

ANNEX 2 – SURVEY OF INTERESTED PARTIES ON EC TDI

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1. TRENDS IN USE OF TDI¹

The survey was used to gather respondent's views on trends in use of TDI.

Annex 7, 1.1 shows that the number of anti-dumping investigations fluctuate from year to year. The following reasons were raised by survey participants for fluctuations in **anti-dumping** (AD) activity:

- business cycle (affects some industries more than others)
- general economic recession
- trends in distortions in overseas markets

The level of EC anti-dumping activity does appear to have been somewhat lower in the past five years. Two reasons were suggested for this:

- The Commission is being very careful in order to avoid being challenged in the WTO.
- TDI use is informed by the impact of other countries' TDI actions against EC exports. The EC needs to set the rest of the world an example by working to high standards and it is arguable that the standards have been increasing in the EC.

However, some survey respondents made the point that, to a large extent, use of TDI is driven by demand and need. Thus, it is possible that anti-dumping activity may increase to higher levels in the future depending on circumstances.

The following reasons were given for the relatively low level of **anti-subsidy** (AS) activity:

- difficulty in making anti-subsidy complaints due to problems with getting data/information on subsidies in third markets.
- generally low margins mean that countervailing (anti-subsidy) duties are low and not worth the trouble of making the complaint and going through the investigation.
- politically sensitive within companies e.g. where they themselves are receiving subsidies.
- politically sensitive because 'accusation' is made against a government rather than a competitor as in AD.

Reasons for the very low level of **safeguards** activity were given as follows:

- perception that politically it is not possible to use this instrument

¹ This section is based on the statements and views expressed by survey respondents. All views expressed are summarised in this section, in order to catalogue all points raised by respondents. However, there is no comment or evaluation on such points in this section. This can be found in section 2.

- perception that safeguard measures are taken against 'fair' trade
- too blunt and too disruptive to normal competition

2. ANTI-DUMPING/ANTI-SUBSIDY

2.1 Procedure

(a) Threshold for accepting complaints

Many comments were made on the threshold for getting a complaint accepted by the European Commission ("Commission").

Most survey participants agreed that the threshold is high and that it has increased in recent years.

At the same time, most survey participants (including complainants) felt that the current threshold is at about the right level. In this regard, the following issues were stressed:

- The EC should be setting an example to other users that high standards should be adopted when using TDI.
- A high threshold for accepting complaints ensures WTO consistency.
- Complainants generally feel that they want their cases to be strong. According to survey participants making this point, a high complaint threshold ensures strong cases and, once initiated, there is a reasonable prospect of measures. People contrasted this with the US where there is uncertainty until the end due to the relatively high number of cases with negative final injury determinations by the ITC.

Some EC industries did complain that the initiation threshold was too high. They pointed out that the level required to get an investigation initiated is higher than the 'sufficient evidence' level in article 5.9 of the basic AD regulation.

Those who complained that it was too high pointed out that it is the highest in the world and that, given this, no-one would challenge the EC in the WTO if standards were dropped a little. The feeling was that it is too much of a challenge to get complaints accepted, particularly for those without experience. In this regard, it was claimed that potential complainants are put off. Too much work at pre-investigation stage, it was asserted, is off-putting and reduces the incentive to go ahead as there is no guarantee that the hard work will be rewarded.

At the same time, some other survey respondents (more liberal Member States, and importers/consumer associations) complained that the threshold is too low.

(b) Type of evidence required on prices

On the level of evidence required, it was claimed that the Commission always requires invoices as evidence of prices and that this is unreasonable. Where there are general difficulties, the Commission should be acceptable in accepting salesmen's reports.

(c) Length of complaint process

Most EC industries complained that it takes around 6 months from noticing a problem to getting case initiated. Others suggested that it can take as long as 9-10 months.

It was pointed out that, given that provisional duties take 9 months from the date of initiation, and definitive duties take 15 months, industry can have up to wait up to two years between noticing a problem and obtaining relief.

(d) Changing requirements for complainants

A number of survey respondents that had been involved in submitting previous complaints survey made the point that the Commission often changes its requirements on complaints which can be frustrating. However, it was also conceded by that this is often related to WTO or court cases.

(e) Comparison with state aid complaints

The complaints procedure for AD/AS cases was compared with state aid complaints. It was claimed that the latter takes between half a day and three days to prepare and to be taken seriously by the Commission.

(f) Burden on industry wishing to submit a complaint

Many survey respondents made the point that complaints are very burdensome for industry, particularly SMEs. However, the same people said that most companies can cope with it. It was conceded by many that questions raised by the Commission about the complaint, whilst sometimes inconvenient, are often valid.

A particular problem was highlighted in respect of industries producing products with many types, models or grades e.g. clothing. This significantly complicates the collection of data for complainants. It was acknowledged that the Commission makes efforts to work with industry in order to find workable solutions but that this is only a case by case basis.

(g) Sensitivity of confidential information and complaints

It was claimed that the need to provide confidential and sensitive information is off-putting for some business people and, on these grounds, they do wish to get involved with complaints.

(h) Difficulties in getting necessary information for complaint

Difficulties were noted by some respondents with regard to collecting evidence on normal value and, particularly, subsidies.

It was claimed that this is a particular problem for SMEs that don't have subsidiaries in overseas markets.

Some participants had tried using EC delegations based in the respective countries but they had not seemed willing or able to help.

Some survey respondents made the point that the Commission should devote resources towards finding out about subsidies in other countries rather than leaving it up to EC industry.

(i) Transparency on vetting of complaints

The point was made that the Commission is not transparent on the vetting of complaints. It was claimed that there should be more transparency to give interested parties an understanding of how many complaints are accepted or rejected.

(j) Representativeness of complaint

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

(k) Non-discrimination in complaint

Some concerns were raised about countries "unnecessarily" being included in complaints. Some complainants had experienced disagreements with the Commission where companies had reasons not to include a particular country.

However, there was general agreement on the point that complainants should not be allowed to arbitrarily choose countries. A number of survey respondents felt that a high standard with regard to non-discrimination at the complaint stage is good.

The point was made by some that other countries have done this in their anti-dumping complaints against the EC or its Member States. It was felt that it is important for the EC to set a good example on this point.

(l) Identification of users/importers at the start of the investigation

A point was raised that complaints do not always accurately identify major users and importers of the product concerned. In this regard, it was claimed that the Commission should do more of its own research on the sector in question to ensure that key users and importers are contacted at the start of the case. The original letter and distribution of questionnaires, it was claimed, should be targeted more accurately.

(m) Transparency of investigation process

In general, participants felt that transparency was sufficient for interested parties to represent and defend their interests.

With regard to access to information, most participants felt overall that they have sufficient information. This includes survey respondents across a diverse range of opinions with regard to TDI i.e. it included both those who have argued for and against measures.

However, some concerns were raised about transparency:

- It was claimed that the Commission sometimes maintains an unnecessary degree of confidentiality on internal matters. Examples raised by survey respondents included issues such as a) who are the members of the advisory committee b) the agenda of advisory committee meetings c) how the Advisory Committee votes d) names and contact details of handlers in a particular case.

- Information on when cases are being presented to the Committee is crucial for interested parties given the importance of lobbying.
- A point raised on duty calculations is that there is no way for complainants to check what the Commission does. There are cases where dumping margins are lower than the complainants expected based on their knowledge of the market. Some complainants said that they would like to be able to see the full dumping and injury margin calculations. At the same time, there would be significant concern amongst complainants if transparency was raised for exporters. On balance, therefore, the need to respect the confidentiality of information from both sides was acknowledged.

(n) Access to non-confidential files by interested parties

The majority of survey respondents praised the Commission for the fact that access to non-confidential files is always readily available. In addition, most people commented on the fact that the files are always well organised.

However, concerns were raised by survey respondents about the content of non-confidential submissions. Interestingly, this concern was raised in the context of the non-confidential responses of both complainants and exporters. Some observed that this varies from case to case and questioned whether there are internal guidelines.

(o) Member States access to information

Several concerns were raised by Member States about access to information (it can be noted that these comments were made by a number of Member States and not only those that traditionally tend to be against AD in principle):

- One member state claimed that the working document (i.e. the document received by Member States outlining the Commission's findings and proposed conclusions) is not detailed enough to take a view about whether the Commission is right or not.
- Another Member State said that, due to the fact that the report is a summary, it is impossible check Commission's findings.
- Another one said that the reports are not always sufficiently specific and it is not clear how the Commission reached all conclusions.

All Member States acknowledged the fact that they can consult all of the Commission's files at any stage during an investigation. However, in response to the question about how often Member States had used the facility to consult the confidential files of the Commission, it was discovered that only two Member States had done so. Even for those Member States, they had only done so in one case each.

Even though all information is available to the Member States in the confidential files, this tends to be very rarely used because Member States say they do not have the time or resources. Thus, they rely on the working document as their principal briefing on the case.

(p) Information made available on the website and through seminars

The TDI section of the DG Trade website received overall positive reviews but suggestions for improvement.

Many survey respondents praised the website for providing comprehensive and up to date information. Others commented that they found it hard to find what they wanted and many people did not seem to be aware of everything that was available on the site.

Two specific comments were made about the website:

- The case-specific timetables provided on the website were particularly praised by those people that had seen them.
- The point was made that the initiation of cases could be made more obvious on the website.

Several survey respondents praised Commission efforts to give information through seminars.

(q) Protection of Confidential Information

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

(r) Hearings & submissions

All survey respondents felt that there is sufficient opportunity to participate in the investigation in terms of oral hearings and written submissions.

There was universal agreement that the Commission is always available for hearings, meetings and telephone conversations.

A point was made that the Commission does not always answer points raised in submissions.

One person also raised the question of whether a hearing officer could be present at AD or AS Hearings. In competition hearings, it was claimed, there is always a hearing officer.

(s) Questionnaires

There was a general complaint about the complexity of questionnaires, particularly for SMEs.

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

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

For industries with many product models or types, e.g. clothing, the transaction by transaction listing is a very big job. PCNs are complicated and can vary between cases.

One such problem stems from the fact that each company has its own system and it is difficult to change to be in line with questionnaire requirements.

Whilst it was understood that PCNs are necessary for the systematic organisation of data and allowing comparison with exports, a concern was raised that decisions on the PCN are often taken by case handlers who have no experience in industry and do not know the intricacies of product.

One person stated that case handlers have too much discretion in deciding how a product is to be classified e.g. in deciding subdivisions, though it was observed that this does vary between cases.

A number of survey respondents praised the Commission for its efforts on simplification of the questionnaire for SME complainants.

Further, it was noted that it is good from the complainants' perspective when the Commission uses sampling for injury. However, heavy questionnaires are still required to be completed by the members of the sample.

(t) Deadlines for completing questionnaires

Several survey respondents made the complaint that deadlines are not always respected by users.

At the same time, the point made by others that users and importers are not directly involved in the case and therefore the incentive for them to participate is lower. The more that complainants and exporters play an active role in the case, the more chance they have of influencing the case in their direction. However, it was highlighted that there is not the same incentive for users and importers and it often only becomes real to them after actual measures are adopted at the provisional stage.

(u) Treatment of non-cooperators

One Member State stated that the rules on treatment of non-cooperating exporters are draconian.

(v) Consultation with Member States

Several Member States raised concerns about the short time in which they have to analyse and take a decision on cases. It was claimed that 10 days is not enough to do everything that has to be done e.g. receive the working document, analyse it, consult (both internally and externally), and get ministerial sign off.

The problem was raised that MS know nothing about the case between seeing the complaint prior to initiation and just before the adoption of provisional measures.

(w) Provisional Measures

Respondents from EC Industry highlighted the difficulties arising from the need to wait nine months from initiation before provisional measures are adopted. Many survey respondents from EC industry requested that provisional duties be adopted more quickly.

Given the comments made about the length of time to get a complaint accepted by the Commission, a further nine months before any relief is obtained is, it is claimed, far too long.

Injury is allowed to continue completely unchecked for a minimum of a year from the date that EC industry first starts suffering a problem and sometimes as long as a year and a half.

Further, it is claimed, there is too much opportunity for surges of imports prior to the adoption of measures.

It was noted that provisional measures are not really provisional at all. Rather, they are draft definitive measures. In this regard, one survey respondent made the point that nine months is too long to wait for provisional measures given the level of detail in the preparatory stage.

At the same time, several survey respondents from EC industry said that, whilst they would support more rapid provisional measures, they would be concerned if provisional measures were adopted only to be later removed (the implication being that it would be better to have no duties than weak provisional measures which would be later removed).

Further, a number of survey respondents pointed out that, like exporters, EC complainants often request extensions due to difficulties in completing questionnaires within the given deadline. The Commission adopts a flexible approach to such requests from all interested parties. If shortening the nine month timetable between initiation and adoption of provisional measures meant that the Commission would have to enforce time limits more strictly, there would in fact be less support for introducing quicker provisional measures.

Others raised the point that, while nine months may be the norm, more rapid provisional duties could be used in specific circumstances. For example, where parallel investigations are occurring in other major markets, such as the US, trade diversion could occur. Thus, it was suggested, provisional duties could be adopted earlier in exceptional circumstances (see appendix 1 of annex 6 for an example of parallel investigations and the scope for trade diversion).

(x) Level of measures

Most survey respondents found that the level of AD or AS measures are acceptable and reasonable. On the whole, EC complainants feel that sufficient protection is provided against injuriously price imports.

Implicit in this is that most survey respondents were relatively positive about the mandatory lesser duty rule applied by the EC (which has the impact of lowering anti-dumping measures below the dumping margin in about 50% of cases).

However, most EC industry survey respondents raised a concern with the lesser duty rule. These concerns were not about the lesser duty rule per se but rather that it is unfair that other major markets, such as the US, do not have it. This means that when there are parallel investigations and duties applied to the same product from, say China, in the EC and US, the US tends to have higher measures which encourages trade diversion towards the EC.

(y) Retroactivity

Several survey respondents asked why duties are not collected retroactively more often. In cases such as the one raised in section Annex 6, appendix 1 (TCCA), where there is a serious risk of trade diversion, this could be one solution. It could also be helpful in preventing surges in imports just before provisional duties are adopted.

A number of people questioned the reason why, if there are good reasons to conclude that quicker provisional measures are not practical, the Commission does not make any use of retroactivity provisions? If a provision is there, they asked, why has the Commission decided not to use it given that it could help to remedy injurious situations at an earlier date within existing EC law and WTO rules?

(z) Non-discrimination

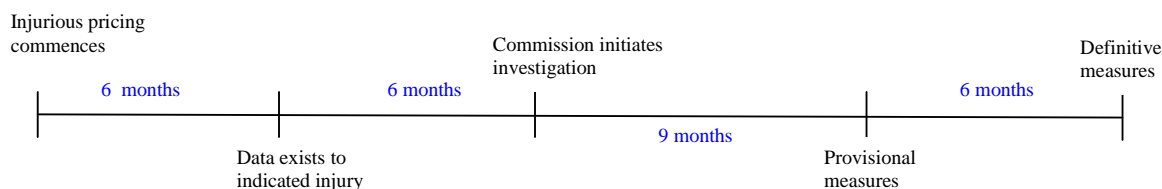
There were mixed views on the need to be non-discriminatory in the adoption of measures. Some believe that if, say, for political reasons, Member States would like one country to be excluded from measures in a multi-country investigation, there should be nothing stopping measures being imposed or maintained against other countries. Others are of the view that this may not be WTO consistent and that the EC should not send out the signal that there is any arbitrariness in the way that it implements trade defence measures.

(aa) Definitive Measures & Overall Length of Investigation

The overall length of investigation was raised as a problem by complainants. If the complaint takes six months to prepare (which in many cases happens), it is fifteen months before provisional measures are taken.

The point was also made that a complaint cannot be made until injury has occurred for at least a year and perhaps even longer and therefore injury can be suffered for several years before protection is obtained..

Typical timeline for AD investigation



**Typical time between problem starting and protection for EC industry
= 2 years and 3 months**

Two further points were made by survey respondents on the duration of investigations:

- Where provisional measures have not been adopted (which occasionally happens), definitive measures should be adopted much earlier.
- There is no reason for an AS investigation to have a thirteen month deadline while an AD investigation has a fifteen month deadline. Many survey respondents suggested that they should be aligned at 13 months.

(bb) Interim Reviews

No views were expressed on EC interim reviews.

However, some participants in the US interviews contrasted the low number of interim reviews with the high number of US administrative reviews.

(cc) Expiry reviews

Several concerns were raised about expiry reviews:

- Some EC industries complained that the Commission requires proof of things which cannot be proven. They claimed that the preparation of a request for an expiry review is worse than, or at least as bad as, an original complaint. It is felt that the Commission expects those requesting an expiry review to prove what will happen in the future which, of course, is impossible.
- Some EC industry survey respondents complained of a built in bias against extending measures beyond five years. They claimed that there is an underlying view that five years protection is enough. They stressed that, in some situations, protection is just as necessary after five years as it was at the beginning of the investigation.
- A point was raised about a particular type of situation where anti-dumping duties do their job by shutting irresponsible exporters out of the market while still allowing responsible exporting companies to continue trading following the imposition of an anti-dumping duty. In a combined expiry/interim review, a problem can occur if the responsible companies are found to have zero or de minimis margins. In a case he had experienced, he had been certain that less responsible companies would start trading again following the expiry of measures. However, he claimed, this could not be used as the basis to continue the measures.

Survey respondents generally were positive that a deadline now exists for expiry reviews. However, some felt that, while fifteen months is better than the previous situation of no deadline, it could be shorter.

2.2 Substance

(a) Overall views on dumping calculation

Few strong views were expressed on the dumping/subsidy calculations. Some commented that the Commission does a good job on calculating the dumping margin. Others commented that the Commission is generally trusted to get the calculation right.

(b) Non-market economy methodology

Whilst there seems to be general approval of the EC's non-market economy methodology, some Member States questioned the analogue countries sometimes used (particular reference was made to the US).

(c) Market economy treatment

With regard to market economy treatment for countries with an economy in transition, some EC industry survey respondents raised questions about some of the companies that have received MET. The question was raised in the context of whether young, inexperienced case handlers (who sometimes play a key role in conducting the analysis particularly at the on-site

verification) are really able to apply five criteria. Concerns were raised that it may be easy for applicants to cheat in the face of such inexperienced officials.

However, one complainant pointed out that they had provided the Commission with updated information about a successful MET applicant during the investigation and it was taken into account.

Several survey respondents from EC industry made the point that once a positive decision on MET has been made, there is no real opportunity to challenge it. They questioned how the Commission's conclusions can be disproved. Also, by the time the decision comes, it was claimed, it is too late to challenge it. MET has big impact when granted and therefore this determination is very important.

Some EC industry survey respondents underlined the importance of appropriate adjustments when MET is granted (whether on a country basis as with Russia) or for individual companies (as with economies in transition such as China). Complainants are satisfied with the MET approach overall but not if it provides the exporters concerned with an unfair advantage (i.e. lower margin due to subsidised inputs and the consequent impact on normal value).

(d) Calculation of SGA and profit in constructed normal value calculations

With regard to SGA and profit calculations, concerns were raised that, following the bed linen WTO ruling, SGA and profit can no longer be based on one 'other' company when data from the company concerned cannot be used. It was claimed that, if the Commission uses other methods allowed (i.e. 2.6 (b) and (c)), there are problems with transparency.

(e) Auditing of costs for normal value purposes

Other concerns were raised about case handlers' ability to audit accurately costs of exporters (given the crucial importance of costs in determining normal value). Complainants can give guidelines on likely cost structure and items to check. However, it was questioned whether case handlers are able to judge costs correctly? Complainants can never be sure that cost structures have been properly audited.

(f) Taking into account the cause of dumping?

Several participants raised the point that it makes a difference whether the cause of dumping is a high domestic price or a low export price. A link here was made to enforcement of WTO rules (in opening markets with high levels of protective trade barriers) and ambition in the DDA negotiations. If dumping is due to a closed market, the cause of the closed market should be attacked (as a complement to anti-dumping measure).

(g) Subsidy calculation

Survey respondents had very little comment on the subsidy calculation.

One of the survey respondents in the US claimed that the Commission is not applying **specificity** test consistently. It was claimed that there only needs to be one small group that is de facto excluded from the subsidy and the Commission concludes that there is specificity.

Several EC industry survey respondents raised the question of using AS measures against **non-market economies or economies in transition** (e.g. China). However, it was

acknowledged that getting information and finding benchmarks to calculate subsidy margins is problematic. Nevertheless, it was questioned whether this should be a barrier to using the AS instrument.

(h) Injury & Causal Link

No strong points were raised on injury and causal link.

Most survey respondents said that the Commission's analysis is done in a professional way and injury & causality are not a controversial topic.

A small number of points were made:

- It was claimed that the definition of domestic industry should not exclude related producers. This is part of EC industry and should not be excluded from the overall picture.
- With regard to like product, several participants claimed that Commission gives insufficient attention to quality and uses which can be critical when considering causality.
- One survey respondent made the point that, given the institutional structure within which TDI operates, once a complaint has been accepted, the Commission is likely to find injury and to defend its decision to initiate.

(i) Injury margin

On the calculation of the injury margin in the context of the lesser duty rule, EC industry survey respondents claimed that the profit margin used is often not sufficient.

Also, a problem was highlighted in cases where there are high and low value products yet average EC industry costs are used for the injury margin calculation. It was claimed that the non-injurious price is not sufficiently high for high value products. This penalizes high cost products within a range of products of the complainant. The impact of duties is limited for such products and thus injury is not removed.

A problem was raised with regard to the confidentiality of calculation. It was pointed out that the Commission calculates the injury margin "in a black box". Unlike the dumping calculation, where the whole calculation is revealed to the relevant interested parties (i.e. each exporter being investigated sees the whole calculation for their own dumping margin), only the Commission sees the whole injury margin calculation.

(j) A general comment on Community interest

Of all the substantive elements, Community interest was the subject on which survey respondents made comments. It has to be first recognised that how Community interest is viewed by any particular survey respondent depends on their general attitude to anti-dumping. There are many different views on dumping ranging from total support to the view that it should be abolished.

Survey respondents were reminded that the evaluation study is not performing a full review of substantive concepts such as Community interest (see section 1 for more information on

the scope of this evaluation). Rather, it is looking at the operation and efficiency of TDI and it was in this context that the following points on Community interest were made.

In general, users felt that the process of the Community interest aspects of the investigation works well. Interested parties from all sides consulted in the survey felt that they have sufficient information and opportunity to make their points to the Commission at hearings and in writing.

To the extent that there is a concern from interested parties that often oppose measures (e.g. users, importers, consumers etc.), it is about the impact of their submissions on the final conclusions and an apparent 'bias' towards always finding that measures are in the Community interest.

(k) Interpretation of a lack of response from users, importers and consumers

Some Member States and various organisations representing importers and consumers felt that the Community interest analysis is too biased in favour of concluding that measures are not in the Community interest due to the interpretation of 'non-cooperation' from users, importers or consumers. The point was made that the Commission treats lack of response from interested parties that might oppose the measure as an indication that there is no issue.

An example was given from the provisional regulation concerning trout from Norway²:

No user or consumer associations made themselves known within the time limit set in the notice of initiation. The Commission services therefore also contacted the associations of users and consumers known from the recent salmon investigations and invited them to submit information regarding the ongoing proceeding. However, no replies were received either from individual users, their representative associations or from consumer associations. Given the non-cooperation of these parties, it can be provisionally concluded that the imposition of any anti-dumping measure would not unduly affect their situation.

Other survey respondents felt that if users have an interest, they will respond. Therefore, no responses from users means that there is no basis not to proceed with measures where the other conditions are met.

(l) Community interest in an enlarged EC

It was noted that the user interest is growing in an enlarged EC. A concern was raised that, with 25 or more Member States, the balance may be altered in that complaining industries may be concentrated in a small number of Member States while users may be dispersed throughout all Member States. In this context, it was noted that lobbying is becoming more intense and making cases more difficult from the perspective of complaints.

(m) Representation of consumers in AD or AS proceedings

A particular problem was raised in the context of TDI proceedings on consumer products.

² Commission Regulation 1628/2003 (Official Journal L232 18 September 2003).

Unlike users or importers, who often have a strong financial incentive to cooperate and put forward their points to the Commission, individual consumers typically are not aware of possible AD or AS measures on products.

Thus, for consumers, the Commission relies on the input of a small number of consumer organisations in the EC. One problem that was raised is that, even in these dedicated consumer organisations, there is actually only a very small number of people across Europe who have the expertise to participate in cases.

Further, consumers organisations tend to be modest with limited resources. The problem raised is that the time required to get involved in an AD or AS investigation is great and the chance of success (in terms of really influencing the outcome) is perceived as being low. Thus, while consumer organisations do get involved in some cases involving consumer products, their role in some cases is more limited than in others.

The point was made that the Commission could chase for more for information provided by consumers. At the same time, with current limited resources, a concern was raised that consumer organisations could not participate fully in every investigation even if the Commission offered it.

(n) Concerns raised by complainants about Community interest

A number of points were raised by EC industry complainants with regard to Community interest:

- Some EC industry survey respondents pointed out that users questionnaires often contain very little information. It was claimed that this means the Commission ends up drawing conclusions from poor and unsubstantiated information.
- One survey respondent from EC industry pointed that the Commission uses new concepts in Community interest to justify a particular finding. For example, in a case involving ferro silicon, it was claimed, the Commission applied a new concept of cumulative cost burden for users which was only ever used in the context of one case.
- One industry survey respondent objected to the Commission concluding that industry is no longer viable. They asked whether the Commission can really make this assessment in the context of a TDI investigation. In one case, it was claimed, an industry went out of business and now industry is in the hands of exporters (magnesium).

(o) Analysis of market situation prior to measures

One survey respondent from a consumer organisation raised the point that previous market situation is never considered in the Community Interest analysis. It was claimed that academic research has shown that most anti-dumping cases are brought by industries already concentrated at an EC level and that this should at least be considered in anti-dumping case. When considering injury, for example, it was suggested that the Commission should look at whether there was competition in the first place? A monopolist may have been earning excessive profits and AD duties merely provide a means to restore them. The Commission should take this into account.

2.3 Institutions

(a) Political nature of decision making

Most EC industry survey respondents made the point that the process of adopting AD and AS measures is too political. The point was made that the Commission conducts a very detailed investigation and makes its conclusions on the basis of the extensive work undertaken. However, given that the adoption of measures is taken on a vote by the Member States, the ultimate decision is taken by people who are not involved in the detail of the investigation.

It was claimed by some survey respondents that TDI measures should be adopted as a Commission decision as in competition policy. Member States should be consulted but without their opinion being binding. The Commission, it was suggested, is in the best position to make what is essentially a technical decision because they have been investigating the issue.

(b) Impact of change in voting and the Eurocoton decision

Most survey respondents felt that voting change (AD and AS measures must now be rejected by a simple majority in the Council rather than accepted by a simple majority) and the Eurocoton judgement³ have had a significant effect, though participants felt that there has not yet been a case where this has really been tested.

Many EC industry participants expressed the opinion that the change in voting and the Eurocoton decision had somewhat eased the problems caused by the political nature of the decision-making process. They felt that the political element of decision-making has been reduced by these two developments.

Some Member States expressed concern that it would now be very difficult for a Commission proposal for AD or AS measures to be blocked.

With regard to the Eurocoton decision, a number of survey respondents pointed out that it is not clear how Member States would motivate the rejection of Commission proposal. Some stated that there is an "understanding" from the council Presidency that the Council Secretariat Legal Service would do this.

A further question was raised as to how decisions could be motivated if each Member State voting against was doing so for different reasons?

(c) Member States

Most survey respondents made points about the role of the Member States in the adoption of AD and AS measures.

Many participants felt that the Member States have a crucial role in providing a check on the Commission.

³ Case C-76/01 P Eurocoton and Others v Council and United Kingdom, 30 September 2003. The ECJ ruled that Member States must state reasons if it does not accept a proposal to impose AD duties from the European Commission.

Given the comments made in the previous point about the fact that it may be more difficult for Member States to block measures in future, several Member States felt that their role during the consultation stages of the investigation has been reduced. However, some pointed out that the role of Member States may have to change slightly. It was suggested that Member States can still influence the case during the investigation (i.e. before the consultation stage by which time it becomes too late to influence the outcome). Member States were very positive about the Commission's willingness to discuss progress in the investigation with any Member State at any stage of the investigation. It was suggested that this type of involvement has become much more important to Member States if they want to influence the outcome of an investigation.

(d) How Member States make their decisions

It was pointed out by a significant number of survey respondents, including representatives from several Member States, that Member States often vote in their own national interest rather than the Community interest. Some Member States believe that the Community interest is a cumulation of the twenty five Member State national interests. Other believe that Community interest is a concept distinct from a simple cumulation of Member State national interests.

(e) Representatives on the Advisory Committee

Concern was raised by several survey respondents about the quality of some Member State representatives on the Advisory Committee. TDI is a very technical area and, it was claimed, some Member States have representatives that are not sufficiently knowledgeable on the technical aspects of the subject.

(f) Lobbying

There was general agreement that lobbying has become an important part of the process for everybody, though there were differing views on whether this is a good or bad thing.

All Member States consulted welcome being contacted by interested parties as it provides them with an alternative source of information to the Commission. However, it was generally acknowledged that, in some cases, lobbying can be overdone. Some Member States talked of being bombarded with materials.

Some EC industry survey respondents made the point that Member States allow their decisions to be heavily influenced by the lobbying of users that have not participated in the original investigation. Such parties, it was claimed, should be ignored.

(g) Internal organisation

There was general agreement amongst survey respondents that the current organisation of the TDI service in DG Trade is better as one complete directorate rather than when it was split into separate directorates for dumping and injury.

There was universal criticism of the system when the directorate was split into two. However, the desirability of two genuinely separate administrative bodies, as in US system, was raised by some.

(h) Role of Commission

Some survey respondents claimed that the Commission has two conflicting roles in TDI investigation. First, it is the objective investigator while, second, it takes on the role in establishing the case on behalf of EC industry (which, it was claimed, is also partly about defending its decision to initiate the investigation). In this sense, the Commission was described as being both prosecutor and judge.

It was suggested that the complaints office could be separated from the investigation teams as a way to alleviate this perceived problem.

(i) Case handlers

Some participants complained of internal politics affecting TDI investigations and there were mixed reviews of case handlers. Several participants had experienced case handlers that did not want to share information with their colleagues or to discuss overall views on a case with each other. This was found to be unacceptable.

Generally, however, most survey respondents felt that investigation teams do function properly.

A concern was raised about the high turnover of staff amongst case handlers. Investigations where case handlers have changed in the middle of a case were particularly highlighted as problematic. It was claimed that the Commission should try to ensure permanent staff throughout proceeding.

Some survey respondents also made the point that they would like to see case handlers specialised by sector.

2.4 Effectiveness of measures

(a) Overall effectiveness

Overall, many expressed that AD and AS measures work in providing protection against dumped and subsidised pricing practices.

The level of measures was generally felt to be adequate by most parties that had made complaints. However, in certain specific cases, it was felt that protection had not been sufficient.

As mentioned earlier, there were some complaints about the lesser duty rule from the perspective that complainants obtain lower levels of protection than domestic industries get under other regimes such as the US.

It was observed that, given that AS measures generally turn out to be significantly lower than AD measures, industry is less interested the AS instrument.

(b) Circumvention & Enforcement

There was almost universal agreement that the biggest issue for survey respondents from EC industry is enforcement of measures. It was claimed that the biggest problem in this regard is in relation to exports from China.

The point was made that circumvention is worse in certain industries than in others. Some industries have simpler product types and a good match with CN codes. Problems tend to arise when CN codes have to be split.

Many of the problems are, in fact, customs problems. In this context, it was claimed that customs authorities and agencies (e.g. the 25 Member State customs administrations and OLAF) do not give sufficiently high priority to enforcing TDI. Several respondents had complaints relating to Olaf (both in terms of its efficiency and the low priority given to TDI). One respondent found Olaf to be efficient.

Participants in the survey generally praised the Commission for being proactive on circumvention problems. It was acknowledged by all complainants the Commission has improved a lot in trying deal with such problems and is showing more flexibility in finding solutions. The preparedness to open ex officio investigations was cited as an example of a good development.

Difficulties in getting actual evidence of circumvention was raised as a significant problem. In this regard, it was suggested that the Commission should consider doing random-checks on-spot to discourage exporters and traders from engaging in circumvention activity.

At the same time, some survey respondents raised the point that the Commission had been reluctant to initiate circumvention cases and, instead, encouraged the submission of new complaints.

With regard to Olaf, the point was made that there should be transparency between Olaf and DG Trade in the context of enforcing TDI. To the extent that this was a criticism, it was directed at Olaf rather than the Commission.

(c) Price undertakings

Many complainants strongly made the point that they do not like price undertakings. There is a feeling that the problem of circumvention is even greater with undertakings and they do not like the lack of transparency. Thus, a strong preference was expressed for duties to correct dumping or subsidies rather than undertakings.

However, one participant noted that the Commission has improved significantly in monitoring undertakings.

(d) Retaliation against EC companies for being involved in AD action

In a small number of cases, there has been retaliation against EC companies making anti-dumping complaints.

However, very few people interviewed in the survey had experienced any retaliatory threats for participating in complaints. Though it has clearly occurred in certain cases, it remains an isolated problem.

Retaliation included threats from companies not to import EC products and pressure from 3rd country governments (including harassment through unrelated regulatory procedures). Harassment has also included physical violence and threats but in a very small number of cases.

3. SAFEGUARDS

Very few points were made on safeguards in the survey. Most survey respondents had no experience of them and, therefore, had no views to express.

There was a general perception amongst survey participants that use of safeguards is not encouraged by the Commission and Member States. Thus, complainants tend to think only about AD and AS complaints. On reflection, many questioned why this is the case. Some felt that they should have access to instrument if it is there and that there should not be a prior attitude against it.

In this regard, certain advantages of safeguards were acknowledged by some EC industry participants. For example, it was pointed that safeguard investigations are shorter and less burdensome than AD and AS investigations. It was claimed that, given that the duration of the investigation and burden on complainants are both concerns generally raised by EC industry, this makes more use of safeguards worth considering. Some concluded that safeguards are a valuable tool alongside the other trade defence instruments.

Some survey respondents stated that they did not think that safeguards should be used, giving the following reasons:

- They are imposed against 'fair trade'
- Proving that serious injury has been directly caused by volume is difficult
- The political nature of safeguards is more likely to affect bilateral relations.
- Industries need political weight to be able to use it.
- Price measures are preferable to quantity measures. Safeguards are too restrictive and affect our customers too much. AD and AS measures are less disruptive to trade.

On the other hand, it was pointed out that safeguards can maintain traditional trade flows which may work to the advantage of developing countries.

It was also highlighted that safeguards are not relevant to all industries. They are of use only to those industries where a surge in imports is possible. Some industries require sophisticated distribution networks (e.g. electronic or chemical products) and, therefore, a short term surge is not really possible. As agriculture becomes more liberalised safeguards may be important due to the likelihood of sudden surges of imports.

With regard to procedure for safeguard investigations, the only issue that was raised was to question why only Member States can request a safeguards investigation. It was asked why EC industry cannot be a complainant?