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# DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.6 Anti-dumping Measures



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## NOTE

**The Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

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## TABLE OF CONTENTS

<b>Note</b>	<b>ii</b>
<b>What You Will Learn</b>	<b>1</b>
<b>1. Introduction</b>	<b>3</b>
<b>1.1 History</b>	<b>3</b>
<b>1.2 Current Situation</b>	<b>4</b>
<b>1.3 Outline of ADA</b>	<b>4</b>
<b>1.4 Actionable Forms of Dumping</b>	<b>4</b>
<b>1.5 Like Product</b>	<b>5</b>
<b>1.6 Forms of Injury</b>	<b>5</b>
<b>1.7 Investigation Periods</b>	<b>6</b>
<b>1.8 Test Your Understanding</b>	<b>6</b>
<b>2. The Determination of Dumping</b>	<b>7</b>
<b>2.1 Overview of article 2</b>	<b>7</b>
<b>2.2 The Export Price</b>	<b>8</b>
<b>2.3 Normal Value</b>	<b>8</b>
2.3.1 <i>Standard Situation: Domestic Price</i>	8
2.3.2 <i>Alternatives: Third Country Exports or Constructed Normal Value</i>	9
2.3.3 <i>Second Alternative Method: Constructed Normal Value</i>	10
2.3.4 <i>Special Situations</i>	12
2.3.5 <i>Related Party Sales on the Domestic Market</i>	13
<b>2.4 Non-market Economy Dumping/Surrogate Country</b>	<b>14</b>
<b>2.5 Fair Comparison and Allowances</b>	<b>14</b>
<b>2.6 Comparison Methods</b>	<b>15</b>
2.6.1 <i>Main Rules</i>	15
2.6.2 <i>Exception</i>	15
<b>2.7 Simplified Calculation Examples</b>	<b>17</b>
<b>2.8 Test Your Understanding</b>	<b>20</b>
<b>3. The Determination of Injury</b>	<b>21</b>
<b>3.1 Overview of Article 3</b>	<b>21</b>
<b>3.2 The Notion of ‘Dumped Imports’</b>	<b>21</b>
<b>3.3 The Like Product/Product Line Exception</b>	<b>22</b>
<b>3.4 The Domestic Industry</b>	<b>22</b>
<b>3.5 Material Injury</b>	<b>23</b>
3.5.1 <i>Injury Investigation Period</i>	24
3.5.2 <i>Volume and Prices</i>	24
3.5.3 <i>Cumulation of Dumped Imports from Various Countries</i>	25
3.5.4 <i>Examination of the Impact of the Dumped Imports on the Domestic Industry</i>	25
3.5.5 <i>Threat of Injury</i>	26
<b>3.6 Causation/Other Known Factors</b>	<b>27</b>
<b>3.7 Injury Margins</b>	<b>28</b>
<b>3.8 Test Your Understanding</b>	<b>29</b>

<b>4. The National Procedures</b>	<b>31</b>
<b>4.1 Introduction</b>	<b>31</b>
<b>4.2 Application</b>	<b>33</b>
4.2.1 <i>Pre-initiation Examination</i>	33
4.2.2 <i>Standing Determination</i>	34
4.2.3 <i>Notification</i>	35
4.2.4 <i>De minimis/Negligibility Thresholds</i>	35
4.2.5 <i>Deadlines</i>	36
4.2.6 <i>Interested Parties</i>	36
<b>4.3 Due Process Rights</b>	<b>36</b>
4.3.1 <i>Public Notices and Explanation of Determinations</i>	37
4.3.2 <i>Confidentiality</i>	38
4.3.3 <i>Other Rights</i>	39
4.3.4 <i>Facts Available/Administrative Deadlines</i>	39
<b>4.4 Provisional Measures</b>	<b>40</b>
<b>4.5 Price Undertakings</b>	<b>40</b>
<b>4.6 Anti-dumping Duties</b>	<b>40</b>
<b>4.7 Retroactivity</b>	<b>42</b>
<b>4.8 Reviews</b>	<b>42</b>
<b>4.9 Judicial Review</b>	<b>43</b>
<b>4.10 Flowchart</b>	<b>43</b>
<b>4.11 Initiation of Anti-dumping Investigations at National Level</b>	<b>46</b>
<b>4.12 Test Your Understanding</b>	<b>46</b>
<b>5. The WTO Procedures</b>	<b>47</b>
<b>5.1 Introduction</b>	<b>47</b>
<b>5.2 WTO ADA Jurisdiction and Standard of Review</b>	<b>49</b>
5.2.1 <i>Identification of Measure in Request for Establishment</i>	49
5.2.2 <i>Special Standard of Review</i>	51
<b>5.3 Procedural Issues</b>	<b>52</b>
5.3.1 <i>Specificity of Claims in Request for Establishment</i>	52
5.3.2 <i>'New' Claims</i>	52
5.3.3 <i>Standing</i>	53
<b>5.4 Panel Recommendations and Suggestions</b>	<b>53</b>
<b>5.5 Test Your Understanding</b>	<b>54</b>
<b>6. Developing Country Members</b>	<b>55</b>
<b>6.1 Article 15 ADA</b>	<b>55</b>
<b>6.2 Panel Interpretation</b>	<b>55</b>
<b>6.3 Constructive Remedies</b>	<b>56</b>
<b>6.4 Timing</b>	<b>56</b>
<b>6.5 Test Your Understanding</b>	<b>56</b>
<b>7. Case Study</b>	<b>57</b>
<b>8. Further Reading</b>	<b>59</b>
<b>8.1 List of Relevant Panel and Appellate Body Reports</b>	<b>59</b>
8.1.1 Appellate Body Reports	59
<b>8.2 Panels</b>	<b>60</b>

## WHAT YOU WILL LEARN

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The official title of this WTO agreement reads *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*. However, it is consistently referred to as the *Anti-Dumping Agreement (ADA)*.

The ADA sets out the conditions under which WTO Members may apply anti-dumping measures as a remedy against injurious dumping in their markets. It provides detailed rules on the concepts of *dumping* and *material injury* and contains many procedural provisions that WTO Members, wishing to take anti-dumping action, must comply with.

This Module gives an overview of the provisions of the *Anti-Dumping Agreement*, and how these provisions have been interpreted by Panels and the Appellate Body over the last seven years. It covers both substantive and procedural rules. Since the entry into force of the ADA in 1995, ten WTO Panel reports have been issued interpreting ADA provisions, of which seven were appealed. These Panel and Appellate Body reports offer crucial interpretations of key provisions of the Agreement. Panel and Appellate Body findings form an important element of this Module are covered in tandem with the relevant provisions. This Module takes into account reports issued until 31 August 2001.

The first Section gives a general overview of the ADA.

The second Section, entitled “the determination of dumping”, explains in some detail the three forms of dumping, considered actionable under the ADA. The third Section on the “determination of injury” examines the material injury requirement, as well as related concepts such as the determination of the like product and the domestic industry and the causal link between the dumped imports and the injury suffered by the domestic industry.

The fourth Section, entitled “the national procedures”, highlights the various stages of an anti-dumping investigation and discusses the rights of interested parties.

Section 5 discusses WTO dispute settlement procedures particular to the ADA. Section 6 analyses the position of developing countries under the ADA.

This Module describes how to conduct a simple anti-dumping calculation and the formal stages of anti-dumping procedures. It also identifies the areas in which the case law of the Panel and the Appellate Body has had a significant impact on the application of the ADA provisions.

# 1. INTRODUCTION

**This section gives an overview of the history of international regulation of dumping, anti-dumping measures and forms of dumping and injury. It also provides a summary overview of the Anti-Dumping Agreement [ADA] and explains certain key terms in the ADA.**

## 1.1 History

Dumping occurs if a company sells at a lower price in an export market than in its domestic market. If such dumping injures the domestic producers in the importing country, under certain circumstances the importing country authorities may impose anti-dumping duties to offset the effects of the dumping.

National anti-dumping legislation dates back to the beginning of the 20th century. The GATT 1947 contained a special article on dumping and anti-dumping action. Article VI of the GATT *condemns* dumping that causes injury, but it does not prohibit it.

### Article VI:1 GATT 1994

*The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.*

Rather, Article VI authorizes the *importing Member* to take measures to offset injurious dumping. This approach follows logically from the definition of dumping as price discrimination practised by private companies. The GATT addresses *governmental* behaviour and therefore cannot possibly prohibit dumping by private enterprises. Moreover, importing countries may not find it in their interest to act against dumping, for example because their user industries benefit from the low prices.

Thus, GATT (and now the WTO) approaches the problem from the other side, *i.e.* from the position of the importing Member. However, recognizing the potential for trade-restrictive application, GATT (like WTO) law prescribes in some detail the circumstances under which anti-dumping measures may be imposed.

Since 1947, anti-dumping has received elaborate attention in the GATT/WTO on several occasions. Following a 1958 GATT Secretariat study of national anti-dumping laws, a Group of Experts was established that in 1960 agreed on certain common interpretations of ambiguous terms of Article VI.

An Anti-Dumping Code was negotiated during the 1967 Kennedy Round and signed by 17 parties. The Code was revised during the Tokyo Round. The Tokyo Round Code had 25 signatories, counting the EC as one. Although the 1979 Code was not explicitly mentioned in the Ministerial Declaration on the Uruguay Round, fairly early in the negotiations a number of GATT Contracting Parties, including the EC, Hong Kong, Japan, Korea and the United States proposed changes to the 1979 Code.

## 1.2 Current Situation

Article VI was carried forward into GATT 1994. A new agreement, the Agreement on Implementation of Article VI [ADA], was concluded in 1994 as a result of the Uruguay Round. Article VI and the ADA apply together.

### Article 1 ADA

*An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.*

## 1.3 Outline of ADA

The ADA is divided into three parts and two important annexes. Part I, covering Articles 1 to 15, is the heart of the Agreement and contains the definitions of dumping (Article 2) and injury (Article 3) as well as all procedural provisions that must be complied with by importing Member authorities wishing to take anti-dumping measures. Articles 16 and 17 in Part II establish respectively the WTO Committee on Anti-Dumping Practices [ADP] and special rules for WTO dispute settlement relating to anti-dumping matters. Article 18 in Part III contains the final provisions. Annex I provides procedures for conducting on-the-spot investigations while Annex II imposes constraints on the use of best information available in cases where interested parties insufficiently cooperate in the investigation.

## 1.4 Actionable Forms of Dumping

GATT 1947 applied only to goods which implied that dumping of services was not covered. Indeed, the General Agreement on Trade in Services, negotiated during the Uruguay Round, does not contain provisions with respect to dumping or anti-dumping measures.

It has furthermore long been accepted that neither Article VI (nor the ADA) cover exchange rate dumping, social dumping, environmental dumping or freight dumping.

On the other hand, the reasons why companies dump are considered irrelevant as long as the technical definitions are met: Dumping may therefore equally cover predatory dumping,<sup>1</sup> cyclical dumping,<sup>2</sup> market expansion dumping,<sup>3</sup> state-trading dumping<sup>4</sup> and strategic dumping.<sup>5</sup>

Conceptually, the calculation of dumping is a comparison between the export price and a benchmark price, the normal value of the like product. Depending on the circumstances in the domestic market, this normal value can be calculated in various manners as shown in Section 2 below.

## 1.5 Like Product

### Article 2.6 ADA

The term like product ('produit similaire') is defined in Article 2.6 ADA as a product, which is identical, *i.e.* alike in all respects, to the product under consideration, or in the absence of such a product, another product, which has characteristics closely resembling those of the product under consideration. This definition is strict and may be contrasted, for example, with the broader term 'like or directly competitive products' in the Safeguards Agreement. In the context of the ADA, the term is relevant for both the dumping and injury determination.

Typical like product might be, for example, polyester staple fibres, stainless steel plates, or colour televisions [CTVs]. Such products can often<sup>6</sup> be classified within a Harmonized System<sup>7</sup> heading. Thus, polyester staple fibres fall under HS heading 55.03, stainless steel plates fall under HS heading 72.19 and CTVs under HS heading 85.28.

However, within the like product, there will invariably be many types or models. To give a simple example, in the case of CTVs, CTVs with different screen sizes (14", 20", 24") will constitute different models. Similarly, in the case of stainless steel plates, plates of different thickness would be different types. While many variations are possible, the underlying principle is that the comparison must be as precise as possible. Consequently, a variation that has an appreciable impact on the price or the cost of a product would normally be treated as a different model or type. For calculation purposes, authorities will then normally compare identical or very similar models or types.

## 1.6 Forms of Injury

In order to impose anti-dumping measures, an authority must determine not

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