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1. INTRODUCTION

This section is an evaluation of identified issues and identification of possible areas of improvement. The issues considered are those identified in the survey (see annex 2) and/or in the EC/US technical comparison (see annex 6).

Identified issues are catalogued below with the main points summarised and evaluated.

2. PROCEDURE

2.1 Complaint threshold

With regard to the level of evidence required by the Commission to initiate anti-dumping and anti-subsidy investigations, the following points were raised in the survey:

- The threshold for accepting complaints in the EC is high i.e. the Commission expects a high level of evidence.
- Some felt that the threshold is too high, while others feel that it is too low
- The EC is tougher in assessing complaints than the US

The comparison with the US revealed the following:

- The threshold for accepting complaints in the US may be lower, particularly with regard to injury.
- However, complainants certainly have to work hard and complaints are much more expensive in the US (lawyers fees are typically $500,000 to $1,000,000 to prepare a petition).

There are a number of reasons why a high standard is desirable:

- A high standard guarantees WTO consistency.
- It sets an example and ensures that only strong cases are pursued because initiation of a case itself has an impact on the market.
- A high complaint standard is an important part of the balance between differing interests in the EC.
- If it is true that the US opens weaker injury cases than the EC (only to close them again without measures) this creates unnecessary harassment for exporters and importers.

The views of survey participants on the complaint threshold are, of course, influenced by their general attitude towards anti-dumping (AD). The Commission has to strike a balance between the differing interests within the Community (which vary considerably between protectionist and liberal extremes). On the one hand, the Commission tries to apply a high threshold to ensure WTO consistency and to set a good example to other countries using TDI. On the other hand, the Commission has to ensure that this legitimate instrument remains usable by its intended beneficiaries.

It can be concluded that the Commission is applying more than a *prima facie* test and is making industry work harder than in many other TDI regimes. At the same time, the level of

analysis of an EC investigation at the pre-initiation stage should not be overstated. Although complainants have to work hard, there is no detailed transaction by transaction analysis and no information is verified on-site at the complaint stage. This would duplicate the work of the subsequent investigation.

Is the threshold applied by the Commission at the right level? The answer to this question is probably yes. Those on both sides of the spectrum (i.e. for and against anti-dumping) criticise the level applied, which in itself perhaps suggests that the balance is about right. Further, the fact that a significant number of cases are terminated by the EC (roughly 40%) would certainly suggest that the threshold is not too high i.e. some cases where there appears to be sufficient evidence of a problem turn out to not to meet all of the conditions to impose provisional or definitive measures.

The fact that around 40% of cases are terminated without measures raises a question as to whether too many 'weak' cases are opened. However, the inherent differences between the pre-initiation and investigation stages (different periods analysed, individualised dumping/subsidy margins in investigations as opposed to single general ones at the complaint stage, different make-up of the Community industry, Community interest consideration etc) and the fact that many terminations are driven by Community industry which may decide to drop the case for various reasons may explain such termination rates.

Benchmarked against the US, it would appear that the EC is applying a higher standard at least with regard to injury. The Commission has a good track record on initiations.

The fact that the standard is high is also supported by the fact that an initiation has never successfully been challenged in the European courts nor at the WTO.

The precise threshold level for a complaint to be accepted as providing sufficient evidence can never be precisely defined. Each case is different and complaints can only be judged on a case by case basis. However, the evidence suggests that overall the Commission gets the threshold level about right given all of the constraints and conditions under which TDI operate.

2.2 **Type of evidence required on prices**

In the survey, the point was made that the proof required by the Commission on prices for the purposes of making an anti-dumping complaint is unreasonable. It was suggested, for example, that salesmen's reports should sometimes be acceptable as evidence.

Given that the evaluation of the threshold for complaints has concluded that it is at about the right level, changing the type of evidence required for prices would not be desirable.

The Commission should recognise on a case by case basis that it may be difficult in certain circumstances to get documentary evidence, such as invoices. However, it appears that the Commission already does this and takes into account specific situations in order to determine what constitutes sufficient evidence.

Caution should certainly be exercised about salesmen's reports due to the fact that they could easily be created by dishonest complainants. The fact that verification cannot take place at the pre-initiation stage makes such reports unreliable as a source of sufficient evidence that dumping is taking place.

2.3 Who can bring a complaint?

The EC/US comparison revealed that trade unions and groups of worker can make complaints in the US, whereas this is not possible in the EC.

The WTO AD agreement requires authorities to determine—on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product—that the application has been made by or on behalf of the domestic industry.

Footnote 14 of the WTO anti-dumping agreement states that Members are aware that in the territory of certain Members, employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation.

Note that, even in the US, the implicit support of the management of companies concerned by the complaint is required. If the management of a firm expresses a position in direct opposition to the views of the workers in that firm, the production of that firm is treated as representing neither support for nor opposition to the petition.

We have had no indication from the survey that this is an issue of significance within the EC. Further, requiring complaints to have the explicit support and cooperation of EC industry is actually a desirable feature of EC AD and AS rules. Finally, the fact that this is possible in the US is made possible by footnote 14 of the WTO anti-dumping agreement. However, it would probably be inconsistent with WTO rules for the EC to introduce such a possibility, even if it wanted to do so.

2.4 Length of complaint process

The survey revealed that many EC complainants are concerned that a typical complaint can take around six months from noticing a problem to getting it accepted by the Commission. Further, in some cases, the process can take 9 months.

The fact that a relatively high complaint threshold is applied by the Commission inevitably means that it takes time for EC industry to collect the necessary evidence and prepare a satisfactory complaint. The threshold should not be lowered just because it takes a long time to prepare a complaint.

However, this is a real problem and is related to the burden on complainants and the time before provisional duties are adopted (both of which are dealt with below).

2.5 Changing requirements for complainants

In the survey, EC industry complained that what is acceptable in one complaint may not be considered acceptable in another complaint. They accused the Commission of changing the requirements for complainants making it inevitable that a complaint is deficient and needs further work.

Some of those who complained did concede that such changes are often related to WTO rulings or cases in the European Courts. It should be noted that, although there have only been two EC anti-dumping measures (Bed Linen and Pipe Fittings) and one anti-subsidy (AS) measure (DRAMs) subject to review by the WTO, such rulings against other TDI-

authorities' measures must for practical purposes also be taken into account by the Commission. Sometimes this may require changes.

It is perfectly reasonable that the Commission updates and modifies the complaint requirements. The Commission puts considerable effort into briefing EC industry when such changes occur (which is considered below).

However, this does serve to remind the Commission that it should remain constantly vigilant in ensuring that the complaint requirements are as consistent as possible between different cases.

2.6 **Comparison with state aid complaints**

In the survey, a comparison was made with the state aid complaints process (dealt with by DG Competition) which can be as short as a few days.

However, state aid is a much clearer cut issue than that faced in AD or AS investigations. Although there are always grey areas, the state aid rules are relatively black and white about what constitutes illegal state aid and what does not. Thus, once the basic facts have been presented, the Commission can fairly easily assess if there appears to be a problem. It is relatively straightforward for the Commission to initiate proceedings in order to start collecting more information on the alleged state aid. AD and AS rules are not as unambiguous. Given the need to establish that there is sufficient evidence of dumping/subsidy, injury and causality, the issues will never be as black and white as state aid complaints. It is inevitable, therefore that the AD and AS complaint process will be significantly longer than that which follows a complaint about state aid.

Further, complaints in State aid matters are only a "source of information" to the Commission. No formalities are required to make a State aid complaint (basically anybody can write a letter to the Commission and complain about an alleged unlawful aid). There are thus no standing requirements as there are with AD or AS complaints. Moreover, the Commission does not even need a complaint; it does not make a difference whether the Commission starts an investigation on the basis of information it found in a newspaper or in a detailed complaint. Finally, it should be noted that complainants have very limited rights in the proceeding (no access to the file, no disclosure, etc.) as they are not a party. Proceedings are strictly between the Commission and the Member State concerned.

2.7 **Burden on industry wishing to make a complaint**

Many participants in the survey highlighted how burdensome the complaint process is, particularly for SMEs.

It can be noted that the Commission has made considerable efforts to assist complainants in full objectivity and to ease the burden without compromising the high threshold. The following initiatives suggest that the Commission has been extremely proactive in this task:

- SME helpdesk facility
- Dissemination of information in SME fora, including meetings with main industry associations.
- Chart of previously countervailed subsidy schemes on website.
- Guide for complainants in all languages.

- Mini-questionnaire to assist industries in putting together initial information.
- Offer to visit companies in small industries, to assist them in understanding what has to be done and how to collect information.
- Wide language coverage in the complaints office.
- Availability to discuss technical problems encountered in the process of drafting complaints. The same facility is also available to exporters and importers who may be wishing to request reviews.

Clearly this issue is particularly a problem for SMEs. However, the Commission is already making considerable efforts in this regard, with many of the above-mentioned initiatives particularly targeted at easing the burden on SMEs.

Whilst there seems to be general agreement that the Commission is doing a good job at the moment, it should remain vigilant in maintaining an innovative approach to easing this burden, particularly with regard to SMEs.

Whilst those who oppose TDI will be sceptical of the burden on EC industry due to a belief that the current threshold is too low, it is important to dispel a common misconception. There is a perception amongst some that the threshold applied by the Commission is too low and that the Commission works closely with complainants to get complaints through. This is certainly not the case. Those who oppose current anti-dumping rules will inevitably feel that the threshold is too low. However, the fact is that the threshold is set at about the right level given the requirements of law (i.e. sufficient evidence). Whilst the Commission inevitably tries to assist EC industry as outlined above, it is not the "friend" of EC industry and is often very tough in its requirements as evidenced by the many comments made in the survey by EC industry complainants.

The burden is high and EC industries have to work hard to get a complaint accepted. This is how it should be and the Commission should be commended for its considerable efforts in trying to reduce this burden without compromising the standards it has set for a high complaint threshold.

With regard to SMEs, efforts should continue to ease the problems faced. However, it should be acknowledged that this is not only a problem related to TDI. When it comes to regulatory matters, SMEs are often disadvantaged in relation to their larger counterparts such as multinational companies. This is important because the fact that this is not a problem unique to TDI means that it cannot be completely solved within TDI practices and procedures. Despite the best efforts of the Commission, seeking protection from dumped or subsidised imports is often going to be difficult for small companies.

2.8 Difficulties in getting necessary information for complaint

In the survey, many EC industry participants raised the problem of getting hold of information for AD and AS complaints. The burdensome nature of the process, and the high standards, have been discussed above.

A particular problem not dealt with in the points discussed above is the difficulty of obtaining information on subsidy schemes for AS complaints. The question was raised whether the Commission can do more to assist potential AS complainants?

The Commission is already providing information on the schemes that have already been countervailed by EC AS measures. This information is available on DG Trade's website and may be a useful resource if the problem stems from countries that have already been investigated.

A particular problem was raised in the context of China. In this regard, it can be observed that the Commission has been pursuing China on its notification of subsidies to the WTO. This provides a source of information that may guide potential complainants in understanding where they might need to dig a bit further, if they feel that they are facing problems from subsidised imports.

The Commission should assess whether there are additional ways in which potential AS complainants can be assisted in getting information on subsidy schemes. Could the EC commission surveys of key markets (e.g. China) to catalogue schemes and programmes that may be subsidies? Further, could EC delegations – considered unsupportive by EC industry – be provided with more resources to assist with gathering information for AS complaints? Both of these would involve more resources, which are outside the direct remit of this study. However, the Commission may reflect on whether such schemes could assist EC industry in making more use of the AS instrument.

2.9 **Sensitivity of confidential information**

The survey suggested that some complainants may be put off by the need to submit sensitive and confidential information to the European Commission.

The Commission goes to a considerable amount of trouble in order to ensure that confidential information supplied by interested parties is protected.

Further, most of the key injury indicators (e.g. market share, price, profitability) involve highly sensitive information. Yet it would be impossible for the Commission to conduct the injury analysis without such confidential information being provided.

Finally, the Commission has received high praise for the way in which it protects confidential information (see point on protection of confidential information below). To this extent, this cannot be considered as a significant issue.

It can also be noted that in the US, the APO system allows lawyers and consultants to see all confidential information submitted during the investigation. It is even possible in certain circumstances that in-house lawyers from companies involved in anti-dumping proceedings can be allowed access to the confidential information under the APO system. Whilst the US survey suggested that companies had a high level of confidence in the integrity of the US system and the protection of confidential information, it is clear that business submitting confidential information in the context of an EC TDI investigation has a higher level of comfort in the EC since fewer people will see and use any confidential information.

2.10 **Insufficient information in the non-confidential complaint**

Concerns were raised in the survey about insufficient information being provided in the non-confidential version of the complaint.

As a general rule, the Commission is strict in ensuring that the complainant provides a comprehensive and meaningful summary of confidential information that has been excluded from the non-confidential version of the complaint.

A problem can arise where there is only a small number of domestic producers making a complaint. The smaller the number of producers making the complaint, the more difficulties there may be in summarising certain pieces of confidential information. Thus, where a non-confidential version of a complaint is absent, it may be for a reason.

Besides, problems can exist with retaliation (see paragraph 5.4 below), which may even justify the non-identification of complainant companies. Although historically, the incidence of this kind of problem is relatively low at first sight, this issue is inherently elusive and, while existing, may not always come to the surface. Complainants may be faced with such a situation, for example, in cases regarding certain specific exporting countries (e.g. China) or where the contractual power of distributors is large.

The Commission should devote considerable attention to ensuring that complainants provide the maximum amount of information that they can in the non-confidential version of the complaint. Exceptions to this for uniquely difficult circumstances should be kept to a minimum.

2.11 **Identification of users/importers at the start of the investigation**

The point was raised in the survey that complaints do not always accurately identify all users and importers. It was claimed that it is often the case that large users or importers are omitted from the complaint. The result of this is that they may not get sent questionnaires at the start of the investigation.

There is no legal requirement for complainants to identify such operators. There is also a rationale for not doing so, since such identification implies the disclosure of client lists, which is a very sensitive issue.

Nonetheless, within these constraints, the Commission should encourage complainants to provide details of all major known users and importers in order to maximise user coverage.

2.12 **Information on how many industries prepare complaints**

In the survey, a point was made that the EC should be more transparent on how many complaints are submitted and how many are accepted and rejected.

Whereas the number of accepted or rejected complaints is publicly available, this is only part of the picture. Two points come to mind in this context.

Firstly, if the Commission's analysis shows that a complaint does not meet the necessary requirements, the complainant is notified. EC industries have then the choice of withdrawing the application or receiving a formal rejection. They overwhelmingly tend to withdraw the complaints—rather than having them formally rejected. In such cases, the law considers complaints as not having been lodged.

Secondly, most industries tend to have informal exchanges with the Commission services before complaints are formally presented. These exchanges typically address specific issues

where the industry is uncertain as to which general standards apply for acceptability. If such exchanges underline deficiencies of an eventual application, potential applicants typically prefer not to submit the complaint. So even at such a preliminary stage, weak potential complaints go away rather than being formally rejected.

2.13 Representativeness of complaint

Some survey respondents thought that the minimum 25% production threshold could be higher.

It can be noted that industries that traditionally have a lot of SMEs (e.g. textiles, clothing and footwear) are often at a disadvantage in making complaints because there are many small companies spread throughout the EC. This can make meeting the 25% threshold difficult on a practical level.

Further, globalized companies, which may be doing business in various markets, may not want to be seen to participate openly in an AD proceeding which is hitting their competitors (and perhaps their subsidiary) in a third country.

Finally, not all producers may be able to participate in a complaint because of the cost of cooperation.

Therefore, the 25% level should not be changed but complaints with relatively low production levels (e.g. between 25% and 33%) should only be accepted when this kind of circumstance is adequately explained.

2.14 Non-discrimination in complaint

Concerns were raised in the survey that countries are sometimes 'unnecessarily' included in complaints on the grounds that there is a need for complaints to be non-discriminatory.

It is also important to note that individual companies, who only want to target certain competitors in certain countries, do not always have the full picture.

Though there is no explicit requirement to be non-discriminatory at the complaint stage, there is a general legal principle in EC law not to discriminate. Further, it is arguable that, under WTO rules, the content of the complaint is informed by the WTO agreements (both the anti-dumping agreement and the broader WTO agreements) which emphasise non-discrimination. The Commission therefore tends towards including more sources (where there is sufficient evidence of dumping and injury) to guard against such allegations.

As a final comment on this issue, non-inclusion of countries that may be contributing to injury through dumping or subsidies may complicate the analysis of the causal link. If countries have been cherry picked for particular commercial or political reasons, the Commission is obliged to examine whether other countries are significant causes of injury in the analysis of causal link.

2.15 Transparency of the investigation process

(a) General comments

In general, the survey found that all interested parties find the level of transparency sufficient overall.

However, some concerns were raised about an unnecessary degree of confidentiality on internal matters which have an impact on the ability of parties to defend their interests. These included:

- Members of the Advisory Committee
- Agenda of Advisory Committee
- The opinion of the Advisory Committee on specific cases
- Names and contact details of case handlers on a particular case.

Concerns were also raised about the lack of transparency on the dumping and injury calculations (which remain confidential except to the specific parties who have provided confidential information). Note, however, that the people who made this point did not want their own confidential information to be revealed to other parties.

At the same time, there was praise for the Commission on some aspects of transparency. All notices/decisions are well written, and are easy to obtain through the website. Further, the timeline for each case, available in spreadsheet form on the DG Trade website, is seen as an excellent innovation.

The Commission should be vigilant in improving transparency wherever possible. More transparency is always desirable, subject to the need to protect confidential information. In this regard, a number of potential ideas for improving transparency can be considered in the following subsections.

(b) Access to confidential information under an APO-type system

An obvious question is whether the EC should introduce an APO system as in the US (i.e. allow legal representatives and consultants to have access to all information on the files including confidential information). This 'ultimate' transparency, while protecting confidentiality, is at first sight very appealing. Many people complain that certain aspects of the Commission's work take place in a black box; and it is certainly true that the Commission has considerable discretion in the economic aspects of AD and AS investigations. Allowing counsel and other experts to check all aspects of the Commission's work would be good from the perspective that it would permit every aspect of the analysis to be checked and, if necessary, challenged. From the point of view of legal process and certainty, this would be highly desirable.

However, a number of other points should be taken into account when assessing whether an APO type system should be introduced in the EC:

- Full transparency greatly increases the cost of being involved in an AD or AS proceeding. In the US, because interested parties themselves cannot be granted APO

access, it is almost necessary to engage counsel in order to be able to fully defend your rights.

- It can be expected that there would be much more litigation against EC TDI decisions.

- Some people make the point that setting up an APO system (with the necessary sanctions that need to exist to ensure that confidential information remains protected) would be difficult in a union of 25 Member States. In this regard, it has been pointed out that there is generally a different culture in the EC compared to the US, both in terms of the law (less litigious) and administrative culture (more discretion given to authorities).

This is certainly a complex issue. However, an APO type system comes with such clear advantages, in terms of legal process and certainty, that it is certainly worth a debate on the issue. Nevertheless, it has to be acknowledged that no one in the survey suggested that the EC should have such a system. If there were greater calls from EC interested parties for full transparency under an APO type system in the future, this might push the issue up the agenda, and allow consideration of some of the problems that would be faced in introducing such a system.

(c) Members of the advisory committee

Lobbying[1] has become an important part of the process in adopting measures, and sometimes it will be unavoidable for interested parties to engage in it. However, it can be extremely difficult, particularly for SMEs.

In this regard it would be desirable for Member States to make relevant website links and/or contact telephone numbers readily available. A possible proposal is that links to such websites could be provided on the DG Trade website for TDI offices in each Member State to facilitate contact.

(d) Agenda of meetings

Those wishing to engage in lobbying need to know when is the best time to contact Member States. Member States generally do not like to be contacted too far in advance of the relevant advisory committee meeting.

One proposal would be to publish the agenda of the advisory committee meetings on the web. Several comments can be made in this regard:-

- Many other meeting agendas are now published (e.g., the "133" Committee agenda). The agenda need only list topics; it does not have to give anything away about what the Commission is proposing.

- Information about the agenda already leaks out, so some already have access to the information while others do not. This is likely to be another source of difficulty for SMEs. Perhaps it would be better to ensure an even distribution of such information.

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[1] For a further comment on lobbying see section 4.6, p. 33.

(e) Position of the Advisory Committee

On cases where the vote is close, it is important for interested parties that want to lobby to know the position of each Member State in order to identify allies/targets etc.

One idea would be to publish the opinion of each Member State after advisory committee meetings. This is perhaps a controversial proposal as there is a possible problem of retaliation, particularly for small Member States. However, this is to a certain extent already a problem, as information on who supported and opposed a measure sometimes leaks out.

An alternative proposal, which might not have the possible retaliation problem, would be to publish the aggregate balance of opinions without citing individual Member States.

Given that this information may leak out, this is a less radical proposal than it may at first seem. A company that employs certain law firms will know how Member States voted, but an SME working alone may find it much more difficult to get the information. Again, such a proposal would ensure the even distribution of information.

(f) Contact numbers of case handlers for each investigation

Contact details are provided on the front of the questionnaires. However, not all interested parties are sent the questionnaire (if the Commission is unaware of their existence, for example). For companies that wish to request participation, or would like to speak to the case handlers for other reasons, contact details for each case should be provided on the website.

The Commission could provide a list of case handlers for each case on its website.

(g) Availability of the non-confidential complaint

Making the non-confidential complaint available after it has been submitted would have many advantages (all of which are evident in the US where complaints are available to general public through the reading room).

Making non-confidential complaints available prior to initiation would appear to have certain advantages:

- allows parties to start considering whether they would cooperate and to put preparations in place to play a full role in the investigation.
- would allow more time for parties to analyse the selection of an analogue country.

Negative aspects of such a proposal are:

- There is significant uncertainty about its legality. Both EC law and WTO rules require that authorities avoid <u>any</u> publicising of the complaint before a decision has been taken to initiate.
- Such a system could possibly be abused through the formal submission of weak complaints just to disturb the market.

The matter is therefore complex and could probably be best tackled in the current rules negotiations taking place within the DDA.

2.16 Access to non-confidential files by interested parties

Survey respondents commented on how amenable the Commission is in organising access to the non-confidential files and that the files are always well organised.

However, concerns were raised about the content of non-confidential submissions. Such concerns were raised equally with regard to the non-confidential documentation of complainants, exporters and users.

The Commission is already under great pressure during AD and AS investigations, given the amount of work that has to be done within the deadlines. It is understandable that checking non-confidential versions of documents is not as important as many of their other tasks, such as verifications or calculations. However, meaningful information in non-confidential form is critical for all interested parties to be able to defend their interests. Thus, it is important for the Commission to make every effort to check that non-confidential submissions are as meaningful as possible.

2.17 Member States access to information

Several Member States raised concerns about the amount of information that they receive.

The Member States are familiar with the facility by which they can consult the confidential files of the Commission, or discuss the case with the Commission at any time. However, most Member States had never actually used this facility.

This is really a question of Member States' resources rather than the Commission doing things differently.

2.18 Information made available on the website and through seminars

The Commission can be praised for its efforts to make information available through the website and seminars.

2.19 Protection of confidential information

The Commission was universally praised for its care in handling confidential information.

2.20 Hearings & submissions

All survey respondents felt that there is sufficient opportunity to be heard during investigations, both through formal hearings and submissions and through informal contact and discussions with the case handlers.

One person raised the possibility of having a hearing officer for hearings, as in the case of DG Competition hearings. This possibility already exists though it is rarely used. Perhaps the Commission should consider making it clearer that this facility exists. For interested parties that feel that they are not getting their case across during the investigation, having a hearing officer can ensure that their rights are fully protected by having someone present who can consider the case more objectively due to their independence from the everyday workings of the investigation.

At the same time, if all interested parties request a hearing officer, there may be a resource issue.

This was only raised by one EC industry participant in the survey. In addition, most survey respondents said that they were satisfied with the extent to which they have opportunities to present their views and arguments during a case. Thus, it does not appear that there is a major issue to be addressed here.

However, the lack of awareness of the possibility to have a hearing officer may be the reason why few people have strong feelings about it. The Commission might, therefore, consider being explicit about the possibility of requesting a hearing officer either in the notice of initiation or in the original correspondence with interested parties.

2.21 **Addressing all arguments submitted**

Another issue raised in the survey was that the Commission does not always answer points raised in submissions in the provisional and definitive regulations.

In general, the Commission is thorough in addressing points raised by interested parties in the provisional and definitive regulations.

Sometimes the Commission responds to certain points made by interested parties by responding individually to those parties, without the point being mentioned in the provisional or definitive regulations.

Several comments can be made on this issue:

- The WTO anti-dumping agreement requires that public notices, *inter alia*, give reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers. Clearly, the Commission has discretion here in that they can decide whether such arguments are relevant or not; the Commission is not required to give reasons for the acceptance or rejection of irrelevant arguments.
- In addition, it can be noted that many irrelevant arguments do get submitted to the Commission. Because there are always two (or more) sides to TDI investigations, the Commission's determinations will always be opposed by at least one side. Often, submissions made in such situations include every argument that could possibly be made to oppose the decision, and some of these may not be relevant. Thus, the Commission is right in selecting only relevant arguments, for which reasons for acceptance or rejection should be given.
- Sometimes there can be issues of confidentiality in mentioning certain points.
- Documents would be unreadable if every single argument was summarised. The Commission has to be selective and focus on the relevant arguments to keep the documentation readable.

Overall, it does not appear that this is a systematic problem. The provisional and definitive regulations are typically very comprehensive and address the relevant arguments, both those in support of, and those opposed to, the Commission’s decision.

However, the Commission does need to ensure that every relevant argument is addressed in the provisional and definitive regulations. It can be argued that relevant issues should not be addressed only in private correspondence, or in disclosure documents that are not publicly available.

2.22 **Questionnaires**

Most survey respondents commented on the complexity and burdensome nature of questionnaires (both for complainants and exporters). As with other aspects of the investigation, this is a particular problem for SMEs.

However, overall, survey respondents found questionnaires to be complex and heavy but, at the same time, reasonable and logical.

Several EC industry participants with experience of other AD regimes made the point that EC questionnaires are reasonable compared to others.

The comparison with the US suggested that US questionnaires are at least, and probably more, burdensome then those in the EC.

The fact that the Commission undertakes an extremely detailed analysis of dumping, injury, causal link, and Community interest, means that it requires a lot of information. The questionnaires do not request more information than is absolutely necessary for undertaking this task.

Given the significance of the issue raised in the survey, the burdensome nature of questionnaires needs always to be borne in mind by the Commission. However, there has to be a balance between getting enough information to make reliable and accurate conclusions and minimising the burden on interested parties.

The Commission also received praise in the survey for its efforts in trying to simplify the questionnaires used in investigations. Thus, it would seem that the Commission is making great efforts to minimise the burden on interested parties.

There is no easy answer to this problem. The Commission must get detailed information in order to undertake the necessary analysis as required by the law. Taking into account the fact that EC questionnaires are not more burdensome than other TDI authorities, including the US, it would appear that the Commission has the balance right on this issue.

2.23 **Deadlines for users completing questionnaires**

A concern was raised by EC industry about the fact that deadlines are not always respected by users.

However, users are not directly involved in the investigation in the same way as complainants and exporters. The latter parties have a direct involvement in the case, and they are sent detailed questionnaires that are absolutely necessary for the determination of dumping and injury. Complainants and exporters have to complete these questionnaires, as to be considered "non-cooperating" has a direct impact on the outcome of the dumping and injury findings.

For users, the situation is somewhat different. Not all users need to participate in order for the Commission to incorporate the user interest into the Community interest analysis. Thus, there is a 'free-rider' problem that does not exist for complainants and exporters, who all know that their individual cooperation is critical to the outcome of the case.

That said, the Commission does not allow a 'free for all' for users. The Commission can be praised for its overall approach to deadlines for questionnaires. The Commission strikes the right balance between strictly applying deadlines in order to get its work completed, and showing some flexibility towards interested parties in recognition of the burden imposed on a business. All parties, including complainants and exporters, benefit from flexibility and extensions in questionnaire deadlines. The fact that users are shown a little more flexibility seems reasonable given the free-rider problem mentioned above, while still maintaining a strict approach.

Besides, the Commission attempts to obtain user information that is representative, and it does not rely on full cooperation from all user industries. This is an implicit recognition that the incentive to cooperate —and the disincentives attaching to non-cooperation – do not exist for users to the same level as for other interested parties.

2.24 **Treatment of non-cooperating exporters**

A point was raised in the survey about the harsh treatment of non-cooperators.

The comparison with the US indicates that exporters that do not cooperate get treated much worse than in the EC. This is evident from comparing residual duty levels applied in cases where there is a high level of non-cooperation. Such duty levels in the US are usually set at much higher levels than those in the EC.

Some may argue that the difference between a high residual duty and a very high residual duty is insignificant. The level of such duties, when there has been non-cooperation, is often sufficiently high as to be prohibitive.

However, there is no need for them to be prohibitive. The important point is that non-cooperation must not in any way be rewarded. Reliable and rigorous analysis during TDI investigations relies on good cooperation from exporters. Thus, there needs to be strong incentives that encourage exporters to cooperate in anti-dumping investigations. By ensuring that co-operators are treated better than non-cooperators, a desirable incentive to cooperate is created.

The comparison with the US also revealed that being considered as non-cooperating happens more easily in the US than in the EC. The US is much more rigid in its expectations of cooperators. Information must be complete with a very high level of accuracy first time. The Commission is much more flexible with exporters. As long as exporters have made a significant effort to answer the majority of questions, incomplete submissions are treated with some flexibility. Even at verification, exporters in EC investigations have the opportunity to provide additional information and fill in small gaps left in the questionnaire. This is not possible to the same extent at verifications under the US system.

It is crucial that cooperation is rewarded and that non-cooperators do not receive as good treatment as cooperators. Thus, it is quite right that non-cooperators face higher duties. However, the level of EC residual duties is lower than for the US, and the definition of non-

cooperation is more flexible in the EC than in the US. Thus, it appears that the EC treatment of non-cooperation is not over-harsh.

2.25 Consultation with Member States

Several Member States raised concerns about the short time in which they have to consider working documents. The investigation leading up to provisional measures takes 9 months, yet Member States get only 10 days to consider the Commission's findings. Such concerns seem to be justified, if Member States are to play a meaningful role in the adoption of AD or AS measures. Given all that Member States have to do in terms of analysis, consultations, ministerial approvals etc., it is appreciated that 10 days is a very tight timetable.

Nevertheless, although 15 months seems like a long time for an investigation, it is clear that, taking into account all procedural requirements, the Commission does not have any spare time in AD or AS investigations. Thus, there is no time to give Member States more than 10 days in the final stages of the investigation.

If Member States would like to play more of a role in an investigation, they need to take the initiative to increase their involvement at an earlier stage. If Member States identify that a case has a particular importance for them (e.g. because of a strong EC producer and/or user interest), it always has the option to go and speak to the Commission for a briefing on where the case stands. Moreover, Member States have the ability to consult the confidential files, a facility that allows them to play more of a role if they feel the need. Member States can get involved in investigations at any stage. They do not have to wait until they receive the working document before they start considering a case.

In the end, this may be a resource issue for Member States. The problem is really that Member States do not have sufficient resources to get more involved in this way. This was very clear in the survey from the fact that Member State survey respondents have made very little use of the facility to consult the confidential information on the Commission files. If they want to play more of a role in influencing the outcome of TDI decisions, they have to have sufficient numbers of staff in order to get involved in the detail of particular cases of importance.

2.26 Provisional measures

One of the main points raised by EC industry survey respondents was the difficulties arising from having to wait 9 months before provisional measures. Added to the typical 6 months to prepare a complaint, complainants have to wait on average more than a year (and sometimes even 18 months) before any protection is forthcoming. The fact that a complaint is made is already indicative of the fact that the industry is suffering. Once the investigation is initiated, and exporters/importers know about it, there is a great incentive to import as much product as possible, before provisional duties are adopted. Nine months is a long time in which to organise such surges of imports prior to any measures coming into effect. Of course, this exacerbates the injury that was already being suffered by the EC industry.

EC industry looks at the US, where provisional measures are adopted much more quickly than in the EC. The question is legitimately raised as to why, given the problems highlighted above, the EC cannot match the US timetable.

The Commission is already very sympathetic to this point. However, it is difficult to speed up the investigation without lowering standards. The survey revealed that high standards at the provisional stage are considered by many to be important (this view was obviously expressed by those who are usually sceptical of TDI, but interestingly, also by complainants).

It is our opinion that it would be impossible, with current resources, to maintain the current standard of the provisional analysis if the provisional determination was made within 6 months rather than 9.

Also, there could be problem with the overall timescale for an investigation. Provisional duties can only be in place for 9 months if exporters agree. There is a lack of incentive for exporters to agree to additional time, and thus provisional duties would be restricted to 6 months. Thus, the whole investigation would have to be completed within 12 months if provisional measures had been adopted six months after initiation, which may be difficult with current resources and procedural requirements.

In US, provisional measures do come into effect much quicker but, inevitably, this means that they are more provisional than EC provisional measures. This is clear from the fact that there are a significant proportion of cases in the US where provisional measures are adopted but where there are no final measures (see the data on this in annex 6, 2.1(s)).

This happens to a much lesser degree in the EC where, once provisional measures have been adopted, they are very often made definitive. In fact, it is the case that EC provisional measures are, in effect, draft definitive measures rather than being truly provisional.

Some survey respondents made the point that EC provisional measures could be made more provisional and could be adopted earlier.

However, several comments can be made on this:

- As mentioned elsewhere, the current TDI system is a careful balance between all of the various different views and interests that exist within the 25 Member States. Weakening the requirements for provisional measures, although perfectly consistent with WTO rules, would not be acceptable to some groups of EC interests. Overall, tough requirements for provisional measures are necessary to maintain that balance.
- The US system is much less flexible than the EC system due to the need to meet the very tight timetables. It is not clear that a US timetable would be better in the EC. The current timetable allows some flexibility – which is to the advantage of all parties, including complainants.
- A number of complainants in the survey support the idea of high standards for provisional measures. This gives them greater certainty than that enjoyed by US complainants. Under the US system the market is unnecessarily disrupted when provisional duties are not made definitive.
- Complainants also appreciate the flexibility inherent in the current timetable, especially in terms of obtaining extensions which many find crucial.
- It must also be acknowledged that the US has no public interest test/lesser duty rule nor does it have a decision-making procedure involving 25 Member States. These features of the EC system inevitably make the process longer.
- Reducing the time between initiation and provisional duties would require additional resources for DG Trade, Directorate B.

Given the above points, we would conclude that a shortening of the timetable before provisional duties are imposed, is normally not desirable. The Commission is certainly open to finding a solution to this problem although but certain fundamental facts (as outlined above) cannot easily be avoided.

A special case arises where there are parallel investigations in other major markets, such as the US. The Commission could consider moving faster in such exceptional cases, where there is a high risk of trade diversion. One case which may provide such an example is TCCA . As shown in Appendix 1 of Annex 4, significant duties were adopted on Chinese imports into the US before the EC had reached its decision, which, it was claimed, raised a significant trade diversion risk. Such a situation may justify an expedited procedure to reach the provisional decision.

However, given the importance of maintaining the standard behind provisional measures, an expedited procedure should not mean lowering the standards. What it would mean is that the Commission would have to speed up its work, which would probably mean less flexibility for interested parties and higher resource implications. Nevertheless, given the real problem, this is certainly worthy of consideration.

2.27 **Level of measures**

EC survey respondents revealed overall satisfaction with the level of measures in terms of their ability to protect industry against the injurious impact of dumped or subsidised imports. At the same time, EC AD and AS duty levels appear to be generally lower than those of the US (though it is difficult to be certain about this point because we have also found that US administrative review can result in significant reductions in duties from the original rates). The lesser duty rule is generally viewed extremely positively. Overall, it appears that the level of EC AD and AS measures are getting the balance right between providing sufficient protection for EC industry from dumped and subsidised imports, yet ensuring that duties are set at the minimum level necessary to remove the problem.

However, concerns were raised about the lack of a lesser duty rule in other major markets such as the US. The implication of this is that US measures are often set at higher levels than in the EC and, in some cases, this raises the risk of trade diversion.

The mandatory lesser duty rule in the EC is almost universally perceived as a positive feature. Thus, it would not be desirable to weaken this innovative provision of EC TDI law. However, the lack of such features in other countries such as the US explains why the issue is high on the agenda of the EC in the DDA negotiations.

2.28 **Retroactivity**

Several survey respondents asked why duties are not collected retroactively more often. Retroactivity is permitted up to 90 days before the adoption of provisional measures. It could provide a partial answer to the problem of the length of time that elapses before provisional duties are imposed, in cases where there are clear surges in imports prior to the measures, or during parallel investigations in other major markets resulting in trade diversion.

There is a practical problem in that retroactivity cannot be used without firm evidence of a further surge in imports, and statistics are not available quickly enough.

If it is a question of having sufficient information to know whether use of registration is justified at month 6 (i.e. 3 months or 90 days before provisional measures), the Commission should consider what sources of information, and what standard of evidence, would be required in order to impose registration after 6 months.

Of course, registration itself has an impact on the market, in that importers have a potential liability if the duty is to be backdated. If there is a real surge in imports and measures are justified, this would be the purpose of creating the possibility to collect the duties retroactively. However, if provisional measures ended up not being adopted, this would have been an unnecessary disturbance to trade.

It can be noted that the US rarely makes use of its retroactivity provision (though, of course, provisional duties come quicker in the US than the EC).

Where there are legitimate concerns about surges in imports, or parallel investigations, perhaps the Commission could consider either trying to speed up the process by applying more staff to the team – which raises a resource issue – or by requiring registration in certain circumstances.

2.29 Non-discrimination in the application of measures

There have been a small number of cases where an issue has arisen because, for political reasons, Member States do not want measures to be adopted against particular countries. The Commission's policy is that there should be no discrimination in the application of measures, and this has resulted in multiple country duties against the same product all being removed. This was a concern raised by some survey respondents.

The Commission's approach is the correct one, as this is required by the WTO AD agreement (article 9.2) which states that:

> When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury,

The anti-dumping rules are also informed by the general WTO agreements which emphasise non-discrimination throughout.

2.30 Definitive measures and overall length of investigation

The overall length of the investigation was also raised as a concern for EC industry. This point is related to the point made above on provisional duties. The further 6 months between provisional and definitive duties was not really highlighted as a problem in the survey.

One question that was raised was whether there is a reason for setting an overall time limit of 15 months for AD investigations, while AS investigations must be completed within 13 months. The difference comes about from the fact that provisional measures can be adopted for a maximum of 6 months in anti-dumping investigations, but only for 4 months in anti-subsidy investigations. However, there does not appear to be any other underlying rationale.

Two points can be noted:

- There are far fewer anti-subsidy investigations, and therefore it is possible to make this commitment. It would not be possible to do this for all anti-dumping investigations on current resources.

- There is no market economy issue in anti-subsidy investigations, which is an extremely demanding part of anti-dumping investigations.

One survey respondent suggested that the definitive stage should be abolished and that definitive duties should be applied at the provisional stage after 9 months.

Such a proposal does have certain advantages. It would considerably reduce the overall institutional requirements of an anti-dumping investigation and thus free up some resources (as a result of only one round of translation, consultation etc.)

On the other hand, there are often changes between the provisional and definitive findings. The fact is that provisional measures are provisional, even if a high standard is applied before adopting provisional measures.

Overall, it is possible that some relatively straightforward cases could be completed definitively within 13 months, or even 9 months. However, some cases can get extremely complicated in the later stages. Cases where there are a lot of users, and a significant negative impact to the EC from adopting measures, have to be fully considered. In this situation, the full 15 months is necessary to ensure that the Community interest is fully assessed and explored. Further, it may not be possible to finish cases where undertakings might be appropriate within a more restricted deadline.

In conclusion, there do not seem to be strong reasons to change the overall 15 month deadline of an AD investigation.

In view of points mentioned at the beginning of this section, there is also no necessity to adjust the overall 13 month deadline for AS investigations. Thus, the two overall investigation deadlines should be kept at their current levels.

2.31 **Interim reviews**

The only point made on interim reviews was made in relation to the US. In the US, it is relatively easy to obtain revised dumping duties on an annual basis through the administrative review process, and it was observed that the same kind of facility does not exist within the EC. However, the corresponding mechanisms in the EC are not interim reviews but refunds. It is however true, that, unlike in the US, refunds do not lead to an adjustment of the duty for the future. That type of review of the duty can in the EC principally be achieved by an interim review. However, the EC/US comparison revealed that there are a lot less interim reviews in the EC than there are administrative reviews in the US.

One reason for this is that for an exporter requesting an interim review, there is a large element of uncertainty in making such a request. There have been cases where such a request has resulted in higher duties, and this makes companies very cautious about going down this route. Another reason could be simply that the exporter knows that dumping has increased subsequent to the imposition of the duty. It should finally be noted that in the US, duty levels

can also go up following an administrative review.It is also important to remember that the EC operates a prospective duty system and it is explicitly not envisaged that the duty levels will be regularly reviewed. Thus, it is not surprising that there are a lot less interim reviews. The US system clearly envisages regular revisions to the duty levels through administrative reviews.

This is not, therefore, a problem in itself as it results from the EC system of collecting duties. The advantages and disadvantages of the prospective duty system are considered below.

2.32 Expiry reviews

Some EC industry survey respondents raised concerned about the difficulties that they experience in trying to get AD and AS measures maintained beyond the initial 5 year period, even when they feel that there are likely to be continuing problems.

The comparison between the EC and US suggests that the EC is applying a higher standard in expiry reviews.

- For the period 2000 to October 2005, the EC has a much higher proportion of cases that expire without review (57.7% compared to 0%/15.6% for the US)[2].
- Further, of those reviews initiated[3], the EC maintains measures at a lower rate than the US (55.3% compared to 88.7%).

The evidence clearly suggests that the EC is applying a higher standard than the US for expiry reviews. Moreover, the US has had problems of WTO consistency with its expiry review standards..

The EC initiates expiry reviews for almost half of the cases about to expire, and half those reviews result in the measure being maintained. This is not an insignificant level of expiry review and of measure confirmation. It may be that in individual cases, EC industries are frustrated in their attempts to get measures extended. However, overall, and especially when considered against the US, there does not seem to be any systematic bias in favour of or against the maintenance of AD measures beyond 5 years.

3. SUBSTANCE

3.1 Overall views on dumping calculation

The Commission is generally praised for doing a good job on the dumping calculation.

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[2] Note that US expiry reviews are automatically initiated and, to this extent, there is a 0% rate of cases that expire without review. However, not all such reviews have a DOC or ITC determination. If there is no domestic response to the notice of initiation, measures are allowed to expire. The 15.6% figure for the US relates to such cases (i.e. those where no determination was made are counted as expiry without review). See annex 6 2.1(z) for more detail on this point.

[3] US 'initiations' in this case are those where there was a domestic response to the notice of initiation and determinations were made.

3.2 Dumping calculation methods

The EC/US comparison concluded that the dumping calculation methods of the US and EC are similar but there are small methodological differences that can be significant.

Some of the differences between the US and EC make US dumping margins higher. However, other differences (*e.g.*, a different way of applying the 5% test; see annex 6, 2.2(a) for more details) produce different results but can work in either direction: *i.e.*, they may make a US margin calculation higher in one case but lower than the EC in another case.

The following comments can be made about dumping margins:

- In cases with multiple respondents, there is usually a range of dumping margins found. With regard to the lowest margins found, apart from zeroing, there are no major methodological differences that could explain higher US margins.

- With regard to the highest margins found, the US is considerably higher. This is primarily as a result of the use of 'best information available' and adverse inference.

- It should be noted that the US margins are not necessarily those used as the basis to collect final duties. When companies request an administrative review, dumping margins can be much lower – based on actual transactions on a retrospective basis.

- Of course, it is also possible that exporters dump by a higher margin in the US. This could be possible for products where US prices are lower than those in Europe.

It would be desirable that small differences in method are narrowed down in order to create a consistency of approach for exporters to the EC and US.

3.3 Non-market economy (NME) methodology

However, several concerns were raised in the survey about analogue countries:

- the choice of analogue countries in specific EC investigations (e.g. a number of survey respondents questioned the appropriateness of the US as an analogue)

- the short period in which to comment on the analogue country chosen, and the difficulty in finding alternatives due to the need to find cooperating companies.

The US has a different method for non-market economies. At first glance, the US approach appears to have advantages in that it is actually based on the cost structure of the exporters in the NME (but the cost values are not used).

However, the margins produced by the US on NMEs are typically higher than those applied by the EC. Some argue that the factors approach has the effect of using western costs and NME inefficiencies. In using the EC method, although costs and prices may be higher in the analogue country, the productive process may be more efficient.

Thus, there do not seem to be any strong reasons to consider changing the EC approach. A further point to bear in mind is that the NME method may not be so significant in the medium term. It can only be used against China, for example, until 2016 at the latest.

However, where the analogue country chosen is very different from the country subject to investigation, the Commission should be vigilant in ensuring that all differences are accounted for, particularly in the context of using the US as the analogue country.

3.4 Market economy treatment

There were some concerns about particular cases where companies had been granted market economy treatment (MET), where EC industry did not believe such treatment was justified.

However, on the whole, the MET system seems to function well. A significant number of companies have been granted MET, which establishes that the provision is a meaningful one. While exporters in economies in transition will always feel aggrieved if they do not get MET when they believe that they meet the criteria, the key factors that ensure success in an MET claim have now become quite clear, making it somewhat more predicable for MET applicants.

There is no evidence that companies are systematically getting MET when it is not justified. Many applications for MET still get rejected.

However, it is important that case handlers verifying MET claim forms are experienced enough to identify cases where claimants try to cheat by submitting false information – which unfortunately has happened in certain cases.

As a general comment, it has to be stated that the market economy issue has been taken somewhat out of perspective. It has been interpreted as formally classifying whether countries such as China are market economies or not, which gives the decision a political dimension that has nothing to with TDI. In the context of AD, the market economy issue is merely about assessing whether the Commission has reliable information with which to conduct its analysis. It is a decision about whether information is reliable or not for the purpose of calculating normal value, rather than a political determination relating to a particular country or to individual companies.

3.5 Calculation of SGA and profit in constructed normal value calculations

Concerns were raised by EC industry about the calculation of SGA and profit in constructed normal value calculations. They sometimes feel that the amounts used are too low, and that there is no way of checking the calculation due to confidentiality. They stated that they would like greater transparency on this.

However, whichever method is used, it will usually involve the use of confidential data of some form or another. Thus, it is not possible for there to be greater transparency on the evidence gathered by the Commission. However, the issue of transparency is limited to the actual figures used in the calculation and not to the method. Indeed, the Institutions choose the four possible methods in a quasi-hierarchical manner in the order set out in the law. Only the fourth method entails by definition some discretion ("any other reasonable method") but the exercise of this discretion in any given case has to be explained fully.. Moreover, and as expressed elsewhere, the survey showed that the Commission is generally trusted to get the calculations right.

3.6 Auditing of cost for normal value purposes

A concern was raised by EC industry about the ability of inexperienced case handlers to verify accurately the costs of exporters. Complainants sometime have doubts that cost structures have been properly audited, and that as a result measures end up being much lower than they should be.

Again this is an area where the Commission has to be trusted. However, given that trust, the Commission must ensure that officials are sufficiently trained to undertake this task.

The Commission does make efforts in this regard by organising regular cost accounting courses for case handlers.

There is a contrast in the way this aspect is handled by the EC and the US. Both the DOC and ITC include professional accountants on every cost verification (both for exporters and domestic industry). In the EC, there are less accountants employed. However, the team will normally include investigators who have an accounting background (e.g. those coming originally from national customs and tax administrations). The point about specialisation of case handlers is discussed elsewhere.

3.7 Identifying the cause of dumping

The point was made in the survey that, if dumping is caused by a closed export market, a complementary strategy of challenging the trade barriers should also be adopted.

This point really relates to other parts of the Commission than the TDI services, and to the coherence of different EC instruments. However, there is a valid point that the EC should have an offensive as well as a defensive strategy. Given that the EC has a proactive market access initiative (the market access strategy, the trade barriers regulation, the exporters helpdesk etc.), it would not be so difficult to identify situations examined in TDI investigations where there may be trade barriers that the EC could investigate and challenge.

In this regard, perhaps the Commission could distinguish between cases where dumping is caused by a high normal value (which could suggest that the market is closed), and those where it is the result of a low export price (where, for example, the exporter decides to export his product below cost). If dumping is caused by a very high normal value, suggesting a closed market, perhaps the TDI service could inform the relevant parts of DG Trade that deal with market access issues. The advantage of such a strategy is that successful removal of the trade barrier could result in an end of the dumping problem and thus perhaps provide an opportunity to remove the anti-dumping duty.

At the same time, not every case of dumping involves an illegitimate trade barrier. For example, high Indian customs tariffs create conditions where dumping can easily occur. Nonetheless, such tariffs are legitimate provided that they are within the bound levels contained in India's WTO tariff schedules.

Overall though, the more that DG Trade can have an integrated approach across its trade initiatives, both defensive and offensive, the better.

3.8 Zeroing

A difference exists between the EC and US with regard to zeroing.

Following the Bed Linen WTO ruling, the EC has changed its approach to zeroing and is now acting in a manner consistent with WTO rules. However, there is a good deal of confusion about what kind of zeroing is permitted and what is outlawed. Some people believe that zeroing is totally prohibited – which is not true.

The US continues to use zeroing practices that the EC has abandoned; namely inter-model zeroing when there is multiple averaging of dumping margins for different models or types.

3.9 Specificity and subsidies

One issue raised in the survey was a claim that the specificity test is not applied correctly. It was claimed that there only needs to be one small group that is *de facto* excluded from the subsidy and the Commission concludes that there is specificity.

The Commission should ensure that it maintains a consistent approach with regard to specificity. However, it is noted that Article 2.1(a) of the WTO agreement on subsidies and countervailing measures provides: "Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific". Article 2.1(c) goes on to mention the circumstances in which a subsidy may be found to be de facto specific. Where the Commission has found subsidies to be specific or de facto specific, it has done so with due regard to these provisions.

3.10 Use of anti-subsidy instrument against NMEs or economies in transition

A second issue on subsidies was raised with regard to whether the AS instrument could be used against NMEs or against countries with economies in transition.. There is no reason in principle why the AS instrument cannot be used in these circumstances. However, certain practical problems arise. Because of the nature of the economy, it is not straightforward to calculate the benefit due to the distortions that exist or may have existed in the past. Thus, it is necessary to find suitable benchmarks, which is always a difficult task. It is particularly difficult for complainants who, even if they identify a possible subsidy, find it difficult to establish an appropriate benchmark.

However, the fact that using the AS instrument in such circumstances may be difficult does not mean that it should not be used. As countries such as China move towards market economy status, EC industry feels that the AS instrument may increase in importance. Thus, it may make sense for the Commission to start giving some thought now as to how the instrument might be used in such cases, all the more so as an increasing number of companies get individual ME status, thus leaving the issue of subsidies unaddressed.

3.11 Injury & causal link

No major issues were raised in the survey.

One point that was raised was the definition of domestic industry, and the exclusion of companies producing in the EC that are related to exporters in an anti-dumping investigation. The survey respondents making this point questioned whether they should be excluded.

Reasons why they might be excluded include:-

- they may be gaining from dumping;
- they may have an incentive to oppose and block action on behalf of EC producers (which may undermine legitimate use of the instrument).

If such a related company producing in the EC is importing the product concerned from the country subject to investigation, as well as producing it, then it certainly makes sense that they are excluded. However, the performance of such companies could still be useful in assessing whether injury is caused by imports, for instance when they are not actually importing 'dumped' products. In such circumstances, they cannot be gaining in any way from the dumping and might thus be relevant to the injury analysis. On the other hand, if they are importing the dumped product or if they are linked to exporters engaged in dumping, it is normally very difficult to distinguish the injurious effects of dumping by their competitors from the benefits derived from their own dumping, or from their link with dumping exporters.

3.12 A general comment on Community interest

Overall, the process of assessing Community interest works well but a number of issues were raised (see 3.13 to 3.17 below).

A general point was raised by some of those opposed to anti-dumping that there is a bias towards finding that measures are in the Community interest.

However, despite the fairly small number of published terminations on the ground of a lack of Community interest, it cannot automatically be concluded that Community interest is not a meaningful test. Complainants often wish to withdraw their case if they learn that their case is unlikely to go ahead because of a lack of Community interest. More importantly, it does not make sense for any complainant to lodge a case if it is obvious that, at the end of the investigation, measures will not be imposed because they would not be in the Community interest. Thus, while Community interest is not a criterion for the admissibility of the complaint, it has an effect already at this stage. Thus, the relatively small number of published terminations on grounds of Community interest is not the whole picture.

3.13 Interpretation of a lack of response from users, importers and consumers

The point was made in the survey that the Commission can treat lack of response from interested parties that might oppose a measure as an indication that there is no issue. This was raised particularly in relation to consumers, which is discussed below.

The Commission can only base its evidence on reliable information submitted by interested parties. Thus ultimately, if no users participate, it is very difficult for the Commission adequately to analyse their point of view.

At the same time, there could be a significant negative impact on users, yet none of them cooperate because they do not believe it will make any difference to the outcome. In these circumstances, it would be wrong for the Commission to take a lack of response as evidence supporting the argument that that they will not be significantly adversely affected by the measure.

Thus, the Commission should not automatically use non-cooperation by users as a reason to conclude that measures are in the Community interest. They must use whatever information they can to assess the situation.

In cases where there is little cooperation from users, the Commission still tries to get as much information as it can from users, and applies a flexible approach with regard to users that come forward late in the investigation. As long as the Commission makes such efforts, there is little more that can practically be done if users or consumer organisations do not participate.

In conclusion, the Commission needs information and, without it, its job becomes extremely difficult. No user involvement may mean that the Commission concludes that measures are in the Community interest; but the fact that no users participated should not, itself, be taken as evidence that users would not be adversely affected.

3.14 **Community interest in an enlarged EC**

It was noted that the user interest is growing in an enlarged EC. A concern was raised that, with 25 or more Member States, the balance may be altered: complaining industries may be concentrated in a small number of Member States, while users may be dispersed throughout all Member States. In this context, it was noted that lobbying is becoming more intense, and making a case is becoming more difficult from the perspective of complainants. This is related to the political nature of the instrument (see 4.1 below).

3.15 **Representation of consumers in AD or AS proceedings**

A particular problem was raised relating to consumers due to the fact that, for investigations involving consumer products, individual consumers are not even aware of AD or AS investigations taking place.

The responsibility of representing consumers falls to consumer organisations and, it was claimed, here is the problem. There are only a very small number of anti-dumping experts in the various EC consumer organisations. Even those that exist do not have the time and resources to participate regularly in anti-dumping investigations.

The Commission should always try to ensure that, where relevant, the views of consumers are represented in the study, whilst staying sensitive to the fact that consumer organisations do not have sufficient resources to get heavily involved in AD or AS proceedings.

However, this problem is not one that affects only TDI. Consumers are often far removed from regulatory issues that could have a negative impact on them, and consumer organisations face the same problems with regard to resources limiting the extent to which they can get involved. As long as the Commission makes real efforts to reflect the consumer interest in anti-dumping proceedings, there is not really anything else that can be done within the realm of TDI.

Finally, it can be argued that the majority of anti-dumping investigations involve raw materials and intermediate products. Although there are some cases that have a direct impact on consumers, such cases are in a minority.

3.16 Concerns raised by complainants about Community interest

A number of small concerns were raised by EC industry in the survey on the issue of Community interest.

However, subject to the comments in 3.12 above, the relatively small number of cases with explicit or implicit determinations that measures are not in the Community interest suggests that this provision is not an unreasonable obstacle to complainants obtaining protection where the requirements of the basic regulation are met.

3.17 Analysis of market situation prior to measures

One survey respondent made the point that if a non-competitive situation had existed prior to the measures (the extreme example would be a monopolist), some analysis should be undertaken to ensure that the TDI are not merely restoring an anti-competitive position and monopoly profits.

However, DG Trade should not be making competition determinations. Firstly it is not required by the EC legislation (which thus makes it outside the scope of this study) and secondly DG Trade is neither qualified nor has the resources to make such an assessment.

4. INSTITUTIONS

4.1 Political element to decision-making

Many survey respondents complained about the political nature of the decision-making process due to the role of the Commission and 25 different countries in adopting AD and AS measures. This is contrasted with the US where politics has a less explicit role in the decision on whether or not to adopt such measures..

How this is viewed partly depends on how one views the role of Member States (see below). Some would argue that TDI should be purely technical and, to this extent, that the MS should not be involved. However, if the Member States have a role, it has to be a meaningful one yet this may involve a political element.

The fact that Member States play a crucial role in the adoption of measures raises the question of whether there is an excessive political element to the decision-making process. This is not necessarily so. Member States are in a good position to review the Commission's activity on a technical basis but, of course, this implies some resources commitments from their side. Moreover, the involvement of Member States makes sense because they serve as an additional filter. They are often closer to their economic operators than Brussels. Thus, Member States might get a better idea as to the effects of taking measures or not taking measures. This additional ‘market knowledge’ is invaluable information in the decision making process.

It can also be noted that a political decision by Member States would be illegal and would almost certainly not be condoned by the Member States themselves.

To the extent that there is something of a political element to decision-making on AD and AS measures, it is not feasible to change this. This political influence has no impact on actual decision making as long as it is confined to a small minority of Member States. This means

that the technical assessment of the majority of the Member States determines the decision and not the political consideration of a few. As mentioned elsewhere in this report, EC TDI policy is based on a careful balance between the many different and contradictory interests throughout the 25 Member States. Therefore, it seems impossible to envisage this being changed by transferring the decision-making to the Commmission.

It can be noted that there is not the same consensus between MS on TDI that there is on, say, competition issues Member States vary in their attitude towards the general desirability of TDI (particularly in relation to anti-dumping) while all Member States agree that cartels and abuse of monopoly power are a bad thing. This means that it is unlikely to be realistic for competence on this issue to be completely transferred to the Commission and that a certain political dimension will remain.

4.2 Impact of change in voting and the Eurocoton decision

There is a general view that the voting change and the Eurocoton decision are reasonable developments (see annex 2, 2.2(b) for more details), particularly since, taken together, they would appear to reduce the influence of politics in AD investigations.

However, a number of concerns were raised:

- Will Member States ever be able to prevent a measure being adopted again?
- How will Member States motivate a "no" decision if they all have different reasons for opposing measures?

It can be noted that, if the voting change does have an impact on voting patterns, the Member States are voting in an extremely superficial way. This stems from the fact that there is really no such thing as an abstention. The concept of abstentions was created by Member States that wanted to vote against measures as a way of making it look like they were not actually voting against. Abstentions have always been a façade.

If the voting change results in different outcomes in any case, it means that Member States that previously abstained (but who knew that their vote was counted as a no) would still abstain (even though they now know that their vote is counted as a yes). This does not make sense.

A concern has been expressed over whether smaller Member States will feel intimidated in now having to explicitly oppose measures, where previously a no vote could be registered through abstaining. Ultimately, the voting change is still a simple decision of whether you are for or against. It is nowhere near as significant as the Eurocoton decision, which changes the Member States' ability to reject TDI measures through the need to motivate their decision in Council.

Finally, it can be noted that even before Eurocoton and the change in the decision making procedure, the vast majority of Commission proposals were adopted by the Council (the Council has only rejected 10 measures since 1995).

As to the question whether or not Member States will ever be able to reject a Commission proposal, it would seem that this question is not pertinent. It somewhat implies that the final

Commission proposal is by nature a political proposal and that Member States should therefore have unfettered discretion. However, this is not the case, as the Eurocoton judgement has made abundantly clear, also with regard to the concept of Community interest.

4.3 Member States

There is a general view that, despite the concerns about politics, Member States have an important role. Member States provide an additional filter to check the Commission's findings. They provide a final check and balance before the adoption of measures, though not in the same sense as that provided by the Commission's Legal Service or by the European courts.

Despite the fact that Member States can get more involved during the investigation (*e.g.,* by meeting the Commission or viewing the confidential files), Member States cannot redo the investigation nor carry out a parallel investigation.

If this is a correct characterisation of the role of Member States, the way in which the system works at present is correctly and effectively implementing their important but limited role. However, the Commission should always be vigilant in seeking improvement.. If in fact, the Member States' role should be more than this, the current level of their involvement is not sufficient.

Ultimately, the actual role of Member States is also to a certain extent a choice made by each Member State individually. In this context, this may be a resource problem for Member States. However, this is a practical point and should not be the driving force behind determining Member States' role in the adoption of measures. If Member States believe that they should have a bigger role, there is the opportunity to view the confidential files, or to discuss the case with the Commission; to do so would require resources that the Member States do not seem willing to commit.

4.4 How Member States make their decisions

Some people interviewed in the survey claimed that Members States often vote in their national interest. The concern was raised that this creates a problem in cases where users are spread out throughout the EC and industry is concentrated in a very small number of countries. The Commission role in assessing Community interest is crucial as this is a different analysis than the mere cumulation of 25 national interests.

However, although Member States clearly look at the impact of measures on their national operators, this does not mean that they are automatically voting on the basis of their national interest. Indeed, there are many cases with industries only in few or even one Member State while there is a broad majority for the case.

It can further be noted that Member States voting in their national interest is unlawful. Every Member State must assess what is in the Community interest. The Council would lose in court if it motivated a rejection of a measure on the grounds of 13 negative national interest assessments.

4.5 Representatives on the Advisory Committee

Concerns were raised about the low experience of certain members of the advisory committee.

It is important that Member States ensure they have sufficient expertise if their role is going to be a meaningful one.

At first sight, in a 25 Member State EC, the chance of one Member State influencing an investigation seems now very small. Thus, many MS do not apply a high priority to their respective TDI jobs. However, Member States also coordinate themselves. Thus, the position of one Member State can indeed have a certain 'domino effect' on other Member States, in particular if the question at issue raises systemic concerns.

The Commission does provide training courses and meets with MS regularly, both of which assist MS representatives to develop their skills and understanding with respect to TDI..

At the same time, MS should devote sufficient resources to ensuring that dedicated, expert people cover TDI.

As a final comment, it can be noted that survey respondents pointed out that some MS representatives were excellent and did a good job.

4.6 Lobbying

Lobbying has become more important but this is an inevitable reflection of the political aspects of the decision-making process.

Lobbying, if properly and transparently done, will provide the decision makers directly with information which the party engaging in such lobbying thinks is the most pertinent for the defence of their case. As such, it is certainly a useful and necessary tool in the decision making process. However, lobbying also entails the risk that the decision makers receive information which has not been properly introduced in the procedure which is of a quasi-judicial nature. Thus, there is a particular responsibility of decision makers who have such ex parte contacts to ensure that they do not take into account any information which is not fully reflected in the file officially assembled for the purposes of the investigation. The aforementioned advantages but also risks have always to be taken into account when assessing any proposals in this field.

Given the importance of lobbying, it is essential that interested parties engage in it as appropriate. However, as highlighted elsewhere, it is not easy for a company – particularly an SME – to identify the appropriate officials in each Member State to whom they might speak.

In this regard, see the proposal made in 2.15(b) above.

4.7 Internal organisation

One of the biggest differences with the US is the fact that the US has a bifurcated system while the EC does not. Moreover, the ITC enjoys considerable independence.

Would it make sense for the EC anti-dumping service to be independent, either wholly or partially? From a theoretical perspective, one would say yes, it is better to have objective, technical institutions assessing such complex matters as free as possible from any constraints.

However, as noted elsewhere, the decision making power of Member States is an important part of the overall balance of interests in the way TDI policy is implemented in the EC. It is not practical for the additional checks and balances provided by the Member States to be removed from the system altogether.

Moreover, if the EC was to introduce a bifurcated system, such as exists in the US, it has to be appreciated that this comes at a certain financial cost. This is both in terms of the agencies themselves with regard to offices, staffing, etc.; and in terms of interested parties having to deal with two agencies rather than one. The 'experiment' of the past – in which dumping and injury investigations were split into separate directorates within DG Trade – was generally considered by survey respondents to be a disaster. EC interested parties appreciate an integrated, consistent approach to the whole investigation.

While a bifurcated, or completely independent, TDI service would have certain advantages, therefore, it does not appear to be a subject for further consideration.

4.8 Case handlers

Some survey respondents raised points relating to problems within case teams. However, these incidents seem to be isolated and teams normally appear to function well.

Concerns were also raised about the high turnover of staff. A particular issue was highlighted about instances where case handlers move on in the middle of an investigation.

Turnover of staff does create a problem for the TDI service. Know-how must be re-built when people leave and, given the extremely technical nature of TDI, there is a very steep learning curve. Training – especially of new entrants – and a learning culture, are therefore key.

However, the European Commission encourages staff to move jobs for career development and, looking at aspects other than TDI issues, this is desirable. Thus, turnover of staff is just something that has to be tolerated and worked with. It is, however, a justification for having some spare capacity in terms of staffing levels, such that continuity on cases can always be ensured when people move on to other jobs in the middle of an investigation.

4.9 Insufficient specialists (industry, accountants etc.)

The TDI service does not encourage specialisation e.g. in dumping or injury, in professional expertise in areas such as law or accountancy, in designating industry specialists etc. Moreover, in view of the sensitivity of posts in the TDI area, mechanisms have been introduced to make sure that staff members do not deal repeatedly with the same economic operators. Therefore, the Commission policy is that TDI officials should be prepared to deal with any case.

The advantage of this approach is that it allows an efficient utilisation of resources. The Commission does not have enough people to specialise in distinct tasks. Although there is more specialisation in the US, this is achieved with a much higher number of people.

It also ensures that case handlers remain independent and do not become unduly influenced by having built close relationships with particular industries or countries.

The Commission has 163 people currently working on TDI. This compares with around 300 and 75 people working on TDI in the DOC and ITC respectively. To put this into perspective, for the period 2000-2004, the US initiated 89% more anti-dumping cases than the EC yet there are 130% more people working on TDI in the DOC/ITC than there are in the European Commission.

It would be good to have some specialists such as accountants and perhaps a Chinese speaker (which the TDI service currently does not have). However, this is unlikely to be feasible within current resources. This is a broader Commission issue in terms of whether more resources could be allocated to TDI.

5. EFFECTIVENESS OF MEASURES

5.1 Overall effectiveness

There is overall satisfaction with the effectiveness of measures.

5.2 Circumvention & enforcement

This was the highest priority issue raised by many EC industry survey respondents.

Many of the problems with enforcing measures actually relate to issues outside the scope of DG Trade's brief. For example, many issues relate to customs problems, and therefore are more in the realm of national customs authorities, DG Taxation and Olaf (the EC fraud service).

However, one reason why industry has identified this as a priority issue is that, in the past, this has not been adequately addressed by the various institutions that may be involved. In this regard, EC industry has looked to DG Trade to take up the role of following up problems concerning the effectiveness of AD and AS measures, and of trying to improve coordination between the various agencies involved..

DG Trade (the TDI service) has increasingly taken on this role and has made considerable efforts to try and improve the effectiveness of EC AD and AS measures. However, it is not a role that was ever explicitly given to the TDI service. Nevertheless, it is a role that the TDI service has taken on and, in this regard, there are certain resource implications that perhaps need to be considered if these efforts are to continue.

The Commission was praised by many in the survey for adopting a flexible approach to finding solutions to enforcement problems and the Commission has been innovative in trying to improve the overall situation. This includes:

- *Ex officio* initiation of absorption and circumvention investigations where the Commission finds problems;

- Stricter on the acceptance of undertakings;
- Tighter monitoring and control of undertakings;
- Introduction of the possibility to withdraw undertakings with retroactive effect (e.g. see recent definitive duty on certain magnesia bricks from China; Regulation 1659/2005 Official Journal L267, 12. October 2005);
- Use of interim reviews to clarify how duties should applied when the product concerned is joined with other products but retains its distinct character. This has happened in relation to ammonium nitrate and zinc oxide.

The Commission has done an excellent job of trying to find ways that address problems in enforcing anti-dumping and anti-subsidy measures. All survey respondents support the policy of strict enforcement of measures, and the Commission has to be commended for the efforts it has made in this regard. However, the TDI service needs both support and cooperation from the other agencies that have a role in customs issues.

5.3 **Price undertakings**

Many EC industry survey respondents said that they do not like undertakings. However, the concerns raised relate primarily to enforcement rather than to undertakings *per se*. In this regard, the Commission has made significant efforts to improve the reliability of undertakings (see 5.2 above).

5.4 **Retaliation against EC companies for being involved in TDI actions**

There have been some serious instances of retaliation, but such problems appear to remain isolated. Most survey respondents had not experienced problems. However, it is possible that other cases remain unreported. The Commission should therefore stay vigilant in looking out for such issues, and in providing whatever assistance is possible when such instances occur.

6. **SAFEGUARDS**

Few views were expressed on safeguards, owing to a lack of experience with the instrument.

A number of survey respondents questioned why there is a conventional wisdom in the EC that safeguards should not be used.

Safeguards do have some attractive advantages, particularly in terms of some of the problems identified in this evaluation with other TDI (the burden on business, the speed of relief etc.).

It can be noted that safeguards are not relevant to all industries. However, they should not be ruled out as a possible instrument, since safeguards are potentially an important tool in the TDI armoury. Indeed, the EC has recently started to open some safeguard cases, which suggests that the past attitude of ruling out their use is now starting to change. In view of the advantages mentioned above, this may be desirable.