CHAPTER 04

THE ANTI-DUMPING AGREEMENT

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, also known as the Uruguay Round Anti-dumping Agreement (URAA) or the Anti-dumping Agreement, sets out the many aspects that need to be considered during an anti-dumping investigation, as well as the procedures that have to be followed by an applicant bringing an anti-dumping application. Details of all preliminary and final anti-dumping actions must be informed to the WTO Committee on Anti-dumping Practices[1] (GATT Secretariat 1994:191; WTO 2001a:3). The WTO regularly publishes this information on their web site[2]. The current Anti-dumping Agreement will be summarised in this chapter to illustrate that this agreement is a long and complex legal document, which provides ample opportunity to manipulate the results of an anti-dumping investigation. As a result this chapter has more of a legal than an economic slant. The determination of dumping calculation will also be formally introduced in this chapter, by way of an equation. It will be shown how complex the determination of dumping calculation can become, making it possible to use only this calculation as a way to manipulate the results of an anti-dumping investigation.

4.1 THE URUGUAY ROUND ANTI-DUMPING AGREEMENT

Before an investigation can start, the investigative authorities must check whether or not the applicant has enough information to initiate an investigation, for example, whether or not there is enough evidence[3] (Guatemala v Mexico 2000:319-328; Horlick & Shea 1995:23). In addition to evidence of

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1 Anti-dumping Agreement, PART II, Article 16, paragraph 16.4.

2 http://www.wto.org

3 Anti-dumping Agreement, PART 1, Article 5, paragraph 5.2 and 5.3.

dumping, injury and a causal link between these two, an "application shall contain" other information[4] (GATT Secretariat 1994:176). For example, the application must include the identity of the applicant(s) and details of the "like product" as well as of the import-competing industry that is producing this like product. Details of the dumped product, the countries of origin and the identities of exporters must also be supplied, as well as information on prices (for the determination of normal values and export prices) and on volumes of imports, as well as on the effect of the alleged dumping on the import-competing industry.

The investigative authorities must also check whether or not the application has been brought by or on behalf of the domestic industry[5] in the importing country. The applicant or applicants must represent the domestic industry[6] - in other words, the applicant(s) must have standing. Domestic producers in the importing country that are related to the exporter or importer, or who are importing the alleged dumped goods, may not be included in the group known as the domestic industry[7] (GATT Secretariat 1994:174). According to the URAA[8], being representative means being responsible for half of the production of the like product in the importing country. However, this statement is immediately qualified by an additional sentence which states that an investigation would not be initiated unless at least 25 per cent of the industry supported the application (GATT Secretariat 1994:177). In effect the minimum representation can thus be taken to be 25 per cent (Farr 1998:25; Horlick & Shea 1995:24).

The applicant could be one firm, if it is the main player in the importing country, or the applicant could be a number of firms that are bringing an action together. But if a firm which represents a very small section of an industry in the importing country decides it is being harmed by dumped products and the rest of the industry is happy with the imports coming into the country, this firm cannot initiate an

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4 Anti-dumping Agreement, PART I, Article 5, paragraph 5.1, 5.2 & 5.3.

5 Anti-dumping Agreement, PART 1, Article 5, paragraph 5.1 and 5.4.

6 Anti-dumping Agreement, PART I, Article 5, paragraph 5.6 provides for special circumstances under which the authorities could initiate an investigation.

7 Anti-dumping Agreement, PART I, Article 4, paragraph 4.1(i).

8 Anti-dumping Agreement, PART I, Article 5, paragraph 5.4.

application. This is one of many areas where the investigative authorities have to apply a certain amount of discretion. Understandably, such discretion could be applied to the advantage of the applicants. Once the authorities are satisfied that there are sufficient grounds to initiate an investigation, they must notify the government of the exporting country concerned that such an investigation is to be initiated, that is, the authorities must give notice of intent to initiate an investigation (Guatemala v Mexico 2000:54).

4.1.1 Like product

The concept "like product" is very important in an anti-dumping investigation. According to the URAA[9], a product is being dumped, in other words it has been "introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country"[10] (GATT Secretariat 1994:168). A television manufacturer cannot expect to get relief from imports of washing machines, no matter how cheap the washing machines are, but differences or similarities between some products are not always as clear cut as this example, especially when the products under investigation are differentiated products (Messerlin 1991:54). So sometimes it can be disputed whether or not the products are "like products". Exporters could argue that their product is not a "like product", while the applicants could argue the opposite.

According to the URAA, 'the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely

9 Anti-dumping Agreement, PART I, Article 2, paragraph 2.1.

10 Anti-dumping Agreement, PART I, Article 2, paragraph 2.1.

resembling those of the product under consideration'[11] (GATT Secretariat 1994:172). The general consensus is that "like product" means the same product and it is usually the physical attributes that determine whether or not products are "like products" (Farr 1998:22-24; WTO Secretariat 1995:227). Even so, applicants of anti-dumping actions and exporters and importers sometimes disagree about when products are or are not like products.

For example, in India versus EU, Japan, Canada and USA (2002:2-9), the applicants and exporters disagreed about the range of products to be investigated. The description of the products under investigation in the final findings was "cold rolled flat products of stainless steel, of a width of 600mm or more, whether further processed or not of all grades/series". The exporters and importers argued that the import-competing industry did not produce widths exceeding 1250mm and that for this and other reasons, the description of the product was too broad. The import-competing industry argued that they had produced wider products in the past and could do so again if demand warranted such production. After examining the various submissions, the investigative (Indian) authority decided to classify the products under three categories or series, but left the description of the product under investigation as above.

In EC versus People's Republic of China (PRC), Indonesia and Thailand (1998:4-5), the investigative authorities had to establish which type of footwear constituted like products. The description of the product that was decided on was " 'non-sports' footwear, not covering the ankle, with insoles of a length of 24cm or more: - with outer soles of rubber, plastics or composition leather and uppers of leather falling within CN codes ex 6403 99 93 (if not identifiable as men's or women's footwear), ex 6403 99 96 (if for men) and ex 6402 99 98 (if for women), - with outer soles of rubber or plastics, for women (falling within CN code ex 6402 99 98)" (EC v PRC *et al* 1998:4). Footwear for sporting activities was expressly excluded from the product under consideration.

These two examples serve to illustrate that it is not always easy to decide whether or not allegedly dumped products are like products to those produced by an import-competing industry that is bringing

11 Anti-dumping Agreement, PART I, Article 2, paragraph 2.6.

an anti-dumping application. In cases where there is uncertainty about whether or not products are like products, the investigative authority has to apply its discretion, and in each step of an investigation that the investigative authority's discretion is applied, bias in favour of the applicants can creep in.

4.1.2 Evidence of dumping

Once the authorities have decided to conduct an investigation, one of the important steps in the process of such an investigation is to determine whether or not the imported products are being dumped, and it is this part of the investigative process that will be investigated in detail in this thesis. The two values needed to determine whether or not an exporter is dumping are the normal value[12] and the export price. If the normal value is greater than the export price then the exporter is dumping. The dumping margin, which is the difference between the normal value and the export price, is a positive value. The following equation explains the basic process:

$$DM = NV - P_X \qquad \text{----------} \qquad (1)$$

where

DM = the dumping margin, $DM \in Q$, where Q = the set of rational numbers

NV = the normal value, where $NV>0$

P_X = the export price, where $P_X>0$

This comparison between the normal value and the export price reflects the international price discrimination theory of dumping. In other words, the exporter is selling its product at different prices in its different markets, namely its domestic market and its export market. If the export price is lower than the selling price on the domestic market of the exporter (ie the normal value), then the exporter may be exporting at a loss while making excess profits on its domestic market. But international price

12 According to the URAA, the normal value of a product is "the comparable price for the like product when destined for consumption in the exporting country" (GATT Secretariat 1994:168).

discrimination assumes that there must be a difference between the selling prices on the two markets. There have been instances when an exporter has been selling on its domestic market and its export market at the same price but still has been found to be dumping. It is in this type of situation where the less than fair value or less than fully allocated cost approach to dumping is relevant.

The less than fair value or the less than fully allocated cost approach to dumping also requires a comparison between the normal value and the export price. But the normal value is a constructed value that reflects the full cost of production of the exported product. As will be explained in more detail the following chapter, it may be that the selling prices of the product in the country of export do not reflect the full cost of production and then these selling prices may be deemed to be unreliable. The URAA allows for the construction of a normal value. The constructed normal value is supposed to reflect the full cost of production of the product. If the export price is less than this constructed normal value, the exporter is dumping at below cost or at less than fair value. This less than fair value (LTFV) approach to the determination of dumping is followed by the US investigative authorities in anti-dumping cases. The sales below costs provision was introduced into US trade law by the Trade Act of 1974. And "The 1974 Trade Act allowed imports to be actionable if they were sold below cost, even if the domestic and foreign prices were the same" (Nivola 1993:92-93). Prior to this, dumping was determined by the evidence of international price discrimination.

4.1.3 A fair comparison

The URAA stipulates that the comparison between the normal value and the export price should be fair[13] (Krishna 1997:21). A fair comparison means the comparison is made at the same level of trade, which is usually taken to be the ex-factory level fob[14], and at the same time or as near as possible to

13 Anti-dumping Agreement, PART I, Article 2, paragraph 2.4.

14 Fob or "free on board" refers to a contract of sale where 'the seller must arrange for the goods to be loaded on board a ship named by the buyer at the place of shipment. The seller has no responsibility for arranging carriage or insurance' (Chen 1987:727 ft60).

the same time (Jackson 1990:10). In other words, the prices are compared on the same basis (Corr 1997:90). According to the Anti-dumping Agreement, fair comparison between these two values means that "Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions of sale and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any differences which are also demonstrated to affect price comparability"[15] (Farr 1998:15; GATT Secretariat 1994:170-171).

Possible adjustments can result because of differences in a range of factors. The EU's anti-dumping rules[16], known as the Basic Regulation, lists the following factors: physical characteristics; import charges and indirect taxes; discounts, rebates and quantities; level of trade; transport, insurance, handling, loading and ancillary costs; packaging; credit; after sales costs; commissions; and currency conversions (Ethier 1987:937; Farr 1998:15-18; Jackson 1990:2-3; Palmeter 1995:52-53; Stanbrook & Bentley 1996:58-71; Viner 1966b:347; WTO Secretariat 1995:220). A further category called "other factors" is also included in the Basic Regulation, so adjustments may be made in respect of "other factors" as long as it can be shown that such factors affect price comparability (Farr 1998:18). According to the anti-dumping guide published by the Indian Ministry of Commerce, factors that could influence price comparability are, *inter alia*, physical characteristics, levels of trade, quantities, taxation and conditions and terms of sale. This list is basically the same as that listed in the URAA, but an additional note says "It must be noted that the above factors are only indicative and any factor which can be demonstrated to affect the price comparability is considered by the Authority" (Government of India 2003:5).

A certain amount of leeway is thus allowed when making the adjustments to ensure that the comparison between the normal value and export prices is fair. Even though the actual prices of sales in the domestic market of the exporter and of exports, as reflected in the invoices, may be used in the initial stages of the "determination of dumping" calculation (ie as the base prices), these actual prices may be altered significantly in order to ensure a fair comparison. It is also apparent that a number of variables

15 Anti-dumping Agreement, PART I, Article 2, paragraph 2.4.

16 The EU's anti-dumping rules based on the URAA are contained in Council Regulation 384/96 and this document is known as the Basic Regulation (Farr 1998:2).

may have to be considered to ensure such a fair comparison.

It means therefore that the calculation used to determine the dumping margin, as shown in equation (1), becomes a bit more complex because the normal values and export prices usually have to be adjusted for fair comparison. Equation (2) illustrates this additional complexity.

$$DM_{adj} = NV_{adj} - P_{X\ adj} \quad \text{----------} \quad (2)$$

where

DM_{adj} = the dumping margin, DM $\in$ Q, where Q = the set of rational numbers

NV_{adj} = the normal value, where NV>0, adjusted to ensure a fair comparison

$P_{X\ adj}$ = the export price, where P_X>0, adjusted to ensure a fair comparison

Although adjustments to ensure a fair comparison were more of problem before the Uruguay Round, the URAA does not stipulate how these adjustments must be quantified or how they should be given (Krishna 1997:21-22; Vermulst & Driessen 1997:136-138). In certain instances a fair comparison can therefore still be a problem. For example, differences in levels of trade are not always adjusted for and adjustments in respect of direct and indirect expenses can sometimes be very intricate (Corr 1997:79-80; Vermulst & Driessen 1997:136-138). Stanbrook and Bentley (1996:67-68) are of the opinion that the URAA does not really clarify how exporters should deal with sustained movements in exchange rates, even though the URAA elaborates on the conversion of currencies. Although it is clearly stated in paragraph 2.4.1 that "... conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used"(GATT Secretariat 1994:171), in the same paragraph it is also stated that " Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation". Stanbrook and Bentley (1996:67-68) argue that the latter sentence is not very clear and can be open to various interpretations. Horlick and Shea (1995:25), on the other hand, seem to suggest that paragraph 2.4 of the URAA, is sufficient to prevent potential abuse of fluctuations in exchange rates in order to ensure positive dumping decisions or to inflate dumping margins.

During an investigation, the exporters may claim adjustments which they think are necessary to ensure fair comparison. It is then the duty of the investigative authorities (in the importing country) to check whether or not these adjustments are justified. In some cases the investigative authorities may decide to conduct on-the-spot investigations[17] to check the claims for adjustments made by the exporter(s). If the authorities decide that the claims are unjustified, then the adjustments are disallowed (EC v PRC *et al* 1998:6-7). The decision whether or not to allow certain adjustments could create bias in favour of import-competing industries and is another area of potential manipulation.

4.1.4 Weighted averages versus transaction based values

After the normal values and export prices have been adjusted for fair comparison, there is a further complication. Fair comparison between the normal value and export price[18] includes an additional stage - the decision whether or not the comparison between the two values should be between transaction-based values or weighted averages[19] (EC V PRC *et al* 1998:5-8; India v EU *et al* 2002:24-27; New Zealand v Korea 2001:17-21; US v SA 1999:3-6). Sometimes the determination of dumping requires simple comparison between a single transaction export price and a single transaction normal value. Equation (3) reflects this calculation.

$$DM_{adj\ (1)} = NV_{adj\ (tv)} - P_{X\ adj\ (tv)} \qquad (3)$$

where

$DM_{adj\ (1)}$ = the dumping margin, $DM \in Q$, where Q = the set of rational numbers

$NV_{adj\ (tv)}$ = the normal value based on a single transaction normal value, and where NV>0 has been adjusted to ensure a fair comparison

17 Anti-dumping Agreement, PART I, Article 6, paragraph 6.7.

18 Anti-dumping Agreement, PART I, Article 2, paragraph 2.4.

19 Anti-dumping Agreement, PART I, Article 2, paragraph 2.4.2.

$P_{X\,adj\,(tv)}$ = the export price based on a single transaction value, where $P_X>0$ has been adjusted to ensure a fair comparison

But producers could sell products at different prices during the investigation period (IP)[20], or there may be a number of exporters/producers involved in an anti-dumping investigation (EC v Czech Republic, Poland, Thailand, Turkey & the Ukraine 2002:3-6; EC v India 2001:24; GATT Secretariat 1994:171). There may thus be more than one export price and more than one normal value, in which case it may become necessary to obtain a weighted average for the normal value and a weighted average for the export price - the prices are usually weighted over the investigation period. The authorities would then compare the weighted-average normal value with the weighted-average export price. The normal value will be calculated as a weighted average of the prices of all the domestic sales made during the IP and the export price will be calculated as the weighted average of the prices of all the export sales made during the IP.

The comparison of weighted averages is reflected in equation (4):

$DM_{adj\,(2)} = (NV_{adj}\text{-wt}) - (P_{X\,adj}\text{-wt})$ ----------(4)

where

$DM_{adj\,(2)}$ = the dumping margin, $DM \in Q$, where Q = the set of rational numbers

$(NV_{adj}\text{-wt})$ = the weighted average of the normal values, where $(NV_{adj}\text{-wt})>0$ has been adjusted to ensure a fair comparison

$(P_{X\,adj}\text{-wt})$ = the weighted average of the export prices, where $(P_{X\,adj}\text{-wt})>0$ has been adjusted to ensure a fair comparison

The investigative authorities may decide to use a transaction-based comparison for some of the producers in a case, and weighted averages for others. It all depends on the circumstances of a case. For example, in the case EC versus Czech Republic *et al* (2002:8), a weighted-average normal value and a weighted-average export price was established on a monthly basis for some of the respondents

20 The investigation period is the period over which the anti-dumping investigation is conducted.

in Turkey. This country was experiencing high rates of inflation and had devalued its currency, making it unrealistic to use weighted averages over the full IP.

Prior to the URAA, it was quite common for investigative authorities (especially the US authorities) to compare a weighted-average normal value with a single transaction export price to determine the dumping margin (Horlick 1990:146-148; Krishna 1997:21-22; Palmeter 1996:47; Stanbrook & Bentley 1996:71; Vermulst 1987:384-385). This practice was severely criticised, and as a result paragraph 2.4.2 was included in the Uruguay Round Anti-dumping Agreement (Krishna 1997:22 ft92). According to paragraph 2.4.2 of the URAA, when a weighted average is used for one of the values in the determination of dumping, a weighted average should be used for the other value as well. So the authorities may compare a "weighted average of prices of all comparable export transactions" with the weighted average of all the normal values of the like product. Alternatively, the comparison between export price and normal value should be made on a transaction-to-transaction basis[21] (GATT Secretariat 1994:171; Stanbrook & Bentley 1996:71). However, paragraph 2.4.2 of the URAA still allows a comparison between a "normal value established on a weighted average basis" and "prices of individual export transactions"

> if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison (GATT Secretariat 1994:171)

This means that under certain circumstances, the equation to determine dumping could be a combination of equation (3) and (4), as reflected in equation (5).

$$Dm_{adj\,(3)} = (NV_{adj}\text{-wt}) - P_{X\,adj\,(tv)} \quad \text{---------- (5)}$$

where

$DM_{adj\,(3)}$ = the dumping margin, $DM \in Q$, where Q = the set of rational numbers

$(NV_{adj}\text{-wt})$ = the weighted average of the normal values, where (NV-wt)>0 has been

21 URAA, PART 1, Article 2, paragraph 2.4.2.

adjusted to ensure a fair comparison

$P_{X\,adj\,(tv)}$ = the export price based on a single transaction value, where $(P_{xtv})>0$ has been adjusted to ensure a fair comparison

According to Horlick and Shea (1995:25), this qualification was intended to address situations of "hidden dumping"[22], but this qualification has created a loophole which, according to Leebron (1997:236-7), has been taken advantage of by the US legislators. The URAA rule that requires a weighted average-to-weighted average or a transaction-to-transaction comparison has been interpreted by the US authorities (the US Department of Commerce) as being applicable only to investigations and not to reviews[23] (Corr 1997:90 ft221; Leebron 1997:236; Palmeter 1995:45-46, 69). In fact, the US implementing legislation stipulates that comparing the weighted-average normal value with individual export transaction prices is the preferred method for reviews, often making it easier to have a positive dumping result (Leebron 1997:236 ft 239). This thesis, however, will not elaborate on the procedure that is followed in reviews.

The same exception to the rule was used in EC versus Czech Republic *et al* (2002:8). As already explained, it was necessary to establish a monthly weighted average for the normal value for Turkey because of the high rates of inflation and devalued currency in that country during the IP. For some of the Turkish producers, however, "there was a pattern of export prices which differed significantly between the time periods when these exports were made". It was therefore argued that it was necessary to compare the monthly weighted-average normal value with individual export transactions for those producers.

These "exceptions to the rule" create loopholes that can be used to the advantage of applicants in an anti-dumping investigation. For example, it is clear from the URAA that the intention of the authors of

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22 Hidden dumping is defined in the Notes and supplementary provisions to Article VI of GATT as "..the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country ... (GATT Secretariat 1994:545).

23 Other rules to be treated the same way are the 2 % *de minimis* rule affecting dumping margins and the volume of imports rule affecting material injury (Leebron 1997:236).

the agreement was that the comparison between normal values and export prices should be fair to all parties, and, that only the prices of "like products" should be compared. Even so, different interpretations of what is comparable and of what is a fair comparison, have resulted in some cases going to appeal. In EC versus India (2001:19), the EC argued that "differences in physical characteristics" as per Article 2.4 of the URAA, which is one of the differences that could affect price comparability, could also be interpreted to mean that a distinction could be made between different types or models of the "like product". These different types or models of the like product, in this case cotton-type bed linen, were therefore not comparable when determining the weighted-average normal values and weighted-average export prices. In this case, the EC argued that it was only the prices of those types or models of the like product that were the same that had to be used to establish the weighted-average values. It is almost needless to say that it was to the advantage of the applicant to make this distinction between the various types or models of the like product.

The Appellate Body commenting on this case came to the conclusion that the European Community could not decide that the products were comparable enough to be classified as "like products" for one purpose (within the meaning of Article 1(4) of Regulation (EC) No 384/96 or Article 2.6 of the URAA), while arguing that these same products were not comparable and were therefore different types or models of the product for another purpose (within the meaning of article 2.4.2 of the URAA)in the same anti-dumping case (EC v India 2001:18-19). Either the products were like products or they were not like products.

4.1.5 Zeroing

In some anti-dumping investigations, instead of taking the weighted average of all normal values and comparing this with the weighted average of all export prices, the investigative authorities ignore some instances of negative dumping when averaging export prices. For example, the EC used to refuse to offset negative dumping. In other words, when the normal value was less than the export price ($NV < P_X$), the resultant margin of dumping was changed to zero (Farr 1998:19). This practice, known as

zeroing, could have the result of either creating a dumping margin where there may be none, or inflating whatever dumping margin there may be (Hindley 1988:452-454). Both the EC and the US authorities have made use of this practice (Farr 1998:19; Horlick 1990:146; Stanbrook & Bentley 1996:72-73).

Zeroing has been criticised by many, including a meeting of UNCTAD (UNCTAD 2001:4). And zeroing, as practised by the EC, was declared inconsistent with Article 2.4.2 of the URAA by the Appellate Body in the case EC versus India (2001:13-16, 21paragraph 66, 27). The EC changed its anti-dumping practice in line with the recommendations made by the Appellate Body, but then initiated another dispute in order to get clarity on the use of zeroing by the US (EC v US 2003; McNelis 2003:648, 666). This dispute (WT/DS294) was still pending at the time of writing (WTO2004p:1). The zeroing debate has been further complicated by the dissenting opinion expressed by a member of the Panel established to examine the matter of The United States - final determination on softwood lumber from Canada (WT/DS264/R). This member provides a convincing argument, briefly summarised hereafter, as to why zeroing is not inconsistent with the Anti-dumping Agreement (WTO 2004t:174-181).

The URAA states that:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis[24] (GATT Secretariat 1994:171).

According to the dissenting opinion, it is not unequivocally clear that the Agreement means *all* prices. And in addition, Article 17.6(ii) of the Anti-dumping Agreement states that:

> Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations (GATT Secretariat

24 Anti-dumping Agreement. PART I, Article 62 paragraph 2.4.2.

1994:193).

According to this member of the Panel, the Agreement allows for more than one approach to determine weighted averages (WTO 2004t:179). In his/her opinion, zeroing is not prohibited in Article 2.4.2, and read together with Article 17.6(ii), seems to indicate that zeroing is not inconsistent with the Agreement (WTO 2004t:174-181). A more important point also raised, is the fact that zeroing is a part of a bigger debate which deals with the sovereignty of nations versus the obligation of nations under international treaties, as well as whether or not the dispute settlement system should or may be used to change existing anti-dumping rules (Magnus 2003:6; WTO 2004t:174,177-178). This debate will be discussed in more detail in section 4.1.22.

4.1.6 Sampling

Before the investigative authorities can make adjustments for fair comparison or can decide whether to use transaction-based or weighted-average comparisons, they need to have normal values and export prices available. The ideal would be that the normal values that are used as base prices for every product and for every producer are the selling prices of the products on the domestic market of the exporter, and that the export prices used as base prices are the selling prices as reflected on invoices. Unfortunately it is not so simple in practice.

For example, according to the URAA, an individual margin of dumping should be calculated for each known exporter if possible. But sometimes "the number of exporters, producers, importers or types of products involved is so large" to make the determination of individual dumping margins impracticable". The URAA therefore allows the investigative authorities to limit their examination to a

reasonable number of interested parties, a statistically valid sample[25] or "to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated"[26] (GATT Secretariat 1994:180). In some cases, the exporters or producers are not co-operative and in some others, the number of exporters or producers may be so many that it becomes impossible for the authorities to complete their investigation in time (GATT Secretariat 1994:181; Stanbrook & Bentley 1996:297). However, if an exporter or producer supplies the necessary information timeously, the authorities are encouraged to, and often do, determine an individual margin of dumping for that exporter or producer, unless such an individual determination would be too burdensome (EC v PRC *et al* 1998:5; GATT Secretariat 1994:181; Stanbrook & Bentley 1996:298). It is therefore apparent that the simple calculation used to determine whether or not an exporter is dumping (ie DM = NV - P_X) is not so simple.

Adjusting for fair comparison, comparing individual transactions or weighted averages, calculating the weighted averages, zeroing or sampling all create opportunities for the determination of dumping to be manipulated. These, however, are not the only ways in which the dumping margin could be captured by manipulating the results of the determination of dumping. The value of the normal value and the export price can also be influenced in various ways. Those pertaining to the normal value will be briefly explained in the following few sections of this chapter and then elaborated on in the following two chapters. Those that could affect the export price will be discussed in section 4.1.11.

4.1.7 The normal value

The *normal value* (NV) is one of the values needed to determine dumping and it is often the key to a dumping case (Ryan 1996:113). According to Article VI of GATT, dumping occurs when "... products of one country are introduced into the commerce of another country at less than the normal

25 A verification sample can also be taken of the producers in the importing country (region) which the authorities could use to check the applicants' allegations of injury (EC v PRC *et al* 1998:2).

26 Anti-dumping Agreement, PART I, Article 6, paragraph 6.10.

value of the products..." (WTO Secretariat 1995:220), and "... a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country..." (WTO Secretariat 1995:220). However, some or all of the sales of the product in the exporting country may *not* be in the ordinary course of trade. One reason why sales in the domestic market of the exporter could be "not in the ordinary course of trade" could be because these sales are at below per unit (fixed and variable) cost and in substantial quantities. The sales at below per unit cost should then be excluded from any normal value or weighted-average normal value calculation (GATT Secretariat 1994:169). In spite of criticism to the contrary, it is also argued that the term "in the ordinary course of trade"[27], which forms part of the definition of dumping, includes the meaning *not at a loss*. In other words, sales made at a loss are not to be included in the calculation of the normal value (Banks 1993:185,191; Farr 1998:10). The main problem is that dumping margins could be exaggerated. By excluding the prices below per unit cost in the weighted average calculation, the normal value would be higher than it would be if these lower prices were included. This and other issues with regard to sales below cost will be discussed in detail in the next chapter.

4.1.8 No reliable normal value

The determination of dumping becomes further complicated if the product that is being exported is not sold at all in the home market of the exporter, or is sold only in very small quantities in that market[28]. In both these situations there is no reliable normal value with which to compare the export price. The reasons why the normal value(s) could be deemed to be unreliable will be discussed in detail in the next chapter.

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27 The term "in the ordinary course of trade"will be discussed in more detail in chapter 6.

28 Anti-dumping Agreement, PART I, Article 2, paragraph 2.2.

4.1.9 Exports to third country and the constructed value method

According to paragraph 1(b) of the Article VI of GATT, if the normal value based on selling prices in the domestic market of the exporter is an unreliable value, then the export price is to be compared with "either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit." Paragraph 2.2 in the URAA makes the same provision in the event of an unreliable normal value (GATT Secretariat 1994: 168, 493; WTO Secretariat, 1995:220).

The method described in paragraph 1(b)(i) of Article VI has not often been used. It is argued that if an exporter is dumping in one country, the chances are that it may be dumping in other countries. So the price of exports to a third country may not be a good reflection of the cost of production in the exporting country (Hindley 1988:448; Messerlin 1991:47). The method provided for in Article VI, paragraph 1(b)(ii) has been used extensively. This method has become known as the constructed value method. The logic of this method is that the full cost of production, including allowances for administrative, selling and general costs as well as for profits per unit, is calculated. In this way a correct or as near correct as possible proxy normal value, based on the cost structure of the exporting country, is determined, against which the export price will be compared. This method is open to a certain amount of manipulation and abuse and has been criticised for these reasons (Waer 1993:78-79; White 1997: 119). The determination of the normal value in a market economy country and the constructed value method will be discussed in detail in the following chapter.

4.1.10 Non-market economies and the analogue method

The two methods mentioned in the previous section, exports to a third country and the constructed value method, solved the problem of unreliable normal values if the exporting country was a market

economy. However, when member countries of GATT began trading with state-controlled or centrally-planned economies, the determination of the normal value became a more complicated problem. The prices of products under central planning did not reflect the true cost of production as understood in market economies. Selling prices of products in the home market of a centrally-planned economy (CPE) could therefore not be used to determine the normal value for those products. In addition, the unreliable cost information made it impossible to use the constructed value method to determine a normal value. Likewise, the export price to a third country was just as suspect as all the other prices and could also not be used to determine the normal value. Nevertheless, a workable alternative was found. The cost structure of a third economy, which was a market economy and was as similar as possible to the exporting country, was to be used to determine the normal value against which the exporting price could be compared (Corr 1997:81; Ehrenhaft 1990:305; Horlick & Oliver 1989:14-18; Horlick & Shuman 1984:808,819; Messerlin 1991: 47; Olechowski 1993:173; Ryan 1996:113-114; Wang 1999:122).

Many of the previous centrally-planned economies were classified as non-market economies (NMEs) when these countries began to change their economies to incorporate market principles. Although these counties were no longer centrally planned they were also not market economies. NMEs were treated in the same way as CPEs. Prices in these countries were still regarded as unreliable and so an analogue or surrogate country's cost structure had to be used to determine the normal value in most anti-dumping actions against the NMEs.

For example, the Basic Regulation of the EU[29] assumes that when imports come from NMEs, the domestic (exporter's) normal value is deemed to be unreliable. In such cases the normal value would be determined by actual or constructed prices in a "market economy third country". Such a third country would be known as the reference or analogue country. If the Commission cannot find a suitable analogue country it may determine normal value "on any other reasonable basis" (Farr 1998:11). Although not many countries are still classified as non-market economies, one country, China, still is and she objects vehemently to this classification. China has gone so far as to call many of the anti-

29 The anti-dumping rules of the EU are contained in Council Regulation 384/96, known as the Basic Regulation (Farr 1998:2).

dumping (AD) measures taken against her exports 'discriminatory, as the normal value for these AD cases were determined on the basis of the so-called "non-market economy" criteria of using "surrogate country" values' (UNCTAD 2001:9).

The value of the normal value is therefore affected by whether or not the exporter is situated in a non-market economy country. The determination of the normal value in a non-market economy country will be discussed in detail in chapter 6 and it will then become apparent that the analogue method can easily be subject to manipulation.

4.1.11 The export price

The comparable export price of the "like product" may a be a transaction based price (P_{Xtv}) or a weighted-average (P_X-wt) price. As already mentioned, a weighted-average export price should be compared with a weighted-average normal value, while an individual export price should be compared with an individual normal value on a transaction by transaction basis (Farr 1998:14-15). The URAA also provides for the eventuality that there may be no export price or that the export price may be unreliable[30] (GATT Secretariat 1994:170). An export price may be considered to be unreliable "because of association or a compensatory arrangement between the exporter and the importer or a third party..." (GATT Secretariat 1994:170). For example, the importer could be a dealer for the exporter, and in such a case the price paid by the dealer would be regarded as a transfer price and not as an export price.

An export price may then be constructed, using as basis the price at which the imported products are resold to the first independent (unrelated or unaffiliated) buyer in the country of import. In other words, the parties in the transaction must be at arms length (Corr 1997:80; Stanbrook & Bentley 1996:55; Vermulst & Driessen 1997:138-139). If it is not possible to construct the export price on this basis, the

30 Anti-dumping Agreement, PART 1, Article 2, paragraph 2.3.

Anti-dumping Agreement allows the authorities to determine or construct an export price "on such reasonable basis as the authorities may determine". The purpose of constructing the export price is to arrive at a price in a theoretical and objective fashion, which reflects what the importer would have paid if there had been no relationship between the importer and exporter (Farr 1998:14-15; GATT Secretariat 1994:170; Hoekman & Mavroidis 1994:5-6; Palmeter 1995:53-56; Stanbrook & Bentley 1996:52-57). This is done to prevent any attempt to circumvent[31] an anti-dumping investigation or to influence the findings by and in favour of the exporter and importer to the detriment of the import-competing industry. But the export price could be influenced in favour of the applicant of the anti-dumping investigation (the import-competing industry) if the export prices need to be constructed.

Prior to the URAA, both the EU and US were accused of inflating dumping margins in anti-dumping cases when the export prices had to be constructed (Matsumoto & Finlayson 1990:7; Vermulst 1987:441; Vermulst & Driessen 1997:136-139; Waer 1993:55-60). According to Hindley (1988:448-450), when the export price had to be calculated because parties were related, the EC compared ex-factory prices - and in the process manipulated the end result by deducting more costs from the export price to an independent buyer than it did from the normal value. When it was necessary to construct the export price, the following procedure was used (Horlick & Shea 1995:26). The normal value was constructed by adding the cost of production plus expenses of selling on the domestic market of the exporter plus a reasonable profit. This constructed normal value corresponded to the price of the first independent sale in the domestic market of the exporter. Then the constructed normal value and the actual export price were adjusted back to ex-factory level. But different amounts for selling, general and administrative expenses were deducted from the two values. The constructed normal value was adjusted to ex-factory by deducting directly related selling expenses (as per Article 10 of the Basic Regulation), whereas the export price was reduced to ex-factory level by deducting "all costs incurred between importation and resale" according to Article 2(8)(b) of the Basic Regulation (Hindley

31 Some exporters tried to circumvent anti-dumping duties by exporting the components of a product to another country where the finished product (which was subject to an anti-dumping duty from the original country of production) was then assembled. This other country would not be subject to the anti-dumping duties and the products could then be exported to the country of import without paying the anti-dumping duties (Corr 1997:95; Farr 1998:72-73; Hindley 1988:446; Holmes 1995:161-165). The was no final agreement on the problem of circumvention in the URAA and circumvention must still be clarified in subsequent multilateral trade negotiations.

1988:454). In other words, costs like overheads were not deducted from the constructed normal value (Hindley 1988:451-452). According to Vermulst and Driessen (1997:135-136) this method that distinguished between direct and indirect costs was allowed under the Tokyo Anti-dumping Code (Article 2.6).

The URAA clarified a number of issues with regard to the calculation of a constructed export price, but it seems that the EU authorities were able to find a loophole in the URAA. In refund and review proceedings, anti-dumping duties can be deducted from the constructed export price (unless the seller can prove it passes the duty on to its customers) - the argument being that the anti-dumping duty is a cost (Corr 1997:96-97; Horlick & Shea 1995:20; Vermulst & Driessen 1997:139-141). According to Farr (1998:14-15), this method of deducting the anti-dumping duty from the constructed export price inflates the dumping margin and leads to "double counting" when an application for a refund is made. But this double counting does not apply to an anti-dumping investigation.

The US anti-dumping law, on the other hand, allows an adjustment to the constructed export price for the "profit attributable to US operations"[32] (Corr 1997:80; Palmeter 1995:55; Leebron 1997:236 ft 241). The expressed intention is to obtain an ex-factory starting price, but because this adjustment reduces the constructed export price, it could create a dumping margin where there was none, or increase any dumping margin (Corr 1997:92; Palmeter 1995:55). The main problem when constructing the export price seems to be in establishing the same level of trade between the normal value and export price (Vermulst & Driessen 1997:138-139). Moreover, the adjustments to the normal value and the export price to attain this same level of trade allows for some degree of manipulation of the dumping margin. In many anti-dumping investigations (as opposed to reviews or applications for refund) the determination of the export price is quite straightforward, and is usually based on the prices invoiced by the exporter to the importer, adjusted for differences which affect price comparability (Corr 1997:80). So although there appears to be some potential to manipulate the dumping margin by manipulating the constructed export price, the extent to which this happens seems to be rather limited

32 The US treatment of the constructed export price whereby US profits are deducted from the constructed export price is contained in S223 URAA adding s. 772(d) to the Tariff Act 1930 (Leebron 1997:236-237, 236 footnote 241; Palmeter 1995:55).

compared to the potential to manipulate the normal value (Messerlin 1991:52).

4.1.12 The dumping margin

There are a number of reasons why is it important that this result of the "determination of dumping" calculation can be manipulated. Firstly, if the dumping margin is negative or insignificant, then the anti-dumping investigation is immediately terminated.[33] Thus if the normal value is less than the export price, or if the difference between the normal value and export price is less than a certain value, there is no anti-dumping case. It is in the interest of an applicant to ensure that the dumping margin is large enough so that the investigation can proceed. According to the Anti-dumping Agreement the margin of dumping is *de minimis* if it is less than 2 per cent, "expressed as a percentage of the export price"[34] (GATT Secretariat 1994:177; Corr 1997:90). So for example, if the dumping margin as a percentage of the export price is calculated at 1,5 per cent, then the anti-dumping action would be terminated. It is assumed that such insignificant dumping margins would not result in material injury in the importing country and so there can be no injurious dumping (GATT Secretariat 1994:177; Rycken 1991:204). In the previous Anti-dumping Code, the Tokyo Code (1979), it was merely stated that "There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible"[35] (Bierwagen 1990:227). There was no reference to a specific amount or percentage and individual countries used their own interpretation of the word "negligible". In the EC, for example, dumping margins were *de minimis* if they were approximately 1 per cent or less (Rycken 1991:204). But the *de minimis* rule[36] was clarified in the URAA (Leebron 1997:236).

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33 The Uruguay Round Anti-dumping Agreement (URAA), PART 1, Article 5, paragraph 5.8.

34 Anti-dumping Agreement, PART I, Article 5, paragraph 5.8.

35 The Anti-dumping Code (1979), Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade (also known as the Tokyo Code), PART 1, Article 5, paragraph 5.3.

36 The *de minimis* rule as it stands in the URAA, is an example of a rule that is applicable only to investigations and not reviews under US legislation.

Secondly, the dumping margin sets a limit on the value of any anti-dumping duty or provisional measure that may be imposed. The latter may be imposed while an anti-dumping investigation is still in progress and any provisional measure which has been calculated in excess of the actual dumping margin has to be refunded.[37] If the dumping margin has been calculated at 10 per cent, then the anti-dumping duty may not be greater than 10 per cent. If the dumping margin can be manipulated to ensure a greater value, then a greater anti-dumping duty can be imposed. Again, it is in the interest of the applicant that is seeking protection from the imports to have the largest possible anti-dumping duty (or provisional measures) imposed, because this will afford the most protection.

As already indicated, the dumping margin can be manipulated in many ways. The adjustment for fair comparison provides an opportunity for manipulation, as does the calculation of weighted averages or sampling. The dumping margin can also be increased by increasing the value of the normal value or by decreasing the value of the export price. Casting doubt on the reliability of the base prices allows for the recalculation of the export price or the normal value - providing ample scope for manipulation of the results of the determination of dumping. The following three chapters will concentrate on the possibilities to manipulate the normal value only.

4.1.13 Cumulation

According to the URAA, an investigation should also be terminated if the *volume* of imports is negligible. And negligible would be "... if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the import of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member"[38] (GATT Secretariat 1994:177-178).

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37 Anti-dumping Agreement, PART I, Article 7 paragraph 7.2, Article 9, paragraph 9.3 and Article 10, paragraph10.3.

38 The applicable percentages for developing countries are 4% and 9%.

The investigative authorities may therefore make a cumulative assessment of the effects of imports if such cumulation is appropriate and if the imports of the product from several countries are subject to a simultaneous investigation[39] (Corr 1997:84-85; Palmeter 1996:52; Vermulst & Waer 1995:63). One of the conditions for cumulation is that the products cumulated should be like products, because they should all be like products to those produced by the import–competing industry. It has been argued by the respondents in some cases that products that are not like products have been cumulated - resulting in unfairly imposed anti-dumping (or countervailing) duties (US v Argentina & SA 2001:9-14). Cumulation is thus another stage of the proceedings during which the results of the investigation can be manipulated, but this aspect will not be elaborated on in this thesis.

4.1.14 Material injury and causation

It GATT Article VI, paragraph 1, it is stated that dumping "...is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry". It is therefore not enough to establish that dumping is taking place. The dumping must also cause (or threaten) material injury to the domestic industry in the importing country and there must be a causal link between the dumping and the material injury. In other words, the dumping must be injurious. Article 3 of the URAA is dedicated to the Determination of Injury and paragraph 3.5 of the Agreement states that "It must be demonstrated that the dumped imports are, through the effects of dumping, ...causing injury within the meaning of this Agreement" (GATT Secretariat 1994:493,173).

Furthermore the "determination of injury ... shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for the like products, and (b) the consequent impact of these imports on

39 Anti-dumping Agreement, PART I, Article 3, Paragraph 3.3 and Article 5, Paragraph 5.8.

domestic producers of such products"[40] (GATT Secretariat 1994:172). The investigative authorities have to consider whether or not there has been a "significant increase in dumped imports" and whether or not there was "significant price undercutting" or whether the dumped imports depressed prices or prevented price increases "to a significant degree".[41] The actual volume of imports is therefore an important factor when considering injury (Corr 1997:84; Farr 1998:28-30). Paragraph 3.4 of the URAA states that "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including..." and thereafter lists a number of factors or indices that shall be considered. The factors that are listed are "... actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capital; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments" (GATT Secretariat 1994:173). According to a recent Dispute Settlement decision, this list is mandatory (Thailand v Poland 2000: 59). The investigative authorities must therefore consider each of the factors listed in paragraph 3.4 of the URAA when deciding whether or not the import-competing industry has suffered material injury. The investigation of material injury has resulted in a number of disputes but these will not be discussed in this thesis as the material injury part of an anti-dumping investigation does not impact directly on the determination of dumping.

It is also important to determine what is *causing* the material injury to the domestic industry in the importing country (Corr 1997:85). The URAA is quite specific about the causal link between the dumped products and the material injury (Farr 1998:30; Palmeter 1995:59-63). Many anti-dumping cases were taken on dispute prior to this agreement because of the lack of clarity in previous anti-dumping codes in respect of causation (Banks 1993:197-198; Dutz 1993:209-210). The products that are being dumped may be one of many factors contributing to the problems faced by the affected industry (Farr 1998:23). The investigative authorities must examine all the relevant evidence before them in this regard. The URAA stipulates that the "authorities shall also examine any known factors other than

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40 Anti-dumping Agreement, PART I, Article 3, paragraph 3.1.

41 Anti-dumping Agreement, PART I, Article 3, paragraph 3.2.

the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports"[42](GATT Secretariat 1994:173). In other words, if the authorities are aware of any factors which may have caused injury to the domestic industry, which the applicant may not have included in its evidence, such factors also have to be examined. As Palmeter (1996:53) puts it, the authorities "are required to determine that the material injury they find in fact is caused by the investigated imports and not by something else".

This is another area in which the results of an investigation could be manipulated. If a firm or industry is in trouble, it is often possible to attribute the problem to imported products that are being dumped. The injury criterion is an important part of an investigation, and together with the dumping criterion, dictates the eventual result of an anti-dumping action. This major topic, however, is not dealt with in this thesis.

4.1.15 A provisional duty

Although time limits have been set in the URAA, the investigative process can take quite a long time from initiation to completion.[43] During the process of the investigation the authorities may thus decide to impose a provisional duty. There are a number of conditions governing such a provisional duty, as clearly set out in Article 7 of the Anti-dumping Agreement (GATT Secretariat 1994:182). Once the investigative authorities have conducted their investigation and have decided that a duty should be imposed, such a definitive anti-dumping duty is levied on the specific imports and collected by the customs officials of each country (or region as is the case in the EU) (Farr 1998:21). Any discrepancies between the provisional and definitive duty are dealt with at this stage of the proceedings.

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42 Anti-dumping Agreement, PART I, Article 3, paragraph 3.5.

43 According to the Anti-dumping Agreement, PART 1, Article 5, paragraph 5.10, "Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation".

4.1.16 The anti-dumping duty

The actual suppliers subject to an anti-dumping duty must be named by the investigative authorities, unless there are so many suppliers that it become impractical to do so, in which case the supplying countries must be named[44] (GATT Secretariat 1994:184; Krishna 1997:29). Where possible, individual anti-dumping duties should be calculated for each supplier, but once again this is not always possible (see section 5.1.6). The size of the anti-dumping duty is determined by the size of the dumping margin, but may not be greater than the dumping margin.[45] The duty may, however, be less than the dumping margin. Anti-dumping duties are collected from "all sources found to be dumped and causing injury" other than those who have successfully negotiated price undertakings.[46] An anti-dumping duty that is imposed must be country specific. For example, if an anti-dumping duty is imposed on a certain product imported into South Africa from Korea, the like product imported from Brazil does not automatically have an anti-dumping duty imposed on it. But anti-dumping investigations are often filed against multiple countries, and in this way a number of foreign competitors may be restricted by one anti-dumping order (Prusa 1998:1022).

4.1.17 Price undertakings

The Anti-dumping Agreement allows for the negotiation of a price undertaking, instead of an anti-dumping duty. In other words, the exporter may agree to increase its export price in order to remove the injury or "... to cease exports to the area in question at dumped prices ..."[47] (GATT Secretariat 1994:183). In this way the exporter will avoid the imposition of a anti-dumping duty. Such an

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44 Anti-dumping Agreement, PART I, Article 9, paragraph 9.2.

45 Anti-dumping Agreement, PART I, Article 9, paragraph 9.3.

46 Anti-dumping Agreement, PART I, Article 9, paragraph 9.2.

47 Anti-dumping Agreement, PART I, Article 8, paragraph 8.1.

undertaking may only be sought once a preliminary affirmative determination of dumping and injury has been made[48] (Krishna 1997 :27; Palmeter 1996:59). An advantage to the exporter of a price undertaking is that the extra revenue obtained from the higher price accrues to the exporter and not to the customs of the importing country (Eymann & Schuknecht 1993:224; Gallaway *et al* 1999:219-221; Grimwade 1996:102-103). The disadvantages of a price undertaking are that such negotiations can encourage collusion, they could be inflationary and the government of the importing country loses out on tax revenue (Dutz 1993:208-209; Olechowski 1993:172-175).

4.1.18 The lesser duty rule

According to the Anti-dumping Agreement, if a duty that is less than the dumping margin "would be adequate to remove the injury" then such a lesser duty should be imposed[49] (GATT Secretariat 1994: 182,184). This concept of the lesser duty rule is applied in, for example, the EU, Australia South Africa and India (Board on Tariffs and Trade, RSA 1992:6-11; Farr 1998:21-22; Feaver & Wilson 1995:217; Government of India 2003:9). The lesser duty rule means that the anti-dumping duty does not have to equal the dumping margin. It may be a lesser amount - although it may not be greater than the dumping margin. The size of the anti-dumping duty should be large enough to eliminate the material injury caused or threatened by the dumping - in other words, an anti-dumping duty should be equal to the *injury margin*. In such a case it would be necessary to determine an injury margin as well as a dumping margin (Feaver & Wilson 1995:217: India v EU *et al* 2002:23).

The injury margin is determined by comparing the export price with the non-injurious price (NIP) (EC v Czech Republic *et al* 2002; India v EU *et al* 2002:23). This NIP or "fair selling price" is the price at which the product could be sold by an exporter in the country of import without causing injury to the import-competing industry (Government of India 2003:9; Stanbrook & Bentley1996:133-135). In

48 Anti-dumping Agreement, PART I, Article 8, paragraph 8.2.

49 Anti-dumping Agreement, PART I, Article 9, paragraph 9.1.

some cases this NIP could be much lower than the normal value and so the injury margin could be much smaller than the dumping margin. In some cases, for example in the case of Turkey in EC versus Czech Republic *et al* (2002), the injury margin (IM) (or injury elimination margin), could be higher than the dumping margin (DM), but then the DM would still limit the size of any possible anti-dumping duty.

In an anti-dumping investigation between the Republic of South Africa and The People's Republic of China and others, the normal value of the product, a certain group of textiles, using the analogue method, was R6,58/m^2 (Board on Tariffs and Trade, RSA 1992:6-7, 10-11). The export price, based on official import statistics, was calculated at R2,42m^2. The dumping margin, calculated as the difference between these two values, was R4,16m^2. The dumping margin calculated as a percentage of the export price was 172 per cent. The anti-dumping duty imposed on the product was, however, based on the injury margin, in order to eliminate the injury, and not on the dumping margin. The selling price in the Republic of South Africa was R 5,12m^2. The difference between this selling price and the export price, or the domestic price disadvantage against the import price, after some adjustments, which are not clearly indicated in the Report, was R2,34m^2. As a percentage of the export price this amounted to 97 per cent. It was decided by the investigative authorities that a 80 per cent anti-dumping duty would be sufficient to eliminate the injury caused by the dumped product. Although the URAA only suggests that such a lesser duty rule be followed, it is clear from this example that there can be substantial a difference between the dumping and injury margins.

It was suggested in an Expert Meeting on the Impact of Anti-dumping and Countervailing Actions that the lesser duty rule should be made mandatory, as a number of countries, including the US, do not apply it (UNCTAD 2001:5). It has also been argued that a mandatory lesser duty rule may go a long way to reducing the abuse of anti-dumping. A group of WTO member countries, known as the "Friends of anti-dumping" are lobbying to have this and other anti-dumping issues placed on the agenda of the Doha Development Round of multilateral trade negotiations (Negotiating Group on Rules 2002a:5).

4.1.19 The sunset clause and reviews

According to the sunset clause, anti-dumping measures are only to "remain in force as long as and to the extent necessary to counteract dumping which is causing injury"[50] (GATT Secretariat 1994:187). Measures expire after 5 years, unless a new investigation (a review) finds that ending the measures would result in injury (Corr 1997:88-89; Palmeter 1995:75). As mentioned in a previous section of this chapter (section 4.1.4), the US treats reviews differently to investigations. For example, the *de minimis* rule of 2 per cent is applicable only to investigations and not reviews under US legislation - *de minimis* is less for reviews. The rule that requires a weighted average to be compared with a weighted average and transaction-based values with transaction-based values also applies only to investigations and not reviews according to US anti-dumping law (Leebron 1997:236-237). Under the US anti-dumping regulation, it is easier to reach a positive dumping finding under a review than under an anti-dumping investigation, which means that it is likely that an anti-dumping duty will remain in force after a review (Palmeter 1995:74).

There is also what is known as a "new shipper" review. According to Article 9.5 of the URAA, a review has to be carried out to determine individual dumping margins for new exporters or producers who enter the market after the imposition of an anti-dumping duty (Corr 1997:89; GATT Secretariat 1994:186; Krishna 1997:29).

4.1.20 A public interest test

According to research done by Anderson (1993) and Gallaway *et al* (1999:220), the cost of anti-dumping (and countervailing duties) to the US economy far outweighs the benefits from these restrictive practices. Consumers in an importing country benefit from cheaper products. The importers also benefit from cheaper (dumped) imports, as these imports give importers a competitive edge over their competitors in the importing country. Importers and consumers in the importing country lose when an anti-dumping duty is imposed. Unfortunately, the position of those who gain from dumping is often not

50 Anti-dumping Agreement, PART I, Article 11, paragraph 11.1.

considered in an anti-dumping investigation - it is often only those who lose in the importing country as a result of dumping, whose position is considered (Banks 1993:184-185; Finger 1993:69-73; Feaver & Wilson 1995:211). It has been suggested that a cost-benefit analysis could be done of potential or existing anti-dumping duties. For example, the importer is the one who pays the anti-dumping duty, consumers lose access to cheaper products and downstream industries lose access to cheaper inputs which in turn could impact negatively on employment (Gallaway *et al* 1999:228). The applicant of an anti-dumping action bears no political or social costs when bringing an anti-dumping application, just some legal costs (Finger 1993:66). So while the cost of an anti-dumping action is usually low for an applicant, it could be high for the rest of the economy (Anderson 1993:101).

The material injury investigation as defined by the URAA, requires only looking at the injury suffered by the industries which are competitors to the importer and exporter of the alleged dumped products (Banks 1993; Feaver & Wilson 1995; Finger 1993; Gallaway *et al* 1999; Krishna 1997:13). However, Article 6, paragraph 6.12 of the URAA does make allowance for "industrial users of the product under investigation, and for representative consumer organizations ... to provide information which is relevant to the investigation...." (GATT Secretariat 1994:181). However, there is no onus on the investigative authorities to consider what is called the public or the national interest. Even so, the investigative authorities in a number of countries do consider the public interest during an investigation. The authorities in countries like Australia, Canada and the Republic of South Africa*sometimes* conduct a public interest test. Some anti-dumping actions have been rejected because it was not in the public interest to impose anti-dumping duties on the dumped products (Banks 1993:185-187; Dutz 1993:211). The EU authorities, the Commission, *must* look at the public (community) interest (Farr 1998:33-36). The rationale behind the public interest test is that anti-dumping actions are meant to protect domestic industry from unfair trade practices, not against fair competition. In the US the public interest is not taken into consideration.

It has been suggested that a public interest investigation would reduce the success ratio of anti-dumping investigations, in other words that a public interest investigation would make it more difficult to obtain an affirmative dumping outcome in an anti-dumping investigation. According to a study by Miranda, Torres and Ruiz (1998:50) for the period 1987-1997, the success ratio for anti-dumping actions in

Australia, a country that has a public interest investigation, was 29 per cent, which is less than the average success ratio in the study of 51 per cent. However, in the EC, which also conducts a public interest investigation, the success ratio for the same period was higher than the average, at 60 per cent. A study by Kempton, Holmes and Stevenson (1999:table7) for the period 1997-1998, also shows the same disparity between Australia and the EC, that both conduct public interest investigations.[51] It seems that the effect of a public interest investigation on anti-dumping investigations needs to be researched in more depth. Nevertheless, it has been argued that a public or national economic interest or economy-wide investigation or test should be made compulsory in every anti-dumping investigation, to see who gains and who loses in the importing country when products are dumped. The "friends of anti-dumping" have suggested that the question whether or not a public interest test should be made mandatory should be discussed during the Doha Round (Negotiating Group on Rules 2002a:5-6).

4.1.21 Best information available

The authorities investigating an anti-dumping claim need information. In order to obtain the information required, the investigative authorities will issue questionnaires to the targeted exporters, requesting sales and cost information for the "investigation period" (Corr 1997:78, ft145). The investigative authorities may also send auditors to conduct on-site visits to verify the accuracy of the information submitted by the exporters. If the investigative authorities are not satisfied with the information they acquire from the exporters, they may use the "facts available" or the "best information available".[52] The use of the best information available as far as the normal value is concerned, could mean that the constructed value method or the analogue method is used to determine the normal value. As will be seen more clearly in the next two chapters, the use of either of these methods to determine a normal value greatly enhances the potential of manipulating the dumping margin. It must be pointed out, however, that there is a very real need to have the "best information" option available, otherwise an exporter could indefinitely block

51 Here the success ratio for Australia was 13% and for the EC it was 66%.

52 Anti-dumping Agreement, PART 1, Article 6, paragraph 6.8 and ANNEX II.

an anti-dumping investigation by refusing to provide information.

4.1.22 The Dispute Settlement Process

An important contribution of the URAA was the improvement to the Dispute Settlement Process. Disputes are referred to the Dispute Settlement Body, which provides a ruling if prior consultations have failed to reach a settlement[53] (GATT Secretariat 1994:192). The dispute resolution mechanism is only available to members of the WTO though, non-member countries have no recourse to the structures of the Uruguay Round Agreement.

According to the Uruguay Round, it is not the purpose of the Dispute Settlement Body to overturn decisions made by investigative bodies, but rather to ensure that investigative bodies obtained the necessary and correct facts and made a unbiased and objective decision based on the correct facts[54] (GATT Secretariat 1994:193; Guatemala v Mexico 2000:316-317; Vermulst & Komuro 1997:6-7). According to the URAA, "... in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned ..."[55] (GATT Secretariat 1994:193). The Dispute Settlement Body will thus check whether or not the investigative authorities followed the correct procedure as per the URAA during an anti-dumping investigation and whether or not they based their decisions on the correct facts.

Corr (1997:75) seems to be of the opinion that the intent of the new Dispute Settlement Understanding was that dispute resolutions would be binding on members once a panel decision has been adopted by

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53 Anti-dumping Agreement, PART II, Article 17.

54 Anti-dumping Agreement, PART II, Article 17, paragraph 17.6.

55 Anti-dumping Agreement, PART II, Article 17, paragraph 17.6 (i).

the dispute settlement body. But any resolution taken by the dispute settlement board does not automatically become law in the relevant countries. It could happen that the dispute settlement board of the WTO makes a ruling and the country against which the ruling was made simply ignores the international dispute resolution mechanism[56] (Waincymer 1997:329). The only pressure that could be exerted on such a country is that the country's trading partner(s) may retaliate. The ideal is thus to reach a negotiated settlement when there is a declared dispute (Barfield 2002:1-3; Finger 1990:19). If necessary, a panel can be established to make a decision but such decisions are not legally binding on the members. This problem of non-compliance by members with dispute settlement rulings, is one of the issues under negotiation during the Doha Round. The current review of the Dispute Settlement Understanding (DSU) is intended to "improve and clarify" the Understanding (Doha Round Briefing Series 2003). However, strong views have been expressed about the increasing tendency of the judicial bodies of the WTO to amend existing rules or even to create new law (Barfield 2002:1). It seems that in some cases the standard of review agreed to and documented in the DSU may have been disregarded by the DSB.

The function of the Dispute Settlement Body is to ensure that members adhere to the Agreement, not to expand on the Agreement (Magnus 2003). According to Article 3.2 of the DSU, "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" (GATT Secretariat 1994:405). In addition, Article 17.6(ii) of the URAA states that "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law" (GATT Secretariat 1994:193). In other words, the DSB should abide by the standard of review laid down in the DSU, not attempt to reinterpret the Agreement. However, this very important legal debate about the sovereignty of a nation versus its obligations under international treaty is beyond the scope of this thesis.

4.2 ANTI-DUMPING LEGISLATION AND PROCEDURE

56 The EU has recently instituted sanctions against the US because the US has refused to restructure its corporate tax breaks in accordance with a WTO decision made about four years ago (Crutsinger 2004).

All countries that signed the various Rounds of Multilateral Trade Negotiations were meant to ensure that their laws conformed to the provisions of the Agreements. Each nation, however, is sovereign, so the self-execution of international agreements as part of national domestic laws is currently impossible. An international treaty has to be made law in each individual country according to the acceptable process in that country. International agreements or treaties can be interpreted differently in the domestic laws of individual countries because such agreements or treaties are not directly applicable in the domestic legal systems of member countries (Jackson in Palmeter 1995:40 ft). Some countries seem to have interpreted GATT and the subsequent agreements in ways that are to the advantage of their domestic industries. In some countries, for example the US, the anti-dumping and countervailing rules are very specific, allowing the investigative authorities very little discretion. Other anti-dumping and countervailing rules, for example the EC regulations, are more general. The EC regulations allow the investigative authorities quite a lot of discretion, although the EC authorities, the European Commission, must adhere to certain strict criteria set down in the Basic Regulation[57] (Eymann & Schuknecht 1993:222; Finger 1993:51-52).

One of the investigative bodies in the US[58], the US Department of Commerce (USDOC), has been accused of bias towards the US domestic industries. Critics have argued that this bias has increased the probability of positive dumping determinations against exporters to the US (Moore 1999:3-5; Ryan 1996:104-119; White 1997:117). Some of the problems with the USDOC were dealt with during the Uruguay Round Agreements. For example, the *de minimis* dumping margin was increased, the averaging techniques were addressed, and a sunset clause was introduced (Moore 1999:3-5). But in

57 The threat of injury is quite a strict test (Farr 1998:30-31).

58 Both anti-dumping and countervailing duty investigations in the US involve two separate investigations by two separate bodies, the US Department of Commerce (DOC) and the US International Trade Commission (ITC). The dumping or the subsidy investigation is conducted by the USDOC. The USDOC also calculates the dumping margin for anti-dumping cases and the subsidy margin for countervailing cases. The USITC investigates the material injury claim and also checks whether or not the volumes of imports are negligible (Carpenter 1999:II-5; Finger 1990:6; Finger & Murray 1993:242; Gallaway *et al*1999:214-215; Horlick & Oliver1989:31; White 1997:118-120). The first step in an action is a preliminary determination. If the preliminary phase of the investigation shows no injury or if volumes of imports are negligible, then the case ends. If the injury finding is positive during the preliminary phase, the case proceeds to the final determination stage regardless of whether the dumping or subsidy finding is negative or positive (Carpenter 1999:II-13-II-14; Finger & Murray 1993:243). After the final phase of the investigation and if both legs of the investigations prove to be positive, a definitive anti-dumping or countervailing duty is imposed on the products.

the US any international agreement must be "fully transformed into domestic law". The private sector and Congress have a say when such legislation is drawn up. Although Congress approved the Uruguay Round Agreements, it simultaneously provided that " no provision of any of the Uruguay Round Agreements, nor the application of any such provisions to any person or circumstances, that is inconsistent with any law of the United States shall have effect" (Leebron 1997:212, 224-231). So the Uruguay Round Agreements, which include the Anti-dumping Agreement, as incorporated in US legislation can be limited (Leebron 1997:211-212; Moore 1999:6-16; Palmeter 1995:41).

According to the Uruguay Round Anti-dumping Agreement (URAA), the comparisons between normal values and export prices should be made on either a transaction-to-transaction or a weighted average-to-weighted average basis. However, the US legislators made the assumption that this rule applies only to *investigations* and not to *reviews*. For example, during the review phase individual export prices can be compared with weighted average normal values and the resultant duty can be larger than would be the case if the USDOC had used the methods prescribed by the URAA. Another rule that has been interpreted in the same way in respect of reviews is the *de minimis* rule (Corr 1997:90 ft221; Leebron 1997:236-237; Palmeter 1995:45-46).

Another area of criticism against the US application of the URAA is that the US has no public interest test (Finger 1993:71). The URAA, however, only suggested the inclusion of a public interest test in an investigation, so in this respect the US is in line with the URAA. One aspect of US anti-dumping policy that has been criticised and found to be WTO inconsistent is the Byrd Amendment. This amendment authorised that the proceeds from anti-dumping cases be paid to the affected domestic producers. This practice has been mandatory in the US and, as pointed out by critics, acts as an incentive to anti-dumping actions because it gives applicants double protection (Mathrani 2001; Srinivasan 2001). The US has been requested to bring their anti-dumping procedure in line with the URAA in this regard (Tripathy 2001). The US indicated that it has initiated the legislative process to implement a number of the recommendations and rulings of the DSB (WTO 2004q; 2004r; 2004s). Another aspect of US anti-dumping practice that is under dispute is the practice of zeroing. However, in spite of these various disputes it seems that US anti-dumping procedure is mostly GATT/WTO-consistent (Moore 1999:15-16).

The EC anti-dumping and anti-subsidy laws are not the laws of individual nations. The Uruguay Round Agreements were implemented in Community Law and the anti-dumping law is a product of an EU Regulation (Van den Bossche 1997:84, 92-93; Winters 1992:141-142). Investigations are carried out by officials of the European Commission, while the collection of dumping duties falls to the national customs authorities and trade ministries in each member state (Farr 1998:7). Most of the cost of investigations is born by the EC authorities - so these investigations could be considered to be a cheap form of harassment against foreign rivals (Winters 1992:141-142).

The EU anti-dumping regulations are based on the GATT anti-dumping code, which was drawn up during the Tokyo Round of multilateral agreements, as amended by the Uruguay Round Antidumping Agreement (Eymann & Schuknecht 1993:221-239; Farr 1998:2; Finger 1993:27). These rules are contained in "The Basic Regulation"[59]. The object of the Basic Regulation is "to prevent material injury to the Community industry which produces a like product", and to this end the Commission applies the lesser duty rule - a level of duty that will reduce the injury but does not have to be equal to the dumping or subsidy margin (Commission of the European Communities 2000a:18; Farr 1998:22). According to Tharakan *et al* (1998:1051), two issues have to be considered during an anti-dumping or anti-subsidy investigation by the Commission: 1) "the need to eliminate the trade distorting effects of injurious dumping" and 2) the need "to restore effective competition".

In addition to establishing whether or not dumping or subsidisation is taking place and whether or not the relevant EU industry is or could be materially injured by the dumped products, the Commission must also consider whether or not an anti-dumping or countervailing duty would be in the interest of the EU[60]

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59 Council Regulation (EC) No 384/96 as amended for anti-dumping and Council Regulation (EC) No 2026/97 as amended for anti-subsidy investigations (Commission of the European Communities 2000a:18).

60 Very briefly, the way in which an anti-dumping action progresses in the EU is as follows. A complaint that products are being dumped (or subsidised) into the EU is filed with the European Commission. Such a complaint is usually filed by a trade association (Farr 1998:6). The Commission must establish whether or not dumping or subsidisation is taking place and whether or not the relevant EU industry is or could be materially injured by the dumped goods. The investigation by the Commission, into both dumping or subsidy and injury are simultaneous but conducted by different Directorates, the Directorate General Trade C looks at dumping while the Directorate General Trade E looks at injury (Farr 1998:6,49). In addition the Commission (Directorate General Trade E) must also consider whether or not an action against the dumped or subsidised products would be in the interest of the EU (Commission of the European Communities 2000a:18-22; Farr 1998:4,5).

(Commission of the European Communities 2000a:18-22; Farr 1998:4,5). The EU authorities must consider the Community interest and not just the interest of the complainant (Commission of the European Communities 2000a:18; Farr 1998:33-36, 71). If they do not consider the community interest, imposed measures can be annulled by the Court of First Instance (CFI) (Farr 1998:7). Unfortunately, the community interest test has allowed political interest to influences decisions (Eymann & Schuknecht 1993:228-229).

Some critics argue that the Community's trade policy measures were streamlined so that it is easier to get actions through the process in order to protect politically influential domestic producers from injury from competing imports (Eymann & Schuknecht 1993:221; Van den Bossche 1997:85). For example, under certain circumstances the anti-dumping duty is treated as part of the cost of production, and negative dumping margins were not included in weighted average calculations. Such practices tend to increase dumping and injury margins and could result in anti-dumping duties being inflated (Farr 1998:88-90; Winters 1992:141-142).

International obligations are not directly applicable or effective in Canadian domestic law either. A treaty needs specific legislative action, either by Parliament or by provincial legislatives, to become effective. As a result, the WTO Act was enacted by the Parliament of Canada in The WTO Agreement Implementation Act (Steger 1997:246). Canadian and US anti-dumping regulations are similar to each other in some respects.[61] Anti-dumping duties imposed by the Canadian authorities are usually equal to the full dumping margin (Dutz 1993:204-206). In other words, Canada does not have to implement the lesser duty rule. Although a public interest provision was included in the Special Import Measures Act (SIMA) of 1984, this provision, which was meant to put competition law principles back into the anti-dumping law, has not been very effective (Dutz 1993:203; Finger 1993:49).

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61 Canada has two bodies that conduct anti-dumping and countervailing duty investigations (Dutz 1993:204-205; Finger 1993:49; Steger 1997:243-259). A Division of the Department of National Revenue, Customs and Excise (The Department) determines whether or not there is dumping or subsidisation, while the Canadian International Trade Tribunal (The Trade Tribunal) investigates material injury and causation. But an initial check for reasonable grounds for injury in order to impose a provisional duty is done by The Department and not The Trade Tribunal.

Australia has had anti-dumping law in place since 1906 and was one of the original signatories to GATT 1948. By the mid-1970s, the shortcomings of Australia's trade policies were recognised and government started the liberalisation of Australian industrial and trade policies (Finger 1993:47). In spite of these attempts to liberalise trade, Australia was the world's champion user of anti-dumping measures during the early 1980s. However, government efforts to reduce the use of anti-dumping measures paid off during the late 1980s (Banks 1993:183-185; Finger 1993:67-68). According to Feaver and Wilson (1995:232-233), the standard used by Australian authorities to check the causal link between the dumped or subsidised products and material injury is stricter than that used in the US. The dumped or subsidised product must be the *major* cause of the material injury and not just *a* cause of the material injury. Banks (1993:198-199), however, suggests that the reduction in anti-dumping investigations by Australia had more to do with changing domestic economic conditions than with a reduction in protectionist attitudes.

Some countries cite the URAA as their anti-dumping legislation, while some incorporate the URAA into their anti-dumping legislation with a few minor changes, which do not change the essence of the Agreement. Others incorporate interpretations or applications of the URAA into their anti-dumping legislation, creating additional loopholes which allow the results of investigations to be manipulated. If such interpretations of the URAA are left unchallenged, the chances are that other countries would include such loopholes in their own anti-dumping legislation. In this way the potential to manipulate the results of anti-dumping investigations could increase.

4.3 CONCLUSION

The Uruguay Round Anti-dumping Agreement (URAA) is a comprehensive document that explains the agreed-upon rules governing the reaction to injurious dumping. However, as explained in this chapter, there are numerous ways in which the results of an anti-dumping investigation could be manipulated. One stage of an investigation that is particularly prone to the possibility of manipulation is the determination of dumping. Although the export price could be manipulated under certain circumstances,

the potential to manipulate the normal value is far greater (Messerlin 1991:52). The different set of circumstances that could influence the value of the normal value in an anti-dumping investigation will be discussed in detail and summarised in flowchart form in the next two chapters.