96.1	100	108
Subject country-Imports	MT	49226	27754	48701	63274
Trend	%				
Other Countries-Imports subject to duty	MT	94690	90386	92117	156623
Trend	%				
Other Countries not subject to duty	MT	48903	64942	54370	56352
Total Imports in India	MT	192819	183082	195188	219897
Trend	%				13

PRICE EFFECT

Effect of dumped imports on prices

- Price undercutting/
underselling
- Price depression/ suppression

Price Undercutting- Imported goods land at prices below the domestic sales price

Particulars (During POI)	(Rs./Kg)
Landed Value of Imports from Subject Country (a)	109.08
Net Sales Realization (b)	112.86
Price Undercutting (b-a)	3.78

Price Underselling- Imported goods land at prices below the domestic industry ought to get sales price (NIP)

Particulars (During POI)	(Rs./Kg)
Landed Value of Imports from Subject Country (a)	110
NIP (b)	115
Price Under Selling (b-a)	5

Price Suppression-Landed value of import prevent the price increase by domestic Industry

Particulars	Unit	Base Year	2 nd Year	3 rd Year	POI
Landed Value	Rs./Kg	105	108	112	115
Cost of Sales	Rs./Kg	100	110	115	125
Net Selling price of DI	Rs./Kg	110	113	117	122

Price Depression-The Landed Value has depressed the domestic selling price

Particulars	Unit	Base Year	2 nd Year	3 rd Year	POI
Landed Value	Rs./Kg	105	103	100	98
Net Selling price of DI	Rs./Kg	110	108	105	102

Injury: Price effect

- Price undercutting: *Egypt — Steel Rebar* :
Panel rejected Turkey's claim for PUC on end customer basis.
- *EC – tube: no fixed methodologies unlike the requirement of 2.4.2.*

INJURY MARGIN

- Difference between the fair selling price (non-injurious price) and the landed value

Steps involved in injury Margin Determination

- Determination of Non Injurious Price (NIP) of the like article
- Assessment of Landed Value of the product under consideration

Calculation of Injury Margin

Particulars	Rs. Per/Kg
NIP	2.70
Landed Value	2.20
Injury Margin	0.50

NIP- What is it

- NIP or Non-injurious price is the fair selling (notional) price (FSP) that the domestic industry should realize by selling the like product in a fair competition.

How is NIP determined-

(Components of NIP)

- Raw Material cost, Utility Cost, Manufacturing Expenses including Packing and Depreciation
- Allowance for selling & General Administrative Expenses. Selling & Distribution expenses such as freight, discounts, commission etc are not considered for determination of cost of sales at ex-factory level.
- Allowance for Reasonable Return

Calculation of NIP

Description	Rs./MT
Raw Material Cost	49,726
Add Utility Cost	1,489
Prime Cost	51,216
Add Manufacturing Expenses	1,900
Add Depreciation	1,244
Add Employees Remuneration	1,948
Less By Product / Steam credit	-1116
Factory Cost	55,192
Add Administrative Expenses	113
Add Interest	599
Add Selling & Distribution Expenses	-
Less Other Income	(23)
Total Cost	55,882
Add Return on Capital employed less Interest	4,775
Non-injurious price	60,657

Assessment of Landed Value of Imports

- Handling charges @1% are added to the CIF Value of imports to arrive at the assessable value.
- Applicable basic Customs Duty and education cess is added to the assessable value to arrive at landed value per unit of the like product during the POI.

RELIEF TO DOMESTIC INDUSTRY

- Lesser duty rule-DM or IM

Only that amount of duty which is sufficient to remove the injury to the domestic industry.

Injury: Cumulation

- Imports of a product from more than one country.
- Simultaneously subject to anti-dumping investigations.
- Only if the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of the article 5
- And the volume of imports from each country is not negligible
- a cumulative assessment of the effects of the imports is 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.

Injury: Cumulation

No need for country wide analysis before cumulation: *EC — Tube or Pipe Fittings (AB)*.

Conditions for cumulation —appropriate in light of the “conditions of competition: certain degree of discretion with Authority: *EC — Tube or Pipe Fittings (AB)*.

Injury: Impact of the dumped imports on the domestic industry concerned: Article 3.4

- Dumped imports: does not mean dumped imports transactions from a particular exporter: In *EC — Bed Linen (panel)*.
- *Sectoral analysis*: AB in *US — Hot-Rolled Steel*
- Domestic producers outside the “sample”: In *EC — Bed Linen (panel)*.
- *If domestic like product info not there then broader data*: *EC — Tube or Pipe Fittings*

Injury: Impact of the dumped imports on the domestic industry concerned: Article 3.4

- Actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.
- This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Injury: Impact of the dumped imports on the domestic industry concerned: Article

3.4

- Mandatory nature of 15 injury factors :EC –Bed linen (panel), *Mexico — Corn Syrup* , *Thailand — H-Beams*, In *Guatemala — Cement II*,
- Other than mandatory factors:
- *Mexico — Corn Syrup*, *US — Hot-Rolled Steel*

Injury: Impact of the dumped imports on the domestic industry concerned: Article 3.4

- *Concept of evaluation of relevant factors:*
- *Thailand — H-Beams, :Panel* persuasive explanation required.
- *Egypt — Steel Rebar:* mere presentation of tables of data, not enough.
- *EC — Bed Linen :* evaluation of all the factors by the investigating authorities must be apparent in the final determination:
- *EC — Tube or Pipe Fittings: AB :* it does not address the manner of evaluation

Injury: Impact of the dumped imports on the domestic industry concerned: Article 3.4

- *Egypt — Steel Rebar* : Evaluation of specific listed factors:
Not required like profits
- factors affecting domestic prices”
- In *Egypt — Steel Rebar*: *No separate analysis required if covered in the price effect.*

CAUSAL LINK



- ❖ Dumping per se not actionable
- ❖ Causal relationship to be demonstrated

Determination of Causal link

- The dumped imports are, **through the effects of dumping**, as set forth in paragraph 2 and 4, causing injury within the meaning of this Agreement. Article 3.5
- The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence **before** **the** authorities.

Determination of Causal link

- Changes in the concept relating to Causal link
- Kennedy Round:
- Tokyo Round:
- Uruguay Round: it must be demonstrated that dumped imports through the effects of dumping are causing injury to the domestic industry.

Determination of Causal link

- Other Factors to be Analysed:
 - Volume and prices of imports not sold at dumping prices,
 - Contraction in demand.
 - Changes in the patterns of consumption,
 - Trade restrictive practices of and competition between the foreign and domestic producers,
 - Developments in technology
 - Export performance and productivity of the domestic industry.

Determination of Causal link

- *Thailand — H-Beams*, Panel : other “known factors” would include factors “clearly raised before the investigating authorities by interested parties in the course of an AD investigation” and that investigating authorities are not required to seek out such factors on their own initiative:.
- In *US — Hot-Rolled Steel*, the Appellate Body : Injury on account of other factors must not be attributed to dumped imports where dumped imports and other known factors are causing injury to the domestic industry *at the same time*.

Determination of Causal link

- In *Guatemala — Cement II*, : Guatemala's authority failed to take into account certain undumped imports.
- Non-attribution methodology not specified.
- In *US — Hot-Rolled Steel*, the Appellate Body : differed GATT Panel in *US — Norwegian Salmon AD* which the Appellate Body thus also presumably considered erroneous.
- Separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors.

Determination of Causal link

- *US — Wheat Gluten* and *US — Lamb* : AB:
- where AB in *US — Hot-Rolled Steel* interpreted the non-attribution language in a similar manner.
- *EC — Tube or Pipe Fittings* : AB: collective assessment of other factors not required not methodology specified.
- *Argentina- footwear* : AB: coincidence and trends between imports and injury.

Injury in relation to domestic like product (Article 3.6)

- The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits.
- If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

Determination of Threat of injury (Article 3.7)

- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter.
- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) inventories of the product being investigated.

Determination of Threat of injury (Article 3.7)

- A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

Determination of Threat of injury (Article 3.8)

- With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.
- *EC — Tube or Pipe Fittings* : Change of circumstances for threat must be foreseen.
- *US softwood lumber VI* : not all factors in 3.7 must be analysed and be positive. .
- *Mexico — Corn Syrup* : Consequent impact under 3.4 has to be done.
- *US — Softwood Lumber VI* agreed with the views expressed by the Panel on *Mexico — Corn Syrup*

Injury : Domestic industry

- *Mexico Corn syrup* : Panel: footnote 9 to article 3 and 4.1 defines Domestic industry.
- *EC bed linen* : investigating Authorities not precluded to take other domestic producers into domestic industry.
- *Argentina — Poultry Anti-Dumping Duties* : Panel defines major proportion as “important, serious, or significant

Provisional measures

- To be applied in terms of 7.1
- Initiated in accordance with article 5, public notice issued, and opportunities to interested parties to submit their information given.
- A prelim affirmative determination of dumping and consequent injury to domestic industry
- Such measures deemed necessary to prevent injury caused by dumped imports
- No sooner than 2 months from initiation.
- As cash/withholding of appraisement.
- 4 to 6 months (6 and 9 months in case of lesser duty)

Price undertaking

- Proceedings may be terminated or suspended without provisional measures or ADD if exporter undertakes to revise its prices (to eliminate dumping) or less in terms of lesser duty rule.
- Not before preliminary determinations.
- Acceptance by the authority depends on practicality to enforce, examination of comments .
- Any violation will enable the authority to impose ADD determined on provisional basis on the immediate effect.

Imposition and Collection of Anti-Dumping Duties

- Lesser Duty rule: Desirable that duties be less than margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry.
- *Argentina — Poultry Anti-Dumping Duties* : 9.3 specific obligation while 9.1 is general obligation.
- Refund mechanism in terms of 9.3.
- Prospective and Retrospective duty assessment.
- *US — DRAMS* : No De minimus criterion in duty assessment procedures.

Imposition and Collection of Anti-Dumping Duties

- *US — Hot-Rolled Steel : AB : Ceiling for all other rates – prohibition taking into account i) zero or de minimis margins and (ii) margins established on the basis of best facts available*

Imposition of anti dumping duties: Retroactivity

- Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under 7.1 and 9.1 of ADA respectively, enters into force.
- If definitive ADD > Provisional ADD , duties will not be collected. While if is less than it would be refunded.
- Retrospective application in the case of injury determination as per 10.6
- If final determination is negative, all refunded.

Imposition of anti duties

Retroactivity

- Definitive anti dumping duties imposed not more than 90 days from the date of application of provisional measures only if 10.6 conditions satisfied.
- No retroactive application prior to date of initiation.
- 10.6 conditions are history of dumping and massive imports of subject goods in a short time.
- 10.7 measure to withhold appraisement on the basis of sufficient evidence (*US — Hot-Rolled Steel :AB*) of the existence of 10.6.. 10.7 measure not equivalent to provisional measure.

Imposition of anti duties

Retroactivity

- 10.7 measure: preserving the possibility to impose and collect anti-dumping duties retroactively to 90 days prior to the date of application of provisional measures

Duration and Review of Anti-Dumping Duties and Price Undertakings

- An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. (11.1)
- review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review

Duration and Review of Anti-Dumping Duties and Price Undertakings(Mid term review)

- Mid Term Review or Interim review
- Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately. (11.2)

Duration and Review of Anti-Dumping Duties and Price Undertakings (Sunset review)

- Any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 (mid term review) if that review has covered both dumping and injury, or under this paragraph),
- Unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.
- Provision of Article 6 and 8 apply in the review.

Duration and Review of Anti-Dumping Duties and Price Undertakings

- *US — DRAMS* : word continued means temporal relationship between past and future.
- *US — DRAMS: Panel*. *Nothing* limits a Member to a ‘present’ analysis, and forecloses a prospective analysis, when conducting an 11.2 review.
- *US — DRAMS: Panel* considered 11.3 to be particularly relevant in giving support for, and reinforcing, its interpretation of 11.2. [Article 11.2](#)

Duration and Review of Anti-Dumping Duties and Price Undertakings

- *US — DRAMS*: “likely to lead to continuation or recurrence”: likely standard of injury equally relevant to the context of dumping under 11.2.
- *US — DRAMS: Panel*: *Not likely test is not equivalent to likely test or falls short of* establishing that dumping is ‘likely to recur if the order is revoked’.
- Injury in 11.2 is as per injury explained in article 3.

Duration and Review of Anti-Dumping Duties and Price Undertakings

- *US — Corrosion-Resistant Steel Sunset Review*
- *US — Oil Country Tubular Goods Sunset Reviews* : continuation of an anti-dumping duty as “an exception to the otherwise mandated expiry of the duty after five years”.

Difference between original investigation and sunset reviews

- *US — Corrosion-Resistant Steel Sunset Review* noted that, as this likelihood determination is a prospective determination.
- *US — Corrosion-Resistant Steel Sunset Review* : AB: In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping.*”

Sunset review 11.3

- *US — Corrosion-Resistant Steel Sunset Review*
- As per AB: a process combining *both* investigatory and adjudicatory aspects
- Active rather than a passive decision-making role to the authorities.
- Positive evidence.
- No specific methodology. Not necessarily required to carry out that calculation in a sunset review
- *US — Oil Country Tubular Goods Sunset Reviews.*
- forward-looking analysis'. inevitably entail assumptions about or projections into the future.
- investigating authorities are not *mandated* to follow the provisions of article 3 when making a likelihood-of-injury determination

Sunset review 11.3

- *US — Corrosion-Resistant Steel Sunset Review*
- As per AB: does not oblige investigating authorities in a sunset review to make “company-specific” likelihood determinations.
- No margins need be indicated unlike reviews under 11.2.
- same evidentiary standards that apply to the self-initiation of original investigations under article 5.6 do not apply to the self-initiation of sunset reviews under article 11.3.
- *No de minimus criteria.*
- Non-application of negligibility standards: no cross referencing to 3.3 and 5.8.

Sunset review 11.3

- *US — Oil Country Tubular Goods Sunset Reviews.*
- Non-application of negligibility standards: no cross referencing to 3.3 and 5.8.
- does not prescribe any timeframe for likelihood of continuation or recurrence of injury.
- does not need to satisfy the conditions of article 3.3 because “by its own terms article 3.3 limits its scope of application to investigations
- likely’ standard of article 11.3 applies to the overall apply to each factor considered in rendering the overall determinations on dumping and injury
- No need to re establish causal link in sunset reviews as legal obligation.

**THANK
YOU**