

**ANNEX 6 - ANALYSIS OF DIFFERENCES BETWEEN EC AND US TDI**

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## 1. INTRODUCTORY COMMENTS

This section is primarily based on a technical analysis of EC and US trade defence instruments (TDI) in order to identify the main differences. In addition, where survey respondents commented on differences between the EC and US, these are noted.

It should be noted that **this is not an evaluation of US TDI**. The purpose of the comparison with the US is to provide a benchmark against which EC TDI can be assessed. The survey has identified a list of issues that will be considered in the evaluation of EC TDI. Likewise, the technical comparison with the US will provide a list of differences which will be added to the list of issues for the evaluation of EC TDI. They will then be used to help in identifying strengths and weaknesses in EC TDI.

This section merely identifies the differences between EC and US TDI, without any detailed analysis of where such differences indicate a strength or weakness of the EC system. The analysis of the differences is incorporated into the evaluation in section 2 of the main report.

## 2. ANTI-DUMPING (AD) & ANTI-SUBSIDY (AS)

### 2.1 Procedure

#### (a) Who can bring complaints?

In the US, trade unions or groups of workers can bring complaints by or on behalf of a domestic industry. This does not happen in the EC.

Article 5.1 of the basic EC AD regulation states that an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

This means that a trade union could submit a complaint as an agent for an EC industry if it was empowered to do so.

#### (b) Threshold for anti-dumping complaints

Claims were made by EC industry that the EC is tougher on accepting anti-dumping complaints than the US i.e. that the threshold of evidence to initiate a case is higher for the EC than it is for the US.

This is a difficult issue to assess. However, it is useful to start by looking at the relative number of anti-dumping cases initiated by the EC and US. Looking at anti-dumping cases initiated, it is certainly true that the US has opened significantly more investigations than the EC since the creation of the WTO.

Number of anti-dumping investigations initiated<sup>1</sup>

	<b>1995-2004</b>
<b>US</b>	350
<b>EC</b>	287

However, it should be acknowledged that US imports are greater than EC imports. Therefore, it could be expected that the US would initiate more anti-dumping investigations than the EC overall.

In order to assess whether the US has higher propensity than the EC to initiate anti-dumping investigations, it is necessary to look at the number of initiations relative to imports. The following table does this for the years 2000-2004.

US and EC imports and anti-dumping investigations

	<b>Imports (bn euros)<sup>2</sup></b>		<b>AD Investigations</b>	
	<b>US</b>	<b>EU</b>	<b>US</b>	<b>EU</b>
<b>2000</b>	1297.6	995.6	46	31
<b>2001</b>	1278.9	983.4	77	27
<b>2002</b>	1235.9	941.5	34	20
<b>2003</b>	1124.7	940.4	37	7
<b>2004</b>	1181.6	1029.3	21	29
	6118.7	4890.2	215	114

Over the period 2000-2004, US imports were 25% higher than EC imports. At the same time, the US initiated 89% more anti-dumping investigations than the EC. This would suggest that, at least recently, the US has a higher rate of initiating AD investigations.

Over the longer period 1995-2004, the US initiated 22% more investigations than the EC, which is broadly in line with what might be expected given the higher level of US imports.

This evidence would suggest that **the US has relatively a higher rate of initiating anti-dumping investigations than the EC**. Of course, to really measure this, one would have to know the number of complaints received and rejected to make a definitive conclusion on the propensity to initiate anti-dumping cases. Nevertheless, the fact that the US proportionately initiates more cases than the EC is perhaps indicative of the fact that, as survey respondents claim, the EC has a higher complaint threshold.

It can be noted that the US and EC broadly adopt similar absolute numbers of definitive anti-dumping measures, particularly when the higher level of US imports is taken into account.

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<sup>1</sup> Based on WTO, European Commission and DOC statistics.

<sup>2</sup> All import data from DG Trade website

**1995-2004**

	<b>EC</b>	<b>US</b>	<b>US/EC</b>
Initiations	287	350	1.22
Provisional measures	190	297	1.56
Definitive measures	188	174	0.92

**2000-2004**

	<b>EC</b>	<b>US</b>	<b>US/EC</b>
Initiations	114	215	1.89
Provisional measures	85	180	2.11
Definitive measures	89	103	1.16

The above data confirms that, in the long run, the EC and US adopt similar levels of definitive anti-dumping measures<sup>3</sup>. For the recent past (i.e. 2000-2004), the US has adopted 16% more definitive measures than the EC which is not out of line with the difference in imports.

**The above would also seem to confirm that US initiation rates are relatively higher, particularly for the past five years.**

Overall, it is difficult to make definitive conclusions about the relative EC and US propensities to initiate anti-dumping investigations. The number of cases initiated depends on many factors, some of which will be unique to either the EC or US (including the number of complaints received). However, benchmarked against the US, it does appear that the EC initiation standard for anti-dumping complaints is stricter than – that of the US since the WTO was created. In addition, for the last 5 years the EC appears to have been applying a higher standard, perhaps bearing out what survey respondents said.

(c) The US does not formally assess injury at the complaint stage

One possible explanation for the apparently higher initiation rate in the US may be the fact that there is no formal review of injury by the ITC at the initiation stage. In the US, the DOC has sole responsibility for determining whether a complaint provides a sufficient basis to initiate an investigation. This means that the ITC, the agency responsible for injury, has no formal role in deciding whether or not there is sufficient evidence of injury to initiate an investigation. The DOC does review the injury allegations in the petition but this is not an in-depth analysis.

The EC assesses in detail whether there is sufficient evidence of both dumping and injury before initiating an investigation. Therefore, it does seem to be the case that the EC requires a higher level of evidence than the US in order to be persuaded to initiate anti-dumping investigations.

From the point of view of the US, the lower initiation threshold is balanced by the fact that the ITC makes a preliminary determination of injury relatively quickly. The preliminary

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<sup>3</sup> It can be noted that the US imposes significantly more provisional measures than the EC which, although not all US provisional measures are made definitive, is potentially more disruptive for imports..

injury determination is made by the ITC within 45 days of the submission of the complaint (i.e. 25 days after initiation of the case). Several survey respondents made the point that the injury threshold applied at this stage is perhaps higher than the injury threshold applied by the EC in accepting complaints.

An analysis of the stages at which investigations resulting in no measures are terminated perhaps backs up this point. From data for the period 2000-2003, as shown in the following table, it appears that 39% of cases resulting in no measures were terminated as a result of an ITC negative preliminary decision after only 45 days from submission of complaint (25 days after initiation of the investigation).

US AD and CVD investigations resulting in no measures<sup>4</sup>

	2000	2001	2002	2003	TOTAL	
ITC negative (prelim)	10	10	17	10	47	38.84%
ITC negative (final)	5	36	7	5	53	43.80%
ITA negative (prelim)	0	1	0	1	2	1.65%
ITA negative (final)	2	8	0	2	12	9.92%
Withdrawal	0	1	0	6	7	5.79%
TOTAL	17	56	24	24	121	100.00%

It appears to be the case that the injury analysis done at the initiation stage by the DOC is not as rigorous as the Commission's analysis of injury pre-initiation, thus explaining the higher initiation propensity of the US. Nevertheless, it may be the case that the ITC preliminary determination is possibly more rigorous than the EC pre-initiation injury analysis. It should be noted, however, that, to the extent that the preliminary ITC injury determination can result in termination of weak injury cases quickly, by this time, respondents already have had to fill in a questionnaire. Identifying weak injury cases at the pre-initiation stage is preferable to resources being wasted between initiation and a preliminary injury determination.

(d) Evidence required from complainants on prices

The EC requires firm documentary evidence of prices (usually invoices) in order to establish sufficient evidence of dumping. The US is more flexible. {The DOC will accept affidavits attesting to oral quotations or knowledge of actual prices, salespersons' "call reports", market research information provided by a market research firm etc.

(e) Effort required from complainants in preparing complaint

Those EC companies that had been involved in US cases felt that the threshold is slightly lower, but that the amount of documentation required of US industry is very significant.

One of the US participants in the survey from the complainants' side made the point that, in his experience, EC complaints seem less voluminous than US petitions. In looking at the non-confidential versions of US complaints they certainly seem to be at least as thick, and in some case significantly thicker, than EC complaints. Also, US petitioners point out that they typically incur \$1million legal fees for preparation of an anti-dumping complaint.

<sup>4</sup> Decisions are counted by country not by product. Thus, an ITC negative final decision involving 5 countries is counted as 5 negative decisions.

These facts seem to be correct. However, this is partly due to a much more formalistic approach in the US than in the EC. There is no evidence that the more formalistic complaints contain more substance than EC complaints. In fact, as discussed above, the reverse seems to be true in some cases. This does not mean, however, that US complainants can merely turn up at the DOC and they will be successful in getting a case initiated.

(f) Early injury determination

Some US commentators pointed out that under the US approach, all parties have a chance to go through injury arguments very early on in the case.

While the DOC may apply a lower injury standard than the EC on initiation of cases, the ITC preliminary injury analysis may well apply a higher standard than the EC applies in assessing complaints. This means that there is an opportunity for those opposing the imposition of measures in the US to intervene early if the injury case is weak and to get the case closed.

In the EC, interested parties do not have chance to comment on the injury case until the case has been initiated. Then it will be 9-15 months before any decision is made compared to the initial 45 day injury decision in the US. At the same time, this apparent disadvantage of the EC system in fact gives all parties (and not only those who can afford costly legal counsel to be able to make rapid representations) a proper opportunity to fully exercise their rights of defence before the far reaching decision on whether or not to impose measures.

Also, it can be noted that the US has a much higher proportion of provisional measures that are not made definitive compared to the EC (see 2.1(s) below). From data presented in section 2.1(b) above, for the past five years, the US adopted 111% more provisional anti-dumping measures than the EC yet only 16% more definitive measures. This may imply that some weak injury cases may make it through to the definitive stage of the investigation before they are thrown out but in the meanwhile provisional measures are adopted. In other words, the early injury determination does not necessarily apply a high injury standard before provisional measures are adopted. The fact is that of the 83% of US anti-dumping investigation terminated without measures on the grounds of no injury, more than half of them were not terminated until the definitive stage of the investigation (44% of all terminations were at the USITC final stage compared to 39% at the USITC preliminary stage).

A much higher proportion of EC provisional anti-dumping measures are made definitive than is the case for the US. This would suggest that the EC provisional injury analysis is almost at the standard of its definitive analysis and, therefore, much higher than the US preliminary injury analysis.

Overall, therefore, the ITC preliminary injury analysis may well be not much more than the standard applied by the EC at the complaint stage.

(g) Questionnaires

Both the EC and US use detailed questionnaires to collect information from cooperating parties.

In the EC, questionnaires are sent to exporters, importers, EC producers and users. Each of these groups receives a single questionnaire which is dispatched at the start of the investigation.

Because of the bifurcated nature of the US system (see 2.6), cooperating parties receive different questionnaires from the DOC and ITC. The DOC, like the EC, basically sends out one questionnaire, though there can be supplemental questionnaires. Unlike the EC, however, the ITC usually has several rounds of questionnaires during the various phases of the investigation.

In the US, the ITC collects additional information after preliminary measures have been adopted taking into account additional periods to the information requested in the original questionnaires. This means that the ITC can use updated data during the investigation. EC practice, on the other hand, is to have one round of data collection and then for the whole investigation to be based on that data (the DOC approach is basically the same as that of the EC). Thus, for the analysis of dumping, injury and causal link, updated data is not usually used. In fact it is European Commission policy to ignore data relating to periods following the investigation period.<sup>5</sup>

EC industry survey respondents who had experience of US anti-dumping cases stated that, for exporters, the questionnaire is much more onerous than the equivalent questionnaire used by the EC.

(h) Assistance to complainants, particularly SMEs

The EC has a number of initiatives to assist SMEs. Likewise the US provides assistance to SMEs (the DOC's Petition Counselling and Analysis Unit and the ITC Trade Remedy Assistance Office).

However, the point was stressed by many participants in the US survey that it is virtually essential to use counsel in US proceedings. The cost of obtaining counsel may make it much more difficult for SMEs to file cases in the US. In some instances, however, US Producers may form ad hoc groups that share the expense of counsel.

In the EC, industries more often than not submit complaints without the use of a law firm (usually done through relevant industry associations).

(i) Cooperation and ability to participate in the investigation

In the EC, whether an exporter is considered cooperating or not depends on whether the questionnaire is completed and on-site verification takes place. Non-cooperating exporters do not normally play any role in the investigation including submitting injury arguments.

In the US, exporters sometimes choose not to participate in the DOC dumping investigation and instead focus on injury at ITC. There is a perception amongst some that the DOC always finds dumping, and that their money is better spent on a defence at the ITC where a significant number of investigations are terminated.

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<sup>5</sup> This is not the case for the analysis of Community Interest which is a more prospective analysis.

In the EC, there is nothing in principle that stops the Commission from accepting injury arguments from exporters that have not completed the questionnaire. Moreover, an exporter can also have its own injury margin even without cooperating for dumping purposes provided that it fully cooperates with regard to its export prices and related information. However, such partial cooperations occurs rarely..

Exporters are often represented in the injury investigation by an industry association that will organise an injury defence on behalf of the whole industry. The EC always accepts such participation from industry and trade associations, provided that the normal deadlines are respected.

Thus, it would appear that this is not a major difference between the EC and US.

(j) Verification

The general practice of the EC is to verify the questionnaires of as many parties as possible. Unless sampling has been used, it will verify all questionnaires received from complainants and respondents. It also often verifies questionnaires completed by importers and users.

The DOC adopts a similar approach with regard to respondents.

However, unlike the EC, the US does not verify all complainants. The ITC will generally only verify information from the biggest US producer(s).

In the EC survey, some claimed that the EC verifies petitioner's questionnaire responses much more thoroughly than US does. This appears to be true. Verification usually occurs prior to the adoption of provisional measures. Even after provisional measures the EC appears to be more systematic in conducting verifications of the data provided by complainants.

The ITC verifies at least one US producer (after provisional measures) and sometimes two. Usually companies that have the greatest financial impact and largest financial losses are the ones selected and two to three days are spent at each company. This contrasts with EC where the general rule is that questionnaire responses of all complaining companies are verified.

(k) Lower US tolerance of incomplete or inaccurate information

There appears to be a difference between the EC and US approach at verification. The US is stricter than the EC on the necessity for information provided in the original questionnaire response to be almost fully complete and accurate. In the US, companies must certify as to the accuracy of information provided. Incorrect information is often heavily penalised through rejection of information and use of facts available (though "neutral" facts available are used for minor inadvertent errors).

The Commission adopts a more flexible approach and allows small errors or omissions to be put right at the verification. Whilst the DOC has a practice of allowing correction of minor errors or omissions at verification, survey respondents made the point that the US is more formal than the EC in its approach at verification.

The lower tolerance of the US to incomplete or inaccurate questionnaires, and the use of best information available and adverse inferences, has the result that respondent exporters make every effort to provide very reliable information. Companies know they may be subject to

verification and the level of accuracy is generally high. The DOC usually only find small inaccuracies at verification.

For the EC, there appears to be a lower threshold of completeness and accuracy which, if it is met, means that the Commission will be quite flexible in receiving corrections and additional information during and sometimes even after the verification. .

(l) Longer verifications

A verification of a full exporter's questionnaire response by the DOC typically lasts for two weeks (one week for sales, one week for costs).

For the EC, they are usually 2-3 days in total.

This suggests that the US is more thorough in verifying the responses of exporters. However, one survey respondent claimed that US exporters' verifications tend to be very formalistic and like a complete audit of the information contained in the questionnaire. The EC approach is different in that within 3 days a lot less can be done.

(m) Confidentiality

US law requires that the administrative records of anti-dumping and countervailing duty proceedings include copies of all information presented to or obtained by the DOC. Interested parties have extensive access to the administrative record, which is facilitated by a requirement that written submissions must be provided ("served") by the submitting party to all other interested parties. With regard to confidential information, independent representatives (normally legal counsel) can have access to business propriety information under an Administrative Protective Order (APO) (see annex 5, 2.2(r)).

In the EC, interested parties only have access to the non-confidential files, which usually – due to inherent limitations in summarizing confidential information - contain little information. The EC does not have an equivalent to the APO system.

The implications of this are quite far reaching. In the US, for example, lawyers and consultants representing complainants can go through all of the exporters' dumping calculations and try to find reasons why the dumping margin should be higher. By the same token, respondents have full access to Commerce's calculations and therefore can ensure that the information has been used correctly and argue for changes that would bring the margin down. In the EC, neither complainants, nor their lawyers, have access to any confidential information from the exporters. Thus, very little information is known about the detail of the dumping calculation, either by EC complainants or by their advisers. This means that a lot of trust is put in the European Commission. It also means that it is harder for complainants to challenge a dumping calculation by the Commission because they do not have sufficient information to do so. This is quite the opposite in the US where complainants regularly challenge DOC dumping calculations in the courts.

On the other hand, the fact that lawyers can do so much work with the confidential data has a significant cost implication.

(n) Publicly available information

The US has much more information publicly available than the EC. Indeed, non-confidential documents are actually available to the public in the US. All non-confidential documents relating to an investigation are available to any member of the general public who visits the reading room.

All parties that participate in a proceeding are placed on a public service list. Whenever a party makes a submission, the party must provide each person on the public service list with a copy of the public version (i.e. excluding confidential information) of the submission.

In the EC, non-confidential information is only available to those interested parties that have registered their interest in the investigation.

(o) Availability of complaint

In the US, the non-confidential version of the complaint becomes publicly available as soon as it is submitted to the DOC i.e. before a decision has been taken to initiate. This is also different from the EC where the fact that a complaint has been received is formally kept confidential until the day of initiation.

(p) Provisional Measures

When provisional measures are imposed, they come into effect much earlier in the US than in the EC.

In the EC, provisional measures do not come into effect until the maximum deadline of nine months has passed both for AD and AS measures.

For the US, provisional measures are adopted as early as 140 days from initiation and, in fact, once the ITC has made its preliminary determination after 25 days (45 days from submission of complaint), industry is virtually certain that preliminary measures will be adopted due to the extremely low number of negative dumping findings at the DOC preliminary stage. In fact, between 2000 and 2003, there were only two cases of a negative preliminary DOC finding (less than 2% of all negative determinations during this period). Thus, 25 days after initiation (i.e. preliminary ITC determination) parties know whether or not there will be provisional measures. In the EC, this is not known for nine months.

The 45 day preliminary injury investigation is thorough and there are often negative determinations at this stage. By contrast, in the EC, once a case has been initiated, it is unlikely to be terminated for at least nine months and possibly even fifteen months. However, as noted in 2.1(s) below, it appears that US provisional injury analysis is not at the same level as that in the EC. Of course this makes sense given that the comparison is between a 45-day preliminary injury investigation with no verification, and a 9-month EC investigation with all information verified.

A practical example of the difference in timing of provisional measures is shown in appendix 1 for the TCCA investigation. This involved the EC and US having AD investigations on basically the same product (both investigations included China).

## (q) Price Undertakings

In the US, normally price undertakings will not be accepted unless complainants agree. That is not the case in the EC where price undertakings can be adopted in situations where the EC industry would have preferred to have anti-dumping measures.

## (r) 'Success rates'

The proportion of investigations initiated that result in definitive measures being adopted is sometimes called the "success rate".

We can calculate success rates for the EC and US based on the proportion of decisions to impose measures as a proportion of the total decisions for each year.

	EC definitive ADD as % of total decisions <sup>6</sup>	US definitive ADD as % of total decisions
1980-2004	55%	42%
Of which:		
1980-1994	53%	39%
1995-2004	57%	50%

For the period 1980-2004, 55% of EC AD investigations resulted in the imposition of definitive AD measures. For the US, the figure appears to be lower at 42%. This would suggest a much higher 'success rate' in EC investigations than in the US.

The implication of this is that the EC has terminated less cases than the US taking into account this period as a whole. This would appear to back up the belief that the US has a lower threshold for initiating anti-dumping cases but is just as tough as the EC in adopting measures.

For the EC, the trend pre- and post-WTO has not really changed. Interestingly, however, the picture for the US is slightly different looking at the period since the creation of the WTO. Between 1980 and 1994, 39% of US investigations resulted in measures, whilst the success rate increased to 50% for the period 1995-2004. The US success rate is now closer to that of the EC.

The fact that there is a difference between success rates at least partly reflects the fact that a significant number of cases are terminated at the preliminary ITC stage. As noted above, this is perhaps due to the fact that a lower injury threshold is applied by the US at the initiation stage but that some of the weak injury cases are thrown out at the preliminary ITC determination only 25 days into the investigation. It is suggested that such cases would probably never have been opened in the EC, which would explain why there appears to be a lower success rate in the US.

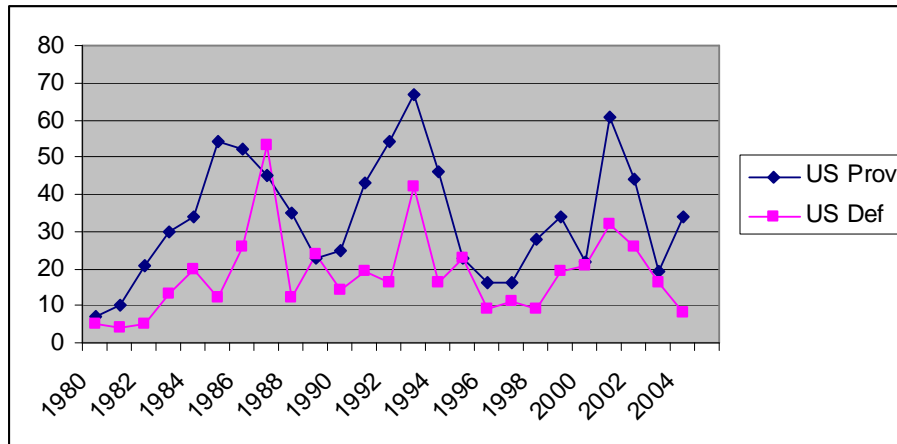
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<sup>6</sup> Note that these figures do not include cases where the complaint was withdrawn which, in the absence of the withdrawal, would have resulted in a negative decision. In the EC, this can cover up to one third of cases meaning that the percentages of the EC are in all likelihood overstated.

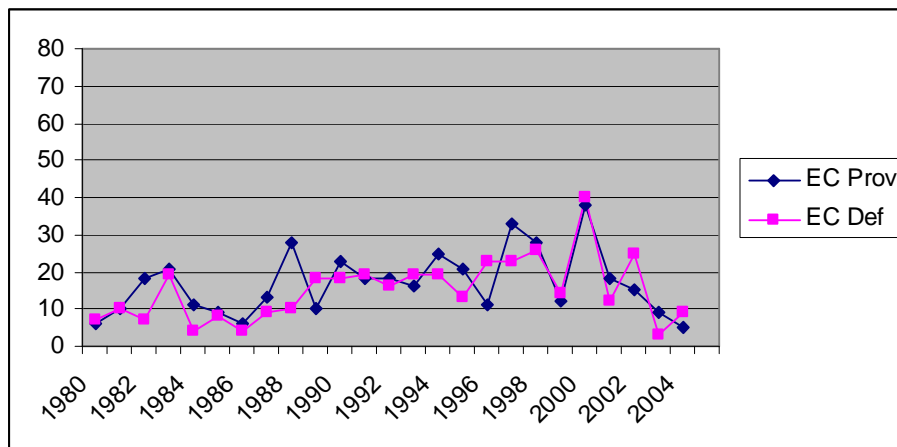
## (s) Proportion of provisional measures made definitive

Taking the period 1980-2004, the extent to which provisional measures are made definitive is shown in the following graphs.

US Provisional and Definitive Measures 1980-2004



EC Provisional and Definitive Measures 1980-2004



Looking at the two graphs above (which are both on the same scale), it is clear that there is a bigger gap between provisional and definitive measures in the US than in the EC.

We can aggregate the total number of provisional measures for this period and express them as a proportion the total number of definitive measures. This is not a precise measure as there will be definitive measures in 1980 where the provisional measure was adopted in 1979. Likewise, there will be provisional measures in 2004, where the definitive measure is in 2005 and not included in the data. However, for the period as a whole, this will be a relatively small issue, and the calculation should provide a good indicator of the extent to which provisional measures are made definitive.

For the EC the provisional/definitive ratio is 89%, while for the US it is much lower at 54%. This suggests that the EC is applying a higher standard in adopting provisional measures. In

fact, it implies that EC provisional determinations may not be so provisional and are, in fact, a draft version of the definitive determination. In considering the lower figure for the US, it should be taken into account that it can be expected by their nature that not all provisional measures will be made definitive. The EC is perhaps applying a level of analysis that is higher than is actually required for a decision that is provisional in nature.

(t) Disclosure

There is no formal disclosure of definitive dumping and injury findings in the US prior to the adoption of definitive measures as there is in the EC. Disclosure conferences are held after preliminary and final determinations, at which time the margin calculation is provided. The parties have an opportunity to request correction of ministerial (clerical) errors in the calculation.

The situation is different in the EC where all interested parties receive written disclosure packages setting out details of relevant calculations (as appropriate given confidentiality requirements) and all legal reasoning. For provisional duties, disclosure normally occurs just after provisional measures have been adopted. In the case of definitive duties, the disclosure documents are sent some way in advance of the measures actually being adopted.

However, the fact that APO gives interested parties' representatives access to the confidential files of the DOC and ITC means that additional disclosure is not as necessary, since every detail of the case can be followed throughout the investigation. The implication of this, however, is that in order to fully exercise their rights of defence, interested parties must engage counsel to be able to take advantage of APO access. Whilst a respondent without counsel can receive full disclosure of its own margin calculation and public DOC decision memoranda etc, they will not be able to defend themselves as well as respondents being advised by counsel with access to much more information through the APO system.

(u) Magnitude of measures

At face value, US anti-dumping measures appear to be generally higher than in the EC when initially imposed following the investigation.

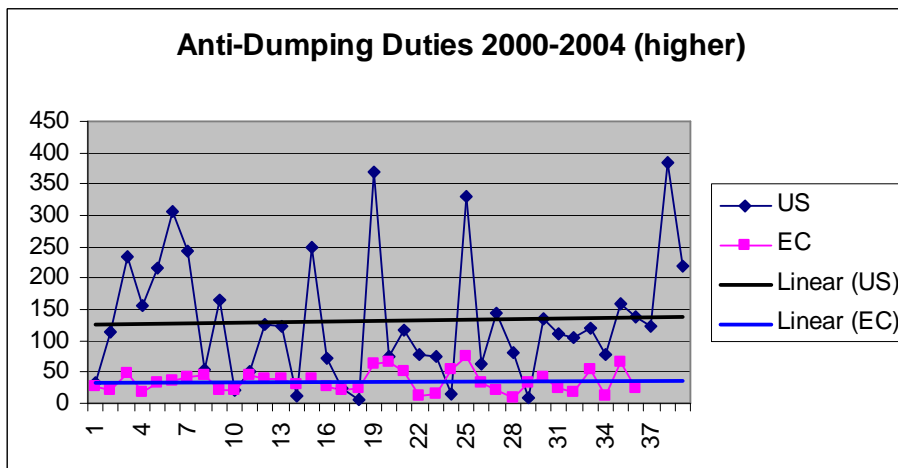
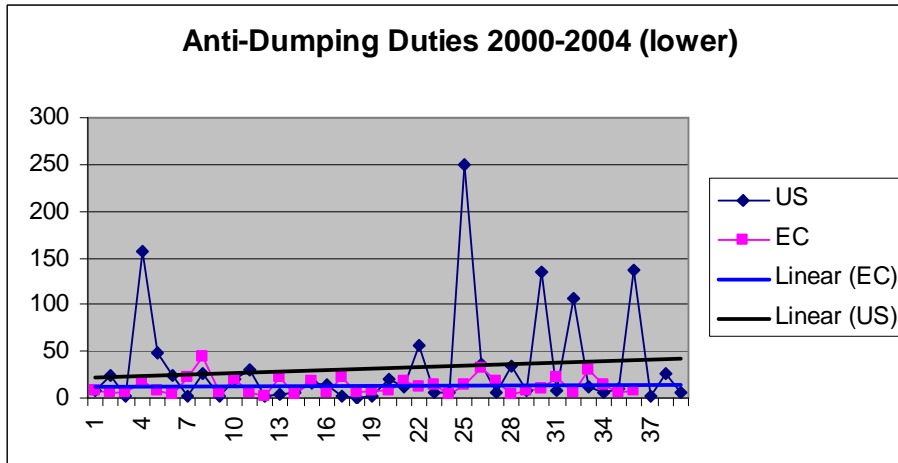
Because different duties are applied to different companies, there is always a range of duties applied in any particular case. We have analysed the upper and lower end of these ranges to see if there is any systematic difference between the EC and US.

The following charts indicate the level of all measures adopted by both the EC and US for the period 2000-2004<sup>7</sup>. The measures for the EC and US are graphed in date order but the dates do not necessarily correspond between the EC and US. Nevertheless, the charts do provide an interesting overall picture of the relative duty levels during this period.

Trend lines have been added. They do not measure any real trends except they reflect the fact that the US duties, on average, are higher than the EC ones.

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<sup>7</sup> The EC cases were taken by date of imposition while the US cases are on the basis of date of original initiation of the investigation. However, for the purpose of comparing overall levels of duty, this makes no difference.



The above graphs demonstrate that there is a clear and systematic difference between EC and US duty levels. Of course, one would expect that measures would vary from case to case according to the particular circumstances. Looking at the overall figures does not take into account the fact that the products and countries analysed are different. However, if this was the explanation for the difference, one would expect that over time such differences would cancel out (i.e. sometimes the US would be higher, sometimes the EC would be higher).

To further support the fact that initial US duties are systematically higher than EC duties, we have identified parallel cases (i.e. where both the EC have investigated the same product from the same country). Of course, these investigations do not necessarily cover the same time period but they do seem to support the hypothesis that US duties are, on average, higher than the EC. Again, the comparison has been done for the upper and lower ends of the range of duties applicable.

High duties (%)

Case	Country	EC	US
Hand pullet trucks	China	46.7	383.6
Foundry coke products	China	43.6	214.89
Trichloroisocyanuric acid (TCCA)	China	42.6	285.63
Barium carbonate	China	31.7	81.3
Silicon	Russia	23.6	79.42

Low duties (%)

Case	Country	EC	US
Silicon	Russia	22.7	56.11
Foundry coke products	China	43.6	48.55
Barium carbonate	China	3.4	34.44
Hand pullet trucks	China	7.6	26.49
Trichloroisocyanuric acid (TCCA)	China	7.3	75.78

Finally, we can include some older data<sup>8</sup> that confirms the same trend.

	1990-1994		1995-1999	
	Median Duty	Mean Duty	Median Duty	Mean Duty
<b>US</b>	56.2	37.9	47.6	30.9
<b>EC</b>	31.0	22.0	27.7	24.8

There are a number of comments that can be made about the fact that US duties appear to be higher than EC duties;

- Most of the common cases identified above involve China, for which both the EC and US still use non-market economy methodologies. The NME methodology used by each is different (see 2.2(b) below) which can give dramatically different results and is probably the cause of some differences above.
- There is no lesser duty rule in the US. US measures are based on purely on the dumping margin whereas in the EC, a significant number of duties are based on the injury margin as a result of the lesser duty rule (though as indicated in 2.2(a), even looking at EC and US dumping margins, there is a difference).
- The differences in the US and EC duty collection systems (see 2.1(aa)) need to be taken into account when comparing the level of duties paid. For the US, the duty rates quoted above are those based on the data in the original investigation. However, it is possible that these rates are more or less than those actually paid. For an exporter

<sup>8</sup> Anti-Dumping action in the US and around the world. June 2001. Congress Budget Office.

that requests an administrative review each year, the duties payable will depend on the actual data for each one-year annual review period. For such companies, the original duty rates are only the "cash deposit" rate (a type of security until the actual duty level is known). However, for a company that does not request administrative reviews, this is the level of duty that will apply.

(v) Impact of administrative reviews on US duty levels

With regard to administrative reviews and the possibility for rates to come down from those found in the original investigation, we have tried to collect some data to look at the impact of such reviews. However, no data is readily available apart from the annual number of administrative reviews completed (source: DOC website).

1995	1996	1997	1998	1999	2000	2001	2002	2003
96	126	104	111	92	86	74	81	65

This data must be carefully interpreted. Each administrative review relates to one or more exporters and will result in importer-specific assessment rates. If, for example, two importers have bought products from an exporter, an administrative review would calculate the level of duty payable by each of the importers.

In order to be able to assess the impact of administrative reviews on the level of duty actually payable in the US, we have tried to identify some examples of recent administrative reviews. We have identified the reviews from two sources a) US notification of anti-dumping activity to the WTO (document G/ADP/N132/USA) and b) administrative reviews published in the Federal Register up to September 2005. This is not supposed to be an exhaustive analysis but at least gives an indication of what happens in US administrative reviews (where a range is given, more than one exporter was involved).

Product (Source)	Original	After Review
Honey (Argentina)	27.04%-55.15%	0.00-55.15%
Stainless steel plate in coils (Argentina)	9.86%	2.71%
Carbon and certain alloy steel wire rod (Brazil)	94.73%	98.69%
Softwood lumber (Canada)	2.26%-15.83%	0.91%-9.10%
IQF raspberries (Chile)	6.33%	0.25%-13.41%
Stainless steel bar (Germany)	13.63%	0.01%
PET film	24.14%	6.28%
Carbon and certain alloy steel wire rod (Mexico)	20.11%	1.06%-5.45%
Glycine (China)	155.89%	2.95%
Automotive replacement glass windshields (China)	9.84%	0.93%-0.91%
Preserved mushrooms (China)	121.47%-198.63%	0.24%-198.63%
Garlic (China)	376.67%	10.78%-19.68%
Uranium (France)	19.95%	12.62%
Stainless steel bar (India)	12.45%	19.8%

The above table suggests that in most cases, the administrative reviews did result in lower duties, in some cases very significantly lower. In three cases (shaded), it appears that the review resulted in a higher duty.

Complainants, exporters and importers all have a right to request a review. Thus, complainants can request a review if they believe that the dumping margin has increased and

importer or exporters can request a review if they believe that the dumping margin has gone down. Importers can only request a review for the exporters from which they have exported the product concerned.

Of course, amended rates in an administrative review will only apply to the company subject to the review. The original investigation rates would still apply for exporters who have not had a review.

Of course, in the EC, there is the possibility for measures to be reviewed through an interim review.

#### EC Interim Reviews

1996	1997	1998	1999	2000	2001	2002	2003	2004
20	7	16	15	20	14	35	8	26

However, few of these interim reviews relate to reviews of the level of the dumping duty. In 2004, only one out of 26 interim reviews related to an attempt by exporters to get a lower duty. Moreover, this case was tied in with an expiry review, so it was not actually during the five year duration of the measure. ]

#### (w) Judicial Review

There are far more challenges to anti-dumping and CVD orders in the US than there are in the EC.

In the EC, we have calculated that there have been 124 CFI and ECJ cases between 1970 and 2005 concerning TDI (see annex 7, 4.1). In the US, no data is produced on the number of AD/CVD cases challenged. However, we have checked the Court of International Trade's electronic docket and there were approximately 143 complaints filed in the past 12 months regarding AD/CVD cases. The actual number of administrative decisions challenged is less, because it is frequently the case that multiple parties file and then the cases are consolidated. Nevertheless, it is confirmed from this data that there is far more TDI litigation in the US than in the EC.

Judicial review in the US is used more by both parties (petitioners and respondents), whereas historically in the EC few cases have been taken by petitioners (though this has changed more recently e.g. EFMA, Eurocoton and Eurometaux). Overall, complainants have accounted for around 10% of all cases where the Commission has been challenged on TDI. In the US, again there are no figures breaking down the plaintiffs in TDI court challenges. However, one of our experienced lawyers in Washington DC estimated from experience that the split between complainants and respondents is pretty even, with perhaps respondents being a little ahead. Note also that it is not uncommon for both sides in the US to file challenges.

A further difference relating to judicial review is that, in the US, it is possible for the courts to remand cases. (Cash deposits are still collected while the case is on remand).

One possible implication of the much higher incidence of judicial review in the US is that the European Commission has somewhat more discretion, since less scrutiny by courts means that it is less likely to be challenged. Some survey respondents told us that the DOC and ITC

are over-thorough – down to the very last detail – because they are more likely to be scrutinised.

This may not be a difference to do with TDI. It has to be recognised that US business is generally more litigious than its EC counterpart. Legal cultures in the EC and US are very different and this has implications for the discretion that is conferred on authorities. Ultimately, therefore, this may not be so much a difference in US and EC TDI but, rather, a difference in legal culture.

(x) Cost

It is clear that the US system is much more costly than the EC both for complainants and respondents. Questionnaires are bigger and verifications are longer, resulting in heavy legal procedures and costs.

Also, in the US it is very rare for a petition to be filed without counsel. This makes it difficult for small industries composed of SMEs to make complaints.

Although many determinations are appealed in the courts, and this would appear to be desirable because it makes the DOC and ITC very careful in its actions, the appeals take a long time. This becomes very expensive for plaintiffs because the DOC and ITC will often appeal adverse rulings. There are cases where the outcome of administrative reviews are appealed and – even before the case is finalised – the next review is started. Appeals relating to different strands of the same case may be taking place at the same time, which is extremely confusing and costly to administer for the plaintiffs.

In the EC, industries often submit complaints without law firms assisting them. In addition, while exporters who respond to an EC TDI investigation often retain counsel in the EC, the fees are very modest compared to those typically quoted in the US.

(y) Interim reviews

The key difference on interim reviews relates to duty collection. In the EC, interim reviews are the only means by which an exporter can get the duty level amended. In the US, because this can be done through the administrative review process, interim (or 'changed circumstances') reviews have much less importance.

(z) Expiry reviews

With regard to expiry reviews, an EC survey respondent claimed that the US has a higher proportion of expiry reviews that result in continuation of the measures. It was claimed that the US operates under a presumption of the recurrence of problems; rather than requiring a positive finding of the likelihood of a recurrence of problems, as is the case in the EC.

Indeed, the US has had problems of WTO consistency with its approach to expiry reviews in terms of establishing the likelihood of recurring problems if duties were allowed to expire (OCTG and the corrosion resistant steel cases).

Reviewing the data has established that the US initiates a higher proportion of expiry reviews than the EC and, of the reviews initiated, the US maintains measures in a higher proportion of cases than the EC.

	EC		US	
	Jan 00 – 19 Oct 05		Jan 00 - 4 Oct 05	
	No	%	No	%
<b>Cases due to expire</b>	142		115	
<b>Expiry review initiated</b>	60	42.3%	97	84.3%
<b>Expired without review<sup>9</sup></b>	82	57.7%	18	15.5%
<b>Number of expiry review decisions</b>	38		71	
<b>Extension of measures</b>	21	55.3%	63	88.7%
<b>Termination of measures</b>	17	44.7%	8	11.3%

The US figures are based on normal expiry reviews and do not include transition reviews (i.e. relating to pre-1995 measures).

For the period analysed, the EC has a much higher proportion of cases that expired without review; 57.8% compared to 15.5%.

Furthermore, of those reviews initiated, 88.7% of US cases resulted in a continuation of the measure. For the EC, the figure is lower at 55.3%.

(aa) Retrospective duty collection

EC duties are set prospectively and, unless an interim review is requested, which is relatively rare, the level stays the same for the five year duration of the duty. In the US, duties are calculated retrospectively based on an administrative review of actual export prices for the previous year and, as noted above, the levels often decline.

One of the key differences here is that in the EC, if an exporter subject to anti-dumping duties raises prices, the duty is still applied to the higher price. In the US, if the price is increased, the duty paid will be less. Further, if the price is equal to or above the normal value, no duty will be paid i.e. exporters can get 0% margin regardless of what their initial margin was.

If the dumping margin is zero in three consecutive administrative reviews, the exporter can be excluded from the duty order. This means that they are also excluded from any future expiry reviews. They can only be brought back in with a new complaint.

Some US survey respondents raised negative points about the retrospective system. The issue raised was that it creates a problem of uncertainty for exporters and importers. It is difficult to stay in the market because the importer takes on an uncertain liability. For US industry also it can be problematic because US industry has no certainty that duties will remain in place. EC industry does have greater certainty through the fact that duties, once adopted, often remain in place for 5 years.

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<sup>9</sup> For the US, expiry reviews are automatically initiated. The figure for the US under this row measures the number of cases where the measure was revoked because there was no domestic response to the DOC's notice of initiation i.e. neither the DOC or ITC made any assessment whether the measure should be revoked or not and the measure was allowed to expire.

Some US survey respondents told us that manipulation of administrative reviews and new shipper reviews reduced the effectiveness of protection received by anti-dumping duties and that the EC system does not have the same scope for manipulation.

## 2.2 Dumping

- (a) Dumping calculation methodologies are similar but small differences can be significant

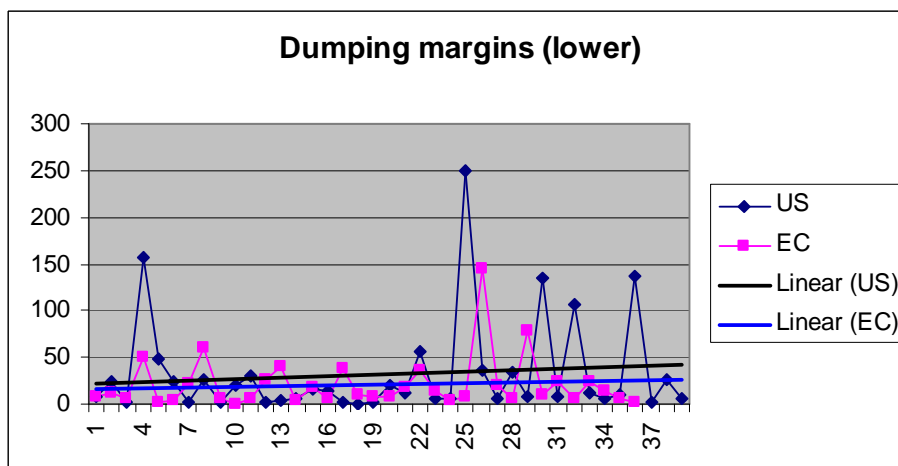
Both the EC and US closely follow the WTO Agreement in relation to the calculation of dumping and to that extent the two methodologies employed are extremely close. However, despite the detailed rules contained in the WTO Agreement and – on the whole – both administrations' close observance of these rules, there are some differences.

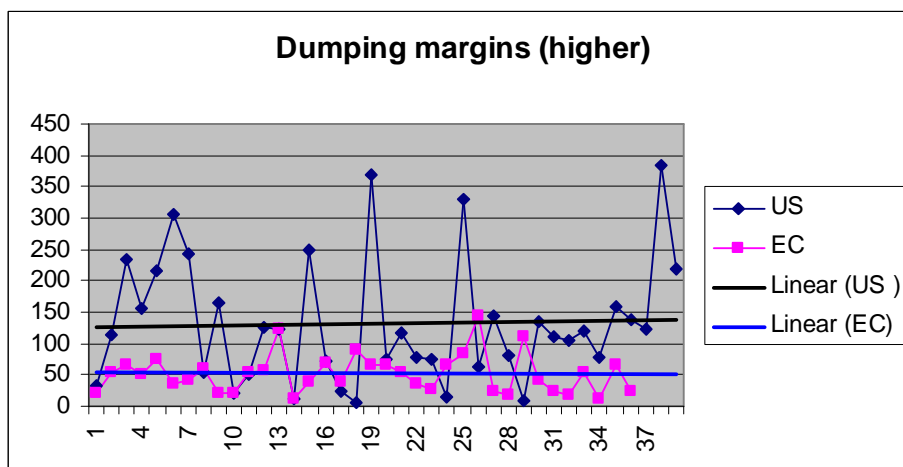
As agreed with the Commission, an extensive survey of every small difference in US AD law and procedure with regard to the substance of the dumping calculations is not within the scope of this report. However, we have identified some of the principal differences and these can have a significant impact on the dumping margins calculated.

An analysis of the dumping margins found by both the EC and US for the last five years shows that the range of US margins is significantly higher than for the EC. Of course, for the US, the dumping margins found are equal to the measures applied (reviewed in 2.1(u) above). For the EC, however, the dumping margins are not always the basis for the dumping duty and, therefore, on average the EC dumping margins are higher than the EC measures applied.

The following charts indicate the level of dumping margins found in the definitive determinations by both the EC and US for the period 2000-2004. The measures are graphed in date order but the dates do not necessarily precisely correspond between the EC and US. Nevertheless, the charts do provide an interesting overall picture of the relative levels of dumping margins calculated during this period.

The trend lines have been added. They do not measure any real trends except they reflect the fact that the US margins, on average, are higher than the EC ones.





There are many reasons why the level of dumping margins may vary, and one of them is the different methods used for calculating dumping margins.

The point was made by some US respondents that care should be taken in comparing margins. First, it was claimed, the initial margin is only relevant for a) determining de minimis or zero dumping and b) setting cash deposit rate for first year. In many cases, actual duty paid is lower due to administrative reviews (which indeed is true as we have established in 2.1(v)). However, administrative reviews are company specific and therefore the higher level of duties still apply to other companies that have not requested such a review.

Second, the point was made that, in most cases, there is no difference between 50% and 350%. Thus, the high end of the dumping margins is irrelevant. If you compare the low end of duty ranges, it was claimed, the US is as low as the EC. Our analysis suggests that this is not true and the lower US dumping margins are in fact higher in general than for the EC. However, it is true that the gap between the margins is smaller at the lower end of the range than for the higher levels.

It is particularly interesting to compare similar cases involving the same products and countries. This confirms that US margins do appear to be higher.

#### Highest dumping margins found (%)

Case	Country	EC	US
Hand pullet trucks	China	46.7	383.6
Foundry coke products	China	60	214.89
Trichloroisocyanuric acid (TCCA)	China	42.6	285.63
Barium carbonate	China	31.7	81.3
Silicon	Russia	24.8	79.42

Lowest dumping margins found (%)

Case	Country	EC	US
Silicon	Russia	23.6	56.11
Foundry coke products	China	60	48.55
Barium carbonate	China	3.4	34.44
Hand pullet trucks	China	7.6	26.49
Trichloroisocyanuric acid (TCCA)	China	7.3	75.78

It is hard to explain why US low margins tend to be higher than EC low margins. The high margins can be explained, at least partly, by the US being more prone to use facts available with adverse inference.

Also, the highest margins may also be affected by differences in the approach to calculating residual duties when there is a high level of non-cooperation. In the EC, the residual duty in the situation of a high level of non-cooperation is often based on the highest dumped model whereas in the US it is often based on the highest dumped transaction.

## (b) Normal Value

A number of differences in relation to normal value exist. These principally relate to issues that are not dealt with by the WTO Agreement. Examples include:

- The **5% representativeness test** for domestic sales is done for each model/type in EC, whereas it is only done globally in US. Thus, as long as domestic sales are at least 5% of export sales, the DOC will use all types/models to assess normal value. In the EC, the Commission applies the text globally in the same way as in the US, and then on a type by type basis. Thus, the Commission can reject prices of individual types that fail the 5% test, while such prices would be used by the DOC.
- In the WTO Agreement, while there are rules on the maximum proportion of sales below cost that is permissible (i.e. if loss making transactions account for less than 20% of all sales by volume, those prices must stay in the normal value determination) there is no guidance on a **minimum level of profitable sales** on which to base normal value. In the EC, the Commission has adopted an informal guideline that sales at a profit must constitute at least 10% of the sales by volume. The DOC has no such minimum level of profitable sales.
- If the DOC finds that one exporter has a **zero, or de minimis, dumping margin**, that exporter drops completely out of the scope of the measure. This means that it is excluded from all future reviews of the measure. If it is felt that such a company has started dumping, a whole new investigation must be started. In the EC, this is not the case. Zero or de minimis dumping margins mean that no measure will apply. However, in future reviews, the Commission can re-consider the position of such exporters if the evidence warrants it.
- There is a significant difference with regard to the method used to calculate normal value in **non-market economy** (NME) situations.

- The EC selects an analogue country. This requires at least one company in that country to complete a questionnaire on domestic prices and costs which is used as the basis to determine the normal value in NME situations.
- In the US, the DOC will analyse the production process of the NME exporters and the volume of all inputs used. The inputs (or factors) are valued in a surrogate market economy (imputed market economy values). The DOC publishes data used in previous investigations as to provide a guide for future cases.
- A further difference with the EC is that there is much more comment and debate in the US on the surrogate values used. In the EC, comments must be received on the choice of analogue country within 10 days of the initiation of an investigation. In practice, due to the need to find a cooperating company in other countries that might be proposed, it is in fact very difficult to challenge the analogue country to be used. In the US, while DOC will start off with certain values that it has itself determined or the parties have submitted, there can be significant changes depending on what other evidence parties submit. The DOC even allows the use of actual input costs in an NME situation where the input has been imported from a market economy.
- The EC has developed an approach whereby individual companies can apply for **market economy treatment**. In addition, whilst not set out in the regulation, the EC has informal procedures for reviewing the treatment of countries in transition to market economies and can graduate countries to full market economy status. In the US, individual companies cannot apply for market economy treatment. Such treatment can be granted on a country basis or on an industry basis (although the latter is viewed as a useless provision and is never used).

(c) Export Price

It was claimed by one of the US survey respondents that, with regard to constructed export price, the US performs a strange and complicated calculation of profits to be subtracted from the actual export price.

The following is an extract from the DOC anti-dumping manual on calculating constructed export price (CEP) profits.

*In a market economy case, CEP profit is calculated by first deriving the ratio of per-unit US expenses to the respondent's total expenses and then multiplying this ratio by the total actual profit earned by the respondent.*

*For example, assume the following:*

*Total US expenses (per unit) = \$0.45*

*Total expenses - \$8,200,000*

*Total profit = \$800,000*

*In this case, CEP profit would equal \$0.0439 per unit, calculated using the following formula.*

*CEP profit =  $(.45/8,200,000) \times 800,000 = \$0.0439$*

The logic of this calculation is not easy to understand.

The EC adopts a more straightforward approach. Profit margins can be determined on the basis of information provided to the Commission by other independent importers. If no such data exists, the Commission uses other reasonable but similar methods. For example, there are cases where information from an importer in a separate anti-dumping investigation in a similar product sector was used.

(d) Comparison of normal value and export price

In making the comparison between normal value and export price, one of the most controversial differences between the EC and US concerns the use of zeroing.

The US continues to use zeroing in situations where there is multiple averaging across different models or types. If the weighted average export price is above that of the normal value for a particular model, it does not allow 'negative' dumping to cancel out the dumping found for other models. In other words, the US applies a zero to that model instead of the negative dumping value. This makes the overall level of dumping higher than if the negative and positive values were offset before determining the final margin of dumping.

The EC used to use the same approach, but it has stopped this practice following the Bed Linen ruling of the WTO Dispute Settlement Body.

The US does not use other types of zeroing (i.e. so-called targeted dumping by time, region etc) in the original investigation whereas, in principle, the EC does. However, even the EC is using this type of zeroing much less frequently.

However, in administrative reviews, the US uses zeroing for every transaction. This is the subject of a current WTO dispute.

It was very interesting to discuss this issue with survey respondents in the US. With the retroactive duty system, it was argued that "zeroing" in administrative reviews is only replicating a situation where the level of duty is calculated on each shipment as it arrives in the US. When the level of duty is calculated on each shipment, a negative dumping margin does not make sense. This would imply that US customs should be making a payment to the importer, an absurd situation. Instead, if a product is deemed not to be dumped in such a situation, then no duty should be paid. By how much it is not dumped is irrelevant. However, it remains the fact that the nature and the extent of zeroing in US administrative reviews is wider than in original US investigations.

A detailed consideration of this issue is outside the scope of this report. However, the comment can be made that the above logic for continuing to use zeroing does not justify the use of inter-model zeroing in the original investigation.

A final comment on zeroing is that it does not affect every case. It only has an impact on those cases where there is a large variation in export prices, such that some transactions are not dumped.

(e) Calculation software

The US uses software (the SAS programme) to calculate dumping which is widely available. This means that all parties with APO access can calculate the dumping margin of every respondent.

No such software exists in the EC. The Commission undertakes its own calculations which are set up manually in a spreadsheet. A printout of the spreadsheet calculation is sent to each of the exporters (only the exporters see the calculations due to the confidential nature of the data contained in them).

Unlike the US, each exporter can only check its own calculations and not those of its competitors. Likewise, EC industry is not able to check any of the dumping calculations. They can only engage in the discussion of the methodologies used.

### 2.3 Subsidy

#### (a) Higher subsidy margins and duties

It would appear that the US method produces somewhat higher subsidy margins than the EC method.

The data in annex 7, 2.11-2.13 indicates that US margins are higher, though the differences are not as great as those apparent when looking at AD duties and margins.

One reason why the differences may not be as great is the fact that neither the EC nor US have initiated any AS investigations against China. Many of the very high US duties involve Chinese exporters.

Two parallel cases (i.e. where the EC and US looked at similar products from the same country) indicate that US margins are higher:

#### Lowest subsidy margins (%)

Case	Country	EC	US
DRAMs (CVD)	South Korea	34.8	44.29
PET Film (CVD)	India	3.8	18.66

#### Highest subsidy margins (%)

Case	Country	EC	US
DRAMs (CVD)	South Korea	34.8	44.29
PET Film (CVD)	India	19.1	24.48

We have identified two possible explanations so far for the higher US subsidy margins:

- On some of the older cases, the US used a specific method for **privatised companies** which was found to be inconsistent with WTO rules. For cases involving companies that had been privatised, the change in method resulted in lower margins.
- US margins can vary from EC margins due to the fact that, for **non-recurring subsidies**, the US amortizes the benefit on a declining balance basis, while the EC does this on a straight line basis. Thus, for non-recurring subsidies, the magnitude of margins in the US will depend on how long ago the subsidy was received. If the subsidy was received just before the investigation was initiated, the benefit would be high when calculated on a declining balance basis. Note that it is possible in the US

to request administrative reviews where the subsidy was recent and the benefit would be lower in ensuing years. However, this is not done automatically by the US, even though it is clear that the amount of benefit would be lower in later years.

(b) Anti-subsidy in non-market economy situations

In the US, CVD cannot be used against non-market economies. In the EC, there is nothing that stops the AS instrument being used against NMEs. However, in practice, AS is never used against such countries.

## 2.4 Injury & Causal Link

A number of issues emerged in the comparison of EC and US AD and AS in relation to injury and causal link.

- **The outcome of injury determination appears to be less certain in the US than in the EC.** The US has a higher rate of cases terminated on findings of no injury. In fact, in the US, for the majority of cases that do not result in measures, the reason is that the ITC did not find injury (either at the preliminary and final stage). However, as discussed in 2.1(b) above, it is arguable that the EC applies a higher standard in assessing injury at the initiation stage than the US. If this is the case, it really is not surprising that the US terminates more investigations than the EC on injury grounds.
- The US considers data on **companies that have gone out of business** (to avoid "survivor bias") whereas the EC will only look at businesses that are still going-concerns.
- The US always considers injury to the **whole domestic industry**. From the domestic industry, it will select certain companies to fill in detailed questionnaires. Not all complainants have to complete questionnaires. The EC only considers injury to the complainants.
- The ITC does not require complainants to prepare a **full transaction listing**. In order to calculate price undercutting the ITC will select representative transactions. In the EC, all complainants have to complete a questionnaire with a full transaction listing for all domestic sales.
- The ITC often uses **updated information** relating to a period after the investigation period (IP) (i.e. in the final stage, they may request additional data in a second or even third questionnaire). In the EC, the Commission only uses information strictly from the IP.
- The ITC can issue an administrative subpoena, if necessary, and obtain information by **court enforcement**. However, this happens in only a small number of cases (less than 1%).

## 2.5 Public Interest

Unlike the EC, the US does not have a public interest test for AD & AS. There is no provision in US law that allows the broader public interest to be taken into account, even where wider considerations of public policy clearly exist.

Users and consumers may participate in the investigation, but they normally only make comments relating to injury. One problem for users/consumers is that they do not have standing and therefore cannot be granted access to confidential information under APO.

The ITC can take the interests of users into account if, for example, there is limited supply in the US and they are purchasing on availability grounds rather than for price. Similarly, their interests can also be taken into account if users are choosing to import for reasons of quality.

## 2.6 Institutions

DG Trade of the European Commission has competence for all aspects of AD and AS investigations, including both procedure and substance. AD and AS are administered under a politically controlled system with a politically appointed Commissioner and the necessity of Council approval before any definitive measures can be adopted although the framework is a strictly legal one.

### (a) US system is bifurcated

The Department of Commerce (DOC) is responsible for assessing AD/AS complaints<sup>10</sup>, initiating investigations and issuing and administering duty orders. The DOC is also responsible for calculating dumping and subsidy margins which, in all cases, determine the level of AD or AS measures. The DOC is a cabinet level agency of the executive branch of government and therefore is under political control. That said, decision-making authority is delegated by the Secretary of Commerce to the Assistant Secretary for Import Administration and dumping determinations appear to be undertaken in a purely technical manner.

The International Trade Commission (ITC) is responsible for making injury determinations in AD and AS investigations. The ITC is an independent agency comprise of six Commissioners (3 from each of the two main political parties, Republicans and Democrats). Although the Commissioners can have a reputation for looking at cases in certain ways, the decisions appear to be truly independent and based on the technical aspects of each case.

Some participants in the US survey compared the EC system to that which existed historically in the US. Until 1979, the US Treasury Department was responsible for the dumping calculation. US survey participants confirmed that the Treasury Department did not operate with the same level of transparency that the DOC now operates under. Also, survey participants claimed, decisions were much more political.

Even further back, until the 1950s, the Treasury Department conducted both the dumping/subsidy and injury analysis.

### (b) Nature of decision-making

US participants in the survey raising this point implied that the EC system (described as non-transparent and extremely political) has similarities to the way the US system used to work.

The EC system is somewhat more complex than the US system because it involves not only a decision of the investigating authority, i.e. the Commission, but also a decision of 25 Member

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<sup>10</sup> "Import Administration" is the branch of the DOC dealing with TDI.

States. Moreover, the fact that the EC has to operate in a multilingual environment with adds to the complexity.

The framework in which the EC system is operated is nevertheless a legal one, as evidenced by the Court ruling on Eurocoton. Complexity is added by the fact that the EC carries out a number of additional tests before measures are applied, notably the lesser-duty rule and the Community interest test.

In the US, AD and AS are considered by some to be political in nature. However, in the conduct of investigations, the DOC and ITC approach their tasks in a purely technical way. The US has no public interest test and this means that the investigation focuses on the technically defined issues of dumping/subsidy margin calculations and injury/causality determinations. The adoption of measures is automatic if the requirements are met.

(c) .US more partisan?

A number of survey respondents claimed that the US DOC and ITC are more partisan than the European Commission. This is extremely difficult to assess.

However two comments can be made in this regard:

- The more complex nature of EC TDI investigations (e.g. a public interest test and Member States' decision-making) perhaps makes the Commission more cautious in adopting measures. In the US, the investigation is more partisan in the sense that the focus is really only on whether domestic industry should be protected or not.
- The US has been targeted in other countries' TDI investigations much less than the EC. This has perhaps increased the sensitivity of using TDI for the Commission and EC Member States. Perhaps there is less concern in the US about taking into account export interests when undertaking TDI actions and more determination to press ahead as an active user of TDI.

(d) More case handlers working on TDI in the US

There are 163 people working on TDI in Directorate B of DG Trade (currently there are 13 vacancies).

This compares with over 300 people (including 35 lawyers) and 75 people working on TDI in the DOC and ITC respectively.

(e) Specialised case-handlers in both DOC and ITC

Whilst some case handlers in the EC have professional backgrounds in law, economics and accountancy, there is no systematic recruitment of professionals in each of these areas.

Further, case handlers are allocated to cases on a case-by-case basis. As a result, case handlers can be allocated to either the dumping or injury aspects of investigations. Further, while some case handlers have informally developed specialisations in particular countries, specialisation of case handlers in specific industries is avoided.

In the US, by definition DOC staff work on the dumping side of the investigation and ITC staff work on the injury analysis.

Also, in both the DOC and ITC, every investigation team conducting a cost audit would include an accountant.

In the ITC, every injury determination is allocated at least six staff including a lawyer, economist, and accountant. The team will also include an industry specialist that keeps up to date on an industry whether or not there are any current investigations in that sector.

One survey respondent claimed that the accountancy expertise of US case handlers is exaggerated. The same person explained that the best case handlers actually have a tax and customs background.

In the EC, a team assigned to the dumping or injury part of a case would include also somebody with a strong accounting background (eg acquired in tax or customs field), although not necessarily an accountant by profession. Moreover, the Commission does organise internal training on accountancy and auditing issues.

## 2.7 Effectiveness of measures

As in the EC, enforcement of US measures is also a significant concern of US industry.

Some participants in the EC survey felt that the US has a big advantage with a single, unified customs authority. The EC has potentially more problems with enforcement caused solely by the fact that AD and AS measures are imposed by a multitude of different customs authorities (each Member State has its own customs authority). However, the Commission has stepped up efforts to reinforce coordination with national customs authorities in the area of TDI.

In the US, those on the domestic industry side felt that there are some problems. First, following the 9/11 disaster in New York, the priority of US Customs has shifted towards security which has resulted in a lower priority being placed on TDI implementation.

Also, US survey respondents highlighted recent problems in collecting duties (particularly on new shipper reviews). More than \$100 million of anti-dumping duties on Chinese imports were not collected in 2003 because of problems with collecting the duties in new shipper reviews (as reported in 'Inside US Trade' on 26 March 2004).

US survey respondents also said that traditional types of circumvention (e.g. screwdriver plants, origin and classification misdeclarations etc.) have been experienced in US for a long time.

In general, however, US respondents thought that US measures are well enforced. As in the EC, problems emerge in specific situations.

## 3. SAFEGUARD

### 3.1 General attitude towards safeguards

Safeguards have traditionally been used more by the US than the EC. However, most participants in the US survey claimed that the safeguard instrument has been **weakened** by the adverse WTO rulings. In addition, those representing US industry interests complained about the political aspects of the decision to adopt measures. Overall, the feeling seems to be that industry will need compelling reasons to use safeguards again.

In the EC, there has not been very much experience of safeguards and therefore survey respondents had few comments on safeguards. In addition, there is a general perception in the EC that use of safeguards is not encouraged by the Commission and Member States. This explains why safeguards have been less used in the EC. However, in recent years, the EC has started to have a small number of safeguard cases.

The US and EC safeguard laws both contain the same definition of **serious injury** (i.e. significant overall impairment in the position of Community producers). The EC legislation contains a list of factors to be considered in the examination of serious injury. These include all of the factors mentioned in the WTO safeguards agreement, though the EC does not use identical wording to that found in the WTO provisions. US legislation does not list all of the factors but does list some factors to be taken into account when considering serious injury:-

- (i) the significant idling of productive facilities in the domestic industry,
- (ii) the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit, and
- (iii) significant unemployment or underemployment within the domestic industry;

In determining whether there is **causation**, the ITC must find that imports are a substantial cause of injury (i.e. a cause which is important and not less than any other cause). US law does not require the ITC to determine that injury caused by other factors is not attributable to imports. The EC adopts the approach that imports must be a genuine and substantial cause of serious injury. A number of US practices on the substance side have been found to be **WTO inconsistent**. This includes the lack of a determination of unforeseen circumstances; failure to separate and distinguish other causes of injury; and the absence of a sudden, sharp, significant, and recent increase in imports.

Due to the fact that the President makes the final decision on whether safeguards should be adopted, and at what level, safeguards have more of a **political element** than AD and AS. The President can be influenced by lobbying from various interests, including those that oppose the measures. In this way, US safeguards are effectively subject to a public, although non-transparent interest test. As in AD and AS, the EC applies the Community interest test before adopting safeguard measures.

### 3.2 Procedure

In the US, it is usually a domestic **industry that submits a safeguards petition**. In the EC, Member States request the initiation of a case. It is not possible for industries to complain directly to the Commission.

The President can **exclude imports** from NAFTA countries (Canada & Mexico).

**APPENDIX 1 - TIMELINE OF PARALLEL EC AND US AD INVESTIGATION INVOLVING TCCA/CHLORINATED ISOCYANURATES**

