Trade Remedies
A TOOL KIT
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The International Institute for Trade and Development
with support from the Asian Development Bank
## Acknowledgments

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- **ANNEX**: Exception Referred to in Paragraph 2 of Article 11
Acknowledgments

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In the last 20 years, Asian countries have developed at a tremendous rate, increasing their economic wealth and standard of living faster than similarly situated countries in other regions of the world. The willingness of Asian countries to liberalize trade is a major reason for the region’s success. However, trade liberalization and its ensuing gains in wealth bring greater exposure to practices such as dumping and subsidization that can cause harm to emerging and established industries alike. As foreign investment is welcomed, exports increase, and protective tariffs are lowered, it becomes increasingly important for these countries to apply trade remedies effectively to counteract such measures. An understanding of the rules and procedures applicable to trade remedies is therefore indispensable for these countries to target and counteract injurious trade practices. This tool kit, consisting of three modules, seeks to provide the user with an introductory understanding of the rules of the World Trade Organization (WTO) that WTO members must respect when applying trade remedy measures.

**Trade Remedies and the World Trade Organization**

At the WTO level, there are three main agreements that deal specifically with the application of trade measures to remedy harm that may result from international trade: the WTO Anti-Dumping Agreement (ADA), the WTO Agreement on Subsidies and Countervailing Measures (ASCM), and the WTO Agreement on Safeguards (ASG). Collectively, the ADA, ASCM, and ASG authorize remedial action against three kinds of situations harmful to international trade: dumping, subsidies, and unforeseen increased imports.

Dumping occurs when the export price of a product is lower than the domestic price. The ADA permits anti-dumping measures when dumped imports are causing injury to a domestic industry. A WTO member may then apply a duty on the ‘dumped imports’, sufficient to offset the injury resulting from dumping.

Subsidization occurs when a government provides a financial contribution that confers a benefit on the recipient. The ASCM, like the ADA, provides unilateral trade remedies when subsidized imports are causing harm to a domestic industry. The remedy most often applied is a countervailing measure, by which the WTO member applies a duty on imports of the subsidized product sufficient to offset the injury incurred from the subsidy, as determined in the domestic investigation. The ASCM also contains so-called fast-track multilateral procedures to challenge subsidies of a particular type, or which have a particular adverse effect. Fast-track procedures may require the WTO member conferring the subsidy to withdraw it or mitigate its adverse effects on the trading interests of the challenging member.
This requirement that the member providing the subsidy take remedial action is the most important difference between fast-track procedures and conventional countervailing measures.

Unforeseen increased imports that result from WTO obligations may cause serious harm to a domestic industry. If so, the ASG permits trade remedies called safeguard measures against them. Safeguards do not apply to unfair trade or trading conditions such as dumping and subsidization. They are exceptional measures designed to be applied in emergency situations in order to prevent or mitigate serious injury to a domestic industry from increased imports. In addition, the ASG requires that safeguards be imposed on a nondiscriminatory basis. That is, unlike measures to counteract dumping or subsidies, they must be applied to all sources of imports and cannot target a particular producer or country. The WTO member imposes an increased tariff or a quota on imports of a good from all sources to the extent necessary to protect the domestic industry from the injury caused by the subsidized imports.

Table 1: Characteristics of the Trade Remedies Agreements of the World Trade Organization

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<th>Situation</th>
<th>Remedies</th>
<th>Actor Applying the Remedy</th>
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<td>Dumping</td>
<td>Anti-dumping measures to offset injurious dumping</td>
<td>Importing member with domestic industry suffering injury</td>
</tr>
<tr>
<td>Agreement on Subsidies and Countervailing Measures</td>
<td>Subsidies</td>
<td>(1) Countervailing measures to offset subsidy or injury</td>
<td>(1) Importing member with domestic industry suffering injury</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2) Withdrawal of subsidy or removal of adverse effects</td>
<td>(2) WTO member conferring subsidy</td>
</tr>
<tr>
<td>Agreement on Safeguards</td>
<td>Unforeseen increased imports</td>
<td>Safeguard measures to the extent necessary to prevent or mitigate serious injury to domestic industry</td>
<td>Importing member with domestic industry suffering serious injury</td>
</tr>
</tbody>
</table>
The Tool Kit

The purpose of this trade remedies tool kit is to introduce the user to these three WTO agreements. It contains three modules, each dedicated to the explanation and study of one of the agreements: a 2007 ADA module, a 2007 ASCM module, and a 2007 ASG module. The main document in each module is an explanatory overview of the substantive and procedural rules governing trade remedy measures. As the user will learn, the rules are detailed, entail analysis of trade information that is sometimes complex, and must be precisely implemented to withstand legal scrutiny. A case study, designed to enable the user to apply some of the rules discussed and see how they operate in practice, follows the step-by-step explanation. Reference materials for further study and a list of relevant WTO dispute settlement panel and appellate body reports follow each case study.

The texts of the three WTO agreements are also provided. The user is encouraged to refer to these documents when reviewing the explanations contained in the modules and the case studies. Finally, five Microsoft PowerPoint presentations are included. Three provide an overview of the ADA, ASCM, and ASG, and the other two cover the Incoterms and a dumping margin calculation.
This module analyzes the World Trade Organization (WTO) Anti-Dumping Agreement (ADA), as interpreted by WTO panels and the Appellate Body. As its name indicates, the ADA concerns the subject of dumping in international trade. At the most basic level, dumping occurs when the export price of a product is lower than the domestic price for a like product. Anti-dumping, in turn, occurs when a country takes measures against imported dumped products that are causing injury to a domestic injury. The ADA, the subject of this module, contains detailed rules defining when and how WTO members may take action to counteract dumping.

History

Anti-dumping has been a fixture in international trade since well before the adoption of the ADA. National anti-dumping legislation dates back to the beginning of the 20th century. In addition, Article VI of the General Agreement on Tariffs and Trade (GATT) 1947 also contained rules on dumping and anti-dumping action. These rules were subject to much discussion and negotiation by the GATT 1947 Contracting Parties. In 1960, a Group of Experts agreed on certain common interpretations of ambiguous terms of Article VI. During the 1967 Kennedy Round, an Anti-Dumping Code was negotiated and signed by 17 parties. The code was revised during the 1979 Tokyo Round. The Tokyo Round Code had 25 signatories, counting the countries of the European Community as one. Although the 1979 code was not explicitly mentioned in the ministerial declaration starting the Uruguay Round, a number of GATT contracting parties—notably the European Communities, Japan, the Republic of Korea, the United States, and Hong Kong, China—proposed changes (sometimes radical ones) to the 1979 code. The amendments, made over time, largely focused on enhancing the transparency of anti-dumping proceedings by introducing numerous procedural rules and requirements.

The ADA came into force on 1 January 1995 as a result of the Uruguay Round negotiations. Article VI of GATT 1947 was carried over to, and now constitutes, Article VI of GATT 1994.

Until the 1990s, Australia, Canada, the European Communities, and the United States initiated most anti-dumping investigations. However, since that time, many other countries have also adopted anti-dumping legislation and applied anti-dumping measures. According to recent WTO statistics, from 1995 to June 2008 3,305 anti-dumping investigations were initiated. Indeed, it has been observed

1 GATT 1947 was carried forward to the WTO GATT 1994 Agreement.

2 World Trade Organization. AD Initiations by Exporting Country from 01/01/95 to 30/106/08. www.wto.org/english/tratop_e/adp_e/adp_stats/tab1_e.pdf.
that “developing countries now initiate about half of the total number of anti-dumping cases, and some of them employ anti-dumping more actively than most of the developed country users.” This includes countries such as Argentina, Brazil, the People’s Republic of China, India, the Republic of Korea, Mexico, and South Africa. The anti-dumping instrument is therefore by far the most actively used trade instrument and the ADA is the main tool for its application.

Overview

The ADA, the subject of this module, contains three main parts and two annexes.

Part I, which includes Articles 1–15, contains the definitions of dumping (Article 2) and injury (Article 3) as well as all procedural provisions that must be complied with by importing member authorities that wish to impose anti-dumping measures.

Part II establishes the WTO Committee on Anti-Dumping Practices (Article 16) and the WTO dispute settlement rules for anti-dumping matters (Article 17).

Part III (Article 18) contains final provisions.

Annex I provides procedures for conducting on-the-spot investigations.

Annex II imposes constraints on the use of best information available in cases where interested parties do not cooperate, or cooperate insufficiently, in the investigation.

What You Will Learn

According to Article VI, paragraph 1 of GATT 1994, 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.” Therefore, an anti-dumping determination pursuant to the ADA involves three main substantive elements: dumping, injury, and a causal link between dumping and injury.

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This module focuses on the rules, as contained in Article VI, paragraph 1, that give an importing member a right to impose anti-dumping measures, and the procedural rules that must be followed in order to put those measures into effect.

Chapter 1 discusses the determination of dumping.

Chapter 2 is concerned with the concept of injury to a domestic industry caused by dumped imports.

Chapter 3 discusses the procedures that apply to an anti-dumping investigation.

Chapter 4 briefly discusses some rules applicable to developing country members.

A case study, a list of resources for further reading, and a list of relevant panel and Appellate Body reports follow the explanatory chapters.

A Word on INCOTERMS

INCOTERMS (short for International Commercial Terms) are trade terms developed by the International Chamber of Commerce and are commonly used in international sales contracts. They describe how functions, costs, and risks are split between the buyer and seller in connection with the delivery of goods as part of a sales contract. These terms are designed to enable a clear understanding between buyers and sellers and to help minimize misunderstandings. There are 13 different terms of trade in four basic categories:

- The E category contains only one term, “Ex Works,” or EXW. This term applies when the seller delivers the goods at his or her own place of business and the buyer assumes all other transportation costs and risks.

- The F category contains terms that describe various situations in which international transport costs are not paid by the seller.

- The C category contains terms that describe various situations in which international transport is paid by the seller.

- The D category contains terms that describe the location where the seller’s responsibility ends.
The apportionment between the buyer and seller of costs, risks, and other responsibilities differs under each of these terms, and affects the price of the goods sold. If the seller pays for international transport and other costs of shipment, the cost will be more than if the buyer takes responsibility and incurs all of these costs. Table 1 sets forth the essential facts about the INCOTERMS.

Table 1: INCOTERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex Works</td>
<td>EXW</td>
<td>The seller must place the goods at the disposal of the buyer at the seller’s premises or another named place not cleared for export and not loaded on any collecting vehicle. Used for any mode of transport.</td>
</tr>
<tr>
<td>Free Carrier</td>
<td>FCA</td>
<td>The seller must deliver the goods, cleared for export, to the carrier nominated by the buyer at the named place. Used for any mode of transport.</td>
</tr>
<tr>
<td>Free Alongside Ship</td>
<td>FAS</td>
<td>The seller must place the goods, cleared for export, alongside the vessel at the named port of shipment. Used for maritime and inland water transport only.</td>
</tr>
<tr>
<td>Free on Board</td>
<td>FOB</td>
<td>The seller delivers the goods, cleared for export, when they pass the ship’s rail at the named port of shipment. Used for maritime and inland water transport only.</td>
</tr>
<tr>
<td>Cost and Freight</td>
<td>CFR</td>
<td>The seller delivers the goods when they pass the ship’s rail in the port of shipment and must pay the costs and freight necessary to bring the goods to the named port of destination. The buyer bears all additional costs and risks after the goods have been delivered (over the ship’s rail at the port of shipment). Used for maritime and inland water transport only.</td>
</tr>
<tr>
<td>Cost Insurance and Freight</td>
<td>CIF</td>
<td>The obligations are the same as under CFR with the addition that the seller must procure insurance against the buyer’s risk of loss of, or damage to, the goods during carriage. Used for maritime and inland water transport only.</td>
</tr>
<tr>
<td>Cost Paid To</td>
<td>CPT</td>
<td>The seller delivers the goods to the nominated carrier and must also pay the cost of carriage necessary to bring the goods to the named destination. The buyer bears all additional costs and risks after the goods have been delivered to the nominated carrier. Used for any mode of transport.</td>
</tr>
</tbody>
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### Incoterms: A General Guide

**Carriage and Insurance Paid To**

CIP

The obligations are the same as under CPT with the addition that the seller must procure insurance against the buyer’s risk of loss of, or damage to, the goods during carriage. Used for any mode of transport.

**Shipper/seller’s responsibility ends upon the arrival at a stated destination (DAF, DES, DEQ, DDU, DDP)**

**Delivered at Frontier**

DAF

The seller must place the goods at the disposal of the buyer on the arriving means of transport not unloaded, cleared for export but not cleared for import, at the named point and place at the frontier. Used for any mode of transport.

**Delivered Ex-Ship**

DES

The seller delivers when the goods are placed at the disposal of the buyer on board the ship, not cleared for import, at the named port of destination. Used for maritime and inland waterway transport only.

**Delivered Ex Quay (Duty Paid)**

DEQ

The seller delivers when the goods are placed at the disposal of the buyer, not cleared for import, on the quay at the named port of destination. Used for any mode of transport.

**Delivered Duty Unpaid**

DDU

The seller must deliver the goods to the buyer, not cleared for import, and not unloaded at the named place of destination. Used for any mode of transport.

**Delivery Duty Paid**

DDP

The seller must deliver the goods to the buyer, cleared for import, and not unloaded at the named place of destination. Used for any mode of transport.


INCOTERMS are often used to ensure that equivalent transactions are being compared when investigating trade remedies issues, especially when comparing costs and prices. For example, Article 2.4 provides that when calculating whether dumping has occurred, the determination whether the export price is greater than the normal value should normally be made at the ex-factory level. In INCOTERMS, this is the ex works (EXW) price. Because most sales transactions analyzed for the purpose of a dumping determination include additional costs, it is then necessary to make adjustments to the sales price, depending on the INCOTERMS that apply in the relevant transaction. For example, suppose that a producer in country A exports goods CFR to an importer in country B. The CFR requires the seller to arrange for inland transportation from the factory to the port of shipment and to pay for the overseas transportation cost and other expenses to deliver the goods.
to the destination port. The risks of loss or damage are passed to the buyer when the goods pass the ship’s rail at the port of shipment. If an authority is investigating this transaction for the purpose of a dumping determination, the CFR costs incurred by the seller for the delivery of the goods will have to be deducted to arrive at the normal value for the goods at the ex-factory, or EXW, level. The first and second chapters of this module refer to INCOTERMS. The reader is encouraged to refer back to this section if clarification of the terms is needed.
“Article 2 contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin.”

Panel Report, Thailand–H-Beams, para 7.35.

A WTO member may impose anti-dumping duties if it determines that a product is being dumped and is causing injury to the domestic industry. Article 2.1 states that

a product is to be considered as being dumped, i.e., 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.

More simply, dumping occurs where the normal value of a product is greater than its export price. This chapter discusses the following elements of dumping: like product, export price, normal value, and comparison of export price and normal value.

Before these concepts are explained in detail, the reader should keep in mind that a dumping determination requires a comparison between prices or costs in different markets over time. This comparison is usually made for a particular period of time set by the authorities at the outset of the investigation, typically called the investigation period or period of investigation (POI). It is noteworthy that Article 2 does not contain any rules for the selection of the POI, although such selection may sometimes have ramifications for the outcome of the proceeding. However, a recommendation adopted by the Committee on Anti-Dumping Practices in 2000 provides that the investigation period for dumping purposes should normally be 12 months, and in any case no less than 6 months, ending as close to the date of initiation of the investigation as is practicable.⁴

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Like Product

Dumping only occurs if the normal value of a “like product” sold on the domestic market is higher than the export price of the exported product, which is referred to in Article 2.6 as the product under consideration. Therefore, identification of the domestic product like the exported product under consideration is an essential element of a dumping determination.

“Like Product” Defined

Article 2.6 defines “like product” as “a product, which is identical, i.e. alike in all respects, to the product under consideration, or in the absence of such a product, another product, which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.” This definition, which applies throughout the ADA, is strict; it may be contrasted, for example, with the broader phrase “like or directly competitive products” in the WTO Agreement on Safeguards.

In the context of a dumping determination, the like product is the product sold on the domestic market that is like the product allegedly being dumped. As is more fully discussed in chapter 2, the Article 2.6 definition of “like product” is also relevant in an injury determination under Article 3. In that case, however, the like product is the product produced on the domestic market which is like the product allegedly being dumped.

While the ADA provides no further guidance on the concept of like product, the following factors are commonly taken into account by investigating authorities:

- physical characteristics,
- uses,
- interchangeability of products,
- channels of distribution,
- customer or producer perception,
- common manufacturing facilities and production employees, and
- production processes.
Subdividing the Like Product

It is noted that most countries subdivide the like product into various types or models, often on the basis of product control numbers, or PCNs. This is done to facilitate comparisons for dumping and injury margin calculations. Table 2 provides a practical example of how product codes may be developed for use in an investigation.

Table 2: Product Code Classification for Catfish

<table>
<thead>
<tr>
<th>Field Description</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Product</td>
<td>Catfish = C</td>
</tr>
<tr>
<td>Fresh or Frozen</td>
<td>Fresh = FR, Frozen = FZ</td>
</tr>
<tr>
<td>Quality of the Product</td>
<td>Superior fish = S, Ordinary fish = O, Other quality fish = L</td>
</tr>
<tr>
<td>Varieties of Catfish</td>
<td>Whole fish = a, Gutted fish, head on = b, Gutted fish, head off (including steaks) = c, Offcuts or trimmings = d, Whole fish fillets exceeding 300 g = e, Other fillets or fillet portions normally weighing 300 g or less = f</td>
</tr>
<tr>
<td>Size for Cuts with Indication of Weights</td>
<td>Less than 1 kg = 1, Equal to or more than 1 kg and strictly less than 2 kg = 2, Equal to or more than 2 kg and strictly less than 3 kg = 3, Equal to or more than 3 kg and strictly less than 4 kg = 4, Equal to or more than 4 kg and strictly less than 5 kg = 5, Equal to or more than 5 kg and strictly less than 6 kg = 6, Equal to or more than 6 kg and strictly less than 7 kg = 7, Equal to or more than 7 kg and strictly less than 8 kg = 8, Equal to or more than 8 kg and strictly less than 9 kg = 9, Equal to or more than 9 kg = 0</td>
</tr>
<tr>
<td>Examples of PCN:</td>
<td>Ordinary quality frozen catfish, gutted, head off, 2 kg = C/FZ/O/c/3, Superior quality fresh catfish, whole fish fillet, 1 kg = C/FR/S/e/2, Ordinary quality frozen catfish, offcuts, 7.5 kg block = C/FZ/O/d/8, Superior quality fresh catfish, other fillet, 250 g = C/FR/S/l/1</td>
</tr>
</tbody>
</table>

Different elements of the product code correspond to different characteristics of the product under consideration. In an investigation of alleged dumping of catfish, interested parties would report data to the investigating authorities corresponding
to product codes developed on the basis of Table 2. For example, if an exporter sold 100 1 kilogram (kg), superior quality whole fish frozen catfish fillets and 100 2 kg, gutted, head off, ordinary quality fresh catfish to a buyer in the importing member, it would not merely report the price information for 300 kg of catfish. Rather, it would divide the sales and report the sales in accordance with the PCN information provided in Table 2.

**Export Price**

Dumping occurs only if the export price of a product is less than its normal value (in principle, the domestic sales price). Therefore, identification of the export price is an essential element of a dumping determination.

According to Article 2.1, the export price is the price at which the product is exported from one country to another. In other words, it is the transaction price at which the product is sold by a producer or exporter in the exporting country to an importer in the importing country. This price is normally indicated in export documentation, such as the commercial invoice, the bill of lading, and the letter of credit.

If there is no export price (as in a case of barter) or if the export price is not reliable (for example, because the exporter and the importer are related and the price between them is unreliable due to transfer pricing reasons), Article 2.3 provides that the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer within the importing country. In such cases, allowances should be made in accordance with Article 2.4 for costs, duties, and taxes incurred between importation and resale and for profits accruing. This is called the construction of the export price. Such allowances decrease the export price and thereby increase the likelihood of a dumping finding. This was an important reason for a WTO panel to interpret the relevant part of Article 2.4 restrictively.5

**Normal Value**

In order for dumping to be found, the normal value of a product must be greater than its export price. Therefore, calculation of normal value is an essential element of a dumping determination. Article 2 provides three separate bases for determining

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the normal value of a product. The preferred basis for the determination of normal value is the domestic price. As will be shown, a number of factors can affect whether and which domestic sales transactions can be taken into account to determine normal value. If normal value cannot be determined with reference to domestic price, Article 2 provides that normal value may be based on third-country exports or a constructed normal value. These requirements are discussed below.

The Standard Situation: Domestic Price

Article 2.1 provides that a product is dumped 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.” In other words, dumping occurs when the export price is lower than the “domestic price.” This is a contextual definition of “normal value” in terms of the standard situation; the normal value is the price of the like product, in the ordinary course of trade, in the home market of the exporting member.

While the principle of normal value based on the domestic price is not conceptually difficult to understand, in accordance with Article 2.1, investigating authorities must take its component factors into consideration when deciding whether domestic prices can constitute the basis for a normal value calculation.

Ordinary Course of Trade

Since normal value must be established on the basis of sales made in the ordinary course of trade, “sales which are not made ‘in the ordinary course of trade’ must be excluded, by the investigating authorities, from the calculation of normal value.” The rationale for this rule is that inclusion of such sales, whether high or low, would distort what is defined as “normal value.” Because the term “in the ordinary course of trade” is not defined by the ADA, WTO members have a certain amount of discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not “in the ordinary course of trade.” The Appellate Body has ruled that this discretion is not unlimited; it “must be exercised in an even-handed way that is fair to all parties affected by an anti-dumping investigation.”

Although the ADA does not define “ordinary course of trade,” Article 2.2.1 delineates one circumstance where sales below cost may be treated as not being

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"in the ordinary course of trade" and may be disregarded, i.e., excluded from the normal value calculation, only if the authorities determine that sales below cost are made:

- within an extended period of time (normally 1 year, but never less than 6 months);
- in substantial quantities (meaning that either the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or the volume of sales below per unit costs represents not less than 20% of the volume sold in transactions under consideration for the determination of the normal value); and
- at prices which do not provide for the recovery of all costs within a reasonable period of time.

In practice, sales below cost are often excluded from the normal value calculation when they occur in substantial quantities as characterized above. Exclusion of sales below cost will increase normal value because it will then be based on (higher-priced) domestic sales above cost only. This will make a finding of dumping more likely. In the following example, we suppose that the full cost of production is 50.

Figure 1: Effect on Normal Value of Exclusion of Sales Below Cost

<table>
<thead>
<tr>
<th>Date</th>
<th>Quantity</th>
<th>Domestic Sales Price</th>
<th>Export Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 August</td>
<td>1</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>10 August</td>
<td>1</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>15 August</td>
<td>1</td>
<td>150</td>
<td>150</td>
</tr>
<tr>
<td>20 August</td>
<td>1</td>
<td>200</td>
<td>200</td>
</tr>
</tbody>
</table>

The domestic sales transaction made on 1 August at a price of 40 is lower than the unit cost of production of 50. It represents 25% of domestic sales, and may thus be excluded under the 20% criterion of Article 2.2.2. As a result, the average normal value is 150 ((100 + 150 + 200)/3). The average export price is 125 ((50 + 100 + 150 + 200)/4). Therefore, the dumping amount is 100 and the dumping margin is 19%.9 If the domestic sale of 40 had been included, the average normal value would have been 122.5 and no dumping would have been found.

9 Assuming a total CIF value of 525; the dumping margin would be calculated as follows: dumping amount per transaction = (Normal Value – Export price), i.e., 150–125 = 25. Total dumping amount for the four transactions = 100. Dumping margin = (100/525) x 100 = 19%.
Many WTO members refuse to find that prices charged by domestic producers to related distributors are in the ordinary course of trade (and therefore refuse to base the normal value on these prices) on the grounds that they are not arm’s-length transactions. In *US–Hot-Rolled Steel*, the Appellate Body recognized that sales between affiliated parties “might not” be in the ordinary course of trade.\(^\text{10}\) When domestic prices between affiliates are not taken into account, investigating authorities will typically base normal value on the sales prices charged by the affiliates to the first independent customer. This price will be higher and is therefore more likely to lead to a finding of dumping. In *US–Hot-Rolled Steel*, the Appellate Body held the practice permissible, but cautioned that investigating authorities that use downstream prices “have a particular duty to ensure the fairness of the comparison.”\(^\text{11}\)

**Transshipments**

Article 2.1 is concerned with the price of the like product when destined for consumption in the exporting country. Article 2.1 provides that the export price shall normally be compared with the comparable price in the country of export. Therefore, the relevant domestic price, as Article 2.1 indicates, is normally that found in the exporting country. As an exception to this rule, however, Article 2.5 allows a comparison with the price in the *country of origin*, if, for example, the products are merely transshipped through the country of export, such products are not produced in the country of export, or there is no comparable price for them in the country of export. Therefore, it is possible that normal value can be based on the prices in the *country of origin* and not the country of export in some situations.

**Alternatives: Third-Country Exports and Constructed Normal Value**

In general, normal value is the price of the like product, in the ordinary course of trade, in the home market of the exporting member. However, the ADA also permits investigating authorities to use two other methods to calculate normal value: they may base normal value on third-country export data, or construct a normal value. According to Article 2.2, the investigating authorities may resort to these methods for calculating normal value if there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or when, because of the particular market situation or low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison.

\(^{10}\) Appellate Body Report, US–Hot-Rolled Steel, para 143.

The Bases for Alternative Normal Value Calculations

There are a number of circumstances in which there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, justifying the resort to an alternative method of calculating the normal value. First, obviously, there may be no domestic sales at all. This may happen if a company only makes and produces goods for export. Second, there may be domestic sales that are not in the ordinary course of trade. This may occur, for example, if the goods were sold at a loss. Korea-Paper provides an additional example of how recourse to an alternative normal value calculation based on no domestic sales in the ordinary course of trade may arise. In that case, Indonesia argued that the Republic of Korea violated Article 2.2 by failing to make an affirmative determination that there were no domestic sales or a low volume of sales in the ordinary course of trade before resorting to constructed normal value. The panel found that it was not necessary since the Republic of Korea had concluded that there was no verifiable sales data and therefore, implicitly, there were no sales in the ordinary course of trade on the domestic market.

The second basis to resort to an alternative method of calculating normal value is most typically applied when there are insufficient sales on the home market, i.e., when the particular market situation or low volume of sales in the domestic market of the exporting country does not permit a proper comparison of such sales. Footnote 2 of the ADA covers this situation and is often referred to as the 5% rule, or the home market viability test. Using this test, authorities will generally examine whether domestic sales of both the like product and individual models represent 5% or more of the export sales to the importing member. If this is not the case, an alternative normal value must be found, either for the like product or for specific models.
Third-Country Exports

If an investigating authority finds that there are no domestic sales in the ordinary course of trade or that the particular market situation or low volume of sales does not permit a proper comparison, Article 2.2 provides that normal value may be based on “the comparable price of the like product when exported to an appropriate third country, provided that this price is representative.” In practice, this method of calculation is not used by most WTO members. At least some investigating authorities have indicated a reluctance to use this method on the grounds that, if exports are allegedly dumped into their market, it cannot be excluded that such exports are dumped into third-country markets as well.

Constructed Normal Value

Article 2.2 also provides that normal value may be based on “the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.” This is also referred to as a constructed normal value.

The purpose of the constructed normal value is to construct a price of the exported product, as if it would have been sold on the domestic market of the exporting country. Thus, one should first calculate the cost of production of the exported product and then add a “reasonable amount” for administrative, selling, and general costs (SGA) and profits.

Article 2.2.1.1 provides additional guidance on how to calculate production and SGA costs for the purpose of constructed normal value:

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—Article 2.2.1.1, ADA.
Article 2.2.2 provides additional guidance for calculating SGA and profits: these amounts “shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.” If the amount cannot be determined on this basis, then Article 2.2.2 provides that they shall be determined on the basis of

- the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

- the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

- any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

To date, at least two panels have found that Article 2.2.2 does not establish a hierarchy between the three alternative methods established by Article 2.2.2. As long as the legal requirements of Article 2.2.2 are properly invoked and applied, investigating authorities are free to choose any of its alternative calculation methodologies. As we will see, however, each alternative calculation cannot be applied in all circumstances.

Articles 2.2.1.1 and 2.2.2 “emphasize two elements, first, that cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles but that second, the costs to be included are those that reasonably reflect the costs associated with the production and sale of the product under consideration.”

—Panel, Egypt-Steel Rebar, para 7.393.

Article 2.2.2(i) provides a method for calculating SGA and profits where data are not available for the like product under consideration.

In *Thailand–H-Beams*, the panel addressed a claim related to an alternative calculation of profit based on Article 2.2.2(i). In that case, Poland claimed that Thailand had adopted too narrow a definition of the term “same general category of products.” The panel observed that the intention of the Article 2.2.2 subparagraphs is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country. Because a narrower category of products means that fewer products other than the like product will be included in the category, it concluded that such an approach is consistent with that intention. Therefore it rejected the Polish position that a broader rather than a narrower definition is required, and hinted that in fact the opposite approach might be more appropriate.13

Article 2.2.2(ii) provides a second alternative method for calculating SGA and profits. Unlike the first alternative method, it applies to data relating to the “like product” and not the “same general category of products.” As the panel in *Thailand–H-Beams* put it, when actual data for the like product are not available

subparagraphs (i) and (ii) respectively provide for the database to be broadened, either as to the product (i.e., the same general category of products produced by the producer or exporter in question) or as to the producer (i.e., other producers or exporters subject to investigation in respect of the like product), but not both.14

In *EC-Bed Linen*, the Appellate Body held that the use of the term “weighted average” in Article 2.2.2(ii) makes it impossible to use this alternative method where there is only one producer or exporter with domestic sales.15 In other words, use of the alternative method requires the existence of at least two producers with domestic sales.

In the same case, the Appellate Body determined that, because Article 2.2.2(ii) refers to actual amounts incurred and realized by other exporters and producers, sales by other exporters or producers that are not in the ordinary course of trade cannot be excluded from a calculation for the purpose of Article 2.2.2(ii).16 Thus, sales below cost will need to be included in cases where this method is used.

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In our view, the ordinary meaning of the phrase “actual amounts incurred and realized” includes the SG&A actually incurred, and the profits or losses actually realized by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. There is no basis in Article 2.2.2(ii) for excluding some amounts that were actually incurred or realized from the “actual amounts incurred or realized.”

—Appellate Body, EC-Bed Linen, para 90.

Article 2.2.2(iii) permits “any other reasonable method” to be used as long as the profit established does not exceed the profit normally realized by other exporters or producers, as specified in that provision. Disputes have arisen about the relation of this language to the provisions of subparagraphs (i)–(ii), which do not contain it, when importing countries have used those subparagraphs to construct a normal value the exporter deems “unreasonable”—36.3% in Thailand–H-Beams, 18.65% in EC-Bed Linen. The panels in each dispute held that subparagraph (iii) did not imply a “separate” reasonableness requirement necessary to satisfy the Article 2.2 provision that constructed normal value should include “reasonable amounts” for SGA and profits. Rather, where one of the methods provided in Article 2.2.2 is “properly” used, the result will be reasonable for purposes of Article 2.2. As the EC-Bed Linen panel put it:

Further, we note that Article 2.2.2 (iii) provides for the use of “any other reasonable method,” without specifying such method, subject to a cap, defined as “the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.” To us, the inclusion of a cap where the methodology is not defined indicates that where the methodology is defined, in subparagraphs (i) and (ii), the application of those methodologies yields reasonable results. If those methodologies did not yield reasonable results, presumably the drafters would have included some explicit constraint on the results, as they did for subparagraph (iii).

Chapter 1
Dumping

Thus, we conclude that the text indicates that, if a Member bases its calculations on either the chapeau or paragraphs (i) or (ii), there is no need to separately consider the reasonability of the profit rate against some benchmark. In particular, there is no need to consider the limitation set out in paragraph (iii). That limitation is triggered only when a Member does not apply one of the methods set out in the chapeau or paragraphs (i) and (ii) in Article 2.2.2. Indeed, it is arguably precisely because no specific method is outlined in paragraph (iii) that the limitation on the profit rate exists in that provision.

—Panel, EC-Bed Linen, paras 6.97–6.98

Nonmarket Economy Dumping/Surrogate Country Concepts

In some cases, WTO members will not accept prices or costs from nonmarket economies (NMEs) for the purpose of making a normal value calculation. In such cases, investigating authorities will resort to prices or costs in a third-country market economy as the basis for normal value. This means that export prices from the nonmarket economy to the importing member will be compared with prices or costs in this surrogate or analogue country. The legal basis for this course of action is contained in a footnote to Article VI.

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

—Annex I, GATT 1947 Second Supplementary Provision to paragraph 1 of Article VI

It may be noted that the surrogate country concept tends to lead to findings of high dumping for several systemic reasons. For example, producers in the surrogate country are competing in the market place with the nonmarket economy exporters, so it is not in their interest to minimize a possible finding of dumping for their nonmarket economy competitors. The Protocols of Accession of the People’s Republic of China and Viet Nam contain special provisions allowing WTO members to treat these countries as NMEs until 2016 (the People’s Republic of China) and 2019 (Viet Nam).
Comparison

Once normal value and export price are determined, these prices must be compared with each other. In other words, it must be determined whether the export price is less than the normal value, licensing the conclusion that dumping has occurred.

Article 2.4 lays down the key principle that a fair comparison must be made between export price and the normal value, with necessary adjustments made to any other factor that affects price comparability.

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

—Article 2.4 ADA

To provide a simple example, if an investigating authority has evidence that an exporter sold 100 widgets to a wholesaler in country A for $100 (export price) and 10 widgets to a retailer in the domestic market for $10.50 (normal value), it must establish that the transactions are comparable before it undertakes a dumping calculation. It will not normally be sufficient for an investigating authority to determine that dumping has occurred simply because the average export price of widgets was $1 while the normal value was $1.05. The authority must take into account the level of trade (wholesaler versus retailer), product differences (if any), and any other factors that may affect price comparability. The reader can easily imagine how an initial impression that dumping has occurred can change once such data are analyzed. A more detailed example of a dumping margin calculation that takes fair comparison considerations into account is provided in the last part of this chapter.
Comparison Methods

Article 2.4.2 addresses the question how multiple domestic and export transactions are to be compared with each other after relevant adjustments have been made. Article 2.4.2 contemplates two main rules (weighted average-to-weighted average, and transaction-to-transaction methods) and one exception (weighted average-to-transaction method):

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. A normal value established on a weighted average basis may be compared to 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.

—Article 2.4.2, ADA

Main Rules

In principle, prices in the two markets should be compared on a weighted average-to-weighted average basis or on a transaction-to-transaction basis. Such weighting will be done on the basis of the sales quantity. An example may be helpful:

Figure 2: Equal-Value Matrix Illustrating Price Comparison Methods

<table>
<thead>
<tr>
<th>Date</th>
<th>Normal Value</th>
<th>Export Price</th>
<th>Transaction-to-Transaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 January</td>
<td>50</td>
<td>50</td>
<td>0</td>
</tr>
<tr>
<td>8 January</td>
<td>100</td>
<td>100</td>
<td>0</td>
</tr>
<tr>
<td>15 January</td>
<td>150</td>
<td>150</td>
<td>0</td>
</tr>
<tr>
<td>21 January</td>
<td>200</td>
<td>200</td>
<td>0</td>
</tr>
</tbody>
</table>

Under the weighted average method, the weighted average normal value (500/4 = 125) is compared with the weighted average export price (again 500/4 = 125), as a result of which the dumping amount is zero. It is noted that,
to keep the example simple, it is assumed that each transaction has an equal weight so that in fact the weighted average is the same as the simple average in the example.

Under the transaction-to-transaction method, domestic and export transactions which took place on or near the same date will be compared with each other. In the perfectly symmetrical example above, the transactions on 1 January will be compared with each other and so on. Again, the dumping amount will be zero.

**Exceptions**

As authorized by Article 2.4.2, weighted average normal value may be compared to 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 one of the two principal methods.

If we apply the exceptional method to the example above, the result will be quite different:

**Figure 3: Comparison of Weighted Average Normal Value with Individual Prices**

<table>
<thead>
<tr>
<th>Date</th>
<th>Normal Value (Weighted Average Basis)</th>
<th>Export Price (Transaction-by-transaction Basis)</th>
<th>Dumping Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 January</td>
<td>125</td>
<td>50</td>
<td>75</td>
</tr>
<tr>
<td>8 January</td>
<td>125</td>
<td>100</td>
<td>25</td>
</tr>
<tr>
<td>15 January</td>
<td>125</td>
<td>150</td>
<td>-25</td>
</tr>
<tr>
<td>21 January</td>
<td>125</td>
<td>200</td>
<td>-75</td>
</tr>
</tbody>
</table>

Thus, there is a positive dumping amount of 100 (75 and 25) on the first two transactions and a negative dumping amount of 100 (−25 and −75) on the last two transactions. The negative dumping occurs because the export price is actually higher than the normal value. If the negative dumping could be used to offset the positive dumping, no dumping will be found.

**Zeroing**

Zeroing is the practice, conducted in some jurisdictions, of replacing actual negative dumping margins (the margin in transactions for which the export price exceeds the calculated normal value) with a value of zero before the final calculation of a weighted-average margin of dumping for the product under investigation. Zeroing
thus has the effect of overstating dumping margins by denying the full impact of negative dumping on the dumping margin for the product as a whole.

History of Zeroing
Before the entry into force of the ADA in 1995, some authorities would routinely use zeroing to calculate dumping margins. They took the position that transactions generating negative margins are not dumped, and replaced negative dumping amounts with zeroes. The result of this technique was that negative-margin transactions could not be used to offset dumped transactions. This practice became known as simple zeroing. Figure 4 provides a simple example.

Figure 4: Simple Zeroing

<table>
<thead>
<tr>
<th>Date</th>
<th>Normal Value Weighted Average Basis</th>
<th>Export Price Transaction-by-Transaction Basis</th>
<th>Dumping Amount</th>
<th>With Zeroing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 January</td>
<td>125</td>
<td>50</td>
<td>75</td>
<td>75</td>
</tr>
<tr>
<td>8 January</td>
<td>125</td>
<td>100</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td>15 January</td>
<td>125</td>
<td>150</td>
<td>-25</td>
<td>0</td>
</tr>
<tr>
<td>21 January</td>
<td>125</td>
<td>200</td>
<td>-75</td>
<td>0</td>
</tr>
<tr>
<td>Amount of Dumping</td>
<td></td>
<td></td>
<td>0</td>
<td>100</td>
</tr>
</tbody>
</table>

Following the entry into force of the ADA, this third method of calculating a dumping margin could only be used in exceptional cases as per the new Article 2.4.2 of the ADA. In response to these new rules, some authorities started to use model zeroing, a variation on simple zeroing.

Model zeroing is the practice of imposing a value of zero on model comparisons that generate negative dumping margins, preventing the results of those comparisons from offsetting the effects of products found to be positively dumped. An example is provided in Figure 5.
Figure 5: Model Zeroing

<table>
<thead>
<tr>
<th>Model</th>
<th>Normal Value</th>
<th>Export Transaction</th>
<th>Model Dumping</th>
<th>Model Zeroing</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>50</td>
<td>100</td>
<td>-50</td>
<td>0</td>
</tr>
<tr>
<td>B</td>
<td>100</td>
<td>100</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>C</td>
<td>100</td>
<td>100</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>D</td>
<td>100</td>
<td>100</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>E</td>
<td>150</td>
<td>100</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>Amount of Dumping</td>
<td>N/A</td>
<td>N/A</td>
<td>0</td>
<td>50</td>
</tr>
</tbody>
</table>

It is noted that the first column now mentions models rather than transactions. In *EC-Bed Linen*, the Appellate Body upheld the panel’s finding that this practice was inconsistent with the requirement to make a fair comparison between export price and normal value. Under the weighted average–to–weighted average method of comparison, investigating authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions. Zeroing does not take all prices fully into account, because it treats some export prices as if they were less than they are, and therefore does not result in a fair comparison between export price and normal value. The Appellate Body accordingly found that the European Communities’ use of model zeroing amounted to a violation of Articles 2.4 and 2.4.2.21

In *US-Zeroing (EC)*, brought by the European Communities, the panel concluded that the United States acted inconsistently with Article 2.4.2 in 15 separate anti-dumping investigations by not properly accounting for negative dumping margins in its calculation of weighted average dumping margins. It also concluded that the United States’ model zeroing methodology is inconsistent, as such, with Article 2.4.2. (The Appellate Body upheld this conclusion, though for different reasons.)22 In *US-Shrimp (Ecuador)* the panel also held that, by zeroing while calculating the dumping margin, the United States had acted inconsistently with Article 2.4.2.23

In *US-Softwood Lumber V*, Canada attacked model zeroing applied by the United States. Upon appeal, the Appellate Body confirmed that the model zeroing

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22 Appellate Body Report, US-Zeroing (EC), para 222. The panel in US-Zeroing (Japan), took the same approach, see paras 7.82–7.86.
applied by the United States violated the ADA.\textsuperscript{24} To implement the Appellate Body report, the United States recalculated the dumping margins. In the new calculations, it used the transaction-to-transaction method and zeroed the nondumped transactions. A simple example of this type of zeroing is given in Figure 6.

**Figure 6: Transaction-to-Transaction Zeroing**

<table>
<thead>
<tr>
<th>Date</th>
<th>Normal Value</th>
<th>Export Price</th>
<th>Transaction-to-Transaction</th>
<th>Transaction-to-Transaction Zeroing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 January</td>
<td>50</td>
<td>25</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td>8 January</td>
<td>100</td>
<td>100</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>15 January</td>
<td>150</td>
<td>150</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>21 January</td>
<td>200</td>
<td>225</td>
<td>−25</td>
<td>0</td>
</tr>
<tr>
<td>Dumping Amount</td>
<td>N/A</td>
<td>N/A</td>
<td>0</td>
<td>25</td>
</tr>
</tbody>
</table>

In this example, the first export transaction is dumped while the last export transaction is not dumped. As the last transaction is zeroed, only the positive dumping amount remains, as a result of which the authorities would find dumping. The Appellate Body condemned this practice.

Turning to the transaction-to-transaction methodology, Article 2.4.2 provides that “margins of dumping” may be established “by a comparison of normal value and export prices on a transaction-to-transaction basis.” The reference to “export prices” in the plural suggests that the comparison will generally involve multiple transactions, as was the case in the anti-dumping investigation before us. At the same time, the reference to “a comparison” in the singular suggests an overall calculation exercise involving aggregation of these multiple transactions. The transaction-specific results are mere steps in the comparison process. This tallies with the term “basis” at the end of the sentence, which suggests that these individual transaction comparisons are not the final results of the calculation, but, rather, are inputs for the overall calculation exercise. Thus, the text of Article 2.4.2 implies that the calculation of a margin of dumping using the transaction-to-transaction methodology is a multi-step exercise in which the results of transaction-specific comparisons are inputs that are aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer. Contrary to the United States’ submission, the results of the transaction-specific comparisons are not, in themselves, “margins of dumping.”

Furthermore, the reference to “export prices” in the plural, without further qualification, suggests that all of the results of the transaction-specific comparisons should be included in the aggregation for purposes of calculating the margins of dumping. In addition, the “export prices” and “normal value” to which Article 2.4.2 refers are real values, unless conditions allowing an investigating authority to use other values are met. Thus, in our view, zeroing in the transaction-to-transaction methodology does not conform to the requirement of Article 2.4.2 in that it results in the real values of certain export transactions being altered or disregarded.


It should be noted that US-Softwood Lumber V was settled between Canada and the United States, so that the United States did not have to revise its calculations to come into compliance with the Appellate Body’s holding in that case.

In its most recent decision, US-Zeroing (Japan), the Appellate Body issued its most sweeping indictment of zeroing to date, including several “as such” findings against zeroing. Contrary to “as applied claims,” which legally are limited to the application of zeroing in a specific case, “as such” claims are much broader in nature because they challenge laws or regulations as such. Like the dispute initiated by the European Community concerning US zeroing procedures, Japan’s dispute concerned dumping findings in several cases and contained allegations of “as such” and “as applied” violations of the ADA. Reversing the panel’s decisions on every substantive finding under appeal, the Appellate Body found that the United States violated various provisions of the ADA, as well as Article VI, paragraph 2 of GATT 1994 by

- maintaining zeroing procedures when calculating dumping margins under the transaction-to-transaction method in original investigation,
- maintaining zeroing procedures in periodic reviews,
- maintaining zeroing procedures in new shipper reviews,
- applying zeroing procedures in 11 periodic reviews at issue, and
- relying on dumping margins calculated in previous proceedings through the use of zeroing for purposes of conducting sunset reviews.\(^{25}\)

Thus, the Appellate Body ruled against virtually all types of zeroing that one can envisage.

While the Appellate Body has now shut the door on zeroing under most circumstances, it has not yet ruled on the permissibility of simple zeroing under the exceptional weighted average-to-transaction method of Article 2.4.2. Parties have argued that zeroing must be permissible under this method because prohibiting it would yield results identical to those found using the weighted average-to-weighted average method. This so-called mathematical equivalence argument posits that there would be no practical reason for the weighted average-to-transaction method to exist if zeroing were precluded, and that would violate the rules of effective treaty interpretation by rendering the exception inutile, or nugatory. The Appellate Body rejected that argument; however

One part of a provision setting forth a methodology is not rendered inutile simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision.


Although the specific question of zeroing under the exception was not before the Appellate Body in US-Zeroing (Japan), it was compelled to address the mathematical equivalence argument, and suggested a hybrid methodology to support its own implication that the weighted average-to-transaction method, used without zeroing, could yield a unique result:

The emphasis in the second sentence of Article 2.4.2 is on a “pattern,” namely a “pattern of export prices which differs significantly among different purchasers, regions or time periods.” The prices of transactions that fall within this pattern must be found to differ significantly from other export prices. We therefore read the phrase “individual export transactions” in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.

The Appellate Body’s statements suggest that, under such a hybrid methodology, sales not exhibiting a pattern of significant price differences would be compared using one of the two preferred methods, and those exhibiting significant differences would be subject to the exceptional method. Application of this hybrid methodology would not necessarily produce a result mathematically equivalent to that stemming from use of one of the preferred methodologies.

It should be noted that in US-Zeroing (EC), the Appellate Body’s failure to endorse the distinction of the panel between the investigation phase and the review phase appears to be an indirect prohibition of zeroing under the weighted average-to-transaction method in the context of reviews under Article 9.3 of the ADA.26

Future of Zeroing
In five reports, the Appellate Body has laid out a broad overarching philosophy that generally condemns the practice of zeroing.27 It is difficult to conceive how the logic invoked by the Appellate Body in previous cases would cease to apply in future disputes, including those involving the weighted average-to-transaction method. Nevertheless, countries including the European Communities and the United States still maintain zeroing in certain contexts. It remains to be seen whether and when the Appellate Body will address further zeroing claims in the future.

Dumping Margin Calculation Examples
To facilitate the reader’s understanding of the operation of these complicated rules, some simple calculation examples are provided.

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27 The cases in which the Appellate Body has considered zeroing are: US-Zeroing (Japan); US-Softwood Lumber V (21.5); US-Zeroing (EC); US-Softwood Lumber (V); EC-Bed Linen. In addition to these Appellate Body reports, the panels in US-Shrimp (Ecuador) and EC-Pipe Fittings discussed zeroing.
Thus, the dumping amount is $81 - 76 = 5$. The dumping margin, expressed as a percentage of the CIF export price, in turn is $(81 - 76)/100 = 5\%$. This example illustrates that, while the domestic and export sales prices are the same, there is nevertheless a dumping margin because the ex-factory export price is lower than the ex-factory normal value.

Figure 8: Construction of Export Price

<table>
<thead>
<tr>
<th>Normal Value</th>
<th>Export Price</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Producer X → unrelated customer</strong></td>
<td><strong>Producer X → related importer → unrelated retailer</strong></td>
</tr>
<tr>
<td>Sales price: 150</td>
<td>Sales price to related importer: 110</td>
</tr>
<tr>
<td>- duty drawback: 3</td>
<td>- discount subs: 9</td>
</tr>
<tr>
<td>- discount subs: 3</td>
<td>- inland freight subs: 2</td>
</tr>
<tr>
<td>- packing: 1</td>
<td>- credit by subs: 3</td>
</tr>
<tr>
<td>- inland freight: 2</td>
<td>- guarantee by subs: 3</td>
</tr>
<tr>
<td>- credit: 6</td>
<td>- net SGA subs: 18 (12%)</td>
</tr>
<tr>
<td>- guarantees: 2</td>
<td>- reasonable profits subs: 12 (8%)</td>
</tr>
<tr>
<td>- level of trade 30 (20%)</td>
<td>- customs duties paid by subs: 5</td>
</tr>
<tr>
<td>-</td>
<td>- constructed EP: 98</td>
</tr>
<tr>
<td>-</td>
<td>- ocean freight/insurance: 5</td>
</tr>
<tr>
<td>-</td>
<td>- inland freight: 2</td>
</tr>
</tbody>
</table>
The Anti-Dumping Agreement

<table>
<thead>
<tr>
<th>Normal Value</th>
<th>Export Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Producer X → unrelated customer</td>
<td>Producer X → related importer → unrelated retailer</td>
</tr>
<tr>
<td>- packing: 2</td>
<td></td>
</tr>
<tr>
<td>- physical differences: 1</td>
<td></td>
</tr>
<tr>
<td>= ex-factory normal value: 103</td>
<td>= ex-factory export price: 88</td>
</tr>
</tbody>
</table>

The dumping margin on this transaction is: 103-88 = 15/100 = 15%.

In this example, we have made an adjustment on the normal value side for a difference in the level of trade equal to 20% or 30. Such a difference in levels of trade exists because the producer sells in both its domestic market and its export market to retailers. In the export market, its importer acts as a distributor. In the domestic market, however, the producer performs the distributor function in-house. An adjustment must be made for his or her indirect costs and profits relating to this function because, on the export side, the same costs and profits are deducted in the process of constructing the export price. The example assumes that, as the functions are the same in both markets, the costs and profits will be the same too (12% and 8%). In reality, the situation is often more complex and level of trade adjustments may give rise to heated arguments with claims sometimes being rejected on evidentiary grounds.

In *US–Hot-Rolled Steel*, the Appellate Body emphasized in a comparable case involving domestic sales through an affiliate distributor that allowances must be made with extra care in order to calculate the normal value at the ex-factory level effectively and ensure fair comparison.

If . . . price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

—Article 2.4 ADA

Finally, it is noted that the ADA does not provide guidelines for calculating the “reasonable profit” of the related importer. The consequence of this omission is that administering authorities have substantial discretion in determining what profit margin is appropriate in concrete cases.
Chapter 2
Injury Caused by Dumped Imports

“Article 3 as a whole deals with obligations of Members with respect to the determination of injury and causal link. . . . The focus of an injury determination is the state of the ‘domestic industry’; the causation analysis focuses on the causal link between dumping and any injury to the ‘domestic industry’.”

Panel Report, Mexico-Pipes and Tubes, para 7.207.

The ADA only authorizes anti-dumping measures if there is dumping and injury to the domestic industry caused by the dumped imports. Article 3 and, indirectly, Article 4 cover the determination of whether injury—which includes material injury, threat of injury and also material retardation of the establishment of an industry—has been caused by dumped imports.28

Article 3.1 outlines the basic requirements for an injury determination: it must be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

Article 3.5 outlines basic requirements for determining whether there is a causal link between dumped imports and injury. The remaining parts of Article 3 are dedicated to aspects of the injury and causation determination outlined in Articles 3.1 and 3.5.

Article 3.1 has assumed great importance because the Appellate Body has time and again emphasized its requirement that an injury determination must be “based on positive evidence and involve an objective examination.” In particular, the Appellate Body has often used the objective examination requirement as a benchmark for determining whether the authorities have conducted their investigation and reached their findings and conclusions in an evenhanded manner.

28 Footnote 9 of the ADA provides that the term “injury” shall be taken to mean “material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.”
The Anti-Dumping Agreement

In *US–Hot-Rolled Steel*, the Appellate Body held that the term “positive evidence” relates to the quality of the evidence that the authorities rely upon. The word “positive” indicates that the evidence “must be of an affirmative, objective and verifiable character and that it must be credible.”\(^\text{29}\) It further found that the term “objective examination” is concerned with the investigative process itself; “examination” relates to the way in which the evidence is gathered and subsequently evaluated while the word “objective” indicates essentially that the examination process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an “objective examination” requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an “objective examination” recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.\(^\text{30}\)

Against this backdrop, this chapter further discusses like product, domestic industry, relevant imports, injury, causation, and injury margins—all elements that must be assessed in an anti-dumping determination. As with the concept of dumping, the reader should also keep in mind that a determination whether injury has been caused by dumped imports also requires an analysis over time. Again, the ADA contains no rules on this important aspect. A recommendation of the WTO Committee on Anti-Dumping Practices provides that injury should preferably be analyzed over a period of at least 3 years and should include the entire period of data collection for the dumping investigation.\(^\text{31}\) This period is often called the injury investigation period, and is normally set by the authorities at the outset of the investigation. Such a relatively long period is needed to examine trend factors, such as those mentioned in Articles 3.4 and 3.5.

**Like Product**

Identification of the like product is an important parameter in an injury assessment because it is this product with regard to which the injury determination must be

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made. It sometimes happens that information for the exact product characterized as the like product is not available. When available data do not permit domestic production of the like product to be separately identified, Article 3.6 provides that “the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.”

**Domestic Industry**

Because Article 3.1 requires an injury assessment to include an examination of dumped imports on domestic producers and Article 3.5 requires that there be a causal relationship between dumped imports and the domestic industry, the domestic industry must be identified in order to determine whether injury has been caused by dumped imports.

Article 4 defines the domestic industry as “the domestic producers as a whole of the like products” or “those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.” Thus, the domestic industry must consist of domestic producers of the like product.

The ADA does not define the term “a major proportion.” In *Argentina-Poultry*, however, the panel rejected a claim that Argentina violated Article 4.1 by defining “a major proportion” of the domestic industry in terms of domestic producers representing 46% of total domestic production.32 Indeed, the fact that Article 4.1 uses the term “a major proportion” rather than “the major proportion” is generally interpreted by the administering authorities to mean that less than 50% of domestic production may satisfy the requirement.

Although the general rule is that domestic producers of the like product seeking to participate in an investigation and providing information in a timely manner should be included in the definition of the domestic industry, Article 4 permits investigating authorities to exclude producers in two specific circumstances.

First, Article 4.1(i) permits exclusion of domestic producers from the domestic industry if they are related to exporters or importers or are themselves importers of the allegedly dumped product. Such producers may benefit from dumping

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and therefore may distort the injury analysis. Footnote 11 to the ADA provides guidance on the definition of “related” for this purpose:

For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

—Footnote 11, ADA

Second, Article 4.1(ii) permits the territory of a member to be divided into two or more competitive markets and to regard the producers within each market as a separate industry if these producers sell all or almost all of their production in that market and the demand within that market is not to any substantial degree supplied by producers of the product located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided that there is a concentration of dumped imports into such an isolated market and the dumped imports are causing injury to the producers of all or almost all of the production within such market.

If this so-called regional industry exception is used, anti-dumping duties shall be levied only on imports consigned for final consumption to the affected area. Where this is not allowed under the constitutional law of the importing member, exporters should be given the opportunity to cease exporting to the area concerned or to give undertakings. Findings of the existence of a regional industry are relatively rare and tend to be confined to industries where transportation is a major cost item, such as cement.

**The Relevant Imports**

Article 3.1 requires an assessment of the volume of dumped imports and the impact of those imports on prices and domestic production. In addition, as provided by Article 3.5, it must be demonstrated that the dumped imports are
causing injury. Consequently, identification of the relevant imports is an important preliminary determination.

**Nondumped Imports**

Article 3.1 and other parts of Article 3 repeatedly refer to *dumped* imports. The panel in *Argentina-Poultry* concluded that the term “dumped imports” includes imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated.\(^{33}\)

In *EC-Bed Linen*, the panel addressed whether, when an individual exporter or producer has been found to have dumped, but not all of its exports or products were dumped, the latter transactions are included in the dumping determination. It held that because dumping is a determination made with reference to a product from a particular producer or exporter, and not with reference to individual transactions, a dumping determination applies to all imports of the product from that producer or exporter during the relevant time.\(^{34}\)

In *EC-Bed Linen* (21.5), the Appellate Body examined whether imports from exporters and producers not examined during the course of an investigation may be treated as dumped imports for the purpose of an injury investigation. In that case, the European Communities had sampled five Indian producers. While it found dumping for three of the sampled producers, it found that two producers, which accounted for 53% of all imports examined, were not dumping. For the purposes of its injury assessment, the European Communities treated all imports attributable to non-sampled producers as dumped and did not take into account the findings of its sampled producers which showed that not all Indian exports were dumped. Without specifying exactly what the European Communities were required to do in that case, the Appellate Body held that the European Communities failed to determine the volume of imports on the basis of an “objective” examination and therefore violated Articles 3.1 and 3.2.

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\(^{33}\) Panel Report, Argentina-Poultry, para 7.303.

\(^{34}\) Panel Report, EC-Bed Linen, para 6.136.
The approach taken by the European Communities in determining the volume of dumped imports was not based on an “objective examination.” The examination was not “objective” because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to limit the examination to some, but not all, producers—as they are entitled to do under Article 6.10—all imports from all non-examined producers will necessarily always be included in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the “all others” duty rate on imports from non-examined producers, regardless of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities’ approach, imports attributable to non-examined producers are simply presumed, in all circumstances, to be dumped, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it “more likely [that the investigating authorities] will determine that the domestic industry is injured,” and, therefore, it cannot be “objective.”


Cumulation of Dumped Imports

When determining the relevant imports for the injury and causation assessments, an investigating authority may examine the volume of imports from more than one country cumulatively. Under Article 3.3, it may do so only if it determines that the dumping margins are more than de minimis, the volumes of imports from each country are not negligible, and the imported products compete with each other and with the like domestic product. Many WTO members apply cumulation almost as a matter of course as long as the de minimis and negligibility thresholds are met.

Material Injury

Following identification of the relevant imports and the like product, and other preliminary determinations, assessment of injury as required by Article 3.1 is possible, based on positive evidence and an objective examination of the factors discussed below.
Volume of Dumped Imports

Article 3.1 provides, first of all, that an injury determination shall include an examination of the volume of dumped imports. Article 3.2 states that investigating authorities are required to consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in an importing member.

In Thailand–H-Beams, the panel held that the textual term “consider” in Article 3.2 does not require an explicit finding or determination by the investigating authority whether the increase in dumped imports is significant. Thus, the word “significant” does not need to appear in the text of the relevant document for the requirements of this provision to be fulfilled. Nevertheless, the panel held that “it must be apparent in the relevant documents in the record that the investigating authority has given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms.”

Effect of Dumped Imports on Prices

Article 3.1 also requires an evaluation of the effect of the dumped imports on prices in the domestic market for like products. This examination is the essence of an injury determination. Article 3.2 specifies how the investigating authorities must proceed:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

—Article 3.2, ADA

<table>
<thead>
<tr>
<th>Injury</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive evidence and objective evidence of:</td>
</tr>
<tr>
<td>+ Volume of dumped imports</td>
</tr>
<tr>
<td>+ Effect of dumped imports on prices</td>
</tr>
<tr>
<td>+ Impact of dumped imports on domestic producers</td>
</tr>
</tbody>
</table>

In *Korea-Certain Paper* the panel held that an investigating authority does not have to use the word “significant.” “We note that the record contains no discussion as to whether or not the price effects found by the KTC [Korean Trade Commission] were ‘significant.’ However, we do not read Article 3.2 as requiring that the word ‘significant’ appear in the text of the IA’s determination.” Nor does Article 3.2 oblige the authority to determine positively whether one of the three price effects is present; rather, the key obligation under this provision is to consider whether the dumped imports have one of the three price effects.

Regarding the price analysis, Article 3.2 stipulates that the IA has to consider whether dumped imports have had one of the three possible effects on the prices of the domestic industry: (a) significant price undercutting, (b) significant price depression or (c) significant price suppression. In our view, what Article 3.2 requires is that the IA consider whether or not any of these three price effects are present in a given investigation. It does not, however, require that a determination be made in this regard. Finally, we note that the last sentence of Article 3.2 mentions that no one or several of these three injury factors can necessarily give decisive guidance. That is, even if the IA finds certain positive trends with respect to some of these factors, it can nevertheless reach the conclusion that there is injury, provided that that decision is premised on positive evidence and reflects an objective examination of the evidence as required by Article 3.1 of the Agreement.


**Impact of the Dumped Imports on the Domestic Industry**

Finally, Article 3.1 requires an investigating authority to examine the impact of the dumped imports on the domestic producers of the like product. Article 3.4 elaborates on this requirement. It provides that the examination “shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry” producing the like product in the importing country, and then mentions 15 specific factors: “actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; 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." This list is not exhaustive, and no single or several of these factors can necessarily give decisive guidance.37

The scope of this obligation has been examined in eight panel proceedings thus far.38 All eight panels, strongly supported by the Appellate Body in Thailand–H-Beams, held that the evaluation of the 15 factors is mandatory in each case and must be clear from the published documents.

In Korea-Certain Paper, the panel noted the consistent conclusion among panels and the Appellate Body that evaluation of all 15 factors in Article 3.5 is mandatory, and described the nature and scope of the requirement to evaluate:

We note that the WTO panels and the Appellate Body have consistently held that an analysis of the impact of dumped imports on the domestic industry in the importing Member shall comprise an evaluation of all factors set out in Article 3.4. To fulfil that obligation, the IA has obviously to collect the data relating to each of the factors set out in Article 3.4. However, the obligation under Article 3.4 is not limited to the compilation of the relevant data. Having gathered the relevant data, the IA then has to evaluate them in context and in connection with one another. The WTO jurisprudence has also consistently approved this proposition. Recently, the panel in Egypt-Steel Rebar stated that “for an IA to “evaluate” evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyze and interpret those data.”

Therefore, the obligation to analyse the mandatory list of fifteen factors under Article 3.4 is not a mere “checklist obligation” consisting of a mechanical exercise to make sure that each listed factor has somehow been addressed by the IA. We recognize that the relevance of each one of these injury factors may vary from one case to the other. The fact remains, however, that Article 3.4 requires the IA to carry out a reasoned analysis of the state of the industry. This analysis cannot be limited to a mere identification of the “relevance or irrelevance” of

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37 However, factors not on the list must be relevant. Thus, the panel in Korea-Certain Paper concluded that the Korean Trade Commission was not obliged to consider the fact that Korean producers were importing substantial quantities of the product as an injury factor under Article 3.4. Panel Report, Korea-Certain Paper, para 7.281.

The Anti-Dumping Agreement

The Anti-Dumping Agreement (ADA) definition of injury contained in footnote 6 includes threat of injury and material retardation of the establishment of an industry.

Article 3.7 provides rules for the assessment of threat of injury. A determination of threat must be based on facts and not merely on allegation, conjecture, or remote possibility; rather, “the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.” In making a threat determination, Article 3.7 provides that the importing member authorities should consider the following four special factors:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficiently freely disposable, or an imminent substantial increase in, capacity of the exporter, indicating the likelihood of substantially increased dumped exports to the importing member’s market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

No single factor will necessarily be decisive, but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur. In Mexico-Corn Syrup the panel concluded that a threat analysis must also include evaluation of the Article 3.4 factors.
Article 3.7 requires a determination whether material injury would occur, Article 3.1 requires that a determination of injury, including threat of injury, involve an examination of the impact of imports, and Article 3.4 sets out the factors that must be considered, among other relevant factors, in the examination of the impact of imports on the domestic industry. Thus, in our view, the text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4.

—Panel, Mexico-Corn Syrup, para 7.131.

The panel in *Egypt-Steel Rebar* came to the same conclusion. In doing so, it outlined the logical basis for an Article 3.4 evaluation in a threat of injury determination:

the text of this provision makes explicit that in a threat of injury investigation, the central question is whether there will be a “change in circumstances” that would cause the dumping to begin to injure the domestic industry. Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority to conclude that it is threatened with imminent injury than if its production, sales, employment, profits and other indicators are low and/or declining.

—Panel, Egypt-Steel Rebar, para 7.91.

The type of injury identified as material retardation of the establishment of an industry is not further defined by the ADA, nor is it extensively used by WTO members. As a result, no panel or Appellate Body report has addressed the issue to date. Presumably, however, the standard requires a high level of proof which should demonstrate, among other things, that the establishment of the industry producing the like product was effectively planned.
The Anti-Dumping Agreement

**Causation**

According to Article 3.5, it must be demonstrated that the dumped imports are causing injury within the meaning of the ADA. In other words, even where dumping and injury to the domestic industry are present, anti-dumping measures may not be imposed unless there is evidence of a causal link between dumped imports from the country or countries concerned and the injury to the domestic industry.

The evaluation, required by Article 3.1, of import volumes and prices and their impact on the domestic industry is relevant not only to the determination of material injury, but also often to whether the injury has been caused by the dumped imports or by other factors. For example, if increases in dumped imports occur at roughly the same time as negative trends for the domestic industry (such as declines in prices, market share, profits, or employment), then the concurrence of events tends to make it more likely that injury to the domestic industry is caused by the dumped imports under investigation.

Although the correlation between import volumes and prices and the Article 3.4 impact factors may provide an indication of injury to the domestic industry, this cannot be the end of a causation investigation. According to Article 3.5, authorities are required to examine all relevant evidence before them in their examination of the causal link, including any known factors that are injuring the domestic industry other than the dumped imports. Article 3.5 provides a nonexhaustive list of other factors that may be relevant, depending on the facts of the case.

The volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

—Article 3.5, ADA

Injury resulting from other known factors must not be attributed to the dumped imports. The Appellate Body has held that this language requires investigating authorities to separate and distinguish the injurious effects of the other known causal factors from those of the dumped imports in order to determine whether
dumped imports are causing injury to the domestic industry.\textsuperscript{39} In\textit{EC-Pipe Fittings}, the Appellate Body clarified that this obligation does not require an examination of the collective effects of the other known factors along with their individual effects, provided that the nonattribution requirement is met.\textsuperscript{40}

In\textit{Thailand–H-Beams}, the panel held that the investigating authorities need not examine the Article 3.5 factors, unlike the Article 3.4 factors, on their own initiative in each administrative determination. Rather, whether such an examination is required will depend on the arguments made by interested parties in the course of the administrative investigation.\textsuperscript{41}

**Injury Margins**

In accordance with Articles 8.1 and 9.1, a WTO member may apply the lesser of the margin of injury or the margin of dumping. Where a member does choose the lesser duty, if dumping and injury are found, it will proceed to calculate an injury margin. The ADA does not give any guidance on such calculation and arguably leaves substantial discretion to its members. Injury margins are normally producer-specific, as are dumping margins, and compare the prices of imported and domestically produced like products in the importing country market, focusing on whether the former are undercutting or underselling the latter.

Figures 9 and 10 present the distinction between price undercutting and price underselling graphically. Explanations of how to calculate the margins follow each figure.

**Figure 9: Calculation of injury margin, based on price undercutting**

<table>
<thead>
<tr>
<th>Domestic Producer X</th>
<th>Foreign Exporter Y</th>
<th>Foreign Exporter Z</th>
</tr>
</thead>
<tbody>
<tr>
<td>Price</td>
<td>100</td>
<td>90</td>
</tr>
<tr>
<td>Injury Margin</td>
<td>$(100 - 90 = 10)/90 = 11.1%$</td>
<td>$(100 - 105 = -5) = 0$</td>
</tr>
</tbody>
</table>

\textsuperscript{39} Appellate Body Report, US–Hot-Rolled Steel, para 223.
\textsuperscript{40} Appellate Body Report, EC-Pipe Fittings, para 192.
\textsuperscript{41} Panel Report, Thailand–H-Beams, para 7.273.
When price undercutting is used, the price of the exporter is deducted from the price of the domestic producer. If the price of the exporter is greater than the domestic producer, as with exporter Z (100–105 = –5), the injury margin will be zero. When it is greater, as with exporter Y (100 – 90 = 10), the difference found is normally divided by the price of the relevant foreign exporter to arrive at a relevant injury margin (10/90). In the first example, the price of exporter Y is greater than the domestic producer X. Using the calculation methodology described above, the injury margin is 11.1%. Because exporter Z’s price is greater than producer X’s price, the injury margin for exporter Z is zero.

Figure 10: Calculation of injury margin, based on price underselling

<table>
<thead>
<tr>
<th></th>
<th>Domestic Producer X</th>
<th>Foreign Exporter Y</th>
<th>Foreign Exporter Z</th>
</tr>
</thead>
<tbody>
<tr>
<td>Price</td>
<td>100</td>
<td>90</td>
<td>105</td>
</tr>
<tr>
<td>Target Price</td>
<td>110</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Injury Margin</td>
<td>(110 – 90 = 20)/</td>
<td>(110 – 105 = 5)/</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(90 x 100) = 22.2%</td>
<td>(105 x 100) = 4.76%</td>
<td></td>
</tr>
</tbody>
</table>

Figure 10 provides an example of the calculation of an injury margin based on price underselling. Suppose that the unit cost of domestic producer X is 100, but faced with low-priced imports it has been forced to sell at cost. In other words, the presence of the low-priced imports precludes the domestic producer from selling at a price which includes a reasonable profit that he or she would be able to make in the absence of the dumped imports. Therefore, a target price is calculated for producer X to assess the injury margin. This target price comprises X’s costs plus a reasonable profit. If the cost is 100 and the reasonable profit 10%, the target price is 100 + (100 x 10% = 10) =110. In the second example, because the relevant price is higher than either of the exporters’ selling prices (110 instead of 100 and 105), both exporter Y and exporter Z have positive injury margins. This is because they now both sell below the target price established for producer X.

In both examples, if the injury margin is less than the dumping margin applicable to the foreign exporter and if the investigating member applies the lesser duty rule, then a duty equal to the lesser injury margin would be applied. If the injury margin is higher than the dumping margin, then the duty will be capped by the lower dumping margin.
Even if there is dumping causing injury to a domestic industry, the ADA does not permit a WTO member to impose anti-dumping measures unless it follows certain procedural rules. As Article 1 provides: “An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.” This chapter discusses some of the more fundamental procedural rules that apply in an anti-dumping investigation.

## The Application

Although Article 5.6 permits self-initiation by members, anti-dumping investigations are normally initiated following the submission of a written application. The ADA provides a number of rules related to the application for initiation itself and what actions WTO member authorities must take in relation to such applications. These rules are discussed in this section.

### Contents of the Application

Article 5.1 provides that an investigation to determine the existence, degree, and effect of any alleged dumping “shall be initiated upon a written application by or on behalf of the domestic industry.” Article 5.2 requires the application to include sufficient evidence of the existence of dumping and injury, and a causal link between the dumped imports and alleged injury; simple assertion is not sufficient. More specifically, to the extent reasonably available to the applicant, the application must contain the following information:

<table>
<thead>
<tr>
<th>Important Procedural Articles</th>
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<tbody>
<tr>
<td>Article 5 Initiation and Subsequent Investigation</td>
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<tr>
<td>Article 6 Evidence</td>
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<td>Article 7 Provisional Measures</td>
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<td>Article 8 Price Undertakings</td>
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<td>Article 9 Imposition and Collection of Anti-Dumping Duties</td>
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<td>Article 10 Retroactivity</td>
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<td>Article 11 Duration and Review of Anti-Dumping Duties and Price Undertakings</td>
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<tr>
<td>Article 12 Public Notice and Explanation of Determinations</td>
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<tr>
<td>Article 13 Judicial Review</td>
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</tbody>
</table>
The Anti-Dumping Agreement

- the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

- a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer, and a list of known persons importing the product in question;

- information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing member; and

- information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

Examination of the Application

Article 5.3 provides that importing country authorities must, before initiation, review the accuracy and the adequacy of the evidence in the application. Article 5.3 does not provide any details on the nature of the examination required. Therefore, it is sometimes difficult in practice for investigating authorities to know if there is “sufficient evidence to justify the initiation of an investigation” as required under Article 5.3. Nevertheless, panel determinations do provide a few guiding principles.

Panels have consistently held that the quality of the evidence needed to initiate an investigation is less than that required to impose preliminary or definitive duties.42 For example, in Mexico-Steel Pipes and Tubes, the panel stated

42 Panel Report, Mexico-Corn Syrup, para 7.102.
it is not necessary for an investigating authority to have irrefutable proof of dumping or injury prior to initiating an anti-dumping investigation. We note in this respect that Article 5.1 refers to the initiation of an investigation “to determine the existence, degree and effect of any alleged dumping” [emphasis added], and that Article 5.2 refers to “alleged injury,” the “allegedly dumped product” and “allegedly dumped imports.” We also are mindful that an anti-dumping investigation is a process where certainty on the existence of all of the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward.

—Panel, Mexico-Steel Pipes and Tubes, para 7.22.

In Guatemala-Cement II, the panel held that the obligation to review the accuracy and adequacy of the evidence requires an investigating authority to consider obvious differences that will affect price comparability. In the context of that case, it determined that Guatemala failed to meet this obligation when it failed to take account of “glaring differences” in the level of trade and sales quantities of normal value and export price information provided as evidence of dumping in the application; such differences could obviously affect price comparability.43 In concluding, the panel further described the scope of the requirement to take account of obvious differences affecting price comparability:

We would like to emphasize that we do not expect investigating authorities at the initiation phase to ferret out all possible differences that might affect the comparability of prices in an application and perform or request complex adjustments to them. We do however expect that, when from the face of an application it is obvious that there are substantial questions of comparability between the export and home market prices being compared, the investigating authority will at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those differences on the sufficiency of the evidence of dumping or seek such further information as might be necessary to do so.


Support for the Application

If an investigating authority determines that an application with accurate and adequate evidence of dumping, injury, and a causal link has been provided, the authority still must determine, in accordance with Article 5.1 and before initiation, whether the application has been made by or on behalf of the domestic industry. This is commonly referred to as the standing determination.

According to Article 5.4, the application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers of the like product expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

Article 5.4 therefore imposes a two-part test. The first test requires greater than 50% support from domestic producers that have expressed an opinion on the application. The second part of the test is absolute. It requires support by producers responsible for at least 25% of the total production of the domestic industry. The example in Figure 11 provides a practical example of the application of these two tests.

Notification

Article 5.5 provides that the authorities must avoid any publicizing of the application for the initiation of an investigation unless a decision has been made to initiate. On the other hand, the article also provides that the importing member authorities must notify the government of the exporting member of the receipt of a properly documented application before initiation. While the ADA does not contain rules on the form of such notification, in Thailand-H-Beams, the panel found that, although not advisable or easily provable if subject to dispute, an oral notification, such as is conveyed in a formal meeting, can satisfy the requirements of Article 5.5 if it is “sufficiently documented to support meaningful review by a panel.”

Initiation

If the investigating authorities do decide that there is sufficient evidence to justify initiation, there are a number of procedural rules related to initiation itself that they must respect. Article 12.1 provides that public notice shall be given to “the Member or Members the products of which are subject to such investigation and
other interested parties known to the investigating authorities to have an interest.” Article 12.1.1 specifies the information which must be included in the public notice or otherwise made available through a separate report. Article 6.1.3 provides that, upon initiation, the full text of the application shall be provided to known exporters, the authorities of the exporting member, and upon request to other interested parties involved.

**Subsequent Investigation**

In addition to the rules concerning a request for the initiation of an investigation, Article 5 also contains a number of procedural requirements for the analysis of dumping and injury and for the termination of investigations.

Article 5.7 requires evidence of dumping and injury to be considered simultaneously both in the decision whether or not to initiate an investigation and during the course of the investigation. In *Guatemala-Cement II*, the panel held that the Article 5.7 requirement to consider dumping and injury simultaneously is about timing and does not relate to the substantive nature of the evidence. Therefore, it rejected an argument that the lack of evidence to justify initiation under Article 5.3 also resulted in an automatic violation of Article 5.7.45

Article 5.8 provides that an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not “sufficient evidence of either dumping or of injury to justify proceeding with the case.” It also provides that there shall be immediate termination if the amount of the margin of dumping is *de minimis*, or if the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping is *de minimis* if it is less than 2% *ad valorem*. As for negligibility, Article 5.8 provides that the volume of imports is normally regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of the imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports 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.

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Article 5.10 provides that investigations shall normally be concluded within 1 year and in no case more than 18 months after their initiation. The 18-month deadline appears to be absolute.

**Evidentiary and Due Process Rights**

Article 6 contains important due process rights for interested parties. These include rights related to confidential treatment of information, treatment of information provided, and other rights.

**Interested Parties**

The evidentiary rights of “interested parties” are the primary focus of Article 6. Article 6.11 provides that “interested parties” include exporters, producers, importers, the government of the exporting member, producers of the like product in the importing member, and trade or business associations (the majority of the members must be producers of the like product in the importing member). This list is not exhaustive; it does not preclude members from allowing other foreign or domestic parties to be included as interested parties.

Article 6.12 provides that authorities “shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.” In practice, many members already include such users and consumers of products under investigation as interested parties under their domestic law.

**Confidential Information**

Article 6.5 contains rules related to the protection of confidential information. It provides that information that is by its nature confidential or that is provided on a confidential basis shall, upon good cause shown, be treated as confidential by the authorities and shall not be disclosed without specific permission of the party submitting it. However, interested parties providing confidential information must provide meaningful nonconfidential summaries thereof. Thus, whenever interested parties make a submission to the importing member authorities, they should generally prepare both a confidential and a nonconfidential version of the submission. The confidential version will be accessible only to the importing member authorities. The nonconfidential version will be placed in the nonconfidential file and can be accessed by all interested parties in the investigation.
In *Korea-Certain Paper*, Indonesia alleged that the Republic of Korea violated Article 6.5 when it did not require good cause to be shown for the designation of confidential information. The panel agreed, concluding that the requirement for interested parties to show good cause applies to all types of confidential information, regardless of whether it is confidential by nature or submitted on a confidential basis.

We note that Article 6.5 provides for the confidential treatment of two types of information: information which is confidential by nature and information which, although not confidential by nature, has been submitted by an interested party on a confidential basis. Article 6.5 stipulates that both types of confidential information may not be disclosed by the IA without specific authorization by the party submitting it.

The only issue presented by this claim is whether or not the requirement of showing good cause in order for information to be treated as confidential under Article 6.5 applies to information that is by nature confidential as well as to information that is submitted on a confidential basis. We note that the phrase “upon good cause shown” is preceded by both types of confidentiality in the text of Article 6.5. We are therefore of the view that the text of Article 6.5 makes it clear that the good cause requirement applies to both categories of confidential information. That is, some showing of good cause is necessary for the confidential treatment of information that is by nature confidential. The degree of that requirement may, however, depend on the type of information concerned.

In the investigation at issue, there is no indication that the KTC requested that any good cause be shown in order to treat as confidential information submitted in the application, which was by nature confidential. We therefore conclude that the KTC acted inconsistently with Article 6.5 in the investigation at issue by not requiring that good cause be shown with respect to the information submitted in the application which was by nature confidential.


**Facts Available/Administrative Deadlines**

Article 6.8 provides that when an interested party “refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available”. Article 6.8 also provides that Annex II of the ADA must be observed when applying its provisions. This paragraph is very important in anti-dumping practice.
Chapter 3
Procedures

Necessary Information
In Korea-Certain Paper, the panel noted that “the decision as to whether or not a given piece of information constitutes ‘necessary information’ within the meaning of Article 6.8 has to be made in light of the specific circumstances of each investigation, not in the abstract. A particular piece of information that may play a critical role in an investigation may not be equally relevant in another one.” In the context of that case, the panel determined that, where normal value was to be based on sales of the subject products by a related company to independent buyers, information pertaining to that company’s sales played a critical role with respect to the normal value determinations. Therefore, related company sales information was considered the type of necessary information, the withholding of which allows determinations to be made on the basis of the facts available.

Reasonable Period
In US–Hot-Rolled Steel the Appellate Body noted that time limits imposed by members are not absolute and held that if information is submitted after the deadline, but within a reasonable period, an investigating authority cannot reject the information solely because it was submitted after the deadline. In order to determine whether information has been supplied within a reasonable period, it held that an investigating authority must consider factors such as:

(i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.

Special Circumpection
Paragraph 7 to Annex II of the ADA also imposes a “special circumspection” requirement when findings are based on information from a secondary source:

In Korea-Certain Paper, the Republic of Korea argued that the Article 5.3 examination requirements relating to evidence provided in an application for

46 Panel Report, Korea-Certain Paper, 7.43.
47 Panel Report, Korea-Certain Paper, 7.44.
The Anti-Dumping Agreement

initiation could satisfy the Annex II, paragraph 7 circumspection requirement in the context of that case. More specifically, it contended that it was not required to further corroborate information used in a final dumping determination taken from the application for initiation because it “came from independent and reliable sources such as the Korean government customs statistics (‘KOTIS’) and the Korea Trade-Investment Promotion Agency (‘KOTRA’)” and was therefore deemed to have been corroborated.50 The panel disagreed, finding that Article 5.3 and Annex II, paragraph 7 contain “two distinct obligations that have to be observed by the IA [investigating authority] at different stages of an investigation.”51 In this regard, it stated:

If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

—Annex II, para 7

We have no specific reason to question that the information about Tjiwi Kimia, submitted by the applicants in the application, may have been reliable as it came from independent institutions, i.e., KOTIS and KOTRA. The fact remains, however, that the KTC was under the obligation to take the procedural step, under paragraph 7 of Annex II, to confirm the reliability of that information for purposes of its determinations in the investigation. The issue, therefore, is whether or not the KTC took that step to satisfy the requirements of paragraph 7.52

—Panel, Korea-Certain Papers

Other Rights

Other important due process rights in Article 6 include the opportunity to present evidence in writing (Article 6.1), have access to the file (Articles 6.1.2, 6.4), receive a copy of the application (Article 6.1.3), have a hearing (Article 6.2), disclosure (Article 6.9), and obtain, subject to exceptions, an individual dumping margin (Article 6.10).\(^{53}\)

In *Korea-Certain Paper*, the panel discussed the due process nature of the provision in Article 6.7 under which authorities must make the results of on-site investigations available, either separately or through the final disclosure under Article 6.9, before a final decision is taken in the investigation.

In our view, the purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results. It is therefore important that such disclosure contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully. This is because, in our view, information which was verified successfully, just as information which was not verified, could well be relevant to the presentation of the interested parties’ cases.


In the same case, the panel also addressed whether the Korean Trade Commission’s determination to treat three related but legally separate companies as a single exporter with a single dumping margin violated the Article 6.10 requirement to determine an individual margin of dumping for each known exporter or producer. The panel considered that while such an approach might be justified depending on the facts of the case, the KTC’s determination on this point was insufficiently motivated.\(^{54}\)

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\(^{53}\) In certain cases, authorities may resort to sampling.

Public Notice and Explanation

Article 12 contains rules that, like those in Article 6, have an important due process function. Article 12 obliges importing country authorities to publish public notices of initiation, and of preliminary and final determinations, with increasing degrees of specificity as the investigation progresses. In addition, they must publish detailed explanations of their determinations.

Figure 12: Important Notice Provisions of Article 12

<table>
<thead>
<tr>
<th>Contents of Public Notice of Initiation, Article 12.1.1</th>
</tr>
</thead>
<tbody>
<tr>
<td>A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on the following:</td>
</tr>
<tr>
<td>(i) the name of the exporting country or countries and the product involved,</td>
</tr>
<tr>
<td>(ii) the date of initiation of the investigation,</td>
</tr>
<tr>
<td>(iii) the basis on which dumping is alleged in the application,</td>
</tr>
<tr>
<td>(iv) a summary of the factors on which the allegation of injury is based,</td>
</tr>
<tr>
<td>(v) the address to which representations by interested parties should be directed, and</td>
</tr>
<tr>
<td>(vi) the time limits allowed to interested parties for making their views known.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Contents of Notice of Imposition of Provisional Measures, Article 12.2.1</th>
</tr>
</thead>
<tbody>
<tr>
<td>A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall . . . contain in particular:</td>
</tr>
<tr>
<td>(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;</td>
</tr>
<tr>
<td>(ii) a description of the product which is sufficient for customs purposes;</td>
</tr>
<tr>
<td>(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;</td>
</tr>
<tr>
<td>(iv) considerations relevant to the injury determination as set out in Article 3; and</td>
</tr>
<tr>
<td>(v) the main reasons leading to determination.</td>
</tr>
</tbody>
</table>
Contents of Notice of Definitive Measures, Article 12.2.2

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

Provisional Measures

Article 7.1 states that provisional measures may be applied only if

- an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

- a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

- the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

According to Articles 7.2–7.3, provisional measures may take the form of a provisional duty equal to the amount of the anti-dumping duty provisionally estimated and be no greater than the estimated margin of dumping; preferably the duty should be in the form of a security (cash deposit or bond). Provisional measures may not be applied sooner than 60 days from the date of initiation. According to Article 7.4, “the application of provisional measures shall be for as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six or nine months, respectively.”
Undertakings

Article 8 contains rules on price undertakings. Article 8.1 lays out the basic principle that an investigation may be terminated or suspended upon receipt of a voluntary undertaking from an exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effects of dumping are eliminated. Undertakings cannot be offered or accepted unless the investigating authority has made a preliminary determination of dumping and injury. Moreover, authorities are not always required to accept an undertaking:

Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

—Article 8.3, ADA.

Exporters are never required to accept undertakings, and refusal to accept an undertaking cannot prejudice the outcome of the investigation.

If a price undertaking is accepted, exporters may request a final determination or authorities may decide to make one nevertheless. If a negative dumping margin is found the price undertaking must be lifted, except where the findings result in large part from the price undertaking. If dumping and injury are found following the final determination, the undertaking shall continue, consistent with the ADA.

If an undertaking is accepted, Article 8.6 provides that authorities may request information for verification purposes and take swift measures if a violation is found:

Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures
using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

—Article 8.6, ADA.

**Imposition and Collection of Anti-dumping Duties**

Article 9 is concerned with the imposition and collection of anti-dumping duties. Imposition of anti-dumping duties where injurious dumping has been found is discretionary, and use of a lesser duty rule is encouraged. WTO members include a public interest clause in their national legislation to enable them to refrain from imposing duties, even where injurious dumping is found.

The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

Article 9.1, ADA.

If an anti-dumping duty is imposed, Article 9.2 provides that it must be collected on a nondiscriminatory basis on imports of the product from all sources found to be injuriously dumped.

Article 9.3 introduces the distinction between retrospective and prospective duty collection systems and requires prompt refunds of overpayments in both cases. Under the retrospective system, used mainly by the United States, the original investigation ends with an estimate of future liability, but the actual amount of anti-dumping duties to be paid is established in the course of annual reviews covering the preceding 1-year period. Under the prospective system, used by the European Communities and most other countries, the findings made during the original investigation form the basis for the future collection of anti-dumping duties, normally for the 5 years following the publication of the final determination.
The Anti-Dumping Agreement

The retrospective system is more precise than the prospective system. On the other hand, it is costly and time consuming for all parties, including the importing member authorities.

Article 9.4 provides special rules for cases in which the authorities have resorted to sampling. In such cases, the cooperating sampled producers normally get their individual anti-dumping duties. Article 9.4 deals with producers that cooperated with the investigation but that were not sampled. It provides that the anti-dumping duty applied to such producers shall not exceed the weighted average margin of dumping established with respect to the sampled producers or exporters, provided that the authorities shall disregard any zero and de minimis margins and margins established on the basis of facts available.

Retroactivity

As a general rule, provisional and definitive anti-dumping duties should only be applied to imports into a member’s territory after a provisional or final anti-dumping determination enters into force. However, Article 10 permits duties to be applied to products that enter for consumption before that point in two instances:

First, Article 10.2 provides that

where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

In Mexico-Corn Syrup, the panel found that there must be some “specific statement” in a final determination which shows that the investigating authority properly considered and decided that the effect of dumped imports would have led to a determination of injury in the absence of provisional measures. Because the Mexican final determination contained no explicit finding on the issue, the panel found that Mexico violated that provision.

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55 Panel Report, Mexico-Corn Syrup, para 7.191.
56 Panel Report, Mexico-Corn Syrup, para 7.192.
Second, Article 10.6 provides that a definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that

- there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

- the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

Because the conditions are very stringent, this second type of retroactivity is seldom applied by most WTO members.

Reviews

The ADA recognizes three types of reviews of anti-dumping measures: newcomer, interim, and expiry reviews.

**Newcomer reviews** apply to producers or exporters that did not export during the original investigation period. Because these producers and exporters are often subject to a residual rate, they will want the investigating authorities to examine their situation in order to have a lower duty or no duty apply to their goods. Article 9.5 provides the legal basis for their request for review. According to Article 9.5, member authorities are required to carry out reviews requested by such newcomers promptly and in an accelerated manner. During the course of the review, no anti-dumping duties are to be levied on the newcomers. The importing member authorities may withhold appraisement or request guarantees to ensure that anti-dumping duties can be levied retroactively to the date of initiation of the review if the newcomer review results in a determination of dumping. However, they may not impose additional conditions on a respondent’s right to a review. In *Mexico-Rice*, the Appellate Body upheld a panel determination that a Mexican law permitting a newcomer review to producers on the condition that they could show a “representative” volume of exports was inconsistent with Article 9.3 as such.
Although, as Mexico emphasizes, none of the above provisions contains an express obligation not to condition a review on a showing of “representative” volume of exports, this does not mean that those provisions permit such a condition. Rather, we consider that they require an investigating authority to undertake duty assessment reviews and changed circumstances reviews once the conditions set out in those provisions have been satisfied. In our view, these conditions are exhaustive; thus, if an agency seeks to impose additional conditions on a respondent’s right to a review, this would be inconsistent with those provisions. This includes a showing of a “representative” volume of export sales, which Article 68 of the FTA imposes as an absolute requirement in every case before affording the respondent the right to a review or refund.

—Appellate Body, Mexico-Rice, para 315.

Article 11 provides for what are often termed interim and expiry reviews. Interim or changed circumstances reviews occur during the 5-year application of definitive anti-dumping measures. Expiry or sunset reviews take place toward the end of the 5-year period. Interim and expiry reviews are not required to be undertaken as a matter of course under the ADA. Rather, like newcomer reviews, they may only be initiated following requests or, in some cases, the decision of the investigating authority.

Under Article 11.2, where warranted, the authorities may conduct an interim review to assess the need for the continued imposition of the duty on their own initiative, or on request by any interested party that submits positive information substantiating the need for a review (provided that a reasonable period of time has elapsed since the imposition of the duty). Interested parties have the right to ask the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or to recur if the duty were removed or varied, or both. If the authorities find that the duty is no longer warranted, it shall be terminated immediately. In Mexico-Rice, the Appellate Body upheld a panel determination that Mexican law was inconsistent with Article 11.2 because it contained an additional requirement not provided in the ADA.57

Article 11.3 provides that investigating authorities are normally required to terminate a duty no later than 5 years from its imposition, or from the date of the most recent interim review if that review covered dumping and injury. The duty may be continued past the 5-year date if the authorities determine that the expiry

57 Appellate Body Report, Mexico-Rice, paras 341–349.
of the duty would be likely to lead to the continuation or recurrence of dumping and injury. This determination must follow a review initiated before the end of the 5-year period on the authorities’ own initiative or a duly substantiated request, made by or on behalf of the domestic industry, within a reasonable period of time prior to that date. The ADA permits the duty to remain in force pending the outcome of the review.

Interim and expiry review investigations require prospective and counterfactual analysis. In this context, the fact that dumping or injury did not take place during the review investigation period is not necessarily decisive, because it might indicate that the measures are having effect.58

Judicial Review

Article 13 provides that members that adopt anti-dumping legislation must also maintain independent judicial, arbitral, or administrative tribunals or procedures for the purpose of prompt review of administrative actions to final determinations and reviews of determinations.

Flowchart

The flowchart below shows the various procedural stages prescribed by the ADA in an anti-dumping investigation. It is emphasized that national implementing legislation often will be much more detailed.

<table>
<thead>
<tr>
<th>Day</th>
<th>Stage of the proceeding</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The domestic industry submits a written application.</td>
</tr>
<tr>
<td></td>
<td>The investigating authority examines the application. Before initiating an investigation, the investigating authority must notify the government of the exporting country concerned that an application for the initiation of an anti-dumping investigation has been received.</td>
</tr>
<tr>
<td></td>
<td>The investigating authority rejects the complaint and no proceeding is initiated if there is insufficient prima facie evidence that injurious dumping has taken place. Otherwise, the authority initiates the investigation, in which case public notice must be given.</td>
</tr>
<tr>
<td></td>
<td>The full text of the written application must be transmitted to the known exporters and to the authorities of the exporting member as soon as the investigation has been initiated. Upon request, the text of the application must be made available to other interested parties. The investigating authority must also send questionnaires to exporters, importers, domestic industry, and other interested parties. Exporters and foreign producers must be given at least 30 days to reply. This time limit must be reckoned from the date of receipt of the questionnaire, which shall be deemed to have been received 1 week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting member. Extensions may be granted.</td>
</tr>
<tr>
<td></td>
<td>Time to respond to questionnaires expires. Interested parties may submit comments. Nonconfidential summaries of written submissions must generally be made available to other parties. Interested parties are also entitled to request to be heard and to hold confrontation meetings with opposing parties. Interested parties are entitled to have access to the nonconfidential (public) file and to prepare presentations on the basis of that information.</td>
</tr>
</tbody>
</table>
The investigating authority analyzes questionnaire responses and submissions, and conducts on-the-spot verifications of interested parties. (It may also carry out such verifications after the imposition of provisional anti-dumping measures).

The investigating authority analyzes all data collected and reaches a provisional determination.

No sooner than 60 days and no later than 9 months from day 1

The investigating authority publishes a notice imposing provisional anti-dumping measures for 4–6 months if a preliminary affirmative determination of dumping and consequent injury to a domestic industry has been made. Interested parties must be given the opportunity to submit comments on the findings that are the basis of the decision to impose provisional anti-dumping measures.

Interested parties have the right to be heard, submit comments, have access to the nonconfidential (public) file, and hold meetings.

The investigating authority analyzes the comments and evidence collected and reaches a definitive determination.

The investigating authority transmits the definitive disclosure to interested parties. This transmission must allow sufficient time for interested parties to defend their interests.

Deadline for interested parties to submit their comments on the investigating authority’s findings expires.
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The investigating authority analyzes the comments submitted by interested parties.

No later than 12 months from day 1 or 4 months after imposition of provisional anti-dumping duties. In exceptional circumstances, no later than 18 months after initiation or 6 months after imposition of provisional anti-dumping duties.

The notice imposing definitive measures for up to 5 years is adopted and published. If it has been found that sales did not take place at dumped prices or that the domestic industry did not suffer injury due to the imports from the targeted country, a notice of termination of the proceeding must be published.
“Article 15 imposes . . . an obligation to actively consider, with an open mind, the possibility of . . . a [constructive] remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.”


The ADA does not treat developing countries differently from developed countries. Developing countries must abide by the same rules and developing country exporters have the same rights and obligations as their counterparts in developed countries. However, like the ASG and the ASCM, the ADA does provide for certain kinds of special and differentiated treatment for developing country members. Article 15, which is unchanged from the Tokyo Round Code, provides:

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

—Article 15, ADA

The panels in EC-Pipe Fittings and US-Steel Plate from India both held that the first sentence of Article 15 does not impose any specific legal obligation or outcome as such.\(^\text{59}\) Rather, as stated by the EC-Pipe Fittings panel, it is the second sentence of Article 15 that provides “operational indications as to the nature of the specific action required” and that “articulates certain operational modalities of the first sentence.”\(^\text{60}\)

In EC-Bed Linen, taking its cue from the ADA itself, the panel ruled that the “constructive remedies” required by the second sentence could take the form of acceptance of price undertakings or application of a lesser duty rule.\(^\text{61}\) In EC-Pipe

\(^{59}\) See Panel Report, EC-Pipe Fittings, para 7.68, Panel Report, US-Steel Plate from India, para #.

\(^{60}\) Panel Report, EC-Pipe Fittings, para 7.68.

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Fittings, similarly, the panel found that price undertakings or the application of the lesser duty rules could be a constructive remedy; however, it also concluded that Article 15 does not impose an obligation to explore undertakings other than price undertakings—such as price quotas, quantitative undertakings, and tariff quotas—since they are not remedies foreseen in the ADA.62

The panels in EC-Bed Linen and EC-Pipe Fittings both found that Article 15 does not require investigating authorities to propose or accept any constructive remedy or any particular outcome.63 In EC-Bed Linen, however, the panel noted that the requirement does “impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country.”64 In EC-Bed Linen, the panel concluded that the European Communities did not act in accordance with this obligation because there was no evidence that it did anything differently than it would have done in any other anti-dumping proceeding; in other words, there was no evidence of any particular “exploration” on the part of the European Communities.

The rejection expressed in the European Communities’ letter of 22 October 1997 does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand . . . the European Communities simply did nothing different in this case, than it would have done in any other anti-dumping proceeding. . . . Pure passivity is not sufficient, in our view, to satisfy the obligation to “explore” possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned.


In EC-Pipe Fittings, however, the panel rejected Brazil’s argument that constructive remedies must be explored directly with a developing country exporter: “The reference in Article 15 is that special regard must be given ‘to the special situation of developing country Members.’”65 Both panels have held that the obligation to explore constructive remedies arises only before definitive measures are imposed, not provisional measures.66

62 Panel Report, EC-Pipe Fittings, paras 7.72, 7.78.
This module discussed the main anti-dumping rules contained in the ADA, including substantive rules for determining whether dumping, injury, and causation exist and procedural rules for investigating dumping and the application of anti-dumping measures. The case study in this section will examine some of the procedural rules that a WTO member must follow to initiate an anti-dumping investigation.

**Facts**

On 21 June 2007, company M, the sole producer of steel I-beams in a WTO member, files an application requesting the member to initiate an anti-dumping investigation against imports of the same product originating in country A, a WTO member.

The application identifies company M as the applicant and contains a description of the volume and value of company M's domestic production. It also describes the allegedly dumped product as steel I-beams of all standard sizes and colors, not custom made. It states that the application concerns I-beams originating in country A and identifies two companies in country A that are known producers and exporters of I-beams. It identifies two companies in the member as known importers of the allegedly dumped I-beams and states that it is the only domestic producer of the I-beams as described in the application.

Company M's application contains sections entitled “dumping,” “injury,” and “causation.” It provides comprehensive evidence for all factors, except for information about the volume of the allegedly dumped imports, which is not publicly available in the member. All of the information provided for dumping, injury, and causation is supported by data including company reports, audited financial statements, invoices, import certificates, and other relevant sources.

Company M's desire for the member to open an anti-dumping investigation is well-known in steel industry circles. An industry magazine devoted to steel construction publishes an article reporting on company M's submission of the anti-dumping application.

An industry representative in country A reads the article and brings it to the attention of government officials dealing with external commerce-related issues. Country A government officials call the member. A meeting is set up for 19 July 2007. The member's internal meeting report notes that member officials met with country A officials about the receipt of company M's anti-dumping application. Member officials informed country A officials that they considered the application to be properly documented and therefore intended to proceed with an examination of
whether there was sufficient evidence to justify the initiation of an anti-dumping investigation. On 22 July 2007, the member sends a copy of this note to country A authorities by registered mail. The cover letter states, in part:

Please find enclosed a summary of our 19 July 2007 meeting concerning the receipt of a properly documented anti-dumping application on 21 June 2007 from Company M requesting us to initiate an anti-dumping investigation against I-beams (of all standard sizes and colors, not custom made) originating in your country. As discussed at the meeting, we are currently examining the adequacy and accuracy of the evidence in the application to determine whether there is sufficient information to initiate an anti-dumping investigation.

The member finds that company M has submitted sufficient evidence of dumping, injury, and causation to justify initiation of an investigation. It notes that invoices and import certificates provided as part of the “dumping” section of the application prove that I-beams are being exported at much lower price than the sale price on country A’s domestic market and interprets this as evidence of dumping. It decides not to conduct any further examination of the issue. The evidence of dumping provided by company M in its application is summarized as follows:

Two invoices dated 17 December 2006 and one invoice dated 14 February 2007. The first 17 December 2006 invoice is for a sale of five I-beams by a retailer in country A to a construction company for a price of 15 Member Currency units (MC) per beam. The second 17 December 2006 invoice involves a purchase by a construction company from a wholesaler. This invoice is for 10 I-beams at 14MC per beam. The invoice dated 14 February 2007 is for a sale of 15 I-beams to a construction company at 12MC per I-beam.

Two import certificates, one dated 29 December 2006 and one additional import certificate dated 3 March 2007. The first import certificate is for the sale of 100 I-beams at 9MC per beam, and the second is for 200 I-beams at 8MC per beam.

In order to analyze injury further, the member investigating authority consults import data not generally available to commercial entities in the member, and finds that imports of I-beams originating in country A increased both in volume and relative to domestic production from 2002 to June 2007. It also takes injury data submitted by company M into account. These data show that profits, market share,
production, and employment in the investigating member all decreased from 2002 to 2007, and that the price of I-beams originating in country A significantly undercuts domestic prices. Following verification of the data and further analysis of other potential causes of injury, the member investigating authority determines that there is evidence that the allegedly dumped imports have caused injury to company M, the only producer of I-beams in the member. Because company M is the only producer, the application is made by or on behalf of the domestic industry.

The investigating authority provides public notice in the member’s official gazette on 6 September 2007 of an anti-dumping investigation concerning I-beams originating in country A. The notice stipulates that the date of publication in the gazette is the date of initiation and identifies all steel I-beams of whatever standards, size, and color, not custom made, as the product and country A as the country concerned. It describes the basis on which dumping is alleged and summarizes the factors on which the claim of injury is based. It also provides the address to which representations by interested parties can be directed and the time limit for them to make their views known. The same day, the member sends the notice as published in the gazette to known exporters and country A.

On 20 September 2007, the member sends a copy of the application to country A officials and the two known exporters of I-beams in country A. The application designates all company M’s price and sales, profits, production, capacity utilization, employment and wage, cash flow, inventory, and investment information as confidential, but does not provide any specific reason why it should be treated confidentially. Company M provided a nonconfidential version of the application with “indexed” information. The member sends that version of the application to country A and the known exporters.

Discussion

1. Did company M’s application meet the requirements of Article 5.2 of the ADA?

The application contains dumping, injury, and causal link information. Moreover, company M has provided evidence in the form of invoices, import certificates, company records, and other sources. Therefore, the assertions contained in the application are more than simple assertions “unsubstantiated by relevant evidence.” However, the question remains whether the application contains “such information as is reasonably available” to company M as is required by Article 5.2(i)–(iv).
Company M provided information concerning the identity of the applicant and a description of the volume and value of applicant’s production of I-beams, as required by Article 5.2(i). In addition, it provided a description of the allegedly dumped product, countries of origin and export of the I-beams concerned, and the identity of known exporters. These are the data required by subsection (ii) of Article 5.2.

Article 5.2(iii) requires an application to contain information about domestic prices in the country of origin or export and about export prices. Company M submitted information on prices of I-beams when sold for consumption in country A and when exported from country A.

Article 5.2(iv) provides that an application should contain

- information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

Company M did not provide information on the evolution of the volume of the allegedly dumped imports, but such information is not generally available to nongovernmental entities. In Guatemala-Cement II, the panel indicated that it “might have been reasonable” for the investigating authority not to expect this specific kind of information from the applicant.67 Thus, information about the evolution of the volume of imports may not be indispensable under Article 5.2(iv).

2. Did the member properly notify country A after receipt of the application?

Member authorities were obliged to notify country A after they received a properly documented application before they could proceed to initiate an investigation. After it received company M’s application, the member had an oral meeting with country A. In Thailand–H-Beams, the panel concluded that Article 5.5 does not, as such, preclude oral notification of receipt of an application, but held that the meeting had to be sufficiently documented to enable meaningful review by a

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In that case, Thailand later documented the discussion of the meeting in an internal note, but did not provide the note to the Polish authorities before initiation. Because Poland did not object to the evidentiary value of the note, the panel found that Thailand had provided notice.

It is not difficult to see how mere oral notification only supported by an internal government note could present problems in cases where the accuracy and validity of such a note is later challenged, unlike in Thailand–H-Beams. In this case study, however, the member not only recorded the content of the meeting in an internal note, but it sent a copy of the note to country A officials before deciding to initiate the anti-dumping investigation. In addition, it provided a cover letter indicating that it had received a properly documented application as provided by Article 5.5. In these circumstances, the member’s notice before initiation is much better documented than Thailand’s was and less likely to be challenged by country A under Article 5.5.

3. Did member, as required by Article 5.3, properly examine the adequacy and accuracy of the evidence in the application to determine whether there was sufficient information to initiate an anti-dumping investigation?

As noted by the panel in Mexico-Corn Syrup, “an application which is consistent with the requirements of Article 5.2 will not necessarily contain sufficient evidence to justify initiation under Article 5.3.” Therefore, the member must also independently determine whether the evidence is sufficient to justify an initiation.

The facts probably support the conclusion that the investigating authority’s investigation of the adequacy and accuracy of company M’s dumping information was not sufficient to justify an initiation. The I-beams sold on the domestic market in country A were sold in much lower quantities and at a much different level of trade—at the very end of the commercialization chain in country A—than those exported to the member. The I-beams exported to the member were sold in much higher quantities and reflect prices at the point of importation, a point at the beginning of the commercialization chain in the member. In Guatemala-Cement II, the panel held that, where the evidence presents such “obvious” differences, an investigating authority must take account of factors affecting price comparability.

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70 Panel Report, Mexico-Corn Syrup, para 7.74.
when examining whether there is sufficient evidence to justify the initiation of an anti-dumping investigation.\textsuperscript{71} In this regard, it stated:

\begin{quote}
We would like to emphasize that we do not expect investigating authorities at the initiation phase to ferret out all possible differences that might affect the comparability of prices in an application and perform or request complex adjustments to them. We do however expect that, when from the face of an application it is obvious that there are substantial questions of comparability between the export and home market prices being compared, the investigating authority will at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those differences on the sufficiency of the evidence of dumping or seek such further information as might be necessary to do so.\textsuperscript{72}
\end{quote}

The member investigating authority accepted the information in the invoices at face value and did not conduct any further examination to ensure comparability. Comparing the facts in the case study to those in \textit{Guatemala-Cement II}, the panel report in that case indicates that the member probably did not sufficiently examine the adequacy and accuracy of the evidence to satisfy Article 5.3.

As a final note, I-beams are sold in many different sizes and colors. If the invoices indicated “obvious” differences in product sizes or quality, the member may have also been required to take account of this information as part of an Article 5.3 examination.

\textbf{4. Assuming member did sufficiently examine the adequacy and accuracy of the evidence submitted by company M and there was sufficient evidence to initiate an investigation, did the member provide proper notification?}

The public notice of the initiation of the investigation appears to be in conformity with Article 12.1.1. The member’s treatment of the application and provision of the application to known exporters and country A, however, is probably not in conformity with the ADA. Article 6.1.3 requires authorities to provide a full text of the application to known exporters and the authorities of the exporting member “as

\textsuperscript{72} Panel Report, Guatemala-Cement, para 8.40.
soon as the investigation has been initiated.” In *Guatemala-Cement II*, the panel
determined that the provision of the application to Mexico 9 days after initiation
did not satisfy this requirement. The member only provided the application to
known exporters and country A officials 14 days after initiation. It is unlikely that a
panel would find this “as soon as the investigation” had been initiated.

In addition, the member’s designation of information on the application as
confidential, without requiring company M to show “good cause” that the
information should be held in confidence, was also probably contrary to Article
6.5. In *Korea-Certain Paper*, the panel determined that, while the degree of
the requirement may depend on the information concerned, an investigating
authority must always require good cause to be shown, whether the information
is confidential by nature or has been submitted on a confidential basis. The
member did not do this. Therefore, country A could challenge its designation.

---

73 Panel Report, Guatemala-Cement II, para 8.104
Further Reading


Panel and Appellate Body Reports

Appellate Body Reports


European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC-Tube or Pipe Fittings), WT/DS219/AB/R, adopted 18 August 2003.

European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India-Recourse to 21.5 of the DSU by India (EC-Bed Linen) (Article 21.5-India), WT/DS141/AB/RW, adopted 24 April 2003.


Panel Reports


United States-Sunset Reviews of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (US-Corrosion-Resistant Steel Sunset Review), WT/DS244/R, adopted 9 January 2004, modified by Appellate Body Report, WT/DS244/AB/R.

European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC-Tube or Pipe Fittings), WT/DS219/R, 18 August 2003, modified by Appellate Body Report, WT/DS219/AB/R.


European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to 21.5 of the DSU by India (EC-Bed Linen) (Article 21.5-India), WT/DS141/RW, adopted 24 April 2003, modified by Appellate Body Report, WT/DS141/AB/RW.

Panel and Appellate Body Reports

Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey (Egypt-Steel Rebar), WT/DS211/R, adopted 1 October 2002.

United States-Section 129(c)(1) of the Uruguay Round Agreement Act (US-Section 129(c)(1)URAA), WT/DS/221/R, adopted 30 August 2002.


Argentina-Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy (Argentina-Ceramic Tiles), WT/DS189/R, adopted 5 November 2001.


The Anti-Dumping Agreement (ADA) Powerpoint

The Anti-Dumping Agreement (ADA)

Module 3 on Trade Remedies

Overview of presentation

- Introduction
- Dumping
- Injury
- Procedures
- Developing Country Members
The Anti-Dumping Agreement

Introduction

- Historical Overview
- Current Situation
- Actionable Forms of Dumping
- Forms of Injury
- Like Product
- Dumping and Injury Investigation Periods

Historical overview

- ADA negotiated in Uruguay Round
- Article VI of GATT 1947 carried over to GATT 1994
- Article VI Part of Background of ADA
  - An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement (Article 1 ADA).
- Anti-dumping measures may only be imposed following a domestic investigation in accordance with ADA procedural rules and a finding of:
  - Dumping;
  - Injury;
  - Causation of the injury by dumped imports.
Historical overview GATT

- Condemns, but does not prohibit dumping;
- Permits protective action if product dumped and causing injury to the domestic industry;
- Subject to negotiations from inception; 1979 Tokyo Round Code.

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

—Article VI, paragraph 1
GATT 1947/1994

Current situation

- Overview of the ADA
  - Part I
    - Articles 1–15
    - Covers dumping, injury and domestic procedures
  - Part II
    - Articles 16–17
    - Establishes the WTO Committee on Anti-Dumping Practices (ADP) and special rules for WTO dispute settlement relating to anti-dumping matters
  - Part III
    - Article 18
    - Final provisions
  - Annex I
    - Provides procedures for on-the-spot investigations
  - Annex II
    - Contains guidelines on what constitutes “best information available”
The Anti-Dumping Agreement

Introduction

Actionable forms of dumping

- Goods, not services;
- Does not apply to exchange dumping, social dumping, environmental dumping, or freight dumping;
- Reasons why companies may dump also irrelevant so long as technical rules are met.

Forms of injury

- Must find injury as well as dumping to impose anti-dumping measures.
- Injury under ADA includes all of the following (Footnote 9):
  - Present material injury;
  - Future injury (threat of material injury);
  - Material retardation of the establishment of a domestic industry.
Introduction

Like product

- Like product is the product that is identical (alike in all respects) to the product under consideration, or in the absence of such a product, another product that has characteristics closely resembling those of the product under consideration (Article 2.6).
- Like product is different for dumping and injury determination:
  - Dumping:
    - Product sold in exporting country like the allegedly dumped product;
  - Injury:
    - Product sold by domestic industry like the allegedly dumped product.

Introduction

Dumping and injury investigation periods

- Authorities need to gather data in order to investigate whether dumping and injury exist. Investigation periods are usually established for dumping and injury.
  - Dumping Investigation Period
    - Shorter than injury investigation period;
    - No ADA rules;
    - ADP Committee suggested 12 months, and in any case no less than 6 months, ending as close to the date of initiation of the investigation as is practicable.
  - Injury Investigation Period
    - No ADA rules;
    - ADP Committee recommended injury be analyzed over a period of at least 3 years and should include the entire period of data collection for the dumping investigation;
    - Longer period needed to examine “trend factors.”
The Anti-Dumping Agreement

Dumping

- Introduction
- Like Product
- Export Price
- Normal Value
- Calculation
- Comparison

Introduction

- Dumping = Export Price < Normal Value
- Four main steps:
  1. Determination of the like product,
  2. Determination of export price,
  3. Determination of normal value, and
  4. Comparison of export price and normal value.

For the purpose of this Agreement, a product is to be considered as being dumped, i.e., 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.

—Art. 2.1
Like product

- Product sold in exporting country that is identical to or most closely resembling allegedly dumped product.
- Product control numbers (PCNs, sometimes called models) are often developed by investigating authorities in order to compare identical types for dumping (and injury) margin calculation purposes.
- Dumping amounts are calculated for each PCN.

Example of PCN system developed by the European Commission at the initial stage of an anti-dumping investigation concerning imports of “farmed Atlantic salmon.”

<table>
<thead>
<tr>
<th>Field Description</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Product</td>
<td>Atlantic Salmon = AS</td>
</tr>
</tbody>
</table>
| Quality of the Product | 1. Superior fish = S  
                          | 2. Ordinary fish = O  
                          | 3. Other quality fish = L |
| Fresh or Frozen   | 1. Fresh or chilled = C  
                          | 2. Frozen = F          |
| Varieties of Cut of Fish | a. Whole fish = a  
                          | b. Gutted fish, head on = b  
                          | c. Gutted fish, head off (including steaks) = b  
                          | e. Offcuts or trimmings = d  
                          | f. Whole fish fillets exceeding 300 g = e  
                          | g. Other fillets or fillet portions normally weighing 300 g or less = f |
The Anti-Dumping Agreement

### Field Description

<table>
<thead>
<tr>
<th>Field Description</th>
<th>Explanation</th>
</tr>
</thead>
</table>
| Size for Cuts with Indication of Weight | Strictly inferior to 1 kg = 1  
Equal to or more than 1 kg and strictly less than 2 kg = 2  
Equal to or more than 2 kg and strictly less than 3 kg = 3  
Equal to or more than 3 kg and strictly less than 4 kg = 4  
Equal to or more than 4 kg and strictly less than 5 kg = 5  
Equal to or more than 5 kg and strictly less than 6 kg = 6  
Equal to or more than 6 kg and strictly less than 7 kg = 7  
Equal to or more than 7 kg and strictly less than 8 kg = 8  
Equal to or more than 8 kg and strictly less than 9 kg = 9  
Equal to or more than 9 kg = 0 |
| Size for Cuts e, f, or g | In all cases = 1  
must not be left empty |

### Examples of PCN:
- Ordinary quality salmon, Chilled, gutted, head off, 3 kg AS/O/C/c/4
- Superior quality salmon, Frozen, Whole fish fillet, 1400 g AS/S/F/f/1
- Ordinary quality salmon, Frozen, Offcuts, 7.5 kg block AS/O/F/e/1
- Superior quality salmon, Chilled, Other fillet, 250 g AS/S/C/g/1

### Export price

- Export price: the price at which the product is exported from one country to another (Article 2.1), but
  
  **IF**
  
  no export price exists or the export price is unreliable because there is a relationship between the exporter and importer (for example, between a producing or exporting parent company and a related importer)
  
  **THEN**
  
  the export price may be constructed using the price at which imported goods are first resold to an independent buyer.
Normal value

- **Domestic Price**: Price of the like product, in the ordinary course of trade, in the home market of the exporting Member;
- **Important query**: Can/should submitted “domestic” sales data be used? Factors that may affect such use:
  - Not in ordinary course of trade:
    - Article 2.2.1 provides that certain sales below cost may be treated as not being “in the ordinary course of trade.”
  - Sales to related parties:
    - Some WTO members base normal value on the (higher) ex-distributor price;
  - Transshipments:
    - Country of export will be basis for normal value unless
      - Products are merely transshipped through the country of export.
      - Products are not produced in the country of export.
      - There is no comparable price in the country of export (Article 2.5).
The Anti-Dumping Agreement

### Normal value

- **Article 2.2** provides two alternative bases for normal value:
  - Third-country exports,
  - Constructed normal value.

- **Situations justifying alternative normal value calculation methods (Article 2.2):**
  - No domestic sales,
  - No domestic sales in the “ordinary course of trade”,
  - Unrepresentative volume of domestic sales (5% rule), and
  - Particular market situation of the exporting country.

---

### Normal value

- **Ordinary course of trade**
  - Article 2.1: sales below cost may be treated as not being “in the ordinary course of trade” and may be disregarded, i.e., excluded from the normal value calculation, only if the authorities determine that:
    - Sales below cost are made within an extended period of time;
    - In substantial quantities;
    - At prices that do not provide for the recovery of all costs within a reasonable period of time.

In practice, sales below cost are often excluded where the weighted average selling price is below the weighted average per unit cost or where they represent more than 20% of the quantity of total domestic sales of the models concerned.
Dumping

Normal value

<table>
<thead>
<tr>
<th>Date</th>
<th>Quantity</th>
<th>Normal Value</th>
<th>Export Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/8</td>
<td>10</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>10/8</td>
<td>10</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>15/8</td>
<td>10</td>
<td>150</td>
<td>150</td>
</tr>
<tr>
<td>20/8</td>
<td>10</td>
<td>200</td>
<td>200</td>
</tr>
</tbody>
</table>

Exclusion of sales below cost (in this case, the 1/8 sale at 40) will increase the normal value and thereby makes a finding of dumping more likely.

- **20% rule:**
  - Normal Value = 150
    \[ ((100 + 150 + 200)/3) \]
  - Average Export Price = 125
    \[ ((50 + 100 + 150 + 200)/4) \]
  - Dumping Amount = 100 (25 x 4)
  - Dumping Margin = 19%
    \[ (100/525 [CIF price]) \]

- **No 20% rule:**
  - Normal Value = 122.5
  - Average Export Price = 125
  - NO DUMPING

Full cost of production = 50

**Constructed Normal Value**
- Purpose: to construct a price of the exported product as if it had been sold on the domestic market
- Three elements (Article 2.2):
  - Cost of production (of the exported product);
  - Reasonable amount for administrative, selling, and general costs (on the domestic market) (also referred to as SGA);
  - Reasonable amount for profits (on the domestic market).
The Anti-Dumping Agreement

### Normal value

- **Data for Nonmarket Economies**
  - It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate. Second Supplementary Provision to paragraph 1.2 of Article VI GATT 1947.
  - Export prices are compared with prices or costs in surrogate/analogue country.
  - Protocols of Accession of the People's Republic of China and Viet Nam contain special provisions allowing WTO Members to treat these countries as NMEs until 2016 and 2019 respectively.

### Comparison

- **Fair Comparison**
  - Must be made between the export price and the normal value at the same trade level, at or about the same time, and taking into account differences that may affect price comparability (Article 2.4).
  - When the normal value and the export price are not on a comparable basis, adjustments must be made if the entity can demonstrate that the differences affect price comparability. Such adjustments include:
    - Differences in commissions paid,
    - After-sales costs,
    - Costs of credit granted,
    - Directly related transport and handling costs,
    - Discounts and rebates,
    - Level of trade,
    - Physical characteristics, and
    - Import charges and indirect taxes.
**Dumping**

**Calculation**

Dumping Amount: Amount by which the normal value exceeds the export price. The difference expressed as a percentage will be the dumping margin.

Dumping Margin: In the basic formula commonly used by Members, the export price is deducted from the normal value and the result is calculated as a percentage of the CIF (cost, insurance, freight) value.

Dumping margin calculation:
Normal value - export price x 100/CIF value

**Dumping margin →**

\[(84 - 78)/100\] = 6%

<table>
<thead>
<tr>
<th>Normal Value</th>
<th>Export Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Producer X → unrelated customer</td>
<td>Producer X → unrelated importer</td>
</tr>
<tr>
<td>Sales price: 100</td>
<td>Sales price: 100</td>
</tr>
<tr>
<td>- duty drawback: 5</td>
<td>- physical differences: 5</td>
</tr>
<tr>
<td>- discounts: 2</td>
<td>- discounts: 2</td>
</tr>
<tr>
<td>- packaging: 1</td>
<td>- packaging: 1</td>
</tr>
<tr>
<td>- inland freight: 1</td>
<td>- inland freight: 1</td>
</tr>
<tr>
<td>- ocean freight/insurance: 6</td>
<td></td>
</tr>
<tr>
<td>- credit: 3</td>
<td>- credit: 3</td>
</tr>
<tr>
<td>- guarantees: 2</td>
<td>- guarantees: 2</td>
</tr>
<tr>
<td>- commissions: 2</td>
<td>- commissions: 2</td>
</tr>
<tr>
<td>= ex-factory normal value: 84</td>
<td>= ex-factory export price: 78</td>
</tr>
</tbody>
</table>

**Comparison**

Zeroing Example

<table>
<thead>
<tr>
<th></th>
<th>Normal Value</th>
<th>Export Price</th>
<th>Dumping Amount</th>
<th>Weighted Average Transaction-by-Transaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Day 1</td>
<td>50</td>
<td>50</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>Day 10</td>
<td>100</td>
<td>100</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Day 20</td>
<td>150</td>
<td>150</td>
<td>-25</td>
<td></td>
</tr>
<tr>
<td>Day 30</td>
<td>200</td>
<td>200</td>
<td>-75</td>
<td></td>
</tr>
<tr>
<td>Weighted Average</td>
<td>125</td>
<td>125</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dumping Amount</td>
<td>100</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dumping Margin</td>
<td>(100/525) = 19%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### The Anti-Dumping Agreement

#### Dumping

<table>
<thead>
<tr>
<th>Comparison</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Zeroing</strong></td>
</tr>
<tr>
<td>The practice of replacing the actual amount of dumping calculated for model or sales comparisons that yield negative dumping margins (i.e., models or export transactions for which the export price exceeds the calculated normal value) with a value of zero before the final calculation of a weighted-average margin of dumping for the product under investigation.</td>
</tr>
</tbody>
</table>

| Practice Before ADA |
| Situation After ADA |
| New Zeroing Methods After ADA |
| Model Zeroing |

#### Dumping

- **Two general methods** (Article 2.4.2)
  - Weighted average-to-weighted average basis,
  - Transaction-to-transaction basis.

- **One exception** (Article 2.4.2)
  - Weighted average normal value is compared to individual export prices IF two conditions are met:
    - There is a pattern of export prices that differ significantly among different purchasers, regions, or time periods; AND
    - The exceptional method is proven to be more appropriate.
The Anti-Dumping Agreement (ADA) Powerpoint

Dumping

Comparison

- Consistent rejection of zeroing by Appellate Body:
  - EC-Bed Linen
    - Model zeroing;
  - US-Softwood Lumber V
    - Model zeroing;
  - US-Zeroing (EC)
    - Model zeroing (inconsistency “as such” with ADA);
  - US-Softwood Lumber V (21.5)
    - Transaction-to-transaction zeroing;
  - US-Zeroing (Japan)
    - Inconsistency as such with ADA for zeroing under the transaction-to-transaction methodology in original investigations, periodic and new shipper reviews, and sunset review determinations;
    - Inconsistency with ADA of application of zeroing procedures in 11 periodic reviews;
    - Implicit rejection of weighted average-to-transaction method (in dictum).

Injury

- Introduction
- Like Product
- Domestic Industry
- Material Injury
- Threat of Injury
- Causation/Other Known Factors
- Injury Margins
- Calculations
The Anti-Dumping Agreement

## Introduction

- **Four steps:**
  - The definition of the like product,
  - The definition of the domestic industry,
  - The determination of material injury, AND
  - The establishment of a causal link between dumped imports and the material injury caused.

- The determination of injury **must** be based on “positive evidence” and involve an “objective examination” of
  - The volume of dumped imports and their effect on prices, AND
  - The impact of the dumped imports on domestic producers of like products.

## Like product

- **Like product**
  - The like product is the domestically produced product identical with or closely resembling the “product concerned,” i.e., the allegedly dumped product.
  - The effect of the dumped imports should be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers’ sales, and profits (Article 3.6).
Like product

- **Exception**
  - If separate identification of domestic production of the like product is not possible, the effects of the dumped imports must be assessed by the examination of the production of the narrowest group or range of products that includes the like product for which the necessary information can be provided (Article 3.6).

Domestic industry

- **Domestic Industry**
  - All domestic producers of the like product, or
  - Those domestic producers whose collective output constitutes a major proportion of the total domestic production of those products.

- **Exceptions**
  - Producers related to exporters or importers or producers that are importers themselves,
  - Regional industry.
Material injury

- Finding of material injury based on **objective examination** and **positive evidence** of volume of imports and their impact on prices and the impact of dumped products on domestic producers of like products.

- **Cumulation**: the injurious effects of a product from more than one country simultaneously subject to anti-dumping investigations will be assessed together only if
  - The margin of dumping established in relation to the imports from each country is more than de minimis (2%) and the volume of imports from each country is not negligible (3%); and
  - A cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like community product.

- Exclusion of nondumped imports

---

**Material injury**

*Injury investigation period: 3 years*

Investigation requires evaluation of all relevant economic factors/indexes including:

- actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; 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.

---

—Article 3.4
The Anti-Dumping Agreement (ADA) Powerpoint

Injury

### Threat of injury

Must be based on facts and not merely on allegation, conjecture, or remote possibility; the change in circumstances that would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

Article 3.4 factors must also be evaluated (panel, *Mexico-Corn Syrup*).

Article 3.7 Threat of Injury Factors:

- A significant rate of increase of dumped imports into the domestic market, indicating the likelihood of substantially increased importation;
- Sufficiently freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing member’s market, taking into account the availability of other export markets to absorb any additional exports;
- Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports;
- Inventories of the product being investigated.

Injury

### Causation

- **Nonattribution**: The fundamental question is “Was the injury caused by the dumped imports or by other factors?”
- **Other factors** (Article 3.5) include
  - Contraction in demand,
  - Changes in patterns of consumption,
  - Trade-restrictive practices of and competition between foreign and domestic producers,
  - Developments in technology, and
  - Export performance and productivity of domestic industry.
The Anti-Dumping Agreement

Injury

Injury margins

- The lesser duty rule
  - Anti-dumping duty can be set at a lower rate than the margin of dumping. The duty imposed should be less than the margin of dumping if the lesser duty would be adequate to remove the injury to the domestic industry (Articles 8.9 and 9.1).
- ADA provides no guidance on calculation methods.
- In practice, domestic authorities use two methods, with two variations:
  1. Price undercutting
     - Global
     - Individual
  2. Price underselling
     - Global
     - Individual

Calculations

Example 1: Calculation of injury margin based on price undercutting

<table>
<thead>
<tr>
<th>Price</th>
<th>Domestic Producer X</th>
<th>Foreign Exporter Y</th>
<th>Foreign Exporter Z</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injury Margin</td>
<td>100</td>
<td>80</td>
<td>110</td>
</tr>
</tbody>
</table>

\[
\text{Injury Margin } = \frac{(100 - 80) - 20}{80} = 25\% \\
\text{Injury Margin } = 100 - 110 = -10 = 0
\]

Example 2: Calculation of injury margin based on price underselling

<table>
<thead>
<tr>
<th>Price</th>
<th>Domestic Producer X</th>
<th>Foreign Exporter Y</th>
<th>Foreign Exporter Z</th>
</tr>
</thead>
<tbody>
<tr>
<td>Target Price</td>
<td>121</td>
<td>80</td>
<td>110</td>
</tr>
<tr>
<td>Injury Margin</td>
<td>(121 - 80 = 41) / 80 = 51.25%</td>
<td>(121 - 110 = 11) 110 = 10%</td>
<td></td>
</tr>
</tbody>
</table>

\[
\text{Injury Margin } = \frac{(121 - 80) - 41}{80} = 51.25\% \\
\text{Injury Margin } = \frac{(121 - 110) - 11}{110} = 10\%
\]
Procedures

- Introduction
- Initiation
- Due Process Provisions
- Provisional Measures
- Price Undertakings
- Anti-dumping Duties
- Retroactivity
- Reviews
- Judicial Review
- Flowchart

Introduction

Main purposes of ADA procedural provisions:
- Ensure transparency of proceedings, and
- Give interested parties the opportunity to make their case known and provide adequate explanations of the determinations made.
## The Anti-Dumping Agreement

### Procedures

<table>
<thead>
<tr>
<th>Introduction</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Important procedural provisions</strong></td>
</tr>
<tr>
<td>- Article 5</td>
</tr>
<tr>
<td>- Initiation and subsequent investigation, including the standing determination;</td>
</tr>
<tr>
<td>- Article 6</td>
</tr>
<tr>
<td>- Evidence, including due process rights of interested parties;</td>
</tr>
<tr>
<td>- Article 7</td>
</tr>
<tr>
<td>- Provisional measures;</td>
</tr>
<tr>
<td>- Article 8</td>
</tr>
<tr>
<td>- Price undertakings;</td>
</tr>
<tr>
<td>- Article 9</td>
</tr>
<tr>
<td>- Imposition and collection of anti-dumping duties;</td>
</tr>
<tr>
<td>- Article 10</td>
</tr>
<tr>
<td>- Retroactivity;</td>
</tr>
<tr>
<td>- Article 11</td>
</tr>
<tr>
<td>- Duration and review of anti-dumping duties and price undertakings, including;</td>
</tr>
<tr>
<td>- Article 12</td>
</tr>
<tr>
<td>- Public notice and explanation of determinations, pertaining to initiation, imposition of preliminary and final measures;</td>
</tr>
<tr>
<td>- Article 13</td>
</tr>
<tr>
<td>- Judicial review;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Initiation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Application</strong></td>
</tr>
<tr>
<td>- Must include evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury (Article 5.2).</td>
</tr>
<tr>
<td><strong>Preinitiation examination</strong></td>
</tr>
<tr>
<td>- Before initiation, investigating authority must examine the accuracy and adequacy of the evidence submitted to determine whether the initiation of an investigation is justified (Article 5.3).</td>
</tr>
<tr>
<td><strong>Standing</strong></td>
</tr>
<tr>
<td>- Before initiation, investigating authority must determine that application is made by or on behalf of the domestic industry (Article 5.4).</td>
</tr>
<tr>
<td>- Two-part test:</td>
</tr>
<tr>
<td>- 50% support from producers expressing an opinion;</td>
</tr>
<tr>
<td>- Producers expressing support must be responsible for 25% of the total production of the domestic industry.</td>
</tr>
</tbody>
</table>
### Procedures

## Initiation

- **Notification**
  - Before initiation, authorities must notify the government of the exporting country after they have received a properly documented complaint, but before proceeding to initiate an investigation (Article 5.5).

- **De minimis/negligibility thresholds**
  - Immediate termination if
    - Margin of dumping is de minimis (less than 2%); or
    - Volume of dumped imports, actual or potential, or the injury, is negligible
      - Negligible volume is less than 3% of imports of the like product in the importing member unless countries that individually account for less than 3% collectively account for more than 7% of the imports of the like products in the importing Member (Article 5.8).

- **Deadlines**
  - Investigations shall normally be concluded within 1 year and in no case more than 18 months after their initiation (Article 5.10).

## Due process provisions

- **Due process rights and public motivation**
  - Articles 6 and 12 provide important due process rights for interested parties, including
    - Opportunity to present evidence in writing (Article 6.1);
    - Right to access the file (Articles 6.1.2, 6.4);
    - Right to have a hearing and to rebut opposing positions (Article 6.2);
    - Right to be timely informed of the essential facts under consideration that form the basis for the decision whether to apply definitive measures (Article 6.9);
    - Right to obtain an individual dumping margin, subject to exceptions (Article 6.10); and
    - Publication of notice of initiation of investigation, imposition of preliminary and final determinations (Article 12).
The Anti-Dumping Agreement

Due process provisions

- **Confidentiality**
  - Information that is by its nature confidential or submitted on confidential basis is provided confidential treatment if good cause shown (Article 6.5);
  - Policy strikes a balance to ensure fair play and equality (confidential and nonconfidential documents).

- **Facts available**
  - In case of lack of cooperation importing member may apply facts available;
  - Power is subject to restraints: exercise must be necessary, member cannot refuse information if submitted within reasonable period, must exercise “special circumspection” (Article 6.8; Annex II).

Provisional measures

- Provided for by Article 7;
- Can be imposed following initiation, if preliminary findings of injury and dumping have been made and the measures are necessary to prevent injury;
- Must give interested parties adequate opportunity to submit information and make comments before imposition;
- May be imposed no earlier than 60 days from the initiation of proceedings but no later than 9 months from the initiation;
- Should preferably be in the form of a bond or security deposit.
Price undertakings

- Provided for by Article 8,
- Exporter undertakes to amend prices,
- ADA expresses preference for a price undertaking sufficient to eliminate injurious effects, but in no case greater than the margin of dumping,
- Undertakings do not have to be accepted if impractical or if other reasons obtain, including authorities’ general policy.

Anti-dumping duties

- Article 9,
- Discretionary,
- Preference for Lesser Duty Rule,
- Collection on a Nondiscriminatory Basis,
- Retrospective versus Prospective Collection,
- Sampling.
### The Anti-Dumping Agreement

#### Retroactivity

- In general, anti-dumping measures can only be applied from the date on which the determination of dumping, injury, and causality has been made.
- In certain cases, duties can be imposed retroactively (Article 10):
  - Provisional measures require
    - Final determination of injury, or
    - Final determination of threat of injury.
  - Definitive measures require
    - History of dumping that caused injury,
    - Massive dumped imports in a relatively short time,
    - Can be imposed 90 days before application of provisional measures.

#### Reviews

**Three types**

- **Newcomer (Article 9.5)**
  - Determine individual margins of dumping for new exporters in the exporting country who did not export the product during the period of the investigation

- **Interim (Article 11.2)**
  - Conducted at request of interested party or at investigating authority’s initiative, after initial measures have been in force for a “reasonable” time

- **Expiry (Article 11.3)**
  - Definitive duties must be terminated at the latest 5 years from their imposition unless reviewing investigators determines that the expiry of the duty would lead to a continuation or recurrence of dumping and injury.
Members that adopt anti-dumping legislation must also maintain independent judicial, arbitral, or administrative tribunals or procedures for the purpose of prompt review of administrative actions to final determinations and reviews of determinations (Article 13).

Standard of review by WTO tribunal panels

(i) 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.

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. 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.

—Article 17.6
The Anti-Dumping Agreement

**Procedures**

### Flowchart

1. **The domestic industry submits written application.**
2. **The investigating authority examines the application. Before initiating an investigation, the investigating authority must notify the government of the exporting country concerned that an application for the initiation of an anti-dumping investigation has been received.**
3. **If initiation, give public notice.**
4. **Rejection or initiation.**
5. **The full text of the written application must be transmitted to the known exporters and to the authorities of the exporting member as soon as the investigation has been initiated. Upon request, the text of the application must be made available to other interested parties. The investigating authority must also send the questionnaires to exporters, importers, domestic industry, and other interested parties. Exporters and foreign producers must be given at least 30 days to reply. This time limit must be reckoned from the date of receipt of the questionnaire, which shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting member. Extensions may be granted.**
6. **Time to respond to questionnaires expires. Interested parties may submit comments.**
7. **Nonconfidential summaries of written submissions must generally be made available to other parties. Interested parties are also entitled to request to be heard and to hold confrontation meetings with opposing parties. Interested parties are entitled to have access to the nonconfidential (public) file and to prepare presentations on the basis of that information.**
8. **The investigating authority analyzes questionnaire responses and submissions, and conducts on-the-spot verifications of interested parties. (It may also carry out such verifications after the imposition of provisional anti-dumping measures).**
9. **No sooner than 60 days from initiation, no later than 9 months**
   - **The investigating authority publishes a notice imposing provisional anti-dumping measures for 4–6 months if a preliminary affirmative determination of dumping and consequent injury to a domestic industry has been made. Interested parties must be given the opportunity to submit comments on the findings that are the basis of the decision to impose provisional anti-dumping measures.**
   - **Interested parties have the right to be heard, to submit comments, to have access to the nonconfidential (public file) and hold meetings.**
   - **The investigating authority analyzes the comments and evidence collected and reaches a definitive determination.**
   - **The investigating authority transmits the definitive disclosure to interested parties. This transmission must allow sufficient time for interested parties to defend their interests.**
   - **Deadline for interested parties to submit their comments on the investigating authority’s findings expires.**
   - **The investigating authority analyzes the comments submitted by interested parties.**

---

**No sooner than 60 days from initiation, no later than 9 months**

1. **The investigating authority publishes a notice imposing provisional anti-dumping measures for 4–6 months if a preliminary affirmative determination of dumping and consequent injury to a domestic industry has been made. Interested parties must be given the opportunity to submit comments on the findings that are the basis of the decision to impose provisional anti-dumping measures.**
2. **Interested parties have the right to be heard, to submit comments, to have access to the nonconfidential (public file) and hold meetings.**
3. **The investigating authority analyzes the comments and evidence collected and reaches a definitive determination.**
4. **The investigating authority transmits the definitive disclosure to interested parties. This transmission must allow sufficient time for interested parties to defend their interests.**
5. **Deadline for interested parties to submit their comments on the investigating authority’s findings expires.**
6. **The investigating authority analyzes the comments submitted by interested parties.**
The Anti-Dumping Agreement (ADA) Powerpoint

Procedures

No later than 12 months from initiation or 4 months after the date of imposition of provisional anti-dumping duties and in exceptional circumstances, no later than 18 months after initiation or 6 months after imposition of provisional anti-dumping duties

The notice imposing definitive measures for up to 5 years is adopted and published. If it has been found that sales did not take place at dumped prices or that the domestic industry did not suffer injury due to the imports from the targeted country, a notice of termination of the proceeding must be published.

Developing country members

- Article 15 imposes an obligation on the investigating authority to consider, actively and with an open mind, the possibility of constructive remedies before imposition of an anti-dumping measure that would affect the essential interests of a developing country.
- Constructive remedies can take the form of acceptance of undertakings or application of a lesser duty rule (panel, EC-Bed Linen).
- Not required before provisional measures (panel, EC-Bed Linen).

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

—Article 15
International Chamber of Commerce INCOTERMS (short for “International Commercial Terms”) have existed since 1936. Under the latest revision, there are 13 different terms of trade.

- INCOTERMS define allocation of risk of loss or damage to goods between the seller and the buyer.
- INCOTERMS do not define or regulate transfer of title to the goods.
Critical points in transportation and logistics

1. Ex works → 2. Inland carrier → 3. Cargo terminal

4. Export clearance

5. Alongside and loading → 6. At sea → 7. Offloading and alongside

8. Import clearance

9. Cargo terminal → 10. Inland carrier → 11. Delivery to buyer

INCOTERMS are relevant to trade remedies in two principal domains:

1. Costs and expenses directly incurred by the seller in connection with commercial transactions.

2. Documentation created and kept by the seller with respect to commercial transactions.

The expenses and the documents will vary depending on the INCOTERMS used in the transaction.
The 13 trade terms of INCOTERMS 2000

<table>
<thead>
<tr>
<th>INCOTERMS</th>
<th>Abbreviation</th>
<th>Expenses</th>
<th>Documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex Works</td>
<td>EXW</td>
<td>Least cost to seller</td>
<td>Least documents for seller</td>
</tr>
<tr>
<td>Free Carrier</td>
<td>FCA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Free Alongside Ship</td>
<td>FAS</td>
<td>Least cost to seller</td>
<td>Least documents for seller</td>
</tr>
<tr>
<td>Free on Board</td>
<td>FOB</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cost and Freight</td>
<td>CFR</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cost, Insurance, and Freight</td>
<td>CIF</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carriage Paid to</td>
<td>CPT</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carriage and Insurance Paid to</td>
<td>CIP</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delivered at Frontier</td>
<td>DAF</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delivered Ex Ship</td>
<td>DAS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delivered Ex Query (Duty Paid)</td>
<td>DEQ</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delivered Duty Unpaid</td>
<td>DDU</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delivered Duty Paid</td>
<td>DDP</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

INCOTERMS 2000 and trade remedy procedures

The following INCOTERMS 2000 are those most often referred to in trade remedy procedures:

- EXW Ex Works (…named place)
- FOB Free on Board (…named port of shipment)
- CFR Cost and Freight (…named port of destination)
- CIF Cost, Insurance, and Freight (…named port of destination)
### INCOTERMS 2000 and trade remedy procedures

#### Responsibility for Fees and Costs

<table>
<thead>
<tr>
<th></th>
<th>EXW</th>
<th>FOB</th>
<th>CFR</th>
<th>CIF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loading in Exporting Country</td>
<td>Buyer</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Inland Freight in Exporting Country</td>
<td>Buyer</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Customs Clearance in Exporting Country</td>
<td>Buyer</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>International Freight Cost</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Insurance Cost</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Seller</td>
</tr>
<tr>
<td>Unloading in Importing Country</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Buyer</td>
</tr>
<tr>
<td>Import Duty</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Buyer</td>
</tr>
</tbody>
</table>

#### Responsibility for Documentation

<table>
<thead>
<tr>
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<th>EXW</th>
<th>FOB</th>
<th>CFR</th>
<th>CIF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-Forma Invoice</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Packing List</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Certificate of Origin</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Bill of Lading</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Commercial Invoice</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Export Declaration</td>
<td>Buyer</td>
<td>Seller</td>
<td>Seller</td>
<td>Seller</td>
</tr>
<tr>
<td>Import License</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Buyer</td>
<td>Buyer</td>
</tr>
</tbody>
</table>
EXW

Under the term “EXW,” the seller will make the goods ready at his own premises or at a named place, such as a factory. The buyer has to arrange further transportation by himself and bear all costs and risks involved in taking the goods from the seller’s delivery point.

EXW is often referred to in trade remedy procedures—in particular, in anti-dumping investigations. For the purposes of dumping calculation, a comparison of normal value and export price is required; mostly such prices are considered at the EXW level or, as it is sometimes called, the “Ex-Factory” level.
FOB
Under the term “FOB,” the seller has to arrange for inland transportation to deliver the goods at the agreed port. Once the goods pass the ship’s rail at the port, all costs and risks of loss or damage are borne by the buyer.

In an anti-dumping investigation, the FOB price may be used as the denominator in the calculation of the dumping margin.

CFR
“CFR” is the term that requires the seller not only to arrange inland transportation from factory to port of shipment, but also to pay for overseas transportation costs and other expenses necessary to deliver the goods to the port of destination. However, the risk of loss or damage is transferred to the buyer when the goods pass the ship’s rail at the port of shipment.

In this regard, all costs and expenses incurred by the seller for the delivery of the goods shall be taken into consideration in an investigation that requires a comparison of prices at EXW level.
The “CIF” term is similar to CFR except that the seller is obliged to provide marine insurance against the risk of loss or damage to the goods for the buyer, even though such risk is transferred to the buyer at the time that the goods pass the ship’s rail at the port of shipment.

In most jurisdictions, the total CIF value of the export transactions is set as the denominator in the calculation of the dumping margin.

Trade payment and finance

Payment and finance are central obligations and concerns of both sellers and buyers in international trade transactions. Payment conditions can be described as follows:

1. Payment on open account,
2. Payment in advance,
3. Documentation collection (D/P or D/A),
4. Documentary credit,
   - Letter of credit
     - Confirmed/Unconfirmed
     - Irrevocable/Revocable
     - Credit Available (payment at sight, deferred payment)
     - etc.
The majority of international trade transactions are carried out on a documentary credit basis.

How does payment via document collection differ from documentary credit?

- Document collection process (D/P or D/A)—buyer commits to pay seller (buyer’s bank requires upfront payment from buyer).
- Documentary credit process—buyer’s bank commits to pay seller (before receiving payment from buyer).

General flow of letter of credit (L/C)

1. Sale contract provides for L/C
2. Buyer applies for L/C in favor of Seller
3. L/C opened, Seller to notify Advising Bank
4. Seller advised of credit, produces goods
5. Goods shipped, Seller to provide sales documents
6. Draft and documents passed to Advising Bank
7. Draft and documents sent to Issuing Bank
8. Documents examined
9.1 Draft paid and remitted
9.2 Buyer receives documents for release of goods
10. Payment received
Letter of credit (L/C) and trade remedy procedures:

As mentioned above, an L/C possesses many conditions subject to choice. For example, it can be confirmed or unconfirmed, irrevocable or revocable. The credit period is also a matter of choice.

The credit period is an important condition which will be taken into consideration in an anti-dumping investigation, particularly when the actual payment date is different from the payment due date as specified in the L/C. In such a case, adjustment shall be made to the selling price in terms of credit cost.
Dumping Calculation

For confidentiality purposes, all data used in our sample calculations are fictitious numbers.

By
Apisith John Sutham
Patamaporn Eiamchinda

How the dumping margin is calculated

Dumping Amount = Normal Value - Export Price
Dumping Margin = \( \frac{\text{Dumping Amount} \times 100}{\text{CIF value}} \)
The Anti-Dumping Agreement

Dumping calculation

How normal value is calculated

Normal value can be calculated from

- Domestic selling price
- Selling price to a third country
- Constructed normal value (CNV): \( \text{CNV} = \text{COP} + \text{SG&A} + \text{reasonable profit margin} \)

Dumping calculation tests

1. Sales Below Cost Test (also known as Ordinary Course of Trade Test or Profitability Test)
2. Representative Test
Sales below cost test/ordinary course of trade test

- This test is conducted by analyzing sales and cost data to find out if sales are made in ordinary course of trade; selling price must be greater than cost.
- The percentage of sales below or above cost will determine the basis used for calculating normal value.

Sales below cost test/ordinary course of trade test

- sales above cost > 80% : averaged ex-factory price
- sales above cost < 80% :
  - averaged ex-factory price of profitable sales or;
  - Constructed Normal Value (CNV) \( CNV = COP + SG&A + \text{reasonable profit margin} \)
Dumping calculation

Sales below cost test/ordinary course of trade test

<table>
<thead>
<tr>
<th>Product</th>
<th>Quantity per transaction</th>
<th>Net sales value per transaction</th>
<th>COP per unit</th>
<th>COP per transaction</th>
<th>Net profit per transaction</th>
<th>Quantity of profitable sales</th>
<th>Value of profitable sales</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>50</td>
<td>4,750.00</td>
<td>100.00</td>
<td>5,000.00</td>
<td>-250.00</td>
<td>0</td>
<td>0.00</td>
</tr>
<tr>
<td>A</td>
<td>650</td>
<td>68,250.00</td>
<td>100.00</td>
<td>65,000.00</td>
<td>3,250.00</td>
<td>650</td>
<td>68,250.00</td>
</tr>
<tr>
<td>A</td>
<td>100</td>
<td>9,500.00</td>
<td>100.00</td>
<td>10,000.00</td>
<td>-500.00</td>
<td>0</td>
<td>0.00</td>
</tr>
<tr>
<td>A</td>
<td>150</td>
<td>15,750.00</td>
<td>100.00</td>
<td>15,000.00</td>
<td>750.00</td>
<td>150</td>
<td>15,750.00</td>
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<tr>
<td>A</td>
<td>50</td>
<td>5,000.00</td>
<td>100.00</td>
<td>5,000.00</td>
<td>0.00</td>
<td>0</td>
<td>0.00</td>
</tr>
<tr>
<td>Total</td>
<td>1,000</td>
<td>103,250.00</td>
<td>100,000.00</td>
<td>3,250.00</td>
<td>800</td>
<td>84,000.00</td>
<td></td>
</tr>
</tbody>
</table>

From this table, would product A sold in the domestic market pass the test?

Quantity of profitable sales = 800
Total sales quantity = 1,000
Percentage of profitable sales by quantity = 80.0%

Value of profitable sales = 84,000
Total sales quantity = 103,250
Percentage of profitable sales by quantity = 81.4%
Representative test

- This test is conducted by comparing the quantity of sales in the domestic market and exported sales to see if the quantity of domestic sales is equal to or greater than 5% of the exported quantity.
- The comparison is made on a per-model basis, not the overall quantity.

<table>
<thead>
<tr>
<th>Product</th>
<th>Domestic sales quantity</th>
<th>Exported sales quantity</th>
<th>Percentage of domestic sales to exported sales</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>200</td>
<td>4,650</td>
<td>4.38</td>
</tr>
<tr>
<td>B</td>
<td>650</td>
<td>9,850</td>
<td>6.59</td>
</tr>
<tr>
<td>C</td>
<td>150</td>
<td>2,500</td>
<td>6.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,000</strong></td>
<td><strong>17,000</strong></td>
<td><em>(Averaged)</em> 5.88</td>
</tr>
</tbody>
</table>

From this table, is there any product sold in the domestic market that does not pass the test?
The Anti-Dumping Agreement

### Dumping calculation

#### Representative test

<table>
<thead>
<tr>
<th>Product</th>
<th>Domestic sales quantity</th>
<th>Exported sales quantity</th>
<th>Percentage of domestic sales to exported sales</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>200</td>
<td>4,650</td>
<td>4.30</td>
</tr>
<tr>
<td>B</td>
<td>650</td>
<td>9,850</td>
<td>6.59</td>
</tr>
<tr>
<td>C</td>
<td>150</td>
<td>2,500</td>
<td>6.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,000</strong></td>
<td><strong>17,000</strong></td>
<td><strong>(Averaged) 5.88</strong></td>
</tr>
</tbody>
</table>

Product A does not pass the representative test as its domestic sales quantity accounts only 4.3% of its exported sales quantity.

### Dumping calculation

#### Representative test

In this case, normal value for product A may be determined from:

- Its selling price in a third country;
- Its cost of production (constructed CNV).
The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

Members hereby agree as follows:

Article 1
Article 2
Article 3
Article 4
Article 5
Article 6
Article 7
Article 8
Article 9
Article 10
Article 11
Article 12
Article 13
Article 14
Article 15
Article 16
Article 17
Article 18
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Part I

Article 1: Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 insofar as action is taken under anti-dumping legislation or regulations.

1 The term “initiated” as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.
Article 2: Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. 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.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities\(^3\) determine that such sales are made within an extended period of time\(^4\) in substantial quantities\(^5\) and are at prices which do not provide for the recovery of all costs

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\(^2\) Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

\(^3\) When in this Agreement the term “authorities” is used, it shall be interpreted as meaning authorities at an appropriate senior level.

\(^4\) The extended period of time should normally be one year but shall in no case be less than six months.

\(^5\) Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.
within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.6

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

6 The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.
(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.\(^7\) In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent

\(^7\) It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.
to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale,\(^8\) 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. 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.

2.4.2 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. A normal value established on a weighted average basis may be compared to 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.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not

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\(^8\) Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.
produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement 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 resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

Article 3: Determination of Injury

3.1 A determination of injury for purposes of Article VI of GATT 1994 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 like products, and (b) the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

9 Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.
3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the like domestic product.

3.4 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 actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; 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. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than 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. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers’ sales and profits. If such separate
identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia, such factors as:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

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10 One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.
Article 4: Definition of Domestic Industry

4.1 For the purposes of this Agreement, the term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related\(^{11}\) to the exporters or importers or are themselves importers of the allegedly dumped product, the term “domestic industry” may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied\(^{12}\) only on the products in question consigned for final

\(^{11}\) For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

\(^{12}\) As used in this Agreement “levy” shall mean the definitive or final legal assessment or collection of a duty or tax.
consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

**Article 5: Initiation and Subsequent Investigation**

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible,
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a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on

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13 In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.
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behalf of the domestic industry.\textsuperscript{14} The application shall be considered to
have been made “by or on behalf of the domestic industry” if it is supported
by those domestic producers whose collective output constitutes more
than 50 per cent of the total production of the like product produced by
that portion of the domestic industry expressing either support for or
opposition to the application. However, no investigation shall be initiated
when domestic producers expressly supporting the application account
for less than 25 per cent of total production of the like product produced
by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate
an investigation, any publicizing of the application for the initiation of an
investigation. However, after receipt of a properly documented application
and before proceeding to initiate an investigation, the authorities shall
notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate
an investigation without having received a written application by or on
behalf of a domestic industry for the initiation of such investigation, they
shall proceed only if they have sufficient evidence of dumping, injury and
a causal link, as described in paragraph 2, to justify the initiation of an
investigation.

5.7 The evidence of both dumping and injury shall be considered
simultaneously (a) in the decision whether or not to initiate an investigation,
and (b) thereafter, during the course of the investigation, starting on a date
not later than the earliest date on which in accordance with the provisions
of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation
shall be terminated promptly as soon as the authorities concerned are
satisfied that there is not sufficient evidence of either dumping or of injury
to justify proceeding with the case. There shall be immediate termination
in cases where the authorities determine that the margin of dumping is \textit{de
minimis}, or that the volume of dumped imports, actual or potential, or the
injury, is negligible. The margin of dumping shall be considered to be \textit{de
minimis} if this margin is less than 2 per cent, expressed as a percentage

\textsuperscript{14} Members are aware that in the territory of certain Members employees of domestic producers of
the like product or representatives of those employees may make or support an application for an
investigation under paragraph 1.
of the export price. The volume of dumped imports shall normally be regarded as negligible 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 imports 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.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 6: Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.\(^{15}\) Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under

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\(^{15}\) As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.
paragraph 1 of Article 5 to the known exporters\textsuperscript{16} and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only insofar as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.\textsuperscript{17}

\textsuperscript{16} It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

\textsuperscript{17} Members are aware that in the territory of certain Members disclosure pursuant to a narrowly drawn protective order may be required.
6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.\(^{18}\)

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

\(^{18}\) Members agree that requests for confidentiality should not be arbitrarily rejected.
6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, “interested parties” shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
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(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 7: Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security—by cash deposit or bond—equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

Article 8: Price Undertakings

8.1 Proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

19 The word “may” shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.
8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfillment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.
Article 9: Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

20 It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.
9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined, provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.
If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10: Retroactivity

Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.
10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.
Article 11: Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

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21 A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

22 When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.
11.5 The provisions of this Article shall apply _mutatis mutandis_ to price undertakings accepted under Article 8.

**Article 12: Public Notice and Explanation of Determinations**

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed;

(vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set

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23 Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.
forth, or otherwise make available through a separate report, in sufficient
detail the findings and conclusions reached on all issues of fact and law
considered material by the investigating authorities. All such notices and
reports shall be forwarded to the Member or Members the products of
which are subject to such determination or undertaking and to other
interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall
set forth, or otherwise make available through a separate report,
sufficiently detailed explanations for the preliminary determinations
on dumping and injury and shall refer to the matters of fact and
law which have led to arguments being accepted or rejected.
Such a notice or report shall, due regard being paid to the
requirement for the protection of confidential information, contain
in particular:

(i) the names of the suppliers, or when this is impracticable,
the supplying countries involved;

(ii) a description of the product which is sufficient for customs
purposes;

(iii) the margins of dumping established and a full
explanation of the reasons for the methodology used in
the establishment and comparison of the export price
and the normal value under Article 2;

(iv) considerations relevant to the injury determination as set
out in Article 3;

(v) the main reasons leading to determination.

12.2.2 A public notice of conclusion or suspension of an investigation
in the case of an affirmative determination providing for the
imposition of a definitive duty or the acceptance of a price
undertaking shall contain, or otherwise make available through
a separate report, all relevant information on the matters of fact
and law and reasons which have led to the imposition of final
measures or the acceptance of a price undertaking, due regard
being paid to the requirement for the protection of confidential
information. In particular, the notice or report shall contain
the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

Article 13: Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14: Anti-Dumping Action on Behalf of a Third Country

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on
the industry’s exports to the importing country or even on the industry’s total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

**Article 15: Developing Country Members**

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

**Part II**

**Article 16: Committee on Anti-Dumping Practices**

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the “Committee”) composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall
inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and (b) its domestic procedures governing the initiation and conduct of such investigations.

Article 17: Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body (DSB). When a provisional measure has a significant
impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

   (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

   (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

   (i) 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;

   (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. 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.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.
Part III

Article 18: Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.\(^{24}\)

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraph 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

\(^{24}\) This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.
18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

**Annex I: Procedures for On-the-Spot Investigations Pursuant to Paragraph 7 of Article 6**

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the Member in question and (b) the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object.
to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

Annex II: Best Information Available in Terms of Paragraph 8 of Article 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g., computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g., it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied
The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g., computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

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Decision on Anti-Circumvention

Ministers,

Noting that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,

Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,

Decide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution.

* *

Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

Ministers decide as follows:

The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.

* *

Declaration on dispute settlement pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on subsidies and countervailing measures

Ministers recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.
The Agreement on Subsidies and Countervailing Measures

The International Institute for Trade and Development
with support from the Asian Development Bank
Introduction

This module analyzes the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM), as interpreted by WTO panels and the Appellate Body. As its name indicates, the ASCM concerns the subject of subsidies in international trade. In general, subsidies occur when governments or public bodies provide a financial contribution of certain enumerated kinds that confers a benefit.

History and Overview

The ASCM came into force on 1 January 1995 as a result of the Uruguay Round negotiations over the General Agreement on Tariffs and Trade (GATT). It regulates the use of subsidies by WTO members. It defines the concept of “subsidy” and sets forth certain conditions under which members may not employ subsidies; it also establishes remedies for the use of prohibited subsidies and for harm done to a member’s trading interests by another member’s subsidization practices.

Before the ASCM, subsidies were regulated by the 1947 GATT. However, the GATT provisions on subsidies were limited and its reporting requirements were not stringent. The ASCM is considered a major improvement over the previous regime not only because it provides a definition of “subsidy” for the first time, but also because it lays down detailed standards for the conduct of countervailing duty investigations and provides a workable multilateral discipline for subsidies.¹

Part I introduces and defines the concepts of subsidies and specificity. It explains that subsidies are subject to multilateral procedures and countervailing duties only if they are specific.

Parts II and III define “prohibited” and “actionable” subsidies. Prohibited and actionable subsidies are specific subsidies within the meaning of Part I of the ASCM, but they have special characteristics. Prohibited subsidies are export and import substitution subsidies. Actionable subsidies are specific subsidies that have specified adverse effects. Prohibited subsidies may be directly challenged using special multilateral procedures that are outlined in Part II; the special procedures for actionable subsidies are outlined in Part III.

Part IV concerning nonactionable subsidies, expired on 31 December 1999. While in effect, it exempted certain specific environmental, research and development, and regional subsidies from countervailing duty investigations.

Part V permits a WTO member to act unilaterally and impose countervailing measures if a specific subsidy is causing injury to its domestic industry. Articles 10–23 of the ASCM are similar to the procedural and material injury provisions of the WTO Anti-Dumping Agreement (ADA).

Part VI establishes the Committee on Subsidies and Countervailing Measures and authorizes the establishment of a Permanent Group of Experts.

Part VII contains notification and surveillance procedures.

Part VIII sets forth provisions that enable special and differential treatment for developing countries. It provides, among other things, that certain developing country members may maintain export subsidies without being subject to a prohibited subsidy action under Part II. As will be further explained in chapter 4, this provision does not make these countries immune from multilateral dispute settlement under Part III (dealing with actionable subsidies) or from countervailing measures following a domestic investigation. However, even if a developing country member’s conferral or maintenance of export subsidies or any other specific subsidy is challenged multilaterally, more favorable rules apply to these countries.

Part IX contains rules related to accessions and economies in transition.

Part X contains provisions related to the application of the Dispute Settlement Understanding.

Part XI includes the provision that Article 6.1 (definition of serious prejudice) and Articles 8 and 9 (nonactionable subsidies) were to remain applicable for 5 years from the entering into force of the WTO agreement. Accordingly, these provisions, like those for nonactionable subsidies, expired on 31 December 1999.

The ASCM also incorporates seven important annexes:

- Annex I contains an illustrative list of export subsidies.
- Annex II contains guidelines on the consumption of inputs in the production process.
Introduction

- Annex III contains guidelines on the determination of substitution drawback systems as export subsidies.
- Annex IV concerns the calculation of total ad valorem subsidization for purposes of Article 6.1(a).
- Annex V contains procedures for developing information concerning serious prejudice.
- Annex VI contains procedures for on-the-spot investigations pursuant to Article 12.6.
- Annex VII concerns the coverage of the terms “developing country members” and “least developed country members.”

What You Will Learn

This module focuses on the identification of subsidies covered by the ASCM and the various actions members may take in response to the conferral of such subsidies.

Chapter 1 discusses the concepts of subsidy and specificity, which form the basis for the multilateral remedies discussed in Chapter 2 and the unilateral countervailing duty remedy discussed in Chapter 3.

Chapter 2 concerns the multilateral remedy track, which authorizes immediate recourse to WTO dispute settlement procedures for subsidies that are "prohibited" or "actionable" as defined in Parts II and III of the ASCM.

Chapter 3 concerns the unilateral remedy track, which authorizes the application of countervailing duties against imports of a specifically subsidized product causing injury to domestic industry.

Chapter 4 focuses on developing countries and transitional arrangements in the ASCM.

A case study, a list of resources for further reading, and a list of relevant Panel and Appellate Body Reports follow the explanatory chapters.

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<thead>
<tr>
<th>Remedies for Specific Subsidies</th>
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<td>1 Multilateral dispute settlement</td>
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<td>2 Unilateral countervailing measures</td>
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Chapter 1
The Concepts of Subsidy and Specificity

“As with any analysis under the SCM Agreement, the first issue to be resolved is whether the measures in question are subsidies within the meaning of Article 1 that are specific . . . within the meaning of Article 2.”


Article 1 of the ASCM provides that a measure may be subject to multilateral dispute settlement or unilateral countervailing measures only if it is a subsidy as defined by Article 1.1 and specific in accordance with Article 2. This first chapter therefore discusses these two key concepts that inform the remedies governed by the ASCM.

Subsidy

Article 1.1 states that a subsidy shall be deemed to exist if a government or any public body makes “financial contribution” of certain specified kinds that “confers a benefit.” These elements of a subsidy are further discussed in this section.

Financial Contribution by a Government or Public Body

Article 1.1 enumerates the types of measures that constitute a financial contribution:

<table>
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<tr>
<th>Subsidy</th>
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<tr>
<td>+ Benefit conferred</td>
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<tr>
<td>+ Financial contribution by a government or public body</td>
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- direct transfers of funds such as grants, loans, and equity infusions as well as potential transfers of funds or liabilities such as loan guarantees;

- revenue due that is forgone or not collected, for example through fiscal incentives such as tax credits;

- the provision of goods or services (other than general infrastructure) or the purchase of goods; and

- any form of income or price support in the sense of Article XVI of GATT 1994.
In *US-Export Restraints*, the panel held that, based on the negotiating history of the clause, this list is “finite”: not all government measures conferring benefits are subsidies within the meaning of the ASCM.\(^2\)

In addition, as indicated by the language of Article 1.1, the ASCM is only concerned with financial contributions provided by a “government or public body.” This requirement raises two issues. First, is the contributing entity a government or public body? Second if the entity is not a government or public body, does the financial contribution still fall within the scope of Article 1.1?

In *Korea-Commercial Vessels*, the panel addressed the first issue and considered that an entity will constitute a public body if it is controlled by the government or other public bodies. It used this criterion to determine that an export credit agency was a public body within the meaning of Article 1.1.\(^3\) Article 1.1(a)(1)(iv) addresses the second issue, providing that financial contributions by a private body fall within the scope of Article 1.1 where a government “entrusts or directs” it to carry out one or more of the functions previously defined as constituting a financial contribution when performed by the government. As stated by the panel in *US-Export Restraints*, subparagraph (iv) “ensures that the same kinds of government transfers of economic resources, when undertaken through explicit delegation of those functions to a private entity, do not thereby escape disciplines.”\(^4\)

**Benefit**

Even if it is determined that there is a financial contribution by a government or public body within the meaning of Article 1.1(a), there can be no subsidy unless a benefit is conferred. What matters here is a benefit to the recipient, not the cost to the government.\(^5\) In *Canada-Aircraft*, the Appellate Body noted that there is only a benefit to the recipient if the financial contribution makes the recipient better off than it would otherwise have been:

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\(^3\) Panel Report, Korea-Commercial Vessels, para 7.50.
\(^5\) Appellate Body Report, Canada-Aircraft, para 156.
In the context of calculation of the benefit in a countervailing duty investigation, Article 14 provides guidance by enumerating four circumstances in which a subsidy “shall not be considered as conferring a benefit”:

(i) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(ii) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(iii) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees; and

(iv) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation, and other conditions of purchase or sale).

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Specificity

Article 1.2 provides that a subsidy may only be subject to multilateral remedies or countervailing measures if it is specific within the meaning of Article 2. Article 2, in turn, provides for certain types of specificity, as concisely summarized in the WTO’s overview of the ASCM:

- **Enterprise-specificity.** A government targets a particular company or companies for subsidization.

- **Industry-specificity.** A government targets a particular sector or sectors for subsidization.

- **Regional specificity.** A government targets producers in specified parts of its territory for subsidization.

- **Prohibited subsidies.** A government targets export goods or goods using domestic inputs for subsidization.7

Unlike the first three types of specificity, the fourth does not depend on whether only certain companies, industries, or parts of a member territory receive a subsidy; rather, it is concerned with the substantive nature of the subsidy itself. (Prohibited subsidies are discussed in detail in Chapter 2).

Article 2.1(b) provides that:

Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document capable of verification.

Footnote 2 of the ASCM clarifies that “objective criteria or conditions” means “criteria or conditions which are neutral, which do not favor certain enterprises over others, and which are economic in nature and horizontal in application.” If the

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“law, regulation, or other official document” does not meet these requirements, *de jure* specificity will generally be found to exist.

Even if a member’s granting authority or legislation spells out apparently objective criteria and conditions, in reality specificity may still exist. Article 2.1(c) provides that, if there are reasons to believe that the subsidy may in fact be specific, the following may be considered:

- use of a subsidy program by a limited number of certain enterprises;
- predominant use by certain enterprises;
- the granting of disproportionately large amounts of subsidy to certain enterprises; and
- the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. (In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions are to be considered).

To determine if subsidies are in fact specific, Article 2.1(c) further requires that account be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority and the length of time the subsidy program has been in operation.
“The SCM Agreement . . . establishes remedies when Members employ prohibited subsidies, and sets out additional remedies available to Members whose trading interests are harmed by another Member’s subsidization practices.”


If a WTO member concludes that another member is providing a prohibited or actionable subsidy as defined by Articles 3 and 5 of the ASCM, it can challenge the subsidy using multilateral dispute settlement procedures. Prohibited subsidies are specific types of subsidies (export and import substitution subsidies), while actionable subsidies include all specific subsidies that have certain predefined adverse effects. This chapter discusses the concepts of prohibited and actionable subsidies and then provides an overview of the multilateral remedy procedures applicable.

**Prohibited Subsidies**

Article 3.1 provides that subsidies “contingent . . . upon export performance” and those “contingent . . . upon the use of domestic over imported goods” are prohibited. If a member grants or maintains a prohibited subsidy, other WTO members may challenge the subsidy in a special multilateral dispute settlement procedure, described in the last part of this chapter.

**Export Subsidies**

Article 3.1(a) prohibits subsidies that are “contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance,” including the programs enumerated in the illustrative list of export subsidies in Annex I of the ASCM.

**Contingent in Law or in Fact**

The word “contingent” in Article 3.1(a) means the grant of the subsidy must be conditional or dependent upon export performance; the export contingency may
be the sole condition governing the grant of a prohibited subsidy or it may be “one of several other conditions.”

De jure export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument. Proving de facto export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is ‘contingent...in fact...upon export performance’. Instead, the existence of this relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.

—Appellate Body Report, Canada-Aircraft, para 167.

Contingency upon export performance in law can be set out expressly, in so many words, on the face of the law, regulation, or other legal instrument or may be expressed clearly, though implicitly, in that instrument.

Footnote 4 of the ASCM provides that the standard of contingency in fact is met “when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact “tied to” actual or anticipated exportation or export earnings.”

The Illustrative List of Export Subsidies

Annex I to the ASCM provides an illustrative list of 12 types of export subsidies, including direct export subsidies, currency retention schemes, exemptions, remissions or deferrals of direct taxes on exports, excessive duty drawback, and provision of export credit guarantee or insurance programs at premium rates or export credits below commercial rates. The list is illustrative, not exclusive; there may be practices not on the list that are subsidies contingent on export performance.

Annexes II (Guidelines on the Consumption of Inputs in the Production Process) and III (Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies) provide further guidelines for the interpretation of items (h) and (i) of the illustrative list, which relate to such exemptions and drawbacks.

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8 Appellate Body Report, Canada-Aircraft, para 166.
9 Panel Report, Canada-Autos, para 10.196.
Annexes II and III have great importance because virtually every country in the world has a duty drawback or exemption scheme. The basic concept underlying such schemes is that duties on imports of raw materials are either not payable or refundable, on the condition that such raw materials are used in the manufacture of products that are subsequently exported.

Some developing countries have argued that to the extent they provide export subsidies only to offset certain disadvantages developing country exporters face, such subsidies ought not to be countervailed. However, panels have rejected this line of reasoning.\(^\text{10}\)

**Import Substitution Subsidies**

Article 3.1(b) prohibits subsidies that are “contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.” In *Canada-Autos*, the Appellate Body held that contingent has the same meaning in Article 3.1(a) and 3.1(b). In the same case, the Appellate Body held that Article 3.1(b), like Article 3.1(a), prohibits both *de jure* (legal) and *de facto* (actual) contingency, even though Article 3.1(b) does not explicitly make reference to subsidies contingent “in fact.”\(^\text{11}\)

**Actionable Subsidies**

Specific subsidies that do not meet the Article 3.1 definition of prohibited subsidies are actionable. Unlike prohibited subsidies, actionable subsidies are permissible so long as they do not cause adverse effects to the interests of other members.

Article 5 defines adverse effects as follows:

(i) injury to the domestic industry of another Member;

(ii) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994; or

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<tr>
<th>Adverse Effects</th>
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<tbody>
<tr>
<td>✓ Injury to the domestic industry</td>
</tr>
<tr>
<td>✓ Nullification or impairment</td>
</tr>
<tr>
<td>✓ Serious prejudice</td>
</tr>
</tbody>
</table>

\(^\text{10}\) Panel Report, Brazil-Aircraft, para 7.25.

\(^\text{11}\) Appellate Body Report, Canada-Autos, para 143.
The Agreement on Subsidies and Countervailing Measures

(iii) serious prejudice to the interests of another Member.\textsuperscript{12}

If a member grants or maintains an actionable subsidy, other WTO members may challenge it in a special multilateral dispute settlement procedure, which is discussed in the last part of this chapter.

**Injury to the Domestic Industry**

The concept of injury to the domestic industry of another member involves an analysis of the effects of allegedly subsidized imports on prices in the domestic market for like products and of the impact on the imports on the domestic producers of the like product. Footnote 11 of the ASCM states that the term has the same meaning as in Part V, so it will not be discussed in more detail here. See Chapter 3 for more information on the meaning of the term.

**Nullification or Impairment**

As Article 5 indicates, erosion of the benefit of a concession bound under Article II of GATT 1994 is a significant type of nullification or impairment. For example, the value of a concession in the form of a tariff binding obtained in trade negotiations by making a reciprocal concession may have been greatly reduced because a domestic industry has lost market share to an industry in the importing country benefiting from the subsidy.

**Serious Prejudice**

Article 6 provides further guidance on the concept of serious prejudice, including the threat of serious prejudice. Article 6.1 previously contained rules for assessing whether serious prejudice has occurred; however, as per Article 31 of the ASCM, they expired at the end of 1999. Consequently, proof of serious prejudice must now be made primarily with reference to the above-mentioned rules of Article 6.3.\textsuperscript{13} Article 6.3 provides that serious prejudice may arise where an actionable subsidy has one or more of the following effects:

\textsuperscript{12} Article 5 also provides that it does not apply to subsidies maintained on agriculture products as provided in Article 13 of the Agreement on Agriculture. Article 13 of the Agreement on Agriculture used to provide special exceptional rules for agricultural subsidies under the ASCM during an "implementation period" that lasted from 1995 to December 2003. Because this period has expired, the application of this rule no longer has practical effect.

\textsuperscript{13} Article 6.1 in conjunction with Article 6.2 used to provide circumstances where serious prejudice was deemed to occur; however, this provision expired on 31 December 1999.
• it displaces or impedes imports of a like product of another member into the market of the subsidizing member;

• it displaces or impedes the exports of a like product of another member from a third-country market;

• it results in a significant price undercutting by the subsidized product as compared with the price of a like product of another member in the same market or significant price suppression, price depression, or lost sales in the same market; or

• it leads to an increase in the world market share of the subsidizing member in a particular primary product or commodity as compared to the average share it had during the previous period of 3 years, and this increase follows a consistent trend over a period when subsidies have been granted.

Notably, all the effects listed in Article 6.3 have application to effects of a subsidy beyond a complaining member’s domestic market. Article 6.3(a) concerns displacement or impediment of a like import into the market of the subsidizing member. Article 6.3(b), similarly, is concerned with displacement or impediment of exports in a third-country market. Article 6.3(c), unlike Articles 6.3(a) and 6.3(b), does not identify any particular market. Rather, it is concerned with effects on the “same market”. In Korea-Commercial Vessels, agreeing with approaches taken in the GATT sugar disputes and US-Upland Cotton dispute, the panel held that the world market, not only a national market, could be the “same market” as for an Article 6.3(c) claim.\(^{14}\) Article 6.3(c) is also different from Articles 6.3(a) and 6.3(b) since it concerns price effects, not displacement or impediment of imports or exports. Article 6.3(d), on the other hand, is directly and solely concerned with the effects of a subsidy on world market share.

\(^{14}\) Panel Report, Korea-Commercial Vessels, para 7.564.
Finally, it should be noted that Article 6.7 provides some circumstances, including force majeure, in which serious prejudice under Article 6.3 is deemed not to occur.

**Multilateral Remedies**

If a WTO member concludes that another member is providing a prohibited subsidy or an actionable subsidy, it can seek to challenge the subsidy in the multilateral WTO dispute settlement context. The multilateral remedies applicable to prohibited and actionable subsidies are discussed in this section.

**Overview of the Procedures**

Article 4 provides the remedies for prohibited subsidies and Article 7 provides the remedies for actionable subsidies. An overview of the procedures is presented in the following table. In both cases, the procedures have teeth, with short deadlines and workable remedies. As may be obvious, the procedure for dealing with prohibited subsidies is stronger.

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<thead>
<tr>
<th>Prohibited Subsidies</th>
<th>Actionable Subsidies</th>
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<tbody>
<tr>
<td>1 Request for consultations, including statement of available evidence regarding the existence and nature of subsidy.</td>
<td>Request for consultations, including statement of available evidence regarding existence and nature of subsidy and injury caused to domestic industry (nullification or impairment, or serious prejudice).</td>
</tr>
<tr>
<td>2 Consultations as quickly as possible.</td>
<td>Consultations as quickly as possible.</td>
</tr>
<tr>
<td>3 If no solution within 30 days, referral to Dispute Settlement Body for immediate establishment of panel.</td>
<td>If no solution within 60 days, referral to Dispute Settlement Body for establishment of panel; composition of panel and terms of reference within 15 days.</td>
</tr>
<tr>
<td>4 Panel may request assistance from Permanent Group of Experts for binding advice on whether it is a prohibited subsidy.</td>
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<tr>
<td>5 Circulation of panel report within 90 days of date of composition of panel and establishment of terms of reference.</td>
<td>Circulation of panel report within 120 days of date of composition of panel and establishment of terms of reference.</td>
</tr>
</tbody>
</table>
Chapter 2
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One important difference between these two types of procedures is the kind of proof needed to make a claim. In the case of a prohibited subsidy, proof of such a subsidy will be sufficient to sustain a claim. Actionable subsidies, however, require proof not only of the existence of a specific subsidy, but also of adverse effects. Therefore, proving an actionable subsidy is inherently more difficult.

As indicated by the table above, the nature of the available remedies is another important difference. Panels are required to recommend withdrawal if a prohibited
subsidy is found, whereas if an actionable subsidy is found, they are required to recommend that the member either withdraw the subsidy or eliminate the adverse effects.

Finally, it should be noted that the procedures for prohibited subsidies do not apply to developing country members in certain contexts and that the actionable subsidy procedure is modified when brought against developing country members. These special rules are discussed in Chapter 4.

**Failure to Cooperate**

Since information about subsidization is in the hands of the member providing the subsidies and often will not be publicly available, Annex V contains detailed provisions for unearthing all relevant evidence of serious prejudice, enjoining panels to “draw adverse inferences from instances of non-cooperation.” Serious prejudice is an element of actionable subsidy; there is no similar provision in the ASCM regarding prohibited subsidies, but the Appellate Body has held that panels have the authority to draw such adverse inferences *a fortiori* when investigating prohibited subsidies.\(^\text{15}\)

\(^{15}\) Appellate Body Report, Canada-Aircraft, para 202.
Chapter 3
The Unilateral Track

“Part V of the SCM Agreement . . . permit[s] Members to levy countervailing duties on imported products to offset the benefits of specific subsidies bestowed on the manufacture, production or export of those goods.”


Chapter 2 discussed prohibited and actionable subsidies. As was shown, the ASCM permits WTO members to challenge these subsidies using WTO dispute settlement procedures. However, members are not always required to use multilateral procedures to challenge a prohibited or actionable subsidy. If specific subsidies are causing injury to the domestic industry, a member may institute domestic procedures and remedy the adverse effects of the subsidy on the domestic industry unilaterally, by imposing countervailing duties. This chapter discusses the substantive and procedural requirements related to the imposition of countervailing duties.

Substantive Requirements

A countervailing duty may not be imposed unless there are subsidized imports causing injury (defined in footnote 45 of the ASCM as “material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry”). That is, imposition of a countervailing duty involves a finding of subsidization, injury, and a causal link. These elements and related concepts are further discussed below.

Subsidization

Subsidization has been discussed in Chapter 1. In countervailing duty cases, the benefit that is an element of a subsidy can be calculated using the specific rules contained in Article 15.

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The Agreement on Subsidies and Countervailing Measures

**Injury**

Article 15 and, indirectly, Article 16 cover the determination of whether injury has been caused to the domestic industry of the importing country producing the like product as a result of the subsidized imports.

Article 15.1 sets out the overarching requirement that a determination of injury shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

In *US-DRAMS CVDs*, the panel determined that, like Article 3.1 of the Anti-Dumping Agreement (ADA), Article 15.1 of the ASCM informs the more detailed obligations set forth in the remainder of Article 15.\(^\text{17}\)

Important aspects of an injury assessment and other related considerations are discussed in the sections below.

**Like Products**

A determination of injury under Article 15 involves assessing the impact of the subsidized imports on the domestic industry producing the like product. "Like product" is defined in footnote 46 of the ASCM as follows:

> Throughout this Agreement 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 resembling those of the product under consideration.

This definition is identical to that in Article 2.6 of the ADA and, like the ADA, applies throughout the ASCM. It is therefore relevant not only to the injury determination for countervailing duty purposes, but also to other aspects of the ASCM such as serious prejudice analysis under Article 6.

To date, the panel report in *Indonesia-Autos* is the only report to discuss the ASCM concept of “like product” in any detail. In that case, the panel was called on to determine whether automobiles manufactured by the United States and the European Communities and sold on the Indonesian market were like the Indonesian...

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Timor, and if so, which ones. As a general matter, the panel stated that “the issue of ‘like product’ must be determined on a case-by-case basis,” and that “in applying relevant criteria panels can only use their best judgment regarding whether in fact products are like, and that this will always involve an unavoidable element of individual, discretionary judgment.”\textsuperscript{18} In the context of this case, it placed much emphasis on physical comparability while acknowledging that the ASCM permits other characteristics to play a role in determining whether products are “like”:

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\textsuperscript{19} Panel Report, Indonesia-Autos, para 14.173. The footnote at the end of the quoted passage explains the connection between the concept of “characteristics closely resembling” discussed in the main quote and “like product”:

This interpretation is confirmed by the negotiating history of this definition. As noted above, this definition of “like product” is virtually unchanged from that which first appeared in the Kennedy Round Anti-Dumping Code. Thus, the penultimate draft of that Code defined the term “like product” to mean a product which “has physical characteristics close to those of the exported product.” . . . In the revised draft of 28 March 1967, the word “physical” had been deleted from the text, which was revised to the formulation (“characteristics closely resembling”) that exists today. (citations omitted)
Domestic Industry

Determination of the impact of imports on the domestic industry is the essence of an injury analysis. Article 16.1 defines the domestic industry as “the domestic producers as a whole of the like products or . . . those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.” The ASCM, like the ADA, does not define “major proportion.”

Article 16 permits investigating authorities to exclude domestic producers in two specific circumstances. First, Article 16.1 permits exclusion of domestic producers from the domestic industry if they are “related to the exporters or importers or are themselves importers of the allegedly subsidized product”. Exclusion of these producers is important because they may benefit from the subsidization and therefore distort the injury analysis. Footnote 48 provides guidance on the definition of “related”:

For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

Second, under Article 16.2 the member’s territory may be divided into competitive markets, and the producers in each market may be regarded as a separate domestic industry if these producers “sell all or almost all of their production of the product in question in that market” and “the demand within that market is not to any substantial degree supplied by producers of the product located elsewhere in the territory.” Injury may then be found even where a major portion of the total domestic industry is not injured, provided that there is a concentration of subsidized imports into the isolated market and the subsidized imports are causing injury to the producers of all or almost all of the production in that market. If the regional industry exception is used, countervailing duties are to be levied only on imports consigned for final consumption to the affected area. Where this is not allowed under the constitutional law of the importing member, exporters should be given the opportunity to cease exporting to the area concerned or to give undertakings that they will mitigate the injury; if they do not do either, the affected member may
impose countervailing duties over its whole territory. Findings of the existence of a regional industry are relatively rare and tend to be confined to industries where transportation is a major cost item, such as cement.

**Import Volumes and Domestic Prices**

Article 15.1 provides that the determination of injury must be based on positive evidence and involve an objective examination of the volume of the subsidized imports and their effect on domestic prices in the importing country market.

Article 15.2 provides:

> With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member.

Article 15.3 provides that imports from several countries simultaneously subject to an anti-subsidy investigation may be analyzed together for the purposes of an injury assessment, but only if they do not qualify for the *de minimis* or negligibility thresholds and a cumulative assessment is appropriate “in light of the conditions of competition among the imports and between imports and the like domestic product.” The question arises whether imports from producers that have been found not to be subsidized should be included as subsidized imports, along with those from subsidized producers. Applying dictum from *EC-Bed Linen*, the panel in *Argentina-Poultry* held that imports from producers found not to have dumped should not be included in the injury analysis.

With regard to the effect of the subsidized imports on prices, Article 15.2 provides that the investigating authorities must consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

**Injury Impact Factors**

In addition to analysis of import volumes and their impact on domestic prices, Article 15.1 also requires assessment of the impact of these subsidized imports

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21 Panel Report, Argentina-Poultry, para 7.303.
on domestic producers of the like products. Article 15.4 provides more detailed rules related to this assessment, which “shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry,” including the following 15 specific factors: “actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments; and, in the case of agriculture, whether there has been an increased burden on government support programmes.” No one or several of these factors can necessarily give decisive guidance and the list is not exhaustive, but evaluation of the 15 factors is mandatory in every investigation.

**Threat of Injury and Material Retardation**

The concept of injury in the ASCM also includes threat of injury and material retardation. Article 15.7 provides that a determination of threat of injury must be based on facts and not merely on allegation, conjecture, or remote possibility, and that the change in circumstances that would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a threat determination, the importing country authorities should consider, among other things, such factors as

- the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
- sufficient freely disposable, or an imminent substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing member’s market, taking into account the availability of other export markets to absorb any additional exports;
- whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- inventories of the product being investigated.

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22 ASCM, footnote 45.
Chapter 3
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We agree with the view expressed by the Appellate Body, when interpreting an almost identical provision in the AD Agreement, that the factors listed are deemed to be relevant in every investigation and must always be evaluated by the investigating authorities. However, the obligation of evaluation imposed by Article 15.4 is not confined to the listed factors, but extends to all relevant economic factors.

—Panel, EC-DRAMS CVDs, para 7.356.

No single factor will necessarily be decisive, but the totality of the factors considered “must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury will occur.” In Mexico-Corn Syrup, the panel held that Article 3.4 of the ADA, which contains a list of 15 injury factors identical to those in Article 15.4 of the ASCM, applied to threat analysis as well as injury analysis.23 By analogy, evaluation of all the threat factors is probably also required in an injury analysis under the ASCM.

The ASCM does not provide any further specific guidance on material retardation, nor has a panel or the Appellate Body addressed the issue to date.

Causation

Article 15.5 provides that it must be demonstrated that the subsidized imports are causing injury through the effects of subsidies (namely, the effect of imports on prices on the domestic industry). This demonstration must be based on an examination of all relevant evidence before the authorities.

Article 15.5 also requires that the authorities examine any known factors other than the subsidized imports that are injuring the domestic industry at the same time; the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology, the export performance and productivity of the domestic industry.

23 Panel Report, Mexico-Corn Syrup, para 7.127.
A WTO ADA panel has held that, unlike the Article 3.4 factors, the Article 3.5 factors need not be examined as a matter of course in each administrative determination. The Article 3.5 inquiry will depend on the arguments made by interested parties in the course of the administrative investigation. This same reasoning is likely to apply to the ASCM analysis of causation as well.

**Injury Margins**

If a subsidy is found to be causing injury to a domestic industry, following the fulfillment of certain procedural requirements discussed in the next section, an importing member is generally authorized to impose a countervailing duty to the extent of the full amount of the subsidy. In this regard, Article 14 ASCM, which provides guidelines for calculating the benefit to the recipient of four types of subsidies, should be recalled.

While an importing member is authorized to impose countervailing duties in the full amount of the benefit conferred by the subsidy, Article 19.2, like the ADA, expresses a preference for a duty of an amount less than the total amount of the subsidy if such lesser duty would be sufficient to remove the injury suffered by the domestic industry. This means that it is important for the investigating authorities not only to calculate the benefit to the exporting recipient of the subsidy, but also the injury to the domestic injury. Again like the ADA, the ASCM does not provide any guidance for calculating such a lesser duty. The general practice of members is to compare the prices of imported and domestically produced like products, focusing on whether the former are undercutting or underselling the latter.

**Example: Calculation of injury margin, based on price undercutting**

<table>
<thead>
<tr>
<th></th>
<th>Domestic Producer X</th>
<th>Foreign Exporter Y</th>
<th>Foreign Exporter Z</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Price</strong></td>
<td>100</td>
<td>80</td>
<td>110</td>
</tr>
<tr>
<td><strong>Injury Margin</strong></td>
<td>100 – 80 = 20/80 x 100 = 25%</td>
<td>100 – 110 = –10 = 0</td>
<td></td>
</tr>
</tbody>
</table>

In the example, if the subsidization margin applicable to the producer’s exports, calculated with respect to the Article 14 factors, is greater than the injury margin, members applying the lesser duty rule would use the injury margin. Indeed, for exporter Z, whose injury margin is zero, the investigation would be terminated.
Procedural Requirements

Articles 11–13 and 17–23 of the ASCM contain important procedural provisions as far as countervailing measures are concerned. Some of the more fundamental rules will be discussed in this section.

The Application for Initiation

Although Article 11.6 permits self-initiation by members, countervailing duty investigations are normally initiated following the submission of a written application. The ASCM provides a number of rules governing the application for initiation itself and the actions WTO member authorities must take in relation to such an application.

Article 11.1 provides that an investigation to determine the existence, degree, and effect of any alleged subsidy shall be initiated upon a written application “by or on behalf of the domestic industry.” Article 11.2 requires the application to include sufficient evidence of a subsidy (and, if possible, its amount), injury, and a causal link between the subsidized imports and alleged injury. Article 11.2 also provides more specific rules regarding the type of information which should be provided in the application.

Article 11.3 provides that importing country authorities must review the accuracy and the adequacy of the evidence in the application. Because Article 11.3 does not provide any details on the nature of this review, it can be difficult for panels to judge whether importing country authorities have complied with Article 11.3.

If an investigating authority determines that an application has accurate and adequate evidence of subsidization, injury, and a causal link, the authority still
must determine *before initiation* whether the application has been made by or on behalf of the domestic industry. According to Article 11.4, the application shall be considered to have been made by or on behalf of the domestic industry if it is supported by those domestic producers of the like product whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers of the like product expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

GATT panels have held several times that the failure to properly determine standing before initiation is a fatal error that cannot be repaired retroactively in the course of a proceeding.

Article 11.5 requires that the authorities avoid any publicizing of the application for the initiation of an investigation unless a decision to initiate an investigation has been made.

**Subsequent Investigation**

Article 11 also contains a number of procedural requirements for the analysis of whether subsidized imports are causing injury, and governing when investigations should be terminated.

Article 11.7 requires evidence of both subsidy and injury to be considered simultaneously, both when deciding to initiate an investigation and during the course of the investigation, starting no later than the earliest date on which provisional measures may be applied.

Article 11.8 provides that when products are not imported directly from the country of origin but are exported to the importing member from an intermediate country, the transactions are to be regarded as having taken place between the country of origin and the importing member.

Article 11.9 provides that an investigation shall be terminated promptly “as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case.” It also provides for immediate termination in cases “where the amount of a subsidy is *de minimis*,”
or where the volume of subsidized imports, actual or potential, or the injury, is negligible." The article specifies that the amount of the subsidy is \textit{de minimis} if it is less than 1\% ad valorem, but special negligibility/\textit{de minimis} rules, discussed in Chapter 4, apply to developing countries.

Article 11.11 provides that investigations shall normally be concluded within 1 year, and in no case more than 18 months, after their initiation. The 18-month deadline appears to be absolute.

**Consultations**

Article 13 requires an importing member to engage in consultations with the exporting member as soon as possible after the acceptance of an application and prior to initiation of an investigation. The aim is to clarify the situation and arrive at a mutually agreed solution. Since domestic industry applicants tend to claim the existence of a large number of subsidy programs, consultations give exporting member governments an opportunity to quickly demonstrate inaccuracies in the allegations or otherwise show why the alleged subsidies are not countervailable. Therefore, as a practical matter, pre-initiation consultations are an important tool for limiting countervailing duty investigations.

Article 13 also provides that exporting members be given a reasonable opportunity to continue consultations throughout the period of investigation. This opportunity is not intended to prevent members from initiating the investigation and reaching other preliminary and final determinations expeditiously.

**Evidentiary and Due Process Rights**

Article 12 contains important due process rights for interested parties, including rights related to confidential treatment of information and treatment of information provided.

[We] are of the view that, like Article 6 of the \textit{Anti-Dumping Agreement}, Article 12 of the \textit{SCM Agreement} as a whole "set[s] out evidentiary rules that apply \textit{throughout} the course of the … investigation, and provide[s] also for due process rights that are enjoyed by ‘interested parties’ \textit{throughout} … an investigation”.

—Appellate Body, Mexico-Rice, para 292.
Confidential Information
Like Article 6.5 of the ADA, Article 12.4 of the ASCM provides that information that is by its nature confidential or that is provided on a confidential basis “shall, upon good cause shown, be treated as confidential by the authorities and shall not be disclosed without specific permission of the party submitting it,” acknowledging that in some territories (including the United States and Canada) disclosure may be required pursuant to a narrowly drawn protective order. Parties providing confidential information must also provide meaningful nonconfidential summaries. The confidential version will be accessible only to the importing member authorities. The nonconfidential version will be placed in the nonconfidential file and can be accessed by all interested parties in the investigation.

Facts Available/Administrative Deadlines
Article 12.7 provides that in cases “where an interested Member or party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.” However, the ASCM, unlike Annex II to the ADA, does not characterize which facts are “available” for its purposes. In Mexico-Rice, however, the Appellate Body extracted such a characterization from Article 12 and by analogy with the ADA.24

[We] understand that recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. First, such recourse is not a licence to rely on only part of the evidence provided. To the extent possible, an investigating authority using the “facts available” in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. Secondly, the “facts available” to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain circumstances, this may include information from secondary sources.

—Appellate Body, Mexico-Rice, para 294.

Other Rights
Article 12 ASCM also contains a number of other due process rights, including ample opportunity to present evidence in writing (Article 12.1), right of access

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to the file (Article 12.3), the right to a hearing (Article 12.2), and the right to be informed in a timely manner of the essential facts that form the basis for the authorities’ decision whether to apply definitive measures (Article 12.8).

Public Notice and Explanation of Determinations

The notice provisions of Article 22, like Article 12’s evidentiary obligations, have an important due process function. Article 22 obliges importing country authorities to give public notice of initiation of an investigation, preliminary and final determinations, and various other developments in the proceeding. In addition, they must publish detailed explanations of their determinations including “all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures of the acceptance of an undertaking.” In US-DRAMS CVDs, the Appellate Body noted that Article 22.5 “does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination.”

Provisional Measures

Article 17.1 ASCM states that provisional measures may be applied only if:

• an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested members and interested parties have been given adequate opportunities to submit information and make comments;

• a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

• the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

According to Articles 17.2–17.4, provisional measures may take the form of provisional countervailing duties secured by a cash deposit or bond. Provisional measures may not be applied sooner than 60 days from the date of initiation of the investigation, and may not last longer than 4 months.

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Undertakings

Under Article 18.1, an investigation may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of voluntary undertakings in two circumstances: the exporting country government may agree to eliminate or limit the subsidy or to take other measures concerning its effects, or an exporter may agree to revise its prices to eliminate the injurious effect of the subsidy.

Imposition and Collection of Countervailing Duties

Pursuant to Article 19, imposition of countervailing duties is discretionary and use of a lesser duty rule is encouraged. Many WTO members include a public interest clause in their national legislation to enable them to refrain from imposing duties, even where injurious subsidization is found. If a countervailing duty is imposed, it must be levied on a nondiscriminatory basis and may not exceed the subsidy, calculated in terms of subsidization per unit of the subsidized and exported product.

Retroactivity

Under Article 20, provisional and definitive countervailing duties may only be applied to imports into a member’s territory after a provisional or definitive countervailing determination enters into force. However, the article permits duties to be applied to products which enter for consumption before the entry into force of such determinations in two exceptions.

First, Article 20.2 provides:

Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

Second, Article 20.6 provides:

In critical circumstances where, for the subsidized product in question, the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or
Reviews

Review of final countervailing duties may occur in three circumstances.

First, Article 19.3 provides:

Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

This type of review is commonly referred to as a newcomer review.

Second, under Article 21.2, during the period of application of a countervailing duty (normally 5 years), interested parties may request the authorities to examine “whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.” This type of review is called an interim review.

We believe that it is important to distinguish between the original investigation leading to the imposition of countervailing duties and the administrative review. In an original investigation, the investigating authority must establish that all conditions set out in the SCM Agreement for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination.

Finally, under Article 21.3, the domestic industry may also request a review within a reasonable period of time preceding the end of the period of application of the countervailing measure. This type of review is called an expiry review. If such a review is initiated and the investigating authority does find that “the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury,” a definitive countervailing duty will normally be applied for another 5 years.

**Judicial Review**

Article 23 provides that members that adopt countervailing duty legislation must also maintain independent judicial, arbitral, or administrative tribunals or procedures for the purpose of prompt review of administrative actions relating to final determinations and reviews of determinations. The tribunals or procedures must be independent of the authorities responsible for the determination or review in question, and must provide all interested parties who participate in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.
“Article 27 of the SCM Agreement provides significant special and differential treatment for developing country Members of the WTO, including with respect to claims of serious prejudice arising from subsidies provided by developing country Members.”


This chapter discusses special rules applicable to developing countries and transitional arrangements. The ASCM accords developing countries differential and in some cases special treatment as regards prohibited and actionable subsidies and countervailing measures. The ASCM also provides an exceptional exclusion from the normal subsidy and countervailing rules for certain existing programs and for economies in transition.

**Developing Countries**

Article 27 provides special and differential treatment to developing countries in a number of ways. To understand the operation of this article properly, it must be borne in mind that the ASCM distinguishes between Annex VII developing countries and other developing countries. The Annex VII developing countries are the least-developed countries designated as such by the United Nations that are members of the WTO, and WTO member countries on the following list: Bolivia, Cameroon, Congo, Côte d’Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka, and Zimbabwe. This list is based on the most recent data from the World Bank on gross national product (GNP) per capita, and a country comes off the list when GNP per capita has reached $1,000 per annum.

<table>
<thead>
<tr>
<th>ASCM Developing Countries</th>
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<tbody>
<tr>
<td>✔ Annex VII: UN least-developed countries</td>
</tr>
<tr>
<td>✔ Annex VII: countries with less than $1,000 GNP per annum</td>
</tr>
<tr>
<td>✔ Other developing countries</td>
</tr>
</tbody>
</table>
Export Subsidies

The Article 3.1(a) prohibition on export subsidies does not apply to Annex VII countries. Other developing countries generally had until 31 December 2002 to phase out export subsidies, but Article 27.4 provided the possibility for an extension if the developing country member deemed it necessary to apply such subsidies beyond that date, subject to entering into consultations with the Committee on Subsidies and Countervailing Measures (Subsidies Committee) 1 year before the expiry of the period.

In order to deal with this issue, the ministerial decision of 14 November 2001 on implementation-related issues and concerns (2001 Ministerial Decision) provided a framework for the Committee on Subsidies and Countervailing Measures to extend the transition period, under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, for certain export subsidies provided by such Members, pursuant to the procedures set forth in document G/SCM/39.26

Programs eligible under G/SCM/39 must be

- an export subsidy program in the form of full or partial exemptions from import duties and internal taxes;

- in existence no later than 1 September 2001; and

- provided by developing country members whose share of world merchandise export trade was not greater than 10%, whose total gross national income for the year 2000 as published by the World Bank was at or below $20 billion, and who are otherwise eligible for an extension under Article 27.4.27

To maintain certain subsidies beyond 2002 based on this framework, information had to be transmitted to the Subsidies Committee by 31 December 2001. By 28 February 2002, members had to provide the Subsidies Committee with detailed information on programs sought to be extended. In accordance with the requirements of Article 27.4, extensions are reviewed and renewed annually (to ensure that transparency and standstill requirements are being fulfilled).


The Subsidies Committee is authorized to provide extensions through 2007 under procedures in G/SCM/39 paragraph 1(e). In October 2006, the Subsidies Committee approved extensions for the following countries through the 2007 calendar year: Antigua and Barbuda, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Fiji Islands, Grenada, Guatemala, Jamaica, Jordan, Mauritius, Panama, Papua New Guinea, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, and Uruguay.28

Following the expiration of this period, a member can still seek an extension, but it must be based on Article 27.4. If a developing country member does not seek an extension or if the request is not granted, Article 27.4 provides that the member must phase out the remaining export subsidies within 2 years. Although WTO members were not required to meet the requirements in the 2001 Ministerial Decision in order to qualify for or seek an extension authorized by Article 27.4, most countries that have sought an extension have based it on the decision’s framework. Finally, it should be noted that, while temporal extensions are permitted, Article 27.4 does not permit a developing country member to increase the level of its export subsidies.

The ASCM introduces the notion of export competitiveness, which also factors into whether a country is permitted to maintain an export subsidy. Export competitiveness is defined as at least 3.25% in world trade of a given product (where “product” is defined as a section heading in the Harmonized System), for 2 consecutive years. Export competitiveness may be self-declared or determined on the basis of a computation by the WTO Secretariat at the request of a member. If Annex VII countries reach export competitiveness on one or more products, Article 27.5 provides that the subsidies should be gradually phased out over 8 years. Where a developing country authorized to use export subsidies has reached such export competitiveness, it must phase out its export subsidies for that product within 2 years from that time.

It must be emphasized that, while certain export subsidies for developing countries are not prohibited, they are still actionable under Part III of the ASCM. Thus, a complaining member must prove an adverse effect. If an adverse effect is shown, the developing country will only have to remove the adverse effect.

In *Brazil-Aircraft*, the panel noted that members claiming a violation of Article 3.1(a) with respect to a member that is a developing country within the meaning of Article 27.2(b) must prove that Article 27.4 does not apply to that member.

We consider that, in order to assert and prove a claim of violation of Article 3.1(a) with respect to a Member that is a developing country Member within the meaning of Article 27.2(b), the Member asserting the claim must demonstrate that the substantive obligations contained in Article 3.1(a) of the SCM Agreement apply to the Member in question. In order to do this, the Member asserting the claim must demonstrate that the developing country Member concerned has not complied with the conditions stipulated in Article 27.4.

—Panel, Brazil-Aircraft, para 7.56.

**Import Substitution Subsidies**

The Article 3.1(b) prohibition on import substitution subsidies began to apply to developing countries after 31 December 1999 and to least-developed countries after 31 December 2002.

**Actionable Subsidies**

Article 27.13 provides that Part III provisions (concerning actionable subsidies) shall not apply to direct forgiveness of debt, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country, provided that both the programme and the subsidies involved are granted for a limited period and notified to the Subsidies Committee and that the program actually results in the eventual privatization of the company concerned.

In addition, as stated by the panel in *Indonesia-Autos*, Article 27.9 further limits the scope of the WTO dispute settlement actions against actionable subsidies granted or maintained by developing country members; the panel specifically held that it excludes claims based on serious prejudice.29

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29 Panel Report, Indonesia-Autos, para 14.156. It should be noted that Article 27.8 used to provide that a claim of serious prejudice against a developing country member could be based on Articles 6.1, but without the usual presumption that normally applied. This provision, however, expired on 31 December 1999 so there is no provision for any kind of serious prejudice claim in Article 27.
A Member may only bring a claim that benefits under GATT have been nullified or impaired by a developing country Member’s subsidies or that subsidized imports into the complaining Member have caused injury to a domestic industry.

—Panel, Indonesia-Autos, para 14.156.

**Countervailing Duty Investigations**

The general right of an Annex VII member or certain developing country members to maintain export subsidies under Article 27 does not prevent countervailing duty actions. Article 27.10 of the ASCM, however, provides special developing country *de minimis* termination provisions for developing countries.

Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per-unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

—Article 27.10, ASCM

As per Article 27.12 of the ASCM, these provisions also apply to cumulation determinations for injury purposes under Article 15.3.

**Transitional Arrangements**

Other exceptions to the application of the subsidy rules are also contained in the ASCM.

**Existing Programs**

For subsidy programs established before a member signed the WTO agreement and that are inconsistent with the ASCM, Article 28 provides a limited exemption from the provisions of Part II regarding prohibited subsidies for up to 3 years.
To gain this exemption the member must have notified the Subsidies Committee within 90 days after the entry into force of the WTO agreement for that member. Moreover, the member must bring the program into conformity with the ASCM within 3 years and it may not extend the scope of the program or renew it.

**Economies in Transition**

Transition economies (that is, countries in transition to a free-market economy) had until 31 December 2001, under Article 29, to phase out export and import substitution subsidies. Until the same date, direct forgiveness of debt and grants to cover debt repayment within the meaning of Article 6.1(d) were not actionable. Regarding other actionable subsidies, multilateral remedies were authorized only where the subsidies resulted in nullification or impairment, in such a way as to displace or impede imports of a like product of another member into the market of the developing country or unless injury to the domestic industry in the importing country market occurred—the same conditions that apply to developing countries under Article 27.9.
The first part of this module discussed some of the main rules covered by the ASCM. As will be recalled, the ASCM is only concerned with subsidies that are specific. The two case studies in this section will further examine the legal rules applicable to the determination of whether a subsidy exists and, if so, whether it is specific.

Case 1

Facts

A WTO member is concerned that the influx of multinational corporations into its country in recent years has stifled the emergence of homegrown industries. It thinks it is important to promote a nationally owned and operated major industry in order to strengthen the self-reliance of the nation and ultimately promote greater long-term economic growth. It judges that land transportation is an essential economic necessity in its country, which will continue to grow in the future. The member decides to enact legislation aimed at promoting the development of national cars in its country.

The legislation provides tax and import duty relief to certain national car companies producing national cars. The legislation defines “national cars” as motor vehicles that

- are made domestically at production facilities owned by a national industrial enterprise or member corporation, the shares of which are wholly owned by member citizens;

- use a brand name never registered by any other party in the member and owned by a member company or member citizen; and

- are developed with technology, construction, design, and engineering based on national capability applied by stages.

The legislation defines “national car companies” as motor vehicle enterprises that produce national cars.

The legislation further defines national car companies that produce national cars with certain local content as “pioneer companies.” National cars produced by pioneer car companies are exempt from luxury taxes, which normally range from
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25% to 50% in the member, depending on the type of automobile. In addition, imports of parts and components used in the manufacture of national cars are exempt from duties.

In order for a national car company to qualify as a pioneer company, it must produce national cars with local materials of greater than 20% at the end of the first year of production, greater than 40% at the end of the second year, and greater than 60% at the end of the third year and thereafter. If a national car company does not meet the relevant requirement in any year, the luxury tax exemption and import duty relief on parts and components will not be accorded.

One year following the enactment of the legislation, the government accords pioneer company status to company A. Company A produces a national car, which would otherwise be subject to a 25% luxury tax, and has maintained its pioneer company status for 3 years. It manufactured 10,000 national cars in its first year, 15,000 national cars in its second year, and 20,000 national cars in its third year. It plans to maintain its pioneer company status indefinitely.

Discussion

1. Does the member’s legislation provide for a subsidy within the meaning of Article 1 of the ASCM?

The facts of the hypothetical case are drawn from those at issue in Indonesia-Autos. In that case, all the parties, including Indonesia, agreed that there was a specific subsidy within the meaning Article 1. As with the hypothetical case, the luxury tax and import duty exemptions qualify as a financial contribution by the government since they amount to “government revenue that is otherwise due is foregone or not collected” within the meaning of Article 1.1(a)(1)(iii). The luxury tax and import duty exemptions also provide a benefit to the pioneer company, since they place it in a more advantageous position than it would have been in but for the conferral of a financial contribution by the member. Indeed, such luxury tax and import duty relief is not normally available on the commercial market.

2. Is the subsidy provided by the member specific within the meaning of Article 2 of the ASCM?

In Indonesia-Autos, the parties also agreed that subsidies conferred in a program such as that described in the hypothetical case were specific within the meaning

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of Article 2. The luxury tax and import duty exemptions provided are, under the member’s legislation, targeted at a particular enterprise or industry, namely the automobile industry. Thus, they are specific within the meaning of Article 2.1(a). In addition, they are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b), and are therefore specific under Article 2.3, which provides that any “subsidy falling under the provisions of Article 3 shall be deemed to be specific.” On these grounds, the panel in *Indonesia-Autos* found that similar subsidies were specific.31

**Case 2**

**Facts**

Company A is a major computer chip manufacturer in a WTO member. It employs over 50,000 people within the member’s territory, comprises 1% of its economy, and is responsible for 5% of the member’s exports. Company A has significant debt, amounting to twice its net worth. The member has become aware that a sizeable amount of company A’s debt (more than its cash flow) will be maturing in the coming year. The member is concerned that company A may face insolvency if measures are not taken to address its short-term liquidity problem. The member believes that the potential dissolution of such a key company would not be in the public interest. It takes the following measures to address this problem.

**Measure A**

The member is aware that eight private banks appear interested in participating in a syndicated loan to help company A address its short-term cash flow problem. Under the terms of the contemplated syndicated loan, each bank would provide $100 million of a total $800 million loan.

The member is aware that bank A, a privately owned bank, will not be able to participate in the syndicated loan if the member does not grant a special exemption authorized by its law. The member’s law prohibits a financial institution from extending credits exceeding 25% of its equity capital to the same individual, corporation, and person. Because the $100 million loan will cause bank A to exceed the credit limit prescribed by law, it would not normally be able to participate in the loan. Nevertheless, member’s law allows its Financial Supervisory Commission (FSC), an administrative agency of member, to grant a waiver permitting banks to exceed the ceilings when it is recognized that it is “inevitable for industrial development or the stability of national life.”

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Economic ministers of the member hold a meeting and discuss the issue of company A. They decide to pursue a resolution of special approval by the FSC upon application by bank A. Following the meeting, a record of the meeting’s resolutions, including the decision to approve an increase in bank A’s credit ceiling, is sent to bank A. The cover letter states, in part:

Dear Bank A,

Enclosed please find discussion results on alleviating the cash crunch of company A which are part of discussion items at the Economic Ministers meeting held yesterday. Please make sure they are carried out perfectly.

Bank A applies for the waiver from the FSC the following week. FSC commissioners approve the increase in the credit ceiling for bank A, noting that company A is “too big and too important to fail.” The minutes of the meeting also explain:

The computer chip industry is a strategic industry; after company A’s merger with company B in 1999, company A accounted for 20% of the world computer chip market and 5% of the member’s exports. Company A employs 50,000 employees in the industry, and other involved companies exceed 2,500 with over 150,000 employees. To support the syndicated loan would improve the member’s international competitiveness. Therefore, for the promotion of the computer chip industry policy, the FSC finds it in the best interest to increase the ceiling.

Following bank A’s receipt of the waiver, it and the seven other private banks finalize the terms of the syndicated loan. Although the loan is financed by eight banks, it is provided to company A on a common set of terms, which include, among other things, identical interest rates and fees. The seven other banks participating in the syndicated loan are privately owned and have no government affiliation. In addition, none of the other banks applied for or received a special waiver from the FSC in order to participate in the syndicated loan.

Measure B
Company A currently has a 90-day documents against acceptance (D/A) export credit facility of $800 million. According to this arrangement, company A can receive immediate payment for export transactions from 14 participating member private banks based on submission of relevant export transaction documents. Overseas purchasers pay the banks later. Member private banks decide to increase company A’s export credit facility from $800 million to $1.4 billion, following a guarantee from member Export Insurance Corporation (EIC) to pay
any money due if the exporter or importer goes bankrupt. Private banks located in member territory refused to grant the increase before company A arranged for the guarantee from the EIC. Company A also approached other banks in the member country before applying for the guarantee. It was unable to obtain an extended credit facility from other banks.

The EIC is the official export agency of member. It is a specialized nonprofit corporation that operates under the Ministry of Commerce. The National Assembly determines total limits for business underwritten and contributions to the Export Insurance Fund, which is the basis of EIC operations. According to its bylaws, the EIC must transfer all its profits to reserves that are used to cover its deficits. In case of a shortage of reserves, the member provides funding to cover the losses. In relation to the guarantee provided for company A, the member’s minister of commerce and minister of economy sent a letter to the EIC stating:

As for the provision of D/A backed loans, the EIC will temporarily resume the insurance for the balance of the nonnegotiated D/A. Please take actions accordingly.

Company A pays the EIC a premium for the guarantee and pays interest to the banks concerned for the D/A amounts withdrawn until the importer makes the final payment.

**Measure C**

Under the member’s law, companies with a credit rating above A—can issue bonds through the normal bond market. Because the member considers it important to set up a program to provide needed liquidity for companies, like company A, that are otherwise viable but cannot issue bonds to raise capital needed to resolve short-term cash flow problems, it sets up a program.

To be placed in the program, companies have to be able to repay 20% of their maturing bonds, normalize business operations through a rescue plan, and have credit ratings below A but higher than BB. If a company is admitted into the program, it repays 20% of the corporate bonds coming due and the Member Development Bank (MDB) assumes the remaining 80%. Company A was admitted to the program and the MDB, as stipulated by the program rules, purchased 80% of the bonds coming due.

Since the enactment of the program, the member has admitted only five companies, although the economic data indicate that 200 companies are potentially eligible for the program. In addition, three out of the five companies admitted, including
company A, are all part of the same corporate group. Forty-one percent of total program funds were used to purchase corporate bonds from company A. Soon after the enactment of the program, newspapers reported widespread criticism from other industries in similar financial situations complaining about the transparency of the process and eligibility criteria for the program.

The MDB is wholly government-owned. It was created pursuant to Article 3 of the member’s Development Act to promote “the sound development of the economy.” The director of the MDB is appointed and dismissed by the member’s president and assisted by deputy directors appointed and dismissed by the member’s Ministry of Finance and Economy.

Discussion

1. **Do measures A, B, and C involve a “financial contribution by a government or any public body within the territory of a member” within the meaning of Article 1?**

Measure A
Measure A may involve a financial contribution by a public body.

Whether measure A involves a financial contribution by a government or public body depends on whether the member has entrusted or directed bank A, a privately owned bank, to carry out a direct transfer of funds in the form of a loan. More specifically, it must be determined whether the member’s actions in relation to bank A’s participation in the syndicated loan amounts to a financial contribution within the meaning of Article 1.

The panel held in EC-DRAMs CVDs that neither bank A’s inability to participate in the syndicated loan without the waiver in its lending limit nor the grant of that waiver in the public interest would, by themselves, provide evidence of an affirmative act directing bank A to participate in the syndicated loan.\(^{32}\) As the panel noted, the text of the letter and its enclosure could be narrowly read to require bank A only to apply for a lending limit waiver, and not to require it to provide a financial contribution by participating in the loan.\(^{33}\)

Many aspects of the letter, however, appear to lead to the conclusion that bank A was required to participate in the loan by applying for the credit ceiling extension.

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\(^{32}\) Panel Report, EC-DRAMs CVDs, paras 7.82–7.83.

\(^{33}\) Panel Report, EC-DRAMs CVDs, para 7.76.
Indeed, the letter, addressed to bank A, outlines the member’s general economic plan for company A, informs bank A that the extension of its credit ceiling will be approved, and also tells bank A to make sure that the member’s plans are “carried out perfectly.” Moreover, a member agency, the FSC, approved the loan based on a public interest specific to company A. This, in addition to the fact that bank A would not have been able to obtain the extension but for the special public interest approval, tends to support the conclusion that the member, even if only implicitly, was directing bank A to participate in the syndicated loan.

The panel in EC-DRAMS CVDs concluded on similar facts, that the Republic of Korea had directed a private bank to participate in a syndicated loan. However, its decision was heavily influenced by the fact that the Republic of Korea had withheld the letter from the European Communities during its domestic investigation. The panel accepted that the Republic of Korea’s noncooperation was an element tiling in favor of a reading on which the letter directed the private bank to participate in a syndicated loan.34

In the case study, it is unclear whether the letter amounts to direction by the member to bank A to participate in the syndicated loan. Further circumstantial facts, such as an indication that bank A could have applied for the waiver but chose not to participate in the syndicated loan, would be useful. For example, if the approval of the lending limit waiver contained a special provision stating that the waiver would be rescinded if bank A later decided not to participate in the loan, this could provide evidence that bank A was not required to participate in the loan despite the strong language of the letter and other surrounding factual circumstances.

If the letter from the member had only invited bank A (or series of banks) to apply or expressed a desire for it for the credit limit extension, without any other explicit or implicit message that it was required to apply, then it is unlikely that the letter could provide evidence of direction of bank A by the member. As per the facts in the case study, however, the member should be aware that the letter could possibly amount to direction to bank A. Furthermore, such a direction would involve a direct transfer of funds in the form of a loan and therefore also amount to a financial contribution within the meaning of Article 1.1(a)(1)(i) of the ASCM.

**Measure B**
Measure B probably involves a financial contribution by a public body.

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34 Panel Report, EC-DRAMS CVDs, paras 7.77–7.83.
In *Korea-Commercial Vessels*, the panel stated that an entity will constitute a “public body” if it is controlled by the government or other public bodies.\(^{35}\) The facts indicate that the member exercises a significant amount of control over the EIC. The EIC operates under the Ministry of Commerce and is subject to significant oversight by the National Assembly. In *Korea-Commercial Vessels*, similar facts, including operation under the control of government-appointed officials and detailed governmental direction concerning financing activities, supported a finding that an export credit agency was a public body.\(^{36}\) Based on the same set of facts described in measure B, the European Communities reached the same conclusion in the domestic investigation at issue in *EC-DRAMS CVDs*.\(^{37}\) The Republic of Korea did not challenge this conclusion.

Even if the EIC is not a public body as such, the letter from the minister of economy and minister of commerce provides evidence of direction by the member’s government. Therefore, given that the member appears to exercise significant control over the EIC’s operations and directed the EIC to provide the guarantee, the guarantee probably amounts to a financial contribution by a government or public body within the meaning of Article 1. This conclusion is supported by the panel’s finding in *EC-DRAMS CVDs* that the provision of a guarantee like that provided by the EIC involved a potential direct transfer of funds and therefore constituted a financial contribution in the sense of Article 1.1(a)(1)(i).

**Measure C**

Measure C also probably involves a financial contribution by a public body.

The panel in *Korea-Commercial Vessels* held that 100% government ownership provides key evidence of government control.\(^{38}\) In the same case, the panel also held that appointment of an official by the president of the Republic of Korea and other government officials was further evidence of government control.\(^{39}\) Therefore, it is likely that the MDB is a public body within the meaning of Article 1.\(^{40}\)

\(^{35}\) Panel Report, Korea-Commercial Vessels, para 7.50.

\(^{36}\) Panel Report, Korea-Commercial Vessels, paras 7.50–7.53.

\(^{37}\) Panel Report, EC-DRAMS CVDs, para 7.87.

\(^{38}\) Panel Report, Korea-Commercial Vessels, para 7.50.

\(^{39}\) Panel Report, Korea-Commercial Vessels, para 7.50.

\(^{40}\) While the MDB’s public policy objective is an important consideration, it is probably not determinative since many nongovernment organizations, such as charitable organizations, also operate pursuant to similar objectives defined by public statutes. (Panel Report, Korea-Commercial Vessels, para 7.55.)
In *EC-DRAMS CVDs*, the panel found that the purchase of bonds by a company such as the MDB constituted a direct transfer of funds and therefore involved a direct financial contribution within the meaning of Article 1.1(a)(1)(i). Therefore, the MDB’s purchase of company A bonds also likely involves a financial contribution.

2. Assuming measures A, B and C involve a financial contribution by a government or public body, do they also provide a benefit to company A?

**Measure A**
Measure A probably does not confer a benefit.

The central issue posed by measure A is whether the financial contribution it provides to company A—the loan by bank A at the direction of the member—constitutes an advantage which company A would not have received under normal market conditions. Considering that it is part of a syndicated loan provided on the same terms by seven other private banks with no known government affiliation, the bank A loan is unlikely to have been an advantage that company A would not have otherwise received under normal market conditions, and so is probably not a benefit. However, it would be important to ensure that the common terms of the syndicated loan are consistent with those provided under normal market conditions. The panel in *EC-DRAMS CVDs* reached a similar conclusion based on comparable facts.

**Measure B**
Measure B probably confers a benefit.

The panel report in *EC-DRAMS CVDs* indicates that a measure like measure B can be analyzed from two perspectives. One could compare the guarantee provided by the member with a comparable guarantee provided by the market. If the member charges a below-market fee, there will be a benefit to company A. Or one could compare the amount paid on the loan guaranteed by the member with the amount that would have to be paid on a comparable commercial loan not guaranteed by the member.

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41 *EC-DRAMS CVDs*, paras 7.88–7.93.
43 *Panel Report, EC-DRAMS CVDs*, para 7.189.
44 *Panel Report, EC-DRAMS CVDs*, para 7.190.
Private banks located within the member’s territory refused to grant the export facility increase unless company A arranged for a guarantee from the EIC, nor could company A, despite its efforts, obtain the additional credit it sought from other banks. Therefore, it is unlikely that company A could have obtained a comparable loan without the backing of the member. In this circumstance, the panel decision in *EC-DRAMS CVDs* found that there was a benefit just because the loan would not normally have been provided by the market.\(^{45}\)

The first method of analysis (comparison of the guarantee provided by the member with one provided by the market) is not possible here because the facts do not indicate whether company A sought export guarantee financing from a private sector company. If it had, the question would be whether the member’s guarantee placed company A in a more advantageous position than it would have been in without the guarantee. For example, the member export guarantee might have been provided at a below-market rate.

**Measure C**

Measure C probably confers a benefit.

Because company A did not have the necessary credit rating to issue bonds through the normal bond market, it would not have been able to obtain comparable financing on the free market. This is strong evidence that a benefit accrued to company A. If there was evidence that company A could have obtained financing on the international market, then the terms would have to be compared. In *EC-DRAMS CVDs*, no evidence was provided to show that the company concerned could have refinanced its bonds in a foreign market and its speculative Standard & Poor’s rating B did not support such a possibility.\(^{46}\) Therefore, the panel upheld the European Communities’ determination that a benefit was conferred.\(^ {47}\)

3. **Assuming measures A, B and C are subsidies, are they specific?**

**Measure A**

If measure A is a subsidy, it is probably specific within the meaning of Article 2. Measure A is an ad hoc measure provided to company A. It was not granted as part of a general program, nor did any other companies benefit from similar measures. Therefore measure A is actually specific within the meaning of Article 2, in that it is limited to a specific enterprise.

\(^{45}\) Panel Report, EC-DRAMS CVDs, para 7.189.

\(^{46}\) Panel Report, EC-DRAMS CVDs, para 7.196.

\(^{47}\) Panel Report, EC-DRAMS CVDs, para 7.199.
Measure B
Measure B is a guarantee for export credits of $600 million. It is tied to or contingent upon export performance and therefore is specific within the meaning of Article 2.3 because it is a prohibited export subsidy within the meaning of Article 3.1(a).

Measure C
Measure C is part of a general program established by the member. The objective criteria for admission to the program (such as credit rating and general financial health) do not appear to favor any enterprise, industry, or region. However, measure C can still be specific under Article 2.1(c) if the factors listed therein exist, i.e., the use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In the case study, given that only five of 200 eligible companies have used the program, the “limited number” criterion is probably met. In addition, the fact that three out of the five companies admitted to the program, including company A, are part of the same corporate group, tends to support the conclusion that the program is predominantly used by certain enterprises. Since 41% of total program funds were allotted to company A, it would appear that the third criterion is also applicable to measure C. Lastly, the newspaper reports indicate that the fourth factor may also apply. In *EC-DRAMS CVDs*, the panel concluded that similar findings could support a finding of a de facto specific subsidy.  

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Further Reading


Appellate Body Reports


Brazil-Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU (Brazil-Aircraft) (Article 21.5-Canada), WT/DS46/AB/RW, adopted 4 August 2000.

Canada-Measures Affecting the Export of Civilian Aircraft-Recourse by Brazil to Article 21.5 of the DSU (Canada-Aircraft) (Article 21.5-Brazil), WT/DS70/AB/RW, adopted 4 August 2000.


Brazil-Export Financing Programme for Aircraft (Brazil-Aircraft), WT/DS46/AB/R, adopted 20 August 1999.


Panel Reports


European Communities-Export Subsidies on Sugar, Complaint by Brazil (EC-Export Subsidies on Sugar (Brazil)), WT/DS266/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R.


Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Second Recourse to Article 21.5 of the DSU by New Zealand and the United States (Canada-Dairy) (Article 21.5-New Zealand and US II),
Panel and Appellate Body Reports


United States-Section 129 (c) (1) of the Uruguay Round Agreement Act (US-Section 129(c)(1) URAA), WT/DS221/R, adopted 30 August 2002.


Brazil-Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU (Brazil-Aircraft) (Article 21.5- Canada), WT/DS46/RW, adopted 4 August 2000, modified by Appellate Body Report, WT/DS46/AB/RW.

Canada-Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of the DSU (Canada-Aircraft) (Article 21.5-Brazil), WT/DS70/RW, adopted 4 August 2000, modified by Appellate Body Report, WT/DS70/AB/RW.


Brazil-Export Financing Programme for Aircraft (Brazil-Aircraft), WT/DS46/AB/R, adopted 20 August 1999, modified by the Appellate Body Report, WT/DS46/AB/R.

Australia- Subsidies provided to Producers and Exporters of Automotive Leather (Australia-Automotive Leather II), WT/DS126/R, adopted 16 June 1999.


Brazil-Measures Affecting Desiccated Coconut (Brazil-Desiccated Coconut), WT/DS22/R, adopted 20 March 1997, upheld by the Appellate Body Report, WT/DS22/AB/R.
The Agreement on Subsidies and Countervailing Measures (ASCM)

Module 3 on Trade Remedies

Overview of presentation
- Introduction
- Subsidization
- Prohibited & Actionable Subsidies
- Countervailing Measures
- Developing Country Members
Introduction

- History
- Overview of ASCM
- Multilateral and Unilateral Tracks
- Like Products

History

- GATT 1947
  - Limited provisions on subsidies
  - Loose reporting requirements
  - Three basic requirements:
    - No duty in excess of “bounty or subsidy”;
    - Subsidy had to cause or threaten material injury to an established domestic industry, or materially retard the establishment of domestic industry;
    - No product could be subject to both anti-dumping and countervailing duties.
  - Article III, paragraph 8(b)—permitted payment of subsidies to exclusively domestic producers
  - No definition of subsidy
1950
- A working party recognized that domestic subsidization could deny benefits associated with tariff concession, constituting a "non-violation nullification or impairment" of GATT benefits that gives right to a redress under dispute settlement.

1954–1955
- GATT amended to reduce use of export subsidies;
- Primary products—No subsidies that resulted in "more than equitable share of world export trade";
- Other products—No subsidies that resulted in an export price for the product lower than on the domestic market;
- These amendments not accepted by all GATT signatories.

1961
- In 1961, GATT membership adopted “illustrative list” of practices that would violate the prohibited subsidies’ disciplines (that is, prohibition of subsidies that resulted in an export price for the product lower than on the domestic market) regarding products other than primary products.

Late 1970s
- Subsidies Code (negotiated at Tokyo Round),
- Tightened restrictions on use of export subsidies,
- Provided more detailed procedures to use in countervailing duty investigations, and
- Identified criteria to be used when examining whether imports were causing or threatening material injury.
The Agreement on Subsidies and Countervailing Measures

Introduction

History

- Uruguay Round
  - Two new agreements:
    - ASCM
    - Agreement on Agriculture:
      - Not addressed by this module,
      - “Peace clause,” Article 13, used to exempt certain agricultural subsidies from provisions of ASCM—expired at end of 2003.
  - GATT still survives
- Major innovations ASCM
  - Definition of subsidy,
  - Special multilateral remedy provisions, and
  - More detailed domestic investigation procedures.

Overview of ASCM

- Part I: General Provisions
  - Definition of subsidy (Article 1)
  - Concept of specificity (Article 2)
- Part II: Prohibited Subsidies
  - Prohibition of import substitution and export subsidies (Article 3)
  - Multilateral remedies (Article 4)
- Part III: Actionable Subsidies
  - Concept of adverse effects (Article 5)
  - Serious prejudice (Article 6)
  - Multilateral remedies (Article 7)
- Part IV: Nonactionable Subsidies
  - Examples: R&D, regional and environment (Article 8)
    - Article 8 expired in 1999; these subsidies are hence actionable.
Overview of ASCM

- **Part V: Countervailing Measures**
  - Articles 10–23
  - Calculation of the benefit to the recipient of a subsidy; Parallelism with ADA (Article 14)
- **Part VI: Institutions**
  - The Committee on Subsidies and Countervailing Measures
  - The Permanent Group of Experts (Article 24)
- **Part VII: Notification and Surveillance**
  - Procedures (Articles 25–26)
- **Part VIII: Developing Country Members**
  - Special and differential treatment (Article 27)
- **Part IX: Transitional Arrangements**
  - Accessions and transition economies (Articles 28–29)

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Overview of ASCM

- **Part X: Dispute Settlement**
  - According to the Dispute Settlement Understanding except for specific provisions in the ASCM (Article 30).
- **Part XI: Final Provisions**
  - Provisional application and other final provisions (Articles 31–32)
- **Annexes**
  - Illustrative List of Export Subsidies (annex 1)
  - Guidelines on Consumption of Inputs in Production Process (annex 2)
  - Guidelines on Determination of Substitution Drawback Systems (annex 3)
  - Calculation of Total Ad Valorem Subsidization (annex 4)
  - Procedures for Developing Information on Serious Prejudice (annex 5)
  - Procedures for On-the-spot Investigations (annex 6)
  - Developing Country Members and Least Developed Countries (annex 7)
### Introduction

#### Multilateral and unilateral tracks

- **Multilateral Track:**
  - Applies to *prohibited and actionable* subsidies;
  - Member seeks the withdrawal of the subsidy program or the removal of its adverse effects *in any export market*, using WTO dispute settlement procedures;
  - Accelerated procedure provided in the case of prohibited subsidies.

- **Unilateral Countervailing Duties (CVD) Track:**
  - Applies to subsidized imports causing injury to the domestic industry;
  - Affected Member imposes countervailing measure to offset advantage subsidized exporters gain when they enter the affected Member’s market;
  - ASCM imposes procedural obligations on Members taking this domestic step.

#### Like product

- If no identical product exists then “another product which . . . has characteristics closely resembling those of the product under consideration.”
- Identical provision to ADA; stricter than in the Safeguards Agreement
- Segmentation in accordance with physical characteristics (*Indonesia – Autos*)

> Throughout this Agreement 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 resembling those of the product under consideration.

—ASCM, footnote 46
The ASCM effectively only regulates the use of specific subsidies. Therefore, whether a Member may seek a remedy against the conferral of a subsidy is contingent on the identification of the subsidy as specific within the meaning of the ASCM (Articles 1 and 2).
Definition of subsidy

- Article 1—Subsidy Requires:
  1. A *financial contribution* by a government or any public body
     - Examples: transfer of funds, foregone government revenue, goods or services provided by government.
  2. A *benefit* conferred thereby (*US – Lumber*)
     - It is the benefit to the recipient, not the cost to the government (*Canada – Aircraft*);
     - Article 14, concerning guidance on the calculation of benefit for countervailing duty purposes, provides for circumstances where a benefit should not be found.

Specificity

- Article 2—Four Types of Subsidy
  - *Enterprise specificity*: A government targets a particular company or companies for subsidization.
  - *Industry specificity*: A government targets a particular sector or sectors for subsidization.
  - *Regional specificity*: A government targets producers in specified parts of its territory for subsidization.

- De jure versus de facto specificity
  - De jure: subsidy states that it is for specific recipients.
  - De facto: subsidy benefits only specific recipients in practice.
Prohibited and actionable subsidies

- Introduction
- Prohibited Subsidies
- Actionable Subsidies
- Multilateral Remedies

Introduction

Prohibited and actionable subsidies are addressed and defined by Parts II and III of the ASCM.
- Prohibited—never permissible (with exceptions for developing country members)
- Actionable—permissible unless they cause adverse effects

Prohibited and actionable subsidies have special and differentiated multilateral dispute settlement remedies.

Prohibited and actionable subsidies can also be subject to countervailing measures if subsidized imports cause injury to the domestic industry of an importing member.
The Agreement on Subsidies and Countervailing Measures

### Prohibited and actionable subsidies

#### Prohibited subsidies

- Article 3—Two kinds of subsidies are prohibited:
  1. Export subsidies (de jure or de facto)
     - Illustrative list of examples (annex 1)
     - No exception for developing countries (Brazil–Aircraft)
  2. Import substitution subsidies (de jure or de facto)
     - Local content requirements
- Problems with duty drawback exception exist for developing countries because of
  - physical incorporation details, and
  - inadequate verification procedures.
- If subsidy is prohibited, member may utilize special multilateral procedure.

#### Actionable subsidies

- All specific subsidies other than those that are prohibited
- A complaining member must show that the actionable subsidy has an adverse effect on its interests
- Article 5—Adverse effects are
  1. “Injury to a domestic industry of another Member”;
  2. “Nullification or impairment of benefits”; or
  3. “Serious prejudice.”
Prohibited and actionable subsidies

### Actionable subsidies

- **Adverse Effect #1: Injury to the Domestic Industry:**
  - Includes material injury, threat of material injury, and “material retardation” of the establishment of an industry;
  - Same “injury” required in countervailing measure actions (in fact, sole basis for such actions).

- **Adverse Effect #2: Nullification or Impairment of Benefits Accruing Directly or Indirectly to Other Members Under GATT 1994:**
  - Must be “in accordance with the practice of application” of GATT Article XXIII”;
  - Most likely to be used in a nonviolation complaint: when a member reduces its bound tariff for a good, this is supposed to improve market access. However, the member may then dilute the effect of the improved market access through subsidization.

- **Adverse Effect #3: Serious Prejudice to the Interests of Another Member:**
  - Includes threat of serious prejudice;
  - Article 6.3—Serious prejudice may arise when an actionable subsidy has one or more of the following effects:
    - It displaces or impedes imports of a like product of another member into the market of the subsidizing member.
    - It displaces or impedes the exports of a like product of another member from a third country market.
    - It results in a significant price undercutting by the subsidized product as compared with the price of a like product of another member in the same market or significant price suppression, price depression, or lost sales in the same market.
    - It leads to an increase in the world market share of the subsidizing member in a particular primary product or commodity as compared to the average share it had during the previous period of three years, and this increase follows a consistent trend over a period when subsidies have been granted.
The Agreement on Subsidies and Countervailing Measures

Prohibited and actionable subsidies

Actionable subsidies

- Adverse Effect #3: Serious Prejudice to the Interests of Another Member:
  - Article 6.1, in conjunction with Article 6.2, used to provide circumstances where serious prejudice was deemed to occur; however, this provision expired on 31 December 1999.
  - Article 6.1 provided that serious prejudice shall be deemed to exist in the following circumstances (unless the defending member could demonstrate that the subsidy did not have any of the effects specified in Article 6.3):
    - The total ad valorem subsidization of a product exceeds 5%;
    - Subsidies are provided to cover operating losses sustained by an industry;
    - Subsidies are provided to cover operating losses sustained by an enterprise (other than one-time measures that are nonrecurrent and cannot be repeated for that enterprise and that are given merely to provide time for the development of long-term solutions and to avoid acute social problems);
    - There is direct forgiveness of debt, that is, forgiveness of government-held debt or grants to cover debt repayment.

Multilateral remedies

- For both prohibited and actionable subsidies, the procedures have short deadlines and workable remedies.
  - The procedure for the prohibited (red light) subsidies is the strongest. (Australia-Automotive Leather).
- Failure to Cooperate:
  - Right to draw adverse inferences when parties fail to cooperate, originally in the case of actionable subsidies;
  - Appellate Body extended this right to prohibited subsidies (Canada-Aircraft).
- Retroactivity of Remedies:
  - Panel’s understanding of the term “withdraw” required repayment by the recipients of the subsidy (Australia-Automotive Leather);
  - Subsequent panels and Appellate Body took a more cautious approach. They required the immediate withdrawal of the subsidy but did not require repayment (Canada-Aircraft and Brazil-Aircraft).
### Multilateral remedies

<table>
<thead>
<tr>
<th>Prohibited Subsidies</th>
<th>Actionable Subsidies</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Request for consultations, including statement of available evidence regarding existence and nature of subsidy;</td>
<td>Request for consultations, including statement of available evidence regarding existence and nature of subsidy and injury caused to domestic industry (nullification or impairment, or serious prejudice);</td>
</tr>
<tr>
<td>2 Consultations as quickly as possible;</td>
<td>Consultations as quickly as possible;</td>
</tr>
<tr>
<td>3 If no solution within 30 days → referral to Dispute Settlement Body for immediate establishment of panel;</td>
<td>If no solution within 60 days → referral to Dispute Settlement Body for establishment of panel; composition of panel and terms of reference within 15 days;</td>
</tr>
<tr>
<td>4 Panel may request assistance from Permanent Group of Experts for binding advice on whether it is a prohibited subsidy.</td>
<td></td>
</tr>
<tr>
<td>5 Circulation of panel report within 90 days of date of composition of panel and establishment of terms of reference;</td>
<td>Circulation of panel report within 120 days of date of composition of panel and establishment of terms of reference;</td>
</tr>
<tr>
<td>6 If the subsidy is prohibited, panel recommends that the member withdraw it without delay and specifies the time period for withdrawal. Thus far, panels have generally given 90 days.</td>
<td></td>
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<tr>
<td>7 Within 30 days of circulation, report to be adopted by DSB, unless appealed;</td>
<td>Within 30 days of circulation, report to be adopted by DSB, unless appealed;</td>
</tr>
<tr>
<td>8 Appellate Body must normally issue decision within 30 days from notice of intention to appeal; in no event more than 60 days.</td>
<td>AB must normally issue decision within 60 days from notice of intention to appeal; in no event more than 90 days.</td>
</tr>
<tr>
<td>9</td>
<td>After adoption of panel or AB report that finds adverse effects, subsidizing member must take appropriate steps to remove the adverse effects or withdraw the subsidy.</td>
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</table>
The Agreement on Subsidies and Countervailing Measures

Prohibited and actionable subsidies

Multilateral remedies

<table>
<thead>
<tr>
<th>Prohibited Subsidies</th>
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<tbody>
<tr>
<td><strong>10</strong> If DSB recommendation is not followed within time period specified by panel (which commences from data of adoption of the panel/AB report), DSB grants authorization to complaining member to take appropriate proportionate countermeasures.</td>
<td>If member does not take steps within 6 months from date of DSB’s adoption of panel or AB report, DSB authorizes complaining member to take appropriate countermeasures, commensurate to the degree and nature of adverse effects.</td>
</tr>
<tr>
<td><strong>11</strong> Applicable DSU time periods shall be half.</td>
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</table>

Countervailing measures

- Introduction
- Substantive Rules
- Procedural Rules
Countervailing measures

Introduction

- Rules are contained in Part V of ASCM.
- Must respect substantive and procedural rules in ASCM:
  - Substantive: Subsidized imports, that is, any specific subsidy, must be causing injury to domestic industry within meaning of ASCM;
  - Procedural: Domestic investigation must conform with ASCM rules.
- Article 10:
  - Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.
- Footnote 36:
  - The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

Countervailing measures

Substantive rules

- A countervailing duty (CVD) may not be imposed unless there are
  - subsidized imports, AND
  - injury to a domestic industry caused by subsidized imports.
- Footnote 35
  - Multilateral and countervailing remedies may be invoked simultaneously by a Member, but “only one form of relief shall be available” with respect to the effects of a particular subsidy in the domestic market of the importing member.
Substantive rules

1. Subsidized imports:
   - Specific subsidy within meaning of Articles 1 and 2;
   - Article 14 provides rules relating to determining the existence of a benefit and if necessary, the calculation of the subsidy, that is, the benefit, in the following four circumstances:
     - Government provision of equity capital,
     - A loan by a government,
     - A loan guarantee by a government, and
     - Provision of goods or services or purchase of goods by a government.

2. Injury
   - Four steps:
     - Determination of Like Product,
     - Determination of the Domestic Industry,
     - Determination of Injury to the Domestic Industry, and
     - Determination of “Causal Link” Between the Injury to the Domestic Industry and the Subsidy in Question.
   - Must involve an objective examination and be based on positive evidence.
### Substantive rules

<table>
<thead>
<tr>
<th>Injury: Like product:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central consideration: whether the product produced by the domestic industry is like the allegedly subsidized imports.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Injury: Domestic industry:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic producers as a whole or those who produce a major proportion of the domestic output (Article 16);</td>
</tr>
<tr>
<td>Three groups may be excluded from the domestic industry defined for the dispute:</td>
</tr>
<tr>
<td>Domestic producers related to the other member’s exporters/importers,</td>
</tr>
<tr>
<td>Domestic producers that are importers themselves,</td>
</tr>
<tr>
<td>Regional industry (in exceptional circumstances in which the territory can be divided into two or more separate markets).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Injury: Material Injury:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injury means material injury, threat of material injury, or material retardation of the establishment of an industry (Footnote 45).</td>
</tr>
<tr>
<td>Injury determination MUST be based on positive evidence and an objective examination of</td>
</tr>
<tr>
<td>The volume of the subsidized imports and their effect on domestic prices; AND</td>
</tr>
<tr>
<td>The consequent impact of the subsidized imports on the domestic industry.</td>
</tr>
<tr>
<td>Volume and prices (in relative or absolute terms, see Article 15.2);</td>
</tr>
<tr>
<td>Subsidized imports (what about nonsubsidized imports?)</td>
</tr>
</tbody>
</table>
The Agreement on Subsidies and Countervailing Measures

Substantive rules

- Injury: Material Injury:
  - Cumulation
    - If a member is investigating several allegedly subsidizing countries at the same time, it may analyze the overall effects all of these countries’ imports on the domestic industry (Article 15.3).
    - Each of the countries’ imports must be more than de minimis or negligible; AND
    - The conditions of competition among the importing countries and between the imports and the like domestic product must be similar.

Injury: Material Injury

Obligation to evaluate all 15 injury factors listed in Article 15.4 and all other relevant factors (EC-DRAMS CVD)

- actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes.

—Article 15.4
Substantive rules

- **Injury: Causation**
  - A causal link is required between the subsidized imports and the material injury.
  - Article 15.5 obliges the investigating member to examine any “known factors,” other than the subsidized imports, that may be causing the injury.
  - Examples:
    - Contraction in demand,
    - Changes in patterns of consumption, and
    - Trade-restrictive practices.

- **Injury: Threat of injury**
  - The threat must be based on facts, not mere allegations, conjecture, or remote possibility (Article 15.7).
  - The change in circumstances must be foreseen and imminent (*Mexico – HFCS*).
  - Looking at all factors considered, it must be concluded that further subsidized exports are imminent and that unless protective action is taken, material injury will occur.
**Countervailing measures**

**Substantive rules**

- **Injury: Threat of injury**
  - Article 15.7 injury factors:
    - nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
    - a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
    - sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing member’s market, taking into account the availability of other export markets to absorb any additional exports;
    - whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
    - inventories of the product being investigated.

- **Injury margins**
  - Lesser duty preferred (Article 19.2);
  - The ASCM, like ADA, does not give any guidance on such calculation.
  - Margins routinely based on
    - Price undercutting, and
    - Price underselling.
Countervailing measures

Procedural rules

- **Important procedural provisions**
  - Article 11
    - Initiation and subsequent investigation, including the standing determination
  - Article 12
    - Evidence, including due process rights of interested parties
  - Article 13
    - Preinitiation consultations
  - Article 17
    - Provisional measures
  - Article 18
    - Undertakings
  - Article 19
    - Imposition and collection of countervailing duties
  - Article 20
    - Retroactivity
  - Article 21
    - Duration and review of countervailing duties and undertakings
  - Article 22
    - Public notice and explanation of determinations, pertaining to initiation and imposition of preliminary and final measures
  - Article 23
    - Judicial review

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**Application**
- Must contain evidence of a subsidy and, if possible, its amount; injury; AND a causal link between the subsidized imports and alleged injury (Article 11.2).

**Preinitiation examination**
- Before initiation, authorities must review the accuracy and adequacy of the evidence in the application (Article 11.3).

**Standing**
- Before initiation, authorities must determine that the application has been made by or on behalf of the domestic industry (Article 11.4);
- Determination made on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product (Article 11.4).
Consultations
- Before initiation, members must engage in consultations with the exporting member with the aim of clarifying the situation and arriving at a mutually agreed solution (Article 13).

De Minimis/Negligibility Thresholds
- Prompt termination of investigation if the subsidy margin is less than 1% (2% for developed countries, 3% for least developed countries) ad valorem OR when the volume is negligible (4%–9% for developed countries) (Articles 11.9 jo. 27.10–11).

Deadlines
- Investigations must be concluded within one year AND in no case may last more than 18 months (absolute deadline) (Article 11.11).

Due Process Rights and Public Motivation
- Important due process rights for interested parties, including public notice and motivation (Articles 12 and 22).

Confidentiality
- ASCM strikes a balance to ensure fair play and equality by distinguishing confidential and nonconfidential documents (Article 12.4);
- Information that is by its nature confidential OR that is provided on a confidential basis is treated as confidential upon good cause shown.

Consequences of Noncooperation
- In case of lack of cooperation, the importing member may make determinations on the basis of the facts available (Article 12.7).
**Procedural rules**

- **Provisional Measures**
  - Must be in the form of a cash deposit or bond;
  - May not be imposed earlier than 60 days from date of initiation of investigation;
  - May not last longer than 4 months.

- **Price Undertakings**
  - Undertaking by *exporting country* government to eliminate or limit the subsidy or to take other measures concerning its effects; OR
  - Undertaking by *exporter* to revise its prices to eliminate the injurious effect of the subsidy or the amount equivalent to the subsidy itself, whichever is lower (Article 18.1).

- **Countervailing Duties**
  - Discretionary and preferred application of a lesser duty rule;
  - Imposition on a nondiscriminatory basis.

**Retroactivity**

- Two Types (Article 20):
  - There is a final determination of injury OR there is a final determination of a threat of injury where there would have been actual injury if the provisional measure had not been in place;
  - In critical circumstances where the injury is difficult to repair and is caused by massive subsidized imports in a relatively short time, countervailing measures may apply to imports that entered the market 90 days or less before the provisional measure was applied.
## Countervailing measures

### Procedural rules

- **Reviews**
  - Three Types:
    - *Accelerated review*: Requested by newcomers, that is, exporters subject to a definitive countervailing duty but who were not actually investigated other than for refusal to cooperate (Article 19.3);
    - *Interim review*: During the 5 years from imposition of the countervailing measure, upon request of the interested parties (Article 21.2);
    - *Expiry review*: Normally after 5 years (Article 21.3).

- **Judicial Review**
  - For the purpose of prompt review, each member must maintain
    - Independent judicial tribunals or procedures,
    - Arbitral tribunals or procedures, and
    - Administrative tribunals or procedures (Article 23).

### Developing country members

- **Introduction**
- **Subsidies**
- **Remedies**
## Developing country members

### Introduction

- **Two types of developing countries:**
  - Annex VII developing countries:
    - UN least developed countries (LDCs), and
    - Certain poorer developing countries
  - Other developing countries.

### Developing country members: SUBSIDIES

<table>
<thead>
<tr>
<th></th>
<th>Developing country Members referred to in Annex VII</th>
<th>Other Developing countries</th>
</tr>
</thead>
</table>
| **Export Subsidies**   | - Allowed—Article 27.2(a);
                        |   - Gradual phasing out in 8 years following export competitiveness—Article 27.5;
                        |   - Export competitiveness defined as state in which developing country exports constitute 3.25% in world trade of product in question for 2 consecutive calendar years—Article 27.6. |
|                        | - Allowed for 8 yrs from date of entry of WTO Agreement—Article 27.2(b);
                        |   - Progressive phasing out by 2003;
                        |   - Possibility of extension as per provisions of Article 27.4, depending on needs of the developing country;
                        |   - If no extension granted or sought, phasing out within 2 years from end of last authorized period;
                        |   - Phasing out in 2 yrs following export competitiveness—Article 27.5. |
| **Import Subsidies**   | Prohibited (were allowed for Annex VII(a) LDC Members until 31 December 2002) |
|                        | Prohibited (were allowed until 31 December 1999). |

**Actionable Subsidies:** Part III actionable subsidy provisions do not apply to developing country Members in case of direct forgiveness of debt, subsidies to cover social costs, and other transfers of liabilities (last for limited period pursuant to privatization program and notification to Subsidies Committee) (Article 27.13).
The Agreement on Subsidies and Countervailing Measures

### Developing country members: REMEDIES

<table>
<thead>
<tr>
<th></th>
<th>Multilateral Track</th>
<th>Unilateral Track</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibited Export Subsidies</td>
<td>- If export subsidy is prohibited by Article 27, Article 4 remedy applies (Article 27.7).&lt;br&gt;- If export subsidy is not prohibited by Article 27, Article 7 remedy applies (Article 27.7).</td>
<td>- Countervailing measures permissible even if export subsidy is not prohibited, subject to special de minimis rules.</td>
</tr>
<tr>
<td>Actionable Subsidies</td>
<td>- No serious prejudice (Article 27.9);&lt;br&gt;- Specific subsidy is actionable if:&lt;br&gt;- Nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist, in such a way as to displace or impede imports of a like product of another member into the market of the subsidizing developing country member OR injury to a domestic industry occurs in the market of an importing member (Article 27.9).</td>
<td>- Countervailing measures permissible subject to special de minimis rules.</td>
</tr>
</tbody>
</table>

Special de minimis rules: Countervailing duty investigation shall be terminated if it is determined that:
- The overall level of subsidies granted upon the product in question does not exceed 2% of its value calculated on a per unit basis; OR
- The volume of the subsidized imports represents less than 4% of the total imports of the like product in the importing member, unless imports from developing country members whose individual shares of total imports represent less than 4% collectively account for more than 8% of the total imports of the like product in the importing member (Article 27.10).
Members hereby agree as follows:

PART I: GENERAL PROVISIONS

Article 1: Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within
the territory of a Member (referred to in this Agreement as “government”),
i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);¹

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

¹ In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.
(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Article 2: Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions\(^2\) governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs

\(^2\) Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.
The Agreement on Subsidies and Countervailing Measures

(a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

Part II: Prohibited Subsidies

Article 3: Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

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3 In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.
subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

Article 4: Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body (DSB) for the immediate

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4 This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

5 Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

6 Any time- NOTE: hyphen is in original here. periods mentioned in this Article may be extended by mutual agreement.
4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts7 (referred to in this Agreement as the PGE) with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE’s conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel’s terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel’s report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB

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7 As established in Article 24.
decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.8

4.10. In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel’s report or the Appellate Body’s report, the DSB shall grant authorization to the complaining Member to take appropriate9 countermeasures, unless the DSB decides by consensus to reject the request.

4.11. In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding (DSU), the arbitrator shall determine whether the countermeasures are appropriate.10

4.12. For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

Part III: Actionable Subsidies

Article 5: Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member;11

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8 If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

9 This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

10 This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

11 The term “injury to the domestic industry” is used here in the same sense as it is used in Part V.
(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994;¹²

(c) serious prejudice to the interests of another Member.¹³

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

**Article 6: Serious Prejudice**

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization¹⁴ of a product exceeding 5 per cent;¹⁵

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

(d) direct forgiveness of debt, i.e., forgiveness of government-held debt, and grants to cover debt repayment.¹⁶

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¹² The term “nullification or impairment” is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

¹³ The term “serious prejudice to the interests of another Member” is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

¹⁴ The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

¹⁵ Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

¹⁶ Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purpose of this subparagraph.
6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third-country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity\(^ {17} \) as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). “Change in relative shares of the market” shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have

\(^ {17} \) Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.
declined; (c) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist\(^{18}\) during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

\(^{18}\) The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.
The Agreement on Subsidies and Countervailing Measures

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, inter alia, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7: Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall

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19 In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.
enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel’s terms of reference.

7.6 Within 30 days of the issuance of the panel’s report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.

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20 Any time- NOTE: hyphen is in original here. periods mentioned in this Article may be extended by mutual agreement.

21 If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

22 If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.
7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

Part IV: Non-actionable Subsidies

Article 8: Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable:

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

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23 It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.
8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if the assistance covers not more than 75 per cent of the costs of industrial research or 50 per cent of the costs of pre-competitive development activity, and provided that such assistance is limited exclusively to:

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24 Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

25 Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as “the Committee”) shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

26 The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term “fundamental research” means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

27 The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

28 The term “industrial research” means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

29 The term “pre-competitive development activity” means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

30 In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.
(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc. ;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria, indicating that the

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31 A “general framework of regional development” means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

32 “Neutral and objective criteria” means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.
region’s difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

— one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;

— unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities\(^{33}\) to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm’s planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

\(^{33}\) The term “existing facilities” means facilities which have been in operation for at least 2 years at the time when new environmental requirements are imposed.
8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.\textsuperscript{34}

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

\textsuperscript{34} It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.
8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9: Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.
Part V: Countervailing Measures

Article 10: Application of Article VI of GATT 1994

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

Article 11: Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The

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35 The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

36 The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

37 The term “initiated” as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.
application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed38 by domestic

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38 In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.
The Agreement on Subsidies and Countervailing Measures

producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation and (b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or

39 Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.
of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is \textit{de minimis}, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be \textit{de minimis} if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

**Article 12: Evidence**

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.\textsuperscript{40} Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under

\textsuperscript{40} As a general rule, the time- limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.
paragraph 1 of Article 11 to the known exporters 41 and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

12.2 Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it. 42

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish

41 It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

42 Members are aware that in the territory of certain Members disclosure pursuant to a narrowly drawn protective order may be required.
non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.43

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigation in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary

43 Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.
and final determinations, affirmative or negative, may be made on the basis of the facts available.

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

12.9 For the purposes of this Agreement, “interested parties” shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and

(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.
Article 13: Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.44

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

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44 It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.
Article 14: Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In the case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).
Article 15: Determination of Injury

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

45 Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

46 Throughout this Agreement 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 resembling those of the product under consideration.
15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects\(^\text{47}\) of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on the examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized 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 subsidized imports. Factors which may be relevant in this respect include, \textit{inter alia}, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers’ sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change

\(^{47}\) As set forth in paragraphs 2 and 4.
in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, inter alia, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports;

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(v) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

**Article 16: Definition of Domestic Industry**

16.1 For the purposes of this Agreement, the term “domestic industry” shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion
of the total domestic production of those products, except that when producers are related\(^{48}\) to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term “domestic industry” may be interpreted as referring to the rest of the producers.

16.2 In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e., a market as defined in paragraph 2, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

\(^{48}\) For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from nonrelated producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.
16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

**Article 17: Provisional Measures**

17.1 Provisional measures may be applied only if:

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.
Article 18: Undertakings

18.1 Proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is

49 The word “may” shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.
due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

**Article 19: Imposition and Collection of Countervailing Duties**

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed
shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20: Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the

50 For the purpose of this paragraph, the term “domestic interested parties” shall include consumers and industrial users of the imported product subject to investigation.

51 As used in this Agreement “levy” shall mean the definitive or final legal assessment or collection of a duty or tax.
case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application or provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Article 21: Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a
reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply mutatis mutandis to undertakings accepted under Article 18.

Article 22: Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

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52 When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.
22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report,\textsuperscript{53} adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested Members and interested parties should be directed; and

(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

\textsuperscript{53} Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.
(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

Article 23: Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to
final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

Part VI: Institutions

Article 24: Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem
appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

Part VII: Notification and Surveillance

Article 25: Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies, Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e., grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

54 The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.
25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.
25.12 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and (b) its domestic procedures governing the initiation and conduct of such investigations.

Article 26: Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

Part VIII: Developing Country Members

Article 27: Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in
a progressive manner. However, a developing country Member shall not increase the level of its export subsidies, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the eight-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member’s exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions

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55 For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.
of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per-unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member.
This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

**Part IX: Transitional Arrangements**

**Article 28: Existing Programmes**

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.
28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

**Article 29: Transformation into a Market Economy**

29.1 Members in the process of transformation from a centrally planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time frame by the Committee if such departures are deemed necessary for the process of transformation.

**Part X: Dispute Settlement**

**Article 30**

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the
Part XI: Final Provisions

Article 31: Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32: Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.56

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

56 This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.
32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

Annex I: Illustrative List of Export Subsidies

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available\(^\text{57}\) on world markets to their exporters.

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\(^{57}\) The term “commercially available” means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.
(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes\(^{58}\) or social welfare charges paid or payable by industrial or commercial enterprises.\(^{59}\)

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes\(^{82}\) in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

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\(^{58}\) For the purpose of this Agreement:

The term “direct taxes” shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term “import charges” shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term “indirect taxes” shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

“Prior-stage” indirect taxes are those levied on goods or services used directly or indirectly in making the product;

“Cumulative” indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

“Remission” of taxes includes the refund or rebate of taxes;

“Remission or drawback” includes the full or partial exemption or deferral of import charges.

\(^{59}\) The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm’s length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.
(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance or waste). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to

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60 Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).
obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, insofar as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

Annex II: Guidelines on Consumption of Inputs in the Production Process

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product.

61 Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.
product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.
4. In determining the amount of a particular input that is consumed in the production of the exported product, a “normal allowance for waste” should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term “waste” refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority’s determination of whether the claimed allowance for waste is “normal” should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

Annex III: Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for
export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.
Annex IV: Calculation of the Total Ad Valorem Subsidization (Paragraph 1(A) of Article 6)\textsuperscript{62}

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm’s\textsuperscript{63} sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.\textsuperscript{64}

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm’s sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.\textsuperscript{65}

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm’s total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

\textsuperscript{62} An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

\textsuperscript{63} The recipient firm is a firm in the territory of the subsidizing Member.

\textsuperscript{64} In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm’s sales in the fiscal year in which the tax-related measure was earned.

\textsuperscript{65} Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefitting from the subsidy have been made, even though production has not begun.
The Agreement on Subsidies and Countervailing Measures

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

Annex V: Procedures for Developing Information Concerning Serious Prejudice

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.\(^{66}\) This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.\(^{67}\)

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\(^{66}\) In cases where the existence of serious prejudice has to be demonstrated.

\(^{67}\) The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.
3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyze adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, inter alia, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its
case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party’s position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

Annex VI: Procedures for On-the-Spot Investigations Pursuant to Paragraph 6 of Article 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.
3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the government of the Member in question and (b) the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

Annex VII: Developing Country Members Referred to in Paragraph 2(A) of Article 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:
(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum:68 Bolivia, Cameroon, Congo, Côte d’Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

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68 The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.
The Agreement on Safeguards

The International Institute for Trade and Development with support from the Asian Development Bank
Introduction

This module analyzes the World Trade Organization (WTO) Agreement on Safeguards (ASG), as interpreted by WTO panels and the Appellate Body. The ASG is concerned with harm that results from unforeseeable increases in imports. It permits a WTO member to adopt safeguard measures in order to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry.

History and Overview

The ASG came into force on 1 January 1995 as a result of the Uruguay Round negotiations over the General Agreement on Tariffs and Trade (GATT). It regulates the application of safeguard measures by WTO members pursuant to Article XIX GATT 1994.

Safeguard measures differ from anti-dumping and countervailing measures in that they may be applied to protect a domestic industry even in the absence of an unfair trade practice like dumping or subsidization. Safeguard measures are viewed as “extraordinary remedies to be taken only in emergency situations.”\(^1\) They have often been described as providing a safety valve or escape clause for members to curb imports when there is no wrongdoing by other exporters or exporting countries.\(^2\)

Before the ASG, safeguards were regulated by Article XIX of GATT 1947, titled “Emergency Action on Imports of Particular Products.” Part 1(a) of Article XIX contained substantive criteria for emergency action. Part 2 contained provisions relating to notice and consultation, the application of provisional and final measures, and suspension provisions for affected contracting parties.

Although Article XIX was relatively broad in scope and gave parties a legitimate legal basis for limiting imports that caused harm to a domestic industry, GATT parties would often act outside of Article XIX and use so-called grey-area measures to limit imports. These included bilateral restraint arrangements like voluntary export restraints or orderly marketing arrangements (usually in the form of quantitative restrictions, surveillance systems, or price undertakings) concluded between importing and exporting countries or between industries, and unilateral actions affecting imports, (involving tariff increases, quota restrictions, or price monitoring in relation to imports from particular sources).\(^3\)

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The ASG was negotiated largely as a result of the increased use of such grey-area measures. It aims “to re-establish multilateral control over safeguards and eliminate measures that escape such control,” to “clarify and reinforce the disciplines of GATT, and specifically those of its Article XIX,” and to encourage “structural adjustment” on the part of the industries adversely affected by increased imports, thereby enhancing competition in international markets. Overall, the ASG is more comprehensive in content and contains more detailed rules regulating the application of safeguard measures by members than Article XIX.

The ASG consists of 14 articles, which may be summarized as follows:

Article 1 states that the ASG establishes rules for the application of safeguard measures as provided for in Article XIX of GATT 1994.

Article 2 sets out general conditions for the application of safeguard measures. The first paragraph provides that a member may apply a safeguard measure to a product by only if it has determined that the product “is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.” The second paragraph provides that safeguard measures are to be applied to a product being imported “irrespective of its source.”

Article 3 provides that safeguard measures may only be applied following an investigation pursuant to procedures previously made public. It also provides that the investigation must include public notice to all interested parties and guarantee other due process rights, such as the right to a hearing and the right for interested parties to present evidence and their views. Authorities are also required to publish a report setting forth their findings and reasoned conclusions on all pertinent issues of fact and law. The article also contains provisions related to the protection of confidential information.

Article 4 provides that the investigating authorities are to use relevant, objective, and quantifiable factors to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry. It also defines important concepts such as serious injury, threat of serious injury, and the domestic industry.

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4 WTO, Technical Information on Safeguard Measures. www.wto.org/English/tratop_e/safeg_e/safeg_info_e.htm

5 ASG, preamble. See, e.g., WTO, Technical Information on Safeguard Measures. www.wto.org/English/tratop_e/safeg_e/safeg_info_e.htm; see also.
Article 5 contains the important principle that safeguard measures should be applied “only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.”

Article 6 sets out rules for the application of provisional safeguard measures.

Article 7 contains rules for the duration and review of safeguard measures.

Article 8 provides that a member proposing to apply a safeguard measure or seeking an extension of a safeguard measure must endeavor to maintain a “substantially equivalent level of concessions and other obligations to those existing under GATT 1994 between it and the exporting members which would be affected by such a measure,” and that the members concerned may agree on “any adequate means of trade compensation for the adverse effects of the measure on their trade.” Further, in the absence of such an agreement, the affected member may, in certain circumstances, suspend the application of substantially equivalent concessions or other obligations under GATT 1994. However, such suspension measures cannot be taken in the first three years a safeguard measure is in effect if it was adopted as a result of an absolute increase in imports and is in conformity with the provisions of the ASG.

Article 9 contains special rules for the application of safeguard measures to developing country members.

Article 10 requires that all pre-existing safeguard measures—that is, those applied pursuant to Article XIX of GATT 1947 and that were in effect on the date of entry into force of the WTO Agreement (1 January 1995)—be terminated not later than eight years after the date on which they were first applied or 1 January 2000, whichever was later.

Article 11 provides that if a member takes emergency action pursuant to Article XIX of GATT 1994, that action must conform to the ASG. The article prohibits the use of grey-area measures such as voluntary export restraints, orderly marketing arrangements, and “other similar measures.” The Article also provides that members shall not encourage or support the adoption or maintenance by public and private enterprises of equivalent nongovernmental emergency measures.

Article 12 sets out certain notification and consultation requirements which WTO members must respect when imposing safeguard measures.

Article 13 establishes multilateral surveillance over the implementation of the agreement by setting up a Committee on Safeguards under the authority of the Council for Trade in Goods.
Article 14 states that the “provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding [annex 2 of the WTO Agreement] shall apply to consultations and the settlement of disputes” arising under the ASG.

**What You Will Learn**

This module focuses on the substantive and procedural rules that an importing member must respect in order to apply safeguard measures.

The Appellate Body has noted that the right to apply safeguard measures arises only when “as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”

Chapter 1 therefore discusses these conditions. The first part discusses the concept of increased imports. The second addresses the concepts of unforeseen developments and obligations incurred. The final part of the chapter deals with serious injury and threat of serious injury caused by increased imports.

Chapter 2 discusses rules related to the application of safeguard measures. These rules mainly concern requirements related to the form, content, duration, and review of safeguard measures.

Chapter 3 concerns specific procedural rules governing the conduct of a domestic investigation by a member. These rules include notification requirements, requirements for consultations, due process rights accorded to parties, and the like.

Chapter 4, the final chapter in this module, briefly discusses some rules applicable to developing country members.

A case study and a list of relevant panel and Appellate Body reports follow the explanatory chapters.

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Safeguard Measures

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<td>+ Unforeseen Developments and Obligations Incurred</td>
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<td>+ Serious Injury Caused by Increased Imports</td>
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**Must Respect Procedural Rules!**

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Chapter 1
The Right to Apply a Safeguard Measure

“As the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure.”


As noted above, the Appellate Body has stated that the right for WTO members to apply a safeguard measure arises only when, “as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”7 This chapter discusses the conditions that must be met under GATT 1994 and the ASG before a member may apply a safeguard measure: increased imports resulting from unforeseen developments and obligations incurred that cause or threaten serious injury to the domestic industry.

Increased Imports

Article 2.1 of the ASG and Article XIX, paragraph 1(a) of GATT 1994 both provide that a member may apply a safeguard measure to a product only if that member has determined that the product is being imported into its territory in such increased quantities as to cause or threaten to cause serious injury to a domestic industry that produces like or indirectly competitive products. Article 2.1 specifies that the increase may be absolute or relative to production. As a practical matter, investigating authorities will normally make findings on both absolute and relative imports in the course of an investigation.

Whether imports have increased can be a complex issue; investigating authorities can easily manipulate the data by their choice of the time period examined and the method of assessment. For example, on the basis of the facts in the chart below, an investigating authority may conclude that imports increased by comparing the

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first and last years of the investigation. However, closer examination shows that this conclusion may perhaps be problematic because by comparing 2003 with 2006, one could equally well argue that imports decreased.

<table>
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<tr>
<th>Import (in millions of tons)</th>
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<tr>
<td>2002</td>
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<tr>
<td>Product A</td>
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The Appellate Body has developed a number of principles addressing these issues of data manipulation. WTO members must take these principles into account when determining whether imports have increased so as to trigger safeguard measures. For example, the Appellate Body has determined that an end point-to-end point analysis of imports is not sufficient to support a determination that imports have increased.\(^8\) Rather, a member must also consider trends over a period of time.\(^9\) The Appellate Body has also stressed the relative importance of recent data for purposes of assessing whether a product “is being imported in such increased quantities.”\(^10\)

In *Argentina-Footwear (EC)*, the Appellate Body noted that the increase in imports “cannot be just any increase”; Article 2.1 requires that the increase in imports be in such increased quantities as to cause or threaten to cause serious injury to the domestic industry and must have been “recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause “serious injury.””\(^11\)

Finally, while recent trends must be taken into account, the Appellate Body has stated that Article 2.1 does not require imports to be increasing at the time of a safeguard determination; rather, they must have increased and continue to be imported in increased quantities.\(^12\) Therefore, a decline at the end of the period of investigation does not necessarily preclude a finding of increased imports.

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\(^8\) See Appellate Body Report, Argentina-Footwear (EC), para 129
\(^11\) Appellate Body Report, Argentina-Footwear (EC), paras 130–131 (footnote omitted).
\(^12\) Appellate Body Report, US-Steel Safeguards, para 367.
Unforeseen Developments and Obligations Incurred

Unlike the ASG, Article XIX provides that safeguard measures require an increase in imports that is a result of “unforeseen developments” and “the effect of the obligations incurred” by a contracting party. These conditions are therefore incorporated into the ASG.

Unforeseen Developments

The Appellate Body has determined that the ordinary meaning of “unforeseen” is “unexpected” rather than “unpredictable.” Furthermore, it has also stated that the phrase “as a result of” in Article XIX, paragraph 1(a) requires a logical connection between the unforeseen developments and the increased imports causing serious injury to justify the imposition of a safeguard measure. Therefore, members must show that unexpected developments resulted in increased imports for each specific product concerned by the investigation.

Obligations Incurred

In Argentina-Footwear (EC) and Korea-Dairy, the Appellate Body stated that it must be demonstrated, as a matter of fact, that the importing member has incurred obligations under GATT 1994, including tariff concessions.

Injury and Causation

Article 2 of the ASG contains the basic provisions for an injury and causation determination. A determination of injury and causation for safeguards is similar to such a determination for dumping or subsidization. It involves definition of the like or directly competitive product, identification of the domestic industry, assessment of serious injury or threat thereof, and determination whether increased imports have caused injury to the domestic industry.

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13 Appellate Body Report, Argentina-Footwear (EC), para 91; Appellate Body Report, Korea-Dairy, para 84.
16 Appellate Body Report, Argentina-Footwear (EC), para 91; Appellate Body Report, Korea-Dairy, para 84.
Like or Directly Competitive Product

According to Article 2.1 of the ASG and Article XIX:1(a) GATT 1994, safeguard measures may only be imposed if increased imports are causing or threatening to cause serious injury to the domestic industry that produces “like or directly competitive products.” The determination of like product is important because it directly affects the definition of the domestic industry and therefore the scope of the injury determination. Indeed, in *US-Lamb*, the Appellate Body emphasized that “the first step in determining the scope of the domestic industry is the identification of the products which are ‘like or directly competitive’ with the imported product. Only when those products have been identified is it possible then to identify the ‘producers’ of those products.”

The Appellate Body has stated in the context of analyzing Article III of the GATT 1994 concerning national treatment that like products “are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all ‘directly competitive or substitutable’ products are ‘like.’” The product coverage of the ASG is therefore notably broader in scope than the Anti-Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM), which apply only to “like products.”

Neither any panel nor the Appellate Body has yet analyzed the meaning of “like or directly competitive products” in the ASG; however, the Appellate Body has generally pronounced on the meaning of “like . . . products” as found throughout the GATT. While the Appellate Body has stressed that the meaning of likeness depends on the circumstances of the case and the particular provision where the term is found and cautioned that “no one approach in exercising judgment will be appropriate for all cases,” it has endorsed certain criteria for determining likeness (as used in the various provisions of the GATT) including the product’s end-uses in a given market, consumers’ tastes and habits, the product’s properties, nature and quality, and tariff classifications. Additionally, while assessing the meaning of “directly competitive or substitutable” in the context of Article III of the GATT, the Appellate Body has indicated that an assessment of whether imported and

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18 Appellate Body Report, Korea-Alcoholic Beverages, para 118 (footnotes omitted).
domestic products are “directly competitive” involves an analysis of factors such as the nature of the compared products, the competitive conditions in the relevant market, physical characteristics of the imported and domestic products, common end uses, and tariff classifications. 21

In practice, domestic authorities routinely take the above-mentioned considerations into account when assessing likeness and direct competition.

**Domestic Industry**

Article 4.1(c) of the ASG defines “domestic industry” as follows:

> In determining injury or threat thereof, a “domestic industry” shall be understood to mean the producers as a whole of the like or directly competitive products, operating within the territory of a member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

In *US-Lamb*, the Appellate Body further elaborated on this definition of domestic industry. Agreeing with the panel, it stated that “producers” are those who grow or manufacture an article or bring a thing into existence.22 In addition, it further emphasized that the definition of domestic industry “focuses exclusively on the producers of a very specific group of products. Producers of products that are not ‘like or directly competitive products’ do not, according to the text of the treaty, form part of the domestic industry.”

In *US-Lamb*, the United States had defined domestically produced *lamb meat* and imported *lamb meat* as like products and it had held that the domestic industry producing *lamb meat* included growers and feeders of live lambs. Australia and New Zealand disputed this interpretation of the term “domestic industry” and argued that producers of the *raw materials* and *inputs* to the like product, in this case *lamb meat*, were not producers of the like product itself. The United States argued that the definition was justified by two circumstances: there was a “continuous line of production” from the raw product (live lambs) to the end product (lamb meat), and there was a “substantial coincidence of economic

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interests” between the producers of the raw product and the producers of the end product.24

The Appellate Body rejected the US’ assertion, stating that the focus “must be on the identification of the products, and their ‘like or directly competitive’ relationship, and not on the processes by which products are produced.”25 Because the US had determined that domestic and imported lamb meat was the like product, and it did not hold that live lambs or any other products were like or directly competitive products, the Appellate Body held that the domestic industry could only include producers of lamb meat.26 Consequently, it found that the United States had defined the domestic industry inconsistently with Article 4.1(c) by including producers of live lambs.27

**Serious Injury and Threat of Serious Injury**

Article 4.1(a) provides that “serious injury” shall be understood to mean a “significant overall impairment in the position of a domestic industry.” Article 4.1(b) provides that “threat of serious injury” shall be understood to mean serious injury that is “clearly imminent.” In accordance with the provisions of paragraph 2, “a determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.”

The standard of injury in the ASG is higher than the standard of injury in the ADA or ASCM. The injury standard in the ASG is qualified by the adjective “serious”, as opposed to the adjective “material” found in the ADA and ASCM which underscores the “significant overall impairment” that the domestic industry must be suffering or about to suffer for the standard to be met.28 The Appellate Body has noted that this higher standard is consistent with the object and purpose of the ASG, since the application of safeguard measures does not depend on unfair trade practices such as anti-dumping or countervailing measures.29 Thus, in determining the existence of serious injury, or a threat of serious injury, panels and

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investigating authorities must always be mindful of the very high standard implied by these terms.\textsuperscript{30}

**Serious Injury**

Article 4.2(a) provides that in determining serious injury “the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.”

The Appellate Body has determined that investigation of factors of an “objective and quantifiable nature” requires authorities to make determinations on the basis of “objective evidence.” This in principle is “objective data,” and also implies that the data must be representative of the domestic industry. What would be sufficient in a given case will depend on the particularities of the “domestic industry” at issue.\textsuperscript{31} In *US-Lamb* the Appellate Body held that because the United States had acknowledged that the domestic industry data used to determine injury did not represent a statistically valid sample, the United States had acted inconsistently with the ASG by making a determination regarding the “domestic industry” on the basis of data that was not sufficiently representative of that industry.\textsuperscript{32}

> [T]he competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors."


The Appellate Body has determined that the obligation to evaluate all relevant factors requires “at a minimum,” evaluation of “each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned.”\textsuperscript{33} In addition, domestic authorities must also investigate “other” relevant factors and seek out evidence if necessary.

\textsuperscript{33} Appellate Body Report, *Argentina-Footwear (EC)*, para 136.
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The requirement to evaluate all relevant factors is also informed by Article 4.1(a), which defines serious injury. Because Article 4.1(a) provides that “serious injury” should be understood to mean significant “overall” impairment, the Appellate Body has determined that the overall position of the domestic industry must also be evaluated, in light of all relevant factors having a bearing on a situation of that industry. Therefore, mere evaluation of individual factors is not sufficient to make a finding of serious injury to the domestic industry; rather, such information must be considered in a broader context. Concerning the outcome of any such evaluation, however, the Appellate Body has stated that how factors may or may not demonstrate serious injury will necessarily vary from case to case.

Threat of Serious Injury

The Appellate Body has held that “threat of serious injury” in the ASG sets a lower threshold for the right to apply safeguard measure than “serious injury,” since serious injury is often the realization of a threat of serious injury.

In our view, defining “threat of serious injury” separately from “serious injury” serves the purpose of setting a lower threshold for establishing the right to apply a safeguard measure.


The ASG, unlike the ADA or ASCM, does not provide a list of special factors to consider in an assessment of threat of serious injury. Nevertheless, an assessment should at least include evaluation of the Article 4.2(a) factors and, as required by Article 4.1(b), a determination that serious injury is “clearly imminent” based on facts and not merely on allegation, conjecture or remote possibility.

In US-Lamb the Appellate Body addressed the future-looking orientation of a determination of threat of serious injury and discussed the kind of data that should be taken into account. It noted that data from the most recent past are the most relevant and reliable data for a determination of future injury, but that they cannot be analyzed in isolation and must be considered in light of the data for the entire period under investigation, because the significance of short-term trends may only emerge against the background of longer-term trends.

34 Appellate Body Report, Argentina-Footwear (EC), paras 138–139 (footnotes omitted).
35 Appellate Body Report, Argentina-Footwear (EC), paras 138–139 (footnotes omitted).
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Causation
Following a determination of serious injury or threat of serious injury, safeguard measures still cannot be justified unless it is shown that the serious injury or threat thereof is caused by increased imports.

Article 2.1 provides that safeguard measures may be applied if a “product is being imported . . . in such increased quantities . . . and under such conditions as to cause or threaten to cause” serious injury. Article 4.2(a) specifies certain factors that should be analyzed in an investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry. Article 4.2(b) contains more specific requirements related to causation and provides that if factors other than imports of the product under consideration are causing injury to the domestic industry, the injury cannot be attributed to those imports.

“Under Such Conditions”
The Appellate Body has determined that Article 2.1 informs the causation analysis under Article 4.2. The Article 4.2(a) requirement to take into account “the rate and amount of the increase in imports of the product concerned in absolute and relative terms, [and] the share of the domestic market taken by increased imports” correspond to the Article 2.1 requirement to take account of the increased imports either absolute or relative to domestic production. The requirement in Article 2.1 that increased imports occur “under such conditions” as to cause or threaten to cause serious injury “is a shorthand reference,” according to the Appellate Body, “to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors ’having

If the most recent data is [sic] evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. For instance, although the most recent data may indicate a decline in the domestic industry, that decline may well be a part of the normal cycle of the domestic industry rather than a precursor to clearly imminent serious injury. Likewise, a recent decline in economic performance could simply indicate that the domestic industry is returning to its normal situation after an unusually favourable [sic] period, rather than that the industry is on the verge of a precipitous decline into serious injury.


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a bearing on the situation of [the] industry. Thus, taking these other factors into account is an essential part of the authorities’ causation analysis:

The phrase “under such conditions,” therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards, the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury.


Non-attribution
As indicated by the last sentence of Article 4.2(b), one of the most important steps in a causation analysis involves “non-attribution” of the effects of injury to the domestic industry caused by imports from other sources of injury. Such other sources of injury could include, for example, anti-competitive practices among domestic producers or changes in demand. In order to fulfill this “non-attribution” requirement, the Appellate Body has stated that “competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.”

The Causal Link
The purpose of the non-attribution rule is to enable an investigating authority to determine whether a “causal link” exists between increased imports and serious injury, and, if so, whether the causal link involves a genuine and substantial relationship of cause and effect between these two elements.

The Appellate Body has stated that the term “causal link” in Article 4.2(b) “denotes . . . a relationship of cause and effect such that increased imports contribute to ‘bringing about,’ ‘producing’ or ‘inducing’ the serious injury.” In addition, it has

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made it clear that Article 4.2(b) does not require imports in increased quantities to be the only source of injury for a positive determination to be made.  

The language of Article 4.2(b), as a whole, suggests that ‘the causal link’ between increased imports and serious injury may exist, even though other factors are also contributing, ‘at the same time’, to the situation of the domestic industry.


Article 4.2(b) does not prescribe the use of any particular methods or analytical tools for demonstrating a causal link.  In Argentina-Footwear (EC), the Appellate Body stated that an assessment of the relationship between movements in imports (volume and market share) and movements in injury factors is the central means of causation analysis and determination and that an absence of a coincidence between increases in imports and declines in injury factors creates a strong presumption against the existence of a causal link.  Thus, if imports of a product are increasing at the same time as domestic industry decreases in factors such as productivity, sales, employment, and profits, a finding of causation of injury by increased imports may be warranted.

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43 In US-Wheat Gluten, the Appellate Body found that Article 2.1 “embraces” a two-part causation analysis—the first relating to increased imports specifically and the second to the conditions under which imports are occurring—and that each of the elements are elaborated further in Article 4.2(a). It found that the first part corresponds to the language in Article 4.2(a) requiring that the rate and amount of the increase in imports in absolute and relative terms be taken into account while the second part concerning “such conditions” refers to the remaining factors in Article 4.2(a) concerning the overall state of the domestic industry and the domestic market, as well as other factors having a bearing on the state of the industry. Based on these considerations, it found that “[t]he phrase ‘under such conditions,’ therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards, the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury.” See Appellate Body Report, US-Wheat Gluten, paras 76–78.

44 Appellate Body Report, Argentina-Footwear (EC), paras 144-145

45 See Panel Report, US-Steel Safeguards, paras 10.507-10.516 (upholding a causation determination that employed such an analysis).
“the right to apply a safeguard measure—even where it has been found to exist in a particular case and thus can be exercised [sic]—is not unlimited.”


Even if an investigating authority demonstrates that the elements discussed in the preceding chapter exist, the application of safeguard measures is still limited by other rules in the ASG. This Chapter discusses rules related to the form, scope, and content of safeguard measures. Procedural rules relating to the conduct of a domestic investigation are discussed in Chapter 3 and special rules applicable to developing country members are discussed in Chapter 4.

Non-discrimination and Parallelism

Article 2.2 provides that safeguard measures shall be applied to a product being imported irrespective of its source. In principle, this establishes an obligation of non-discrimination. The scope of this obligation has not been extensively analyzed by the Appellate Body, but the ASG makes it clear that at least one exception is permissible in the case of developing countries. Moreover, as is discussed in the second section of this chapter, the ASG also permits members to engage in other forms of “discrimination” when allocating quotas among WTO members for products subject to a safeguard measure. Open questions under the ASG are whether members are permitted to exclude imports from free trade agreement members and customs union members.

The parallelism requirement is closely related to the Article 2.2 non-discrimination requirement. The parallelism requirement implies that members have an obligation to ensure that the imports included in the determinations made under Articles 2.1 and 4.2 (i.e., the prerequisite determinations) should correspond to the imports

46 The existence of increased imports; unforeseen developments and obligations incurred; and injury to the domestic industry caused by imports of the product concerned.
included in the application of the measure under Article 2.2. While this is not an express requirement found in the ASG or Article XIX of GATT 1994, the Appellate Body derived it from what it called the “parallel” language found in the first and second paragraphs of Article 2 ASG.

1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

2. Safeguard measures shall be applied to a product being imported irrespective of its source. (emphasis added and footnote omitted)

—Article 2 ASG

In a case where a WTO member conducts an investigation under Articles 2.1 and 4.2 and subsequently seeks to exclude some of those examined imports from the application of safeguard measures (for example, because some of the imports are from developing countries), the Appellate Body has held that it is incumbent on the investigating member to establish explicitly that the imports subject to the safeguard measures themselves comply with the requirements of Articles 2.1 and 4.2.

It would be illogical to require an investigating authority to ensure that the ‘causal link’ between increased imports and serious injury not be based on the share of injury attributed to factors other than increased imports while, at the same time, permitting a Member to apply a safeguard measure addressing injury caused by all factors.


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In *US-Line Pipe*, the Appellate Body stated that “establish[ing] explicitly” signifies that a competent authority must provide a “reasoned and adequate explanation” of how the facts support its determination, and that to be explicit, “a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous.” In this case, the Appellate Body held that a footnote in the United States safeguard determination report explaining that it would have reached the same result if it had not excluded imports from free trade area members did not meet that requirement.

In *US-Wheat Gluten*, the United States argued that the exclusion of Canadian imports from the final scope of safeguard measures did not violate the parallelism requirement, since it had made a separate inquiry concerning whether Canada accounted for a substantial share of total imports and had found that imports from Canada did not contribute “importantly” to the serious injury caused by imports. The Appellate Body disagreed and noted that though the United States had examined the importance of imports from Canada separately, it had not made any explicit determination relating to increased imports, *excluding imports from Canada*, i.e., although the safeguard measure was applied to imports from all sources, excluding Canada, it did not “establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.” The Appellate Body noted that because both Articles 2.1 and 2.2 use the identical phrase “product … being imported,” it would be appropriate to ascribe the same meaning to the phrase in each provision; therefore, if certain imports are included in the injury analysis but then excluded from the application of the measure, it would amount to giving the phrase different meanings under the two provisions.

**Safeguard Measures**

Article 5.1 provides that “[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.” Because among other considerations, the non-attribution requirement in

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Article 4.2(b) informs this obligation, safeguard measures can only be used to offset the injury to the domestic industry resulting from increased imports of the product concerned; they cannot be used to offset other injury.55

Definitive Measures

Definitive safeguard measures normally take the form of tariff increases, quantitative restrictions (quotas in the usual sense), or tariff quotas. While quantitative restrictions or quotas set an absolute limit on the amount of imports, tariff quotas permit a set amount of imports at the normal duty rate and impose additional tariffs on all imports over the set amount.

The ASG permits an importing member to impose definitive safeguard measures in any form to the extent necessary and are to be applied to a product being imported irrespective of its source.56 Special rules, however, do exist in the case where a member seeks to impose a quantitative restriction or quota (a tariff quota is not a quota subject to the special rules).

Article 5.1 provides that if a quantitative restriction is used “such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.”

The Appellate Body has established that this provision only establishes an obligation for authorities to provide a clear justification when the quota is set at a level below the average of imports for the last three representative years. It does not create a general obligation for authorities to provide justifications.57

Articles 5.2(a) and (b) contain provisions for the allocation of quotas. Article 5.2(a) provides that if a quota is allocated among supplying countries, “a Member may seek agreement with respect to the allocation of the quota with all other

56 See Article 2.1 (“Safeguard measures shall be applied to a product being imported irrespective of its source”); see also generally Article 10 (prohibiting any emergency measures, including “grey-area” measures that are not in accordance with the ASG and Article XIX GATT 1994).
Members having a substantial interest in the supply of the product concerned.” If such an arrangement is not reasonably practicable, the member shall base the allocations upon proportions of the total quantity or value of imports supplied by members having a substantial interest during a previous representative period. Due account must be taken of any special factors that may have affected or may be affecting the trade in the product. Article 5.2(b) provides that a member may depart from the Article 5.1(a) obligation provided it conducts consultations under the auspices of the Committee on Safeguards and provides a clear demonstration to the Committee that:

“(i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period; (ii) the reasons for the departure from the provisions in subparagraph (a) are justified; and (iii) the conditions of such departure are equitable to all suppliers of the product concerned.”

The Article 5.2(b) exception may not be applied to a case of threat of serious injury, as opposed to serious injury, and may not last longer than four years. 58

Article 5.2(b) excludes quota modulation in the case of threat of serious injury. It is, in our view, the only provision in the Agreement on Safeguards that establishes a difference in the legal effects of “serious injury” and “threat of serious injury”. Under Article 5.2(b), in order for an importing Member to adopt a safeguard measure in the form of a quota to be allocated in a manner departing from the general rule contained in Article 5.2(a), that Member must have determined that there is “serious injury” A Member cannot engage in quota modulations if there is only a “threat of serious injury”. This is an exception that must be respected. But we do not think it appropriate to generalize from such a limited exception to justify a general rule. In any event, this exceptional circumstance is not relevant to the line pipe measure. We find nothing in Article 5.2(b), viewed as part of the context of Article 2.1, that would support a finding that, in this case, the USITC acted inconsistently with the Agreement on Safeguards by making a non-discrete determination in this case.


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Provisional Measures

Article 6 provides that provisional measures may be applied in “critical circumstances where delay would cause damage which it would be difficult to repair” and a member must make a preliminary determination that there is “clear evidence that increased imports have caused or are threatening to cause serious injury.” Provisional measures should take the form of tariff increases, which should be promptly refunded if subsequent investigation does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of the provisional measure shall not exceed 200 days.

Article 12.4 provides that members must notify the Committee on Safeguards before taking provisional measures, and engage in consultations immediately after they are taken.

“Grey Area” Measures

It should be recalled that a major reason for the negotiation and conclusion of the ASG was the proliferation of so-called “grey area” measures. Article 11 now specifically precludes such measures. Article 11.1(b), in particular, provides that a member “shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side.” The footnote to this provision gives examples of similar measures, including export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels, and discretionary export or import licensing schemes. The 11.1(b) prohibition covers actions taken by a single member as well as actions under agreements, arrangements, and understandings entered into by two or more members.

Duration and Review of Safeguard Measures

Article 7 governs the duration and review of safeguard measures. In general, WTO members are only permitted to apply a safeguard measure for as long as necessary, to a maximum of 4 years, unless it is extended pursuant to Article 7 provisions.

A measure may be extended only if the importing member finds that the continuation of the measure is necessary to prevent or remedy serious injury and there is evidence that the industry is adjusting. The maximum total period of application of a safeguard measure (including the period of application of any provisional
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measure, initial application, and any extension) is 8 years for developed country members. As is discussed in chapter 4, developing country members may apply safeguard measures for a longer period. If a measure is extended, it cannot be more restrictive than it was at the end of the initial period.

To facilitate adjustment, Article 7.4 requires members to progressively liberalize safeguard measures that are expected to last longer than 1 year. If the duration of the measure exceeds 3 years, members are required to conduct a review not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A safeguard measure that is extended should continue to be liberalized.

As per Article 7.5, a safeguard measure may not be reapplied to a product for two years or for a period equal to its original period of application, whichever is greater. However, a safeguard measure applied for 180 days or less may be reapplied after 1 year, provided it has not been applied to the same product more than twice in a five-year period. As discussed in chapter 4, a more liberal rule applies to developing country members.

Concessions

Although the ASG permits the application of safeguard measures in the absence of evidence of unfair trade practices, it also establishes a requirement that members offset the effect of such measures through adjustment of concessions or other obligations. Article 8.1 provides that a member “shall endeavour to maintain a substantially equivalent level of concessions and other obligations to those existing under GATT 1994 between it and the exporting members which would be affected by such a measure.” If the consultations required by Article 12.3 before safeguard measures can be imposed do not result in agreement within 30 days, the affected exporting members may suspend the application of substantially equivalent concessions or other obligations. They must do so no later than 90 days after the measure is applied and 30 days from the receipt of the written notice of suspension by the Council for Trade in Goods, assuming the Council does not disapprove. However, the exporting members may not take such suspension measures during the first three years the safeguard measure is in effect if it has been taken as a result of an absolute increase in imports and in conformity with the ASG.
“the Agreement on Safeguards is concerned with the ultimate determination made and reflected in the Member’s report of investigation. There is no provision on how or when the investigation is to be initiated or whether, in a specific Member, the initiation of the investigation should be undertaken by the King, the President or the industry. Nor does the Agreement on Safeguards dictate the manner in which determinations are to be arrived at.”


The ASG, like the ADA and the ASCM, provides rules that must be respected in the course of a domestic investigation. While the rules are much more extensive than those contained in Article XIX of GATT 1994, they are not as comprehensive as those contained in the ADA or ASCM. This can probably be largely seen as a consequence of the fact that the ASG itself (which entered into force on 1 January 1995) marked the first time since the introduction of Article XIX in the GATT 1947 that, the amendment of the multilateral safeguard rules had been subject to successful negotiation.

Article 3.1 provides the basic requirement: “A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994.” This chapter will discuss some of the basic procedural requirements applicable to a domestic safeguards investigation.

Notifications

Article 3.1 contains the general requirement that a safeguard investigation shall include reasonable public notice to all interested parties. It does not provide any more detailed specifications concerning the form or timing of the notification.

Specific information must be provided to the Committee of Safeguards during the course of an investigation, as set forth in Article 12.1:

“A Member shall immediately notify the Committee on Safeguards upon:
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(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.”

Article 12.4 provides that notification to the Committee on Safeguards must also be provided before taking a provisional safeguard measure.

Immediate Notification

In *US-Wheat Gluten*, the Appellate Body discussed the meaning of “immediate” as this term applies to the notification required by Article 12.1. Agreeing with the panel, it considered that the ordinary meaning of the word implies a certain urgency. It also stated that although the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, the degree of urgency or immediacy required must be assessed on a case-by-case basis and depends on the administrative difficulties involved in preparing the notification and also the character of the information. In this regard, it noted that relevant factors may include the complexity of the notification and the need for translation into one of the WTO’s official languages. It also stated that “immediate” notification is “that which allows the Committee on Safeguards, and Members, the fullest possible period to reflect upon and react to an ongoing safeguard investigation.”

Based on this consideration, it disagreed with the United States’ contention that...
immediate notification is satisfied so long as the Committee on Safeguards and WTO members have sufficient time to review that notification. 61 It found that a lapse of 16 days between domestic publication of information concerning the initiation of the investigation and notification of the same information to the Committee on Safeguards was not in compliance with Article 12.1(a)62 and that the US’s notification concerning injury after a period of 26 days, under Article 12.1(b) was not “immediate”63; and that 5 days was sufficiently immediate notification of the decision to take or extend a safeguard procedure under 12.1(c), where “notification was made the day after the decision of the President of the United States was published in the United States Federal Register, and during the course of the fourth working day following the taking of the decision.”64

All Necessary Information

When making a notification concerning injury and taking a decision to apply or extend a safeguard measure, in addition to the general Article 12.1 requirement to provide immediate notification, Article 12.2 also states that a member must provide the Committee on Safeguards with “all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization.”

If the notice is for the extension of a safeguard measure, evidence that the industry concerned is adjusting must also be provided. The Committee on safeguards or the Council for Trade in Goods may request any further information that they consider necessary.

In Korea-Dairy, the Appellate Body held that notification under Article 12.2 must address all the “pertinent” factors listed in Article 12.2 as well as those listed in Article 4.2 that are “required to be evaluated in a safeguards investigation.”65

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62 Appellate Body Report, US-Wheat Gluten, paras 111–112 (footnotes omitted). In Korea-Dairy, the Panel similarly found that a 14-day period between Korea’s initiation of an investigation and notification also violated Article 12.1(a) ASG. Panel Report, Korea-Dairy, para 7.134.
We are aware that the last sentence of Article 12.2 provides that the Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply a safeguard measure. In our view, the request for additional information is meant to enable the Council for Trade in Goods or the Committee on Safeguards to seek information on elements of information not covered by Article 12.2 or Article 4.2, or to elicit further details on “evidence of serious injury.” We note that the listing of elements is not exhaustive as they are cited following the words “including” or “in particular.”

—Appellate Body Report, Korea-Dairy, para 110.

**Consultations**

According to the ASG, investigating members must have consultations with members having a substantial interest in exports of the product concerned at a number of stages of a safeguard investigation.

Article 12.3 provides that a member proposing to apply or extend a safeguard measure must provide adequate opportunity for prior consultations with those members having a substantial interest as exporters of the product concerned. Such prior consultations provide an opportunity for reviewing the information provided to the Committee on Safeguards concerning findings of serious injury or threat thereof and decisions to apply or extend a safeguard measure, exchanging views on the measure, and reaching an understanding on ways to achieve a balance of concessions as required by Article 8.1. In case of imposition of a provisional safeguard measure, in consonance with Article 12.4, consultations must be initiated immediately after the measure is taken.

The goal of the consultation requirement is “to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange of information on issues identified.”

**Sufficient Information**

Concerning the Article 12.3 requirement to provide sufficient information for a meaningful exchange of information, in *US-Wheat Gluten*, the Appellate Body determined that information on a proposed measure must include a precise description of the proposed measure and its proposed date of introduction. It

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found that a United States International Trade Commission Report recommending that “the President allocate separate quantitative restrictions for the European Union, Australia, and ‘all other’ non-excluded countries, taking into account the disproportional growth and impact of imports of wheat gluten from the European Union” did not provide sufficiently precise information concerning the form of the proposed measure because the recommendations did not include specific numerical quota shares for the individual exporting members concerned and because it implied, without providing details, that the individual quota shares could be less favorable to imports from the European Communities. Such disclosures did not allow the European Communities to accurately assess the likely impact of the measure being contemplated, nor to consult adequately on the overall equivalent concessions with the United States.

**Sufficient Time**

Concerning the Article 12.3 requirement to provide sufficient time for a meaningful exchange of information, in *US-Line Pipe*, the Appellate Body stated that information must be received “sufficiently in advance to permit analysis of the measure,” and provide members “an adequate opportunity to consider the likely consequences of the measure before the measure takes effect.” It noted that this was essential in order to ensure that an exporting member is in a position, as required by Article 12.3, to reach an understanding on ways to achieve the objective set out in Article 8.1 of maintaining a substantially equivalent level of concessions and other obligations to those existing under GATT 1994.

The Appellate Body held that the concept of a meaningful exchange implies that the importing member must “enter into consultations in good faith” and “take the time appropriate to give due consideration to any comments received from exporting members before implementing the measure.”

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71 Appellate Body Report, US-Line Pipe, para 110. In the context of the case at hand where Korea had received information about a final decision on a US measure through a press release 18 days before the measure took effect and otherwise learned the effective date of the measure 11 days before it took effect, the Appellate Body found that sufficient time for a meaningful exchange was not provided by the US.
We note that reaching such an “understanding” serves the interests not only of the exporting Members, but also of the importing Member, who will wish to avoid excessive compensatory measures in response to the safeguard action. As we have said, the Agreement on Safeguards permits Members to impose measures against “fair trade.” As a result, Members against whom such measures are imposed are prevented from enjoying the full benefit of trade concessions. For this reason, Article 8.1 of the Agreement on Safeguards provides that “Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.” If no agreement on compensation is reached, Article 8.2 provides that “the affected . . . Members shall be free, not later than 90 days after the measure is applied, to suspend . . . the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure.” Thus, there is an interest on the part of both the exporting Member and the importing Member applying the safeguard measure to engage in “prior consultations” with a view to reaching an understanding on the import of the measure.


We are mindful of the need for Members to act quickly when applying a safeguard measure. A safeguard measure is, as we have stressed, an extraordinary measure that is applied in extraordinary circumstances. As we have said, the amount of time needed for a meaningful exchange must be judged on a case-by-case basis, depending on the prevailing circumstances. In this case, we do not believe it would have been possible, under the circumstances, to have a meaningful exchange within the period following the proclamation of the effective date of the measure, or even during the period following the issuance of the press release.


Publication and Explanation of Determinations

Article 3.1 provides that the competent authorities “shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.” Article 4.2(c), concerning the determination of injury or threat thereof, more specifically provides that the competent authorities “shall publish
promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.”

The Appellate Body has interpreted the Article 3.1 obligation to set forth “findings and reasoned conclusions” in a published report to require reasoned and adequate explanations. In *US-Steel Safeguards*, the Appellate Body made it clear that this requirement applies to all obligations under the ASG and Article XIX GATT 1994. This obligation therefore informs all aspects of a safeguard determination and has been generally interpreted to oblige authorities to make clear and specific demonstrations of findings on such issues. It is often this factor, rather than a deficient conclusion in substance *per se*, which forms the basis for a negative WTO dispute settlement decision.

We explained in *US – Lamb*, in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, that the competent authorities must provide a “reasoned and adequate explanation of how the facts support their determination.” More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the Agreement on Safeguards, we said that the competent authorities must, similarly, provide a “reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports.” Our findings in those cases did not purport to address solely the standard of review that is appropriate for claims arising under Article 4.2 of the Agreement on Safeguards. We see no reason not to apply the same standard generally to the obligations under the Agreement on Safeguards as well as to the obligations in Article XIX of the [sic] GATT 1994.


**Confidentiality**

Article 3.2 provides that any information that is by nature confidential or that is provided on a confidential basis is to be treated as such by the competent authorities upon a showing of cause. Such information shall not be disclosed without permission of the party submitting it, including in the published report setting

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73 Including findings with respect to unforeseen developments, increased imports, serious injury and threat thereof and causation.
forth findings and reasoned conclusions.\textsuperscript{74} Article 3.2 implies a certain amount of discretion to determine whether or not cause has been shown for information to be treated as confidential, since it “does not define the term ‘confidential’ nor does it contain any examples of the type of information that might qualify as ‘by nature confidential’ or ‘information that is submitted on a confidential basis’.\textsuperscript{75} Notably, unlike the ASCM and ADA, it does not require a showing of “good” cause.

The competent authorities may request the parties providing confidential information to furnish nonconfidential summaries thereof or explain why a summary cannot be provided. Article 3.2 provides that if the competent authorities find that a request for confidentiality is not warranted, “if the party concerned is either unwilling to make the information public or to authorize its disclosure in a generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.”

In \textit{US-Wheat Gluten}, the panel addressed a claim concerning the United States’ confidential treatment of certain information. In that case, it was argued that certain aggregate data could not be considered to be confidential within the meaning of Article 3.2 and that, even if they were confidential, they could have been presented as percentages or indexes.\textsuperscript{76} While the panel considered that the United States ideally could have been more “creative” in providing the essence of the confidential information in its published report, it declined to find that the United States had violated Article 3.2: \textsuperscript{77}

\textsuperscript{76} Panel Report, US-Wheat Gluten, para 8.22.
...given the small number of firms comprising the United States domestic industry (and the non-US producers and exporters) in this case; the fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations; the discretion implied in Article 3.2 SA for the investigating authorities to determine whether or not “cause” has been shown for information to be treated as “confidential;” and the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it, we cannot find that the United States has violated its obligations under Articles 2.1 and 4 SA, nor specifically under Article 4.2(c), by not disclosing, in the published report of the USITC, information qualifying under the USITC policy as information “which is by nature confidential or which is provided on a confidential basis,” including aggregate data.


**Other Interested Party Rights**

Article 3.1 provides that a safeguards investigation shall include “public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest.”
“Article 9.1 of the Agreement on Safeguards, under certain circumstances, requires importing Members to exempt developing country Members from the application of safeguard measures. Those developing country Members, accordingly, are intended to enjoy the benefit of continued access to the market of the importing Member without facing the restrictions imposed by the safeguard measure.”

Panel Report, US-Steel Safeguards, para 10.713

The ASG, like the ADA and ASCM, provides for certain special, distinct rights for developing country members. More specifically, it sets forth special rules governing the application of safeguard measures by WTO members to developing country members and the duration of safeguard measures applied by developing country members to other WTO members. These rules are discussed in this chapter.

Application of Safeguard Measures

Article 9.1 provides:

“Safeguard measures shall not be applied against a product originating in a developing country member as long as its share of imports of the product concerned in the importing member does not exceed 3 per cent, provided that the developing country members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.” (footnote omitted)

In *US-Line Pipe*, the Appellate Body considered what it means to “apply” a safeguard measure to a developing country member within the meaning of Article 9.1 and determined that a tariff quota constitutes the application of a safeguard measure even if a duty is never collected.
a duty, such as the supplemental duty imposed by the line pipe measure, does not need actually to be enforced and collected to be ‘applied’ to a product. In our view, duties are ‘applied against a product’ when a Member imposes conditions under which that product can enter that Member’s market—including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are ‘applied’ irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether.


In the same case, the Appellate Body indicated that an investigating member should take “all reasonable steps” to ensure that developing country members with Article 9.1 de minimis levels are excluded from the application of safeguard measures.78

Duration of Safeguard Measures

Article 9.2 provides that a developing country member has the right to extend the period of application of a safeguard measure up to two years beyond the maximum period provided for other WTO members—that is, the maximum for developing countries is 10 years.

Article 9.2 also provides that a developing country member has the right to apply a safeguard measure again to the import of a product which has been subject to such a measure (imposed after to the entry into force of the WTO Agreement), after a period of time equal to half that during which such a measure was previously applied, provided that the period of nonapplication is at least 2 years. Other WTO members may not apply a safeguard measure again for at least 2 years or a period equal to the application of the previously applied safeguard measure, whichever is greater.

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This module outlined the main rules related to the investigation and application of safeguard measures. As will be recalled, there are three “prerequisite determinations,” as we call them, which must be positively made in order for a WTO member to have a right to apply a safeguard measure. In addition, substantive rules governing the application of safeguard measures and procedural rules applicable during a domestic investigation must also be respected for a safeguard measure to be upheld.

This case study, based on the WTO dispute US-Steel Safeguards, examines whether a WTO member can make a determination of increased imports and unforeseen developments. For the sake of simplicity in presenting the issues and facts, this case study presumes that a WTO member initiates the investigation in 2001, the same year as the relevant safeguard determination by the United States in US-Steel Safeguards.

Facts

A WTO member is concerned that steel products are being imported into its territory in increased quantities and that its domestic producers are suffering serious harm as a result of these increased imports. On 22 July 2001, the member decides to initiate a safeguard investigation into two steel products (A and B) for which it has identified two relevant domestic industries. It establishes an investigation period from 1996 to June 2001.

Increased Imports

After requesting and receiving information from interested parties, the member analyzes the import information for the two products under investigation. It compiles annual import data for the years 1996, 1997, 1998, 1999, and 2000. It also compiles information for the 12-month period preceding the initiation of the investigation, from 1 July 2000 to 30 June 2001. The information compiled by the member is presented below.
For Product A, the data show an absolute increase in imports from 581,731 tons in 1996 to 701,303 tons in 1997, 1.2 million tons in 1998, and 1.8 million tons in 1999, before a decline to 1.7 million tons in 2000. Imports were lower in interim 2001 (January–June), at 852,488 tons, than in interim 2000, when they were 985,991 tons.
The ratio of imports to domestic production rose from 11.7% in 1996 to 12.8% in 1997, 19.9% in 1998, and 29.1% in 1999. It then declined to 25.2% in 2000. The ratio was lower in interim 2001, at 24.3%, than in interim 2000, when it was 30.9%.

**Product B**

![Graph of Imports (Tons) and Imports/Production ratio (Percentage)]
The data show an absolute increase in imports from 1.66 million tons in 1996 to 1.81 million tons in 1997 and to 2.34 million tons in 1998. Imports decreased to 2.26 million tons in 1999, then increased to 2.53 million tons in 2000. Imports were 952,000 tons in the interim (January–June) 2001 as compared to 1.34 million tons in January–June 2000.

The ratio of imports to domestic production decreased from 19.2% in 1996 to 18.6% in 1997. The ratio of imports increased to 23.8% in 1998, to 25% in 1999, and to 27.5% in 2000. Imports were 27% of domestic production in July 2000 and decreased to 24.6% in June 2001.

**Unforeseen Developments**


The Asian financial crisis began in 1997 with the depreciation of the Thai baht, which was followed by depreciations of the currencies of the Philippines, Indonesia, Malaysia, and the Republic of Korea. These depreciations generally corresponded to economic declines in those countries and an overall 40% decline in steel consumption from 1997 to 1998 in these countries.

Increased steel exports from the Russian Federation began in the early 1990s following the dissolution of the former Soviet Union. They followed from declining consumption, resulting from the country’s transition to a market economy and also from the breakdown of trade relations with Eastern European countries. Although the dissolution of the former Soviet Union and the resulting economic dislocations in the former Soviet republics predated the conclusion of the Uruguay Round, unanticipated financial difficulties from 1996 to 1998—the Russian financial crisis—led to a sharp increase in steel exports from the former Soviet Union. Steel exports rose nearly 22% from 1996 to 1998 when Russia and other former republics experienced intense financial disruptions and currency fluctuations.

The member believes that the general appreciation in its currency and the unprecedented growth in its economy over the last few years have made its market an increasingly likely destination for steel products displaced on the world market as a result of the Asian and Russian financial crises. It believes that the sizeable increases in imports of products A and B, beginning in 1997 and continuing till 1998 show that the worldwide displacement of steel caused by the Russian and Asian financial crises resulted in increased imports of steel to the member’s market.
Discussion

1. Are products A and B being imported in increased quantities?

Product A

Absolute imports: Inference can be drawn from the decision of the panel in *US-Steel Safeguards*, wherein it determined that the absolute import data for product A could support a determination of increased imports. The panel held that a finding of increased imports was warranted “given that imports more than tripled from 1996 to 1999 (from 581,731 tons to 1.8 million tons) and then declined relatively insignificantly in 2000 (to 1.7 million tons, or by 5.6%) and in interim 2001 (by 13.5%).”  

The panel noted that though the decreases in 2000 and 2001 might not be insignificant in themselves, the analysis of imports must take into account all features of the development of imports over the period examined: In light of the tripling of imports, the decrease over the last 18 months is not significant enough in order to stand in the way of a conclusion that [the product] ‘is being imported in such increased quantities’. It also recalled that imports do not need to be increasing, but only be imported in “increased” quantities.

Relative imports: Reference can be made to the panel ruling in the same case. The panel considered that it did not need to examine whether the United States International Trade Commission (USITC)'s determination of increased imports relative to domestic production was supported by the facts or whether the USITC had provided a reasoned and adequate explanation, because it had found that there was an absolute increase in imports.

Product B

Absolute imports: Similarly, as regards product B, indication can be taken from the panel ruling in *US-Steel Safeguards* wherein the panel decided that for this product, the facts did not support a finding of increased imports. It found that in the context of upward and downward trends between 1997 and interim 2001, the 28.9% decline in imports in 2001 “significantly” changed the picture of increased imports. The panel considered that the USITC acknowledged the declining imports from interim 2000 to interim 2001 but it failed to present a reasoned
and adequate explanation, as required by Article 3.1, of how the facts support a conclusion that the product examined was being imported in such increased quantities.\textsuperscript{84}

The panel seems to have relied on both the fluctuating trends in the earlier parts of the period of investigation and the decline in imports in the interim period to preclude a finding of increased imports. The Appellate Body in its turn considered the panel’s finding was only based on the second consideration, i.e., failure to provide an explanation of the decline in the imports during the interim period:

\textit{In our view, by failing to address the decrease in imports that occurred between interim 2000 and interim 2001, the United States did not—and could not—provide a reasoned and adequate explanation of how the facts supported its finding that imports of [Product B] “increased,” as required by Article 2.1 of the Agreement on Safeguards}.\textsuperscript{85}

Relative Imports: A hint regarding this point can be taken from the Appellate Body’s decision in US-Steel Safeguards (the panel’s ruling on this issue regarding this specific product was challenged by United States). The Appellate Body noted that for this product the imports increased by 9.4 percentage points between 1997 and 2000 and that while they did decrease by 2.4 percentage points between interim 2000 and interim 2001, the ratio of imports in 2001 was still 6.2 percentage points greater than in 1997, and that the ratio of imports relative to production increased by 43.23\% between 1996 and 2000, so that the relatively modest decline in interim 2000 and 2001 would not necessarily detract from a finding of increased imports.\textsuperscript{86} In this regard, however, it noted that the 43.23 percent increase could not, by itself, support an increased imports determination and stated that the fact of the “increase, in itself, does not prove that a product is being imported in ‘such’ increased quantities in the sense of Articles XIX:1(a) and 2.1.”\textsuperscript{87} Ultimately, while the Appellate Body considered that the facts could support USITC’s conclusion that imports had increased relative to production, it found that USITC did not explain why the facts supported this conclusion despite the decline that occurred at the end of the period of investigation.\textsuperscript{88} Therefore, it concluded, the USITC had failed to provide a reasoned and adequate explanation.\textsuperscript{89} The Appellate Body held that

\begin{itemize}
  \item Panel Report, US-Steel Safeguards, para 10.206.
  \item Appellate Body Report, US-Steel Safeguards, para 388.
  \item Appellate Body Report, US-Steel Safeguards, paras 395–396.
  \item Appellate Body Report, US-Steel Safeguards, para 397.
  \item Appellate Body Report, US-Steel Safeguards, para 398.
  \item Appellate Body Report, US-Steel Safeguards, para 399.
\end{itemize}
“The USITC did not explain why, despite the decline that occurred at the end of the period of investigation, the facts nevertheless supported a determination of “increased imports” within the meaning of Article 2.1.”90

2. Based on the information the member has before it, what kind of developments could the member identify as unforeseen or unexpected at the time of the relevant tariff negotiation?

Reliance can be placed on the ruling in *US-Steel Safeguards*, wherein the panel determined that the relevant tariff negotiation was when the Uruguay Round ended.91 It accepted that the depreciation of Asian currencies in 1997 and 1998 and its effects on the world steel market were unforeseen developments. As the crisis began in 1997, it could not have been foreseen by the US negotiators in 1994, when the Uruguay Round ended.92

In the same case, the Panel also accepted that financial disruptions and currency fluctuations between 1996 and 1999 linked to the USSR dissolution which occurred before the Uruguay Round could also have been unforeseen at the time of conclusion of the Uruguay Round.93 In this regard, the Panel considered that unforeseen developments could evolve from well-known prior facts.94

Whether the appreciation of a Member’s currency and strength of its economy can be accepted as unforeseen developments as such is unclear. In *US-Steel Safeguards*, the US argued that it had identified these two factors, in addition to the Asian and Russian Financial crises, as well as the confluence of all the events, as unforeseen developments. In analyzing the USITC report, however, the Panel determined that the USITC had not identified those developments as unforeseen developments as such; rather, it had referred to these factors in relation to other unforeseen developments, which together had resulted in increased imports causing or threatening to cause injury.95

The panel also however accepted that financial disruptions and currency fluctuations between 1996 and 1999 linked to the dissolution of the USSR, which

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93 Panel Report, US-Steel Safeguards, para 10.84.
95 See, e.g., Panel Report, US-Steel Safeguards, paras 1092, 10.93 and 10.94.
occurred before the Uruguay Round, could also have been unforeseen at the conclusion of the Uruguay Round: “an unforeseen development may evolve from well-known prior facts.”

The panel held that Article XIX does not preclude the confluence of a number of developments as “unforeseen developments”:

“It is for each member to demonstrate that a confluence of circumstances that it considers were unforeseen at the time it concluded its tariff negotiations resulted in increased imports causing serious injury.”

The United States also argued that the appreciation of its currency and the strength of its economy, though not separate unforeseen factors were part of an unforeseen confluence of developments. The panel did not address whether these could constitute unforeseen developments as such because it considered that the USITC had not identified those developments as unforeseen developments as such; rather, it had referred to these factors in relation to other unforeseen developments, which together had resulted in increased imports causing or threatening to cause injury.

3. Is identification of financial crises that occurred after the conclusion of the Uruguay Round sufficient to demonstrate that the developments were unforeseen?

If a member does not affirmatively identify developments (e.g. Asian and Russian financial crises and/or strength of its market and/or currency appreciation) that it claims were unforeseen and adequately explain why they were unforeseen, its determination will not be upheld. Neither the panel nor the Appellate Body will infer unforeseability from general statements or information in the report.

In *US-Steel Safeguards*, the panel found that the USITC report had both identified and explained why the Asian financial crisis was not foreseen:

As late as the fall of 1997, economists projected continued growth at similarly impressive rates for these emerging markets. Despite this period of intense growth and generally optimistic predictions, the

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96 Panel Report, US-Steel Safeguards, para 10.84.
98 See, e.g., Panel Report, US-Steel Safeguards, paras 1092, 10.93 and 10.94.
“Asian Financial Crisis” began with the depreciation of the Thai baht in mid-1997.\textsuperscript{99}

While the panel found that the USITC report had similarly identified the Russian financial crisis as an unforeseen development distinguishable from the increased exports resulting from the dissolution of the USSR, it did not find that the USITC report explained why the crisis was not foreseen.\textsuperscript{100} Therefore, for the purposes of its examination, it only assumed \textit{arguendo} that the Russian Financial Crisis was an unforeseen development.\textsuperscript{101}

4. Assuming the member is able to demonstrate, through a reasoned and adequate explanation, that the confluence of the Asian and Russian financial crises coupled with the appreciation of the its currency and growth of its market were “unforeseen developments,” what kind of information should it provide to demonstrate that the unforeseen developments resulted in increased imports?

The information which WTO Member has currently compiled probably would not be sufficient to demonstrate that unforeseen developments resulted in increased imports of the products concerned. Inference can be drawn from the \textit{US-Steel Safeguards} case, wherein the panel held that general statements linking displacement of steel worldwide to increased imports into the United States as a result of favorable exchange rates were not sufficient. Instead, it considered that the United States had to “provide . . . data to support its general assertion that the confluence of unforeseen developments resulted in the specific increased imports at issue in this dispute.”\textsuperscript{102}

Ideally, the member should devote a specific part of its report to identifying developments and explaining why they were not foreseen. It should also provide as much specific evidence as possible to show how and why unforeseen developments, identified generally, resulted in the specific increased imports it alleges. For example, in \textit{US–Steel Safeguards} the United States might have addressed how the general displacement of steel on the world market caused by unforeseen developments resulted in increased imports of the products under consideration (in the case study product A or product B) into its territory. \textit{US-Steel\textsuperscript{99} Panel Report, US-Steel Safeguards, para 10.79.\textsuperscript{100} See Panel Report, US-Steel Safeguards, para 10.84.\textsuperscript{101} Panel Report, US-Steel Safeguards, para 10.85.\textsuperscript{102} See, e.g., Panel Report, US-Steel Safeguards, paras 10.125–10.126.}
The Agreement on Safeguards

Safeguards underlines the importance of dedicating a portion of the report to this discussion. There, the United States argued that parts of its report containing footnote references to tables that showed imports by country and product for the entire investigation period demonstrated that unforeseen developments resulted in increased imports of specific products. While the panel considered that the “tables contained data that could have been used to explain how unforeseen developments resulted in increased imports that caused injury,” it determined that “the competent authority did no such thing.” The panel added that “the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments or it deals generally with imports without specifying from where those imports came.” This determination was upheld by the Appellate Body on appeal. Thus, US–Steel Safeguards shows that the tribunals will not read an explanation into the report where none has been provided, even if supporting data have been provided.

5. Since the Russian Federation is not a member of the WTO, a member does not have a tariff concession with Russia. Does this affect the ability of the member concerned to take Russian imports into account?

Recall that Article XIX, paragraph 1(a) provides, inter alia, that increased imports causing injury must occur “as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions.” If the imports originate from a non-WTO member, then arguably the injury is not a result of the effect of obligations incurred, in as much as there can be no relevant tariff negotiation.

The panel’s discussion of this issue in US-Steel Safeguards is inconclusive. The United States seemed to take the position that unforeseen events emanating from the Russian Federation were a cause of increased imports from exporters worldwide, but not necessarily from the Russian Federation. The panel found that this hypothesis could be argued but that the United States had not offered a “reasoned and adequate explanation” for it. Therefore, it declined to address the issue.

Further Reading


Appellate Body Reports


Panel Reports


The Agreement on Safeguards (ASG) Powerpoint

The Agreement on Safeguards (ASG)

Module 3 on Trade Remedies

Overview of presentation

- Introduction
- Increased Imports
- Unforeseen Developments and Obligations Incurred
- Injury
- Application of Safeguard Measures
- Domestic Procedures
- Developing Country Members
Introduction

- History
- Overview of ASG
- Article XIX and the ASG
- The Extraordinary Nature of Safeguard Measures
- Reasoned and Adequate Explanations
- The Prerequisite Determinations

No unfair trade

Compare ADA and ASCM

Need for a safety valve

[S]afeguard measures are extraordinary remedies to be taken only in emergency situations. Furthermore, they are remedies that are imposed in the form of import restrictions in the absence of any allegation of an unfair trade practice. In this, safeguard measures differ from, for example, anti-dumping duties and countervailing duties to counter subsidies, which are both measures taken in response to unfair trade practices. If the conditions for their imposition are fulfilled, safeguard measures may thus be imposed on the “fair trade” of other WTO Members and, by restricting their imports, will prevent those WTO Members from enjoying the full benefit of trade concessions under the WTO Agreement.

—Appellate Body, US-Line Pipe, paragraph 80
Introduction

History

Art. XIX GATT 1947

- Paragraph 1 contains main substantive rules
- Paragraphs 2 and 3 contain provisions related to notice and consultation, the application of provisional and final measures, and suspension provisions for affected contracting parties
- Intended to curb use of grey area measures such as voluntary export restraints and orderly marketing arrangements
- Problems/reasons why countries used

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

—Article XIX, paragraph 1(a) GATT 1947

ASG negotiated in Uruguay Round
- Article XIX carried over to GATT 1994
- Objectives of ASG
  - Strengthen GATT 1994;
  - Clarify Article XIX;
  - Control over safeguards and eliminate measures outside of control; in particular, no more grey area measures; and
  - Enhance competition.
Overview of ASG

- **Article 1**
  - Introduces the general concept that ASG establishes rules for the application of safeguard measures as provided for in Article XIX of GATT 1994.

- **Article 2**
  - Sets out general conditions for the application of safeguard measures.

- **Article 3**
  - Sets out certain rules governing the domestic investigation, including publication, interested party rights, and confidentiality provisions.

- **Article 4**
  - Provides rules for the determination of injury and defines important concepts such as serious injury, threat of serious injury and the domestic industry.

- **Article 5**
  - Contains important rules governing the application of safeguard measures, including the principle that safeguard measures should only be applied “to the extent necessary.”

- **Article 6**
  - Sets out rules for the application of provisional safeguard measures.

- **Article 7**
  - Contains rules related to the duration of safeguard measures and the review of safeguard measures.

- **Article 8**
  - Provides rules concerning maintenance of concessions and other obligations and relating to countermeasures by affected members.

- **Article 9**
  - Sets forth developing country Member rules.

- **Article 10**
  - Provided rules applicable to safeguard measures imposed under GATT 1947 when WTO agreement (and consequently ASG) entered into force. No longer applies. Provisions expired.
The Agreement on Safeguards (ASG) Powerpoint

Introduction

Overview of ASG

- **Article 11**
  - Contains provisions concerning prohibited measures, including gray area measures.

- **Article 12**
  - Sets out certain notification and consultation requirements which WTO members must respect when imposing safeguard measures.

- **Article 13**
  - Establishes multilateral surveillance over implementation by setting up a Committee on Safeguards under the authority of the Council for Trade in Goods.

- **Article 14**
  - Provides that the Dispute Settlement Understanding applies.

---

Introduction

Article XIX and the ASG

Appellate Body established early on that Article XIX GATT 1994 and ASG must be respected

Most important for *unforeseen circumstances requirement*

We see nothing in the language of either Article 1 or Article 11.1(a) of the Agreement on Safeguards that suggests an intention by the Uruguay Round negotiators to subsume the requirements of Article XIX of the GATT 1994 within the Agreement on Safeguards and thus to render those requirements no longer applicable.

The Agreement on Safeguards (ASG) Powerpoint

Introduction

The extraordinary nature of safeguard measures

[S]afeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, “emergency actions.” … Article XIX is clearly, and in every way, an extraordinary remedy.

And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.

—Appellate Body, Argentina-Footwear (EC), paragraphs 93–94 (emphasis added)

Reasoned and adequate explanations

Article 3.1 ASG:

The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

Appellate Body: Must provide reasoned and adequate explanation

Informs all obligations under ASG

Often reason not to uphold domestic decision

We explained in US–Lamb, in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, that the competent authorities must provide a “reasoned and adequate explanation of how the facts support their determination.” More recently, in US–Line Pipe, in the context of a claim under Article 4.2(b) of the Agreement on Safeguards, we said that the competent authorities must, similarly, provide a “reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports.” Our findings in those cases did not purport to address solely the standard of review that is appropriate for claims arising under Article 4.2 of the Agreement on Safeguards. We see no reason not to apply the same standard generally to the obligations under the Agreement on Safeguards as well as to the obligations in Article XIX of the GATT 1994.

—Appellate Body, US-Steel Safeguards, paragraph 276

Due to the “extraordinary nature” of safeguard measures, the Appellate Body interprets ASG and Article XIX strictly

To date, no safeguard measure challenged has been upheld by the Appellate Body

This result can partly be attributed to the strict standards applied by the Appellate Body
The Agreement on Safeguards (ASG) Powerpoint

Introduction

The prerequisite determinations

Three prerequisite determinations necessary to justify application of safeguards

- A product is being imported in such increased quantities and under such conditions;
- As a result of unforeseen developments and the effect of obligations incurred;
- So as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

Under Article 2.1 of the Agreement on Safeguards, safeguard measures can be justified “only” when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. It is “only” if these prerequisites set forth in Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards are shown to exist that the right to apply a safeguard measure arises.

—Appellate Body, US-Steel Safeguards, paragraph 331

Increased imports

- Introduction
- Such Conditions
- Such Increased Quantities
The Agreement on Safeguards (ASG) Powerpoint

Increased imports

Introduction

Two conditions:
- Imports in "such increased quantities"
- Imports "under such conditions"

A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

—Article 2.1 ASG (emphasis added)

Increased imports

Under such conditions

Not a separate requirement

- Panels in Korea - Dairy, Argentina – Footwear (EC) and US - Wheat Gluten held that the phrase “under such conditions” in Article 2.1 does not constitute a separate analytical requirement in a safeguards investigation.
- In US - Wheat Gluten, expressing agreement with the Panel, the Appellate Body determined that the phrase “under such conditions” refers to the analysis to be performed under Article 4.2.
Increased imports

<table>
<thead>
<tr>
<th>Such increased quantities</th>
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<tr>
<td>Imports May Have Increased in Absolute Terms or Relative to Domestic Production</td>
</tr>
<tr>
<td>- Article 2.1: imports in such increased quantities may be <em>absolute</em> or <em>relative to domestic production</em>;</td>
</tr>
<tr>
<td>- Requires an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production.</td>
</tr>
<tr>
<td>Thus, to determine whether imports have increased in “such quantities” for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production.</td>
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<td>—Panel, <em>Argentina-Footwear (EC)</em>, paragraph 91</td>
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<th>Such increased quantities</th>
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<tr>
<td>Must have been <em>recent enough, sudden enough, sharp enough, and significant enough</em>, both quantitatively and qualitatively, as to cause or threaten to cause “serious injury” (Appellate Body, <em>Argentina-Footwear (EC)</em>);</td>
</tr>
<tr>
<td>- Imports do not have to be increasing at the time of the determination or end of investigation period (Appellate Body, <em>US-Steel Safeguards</em>);</td>
</tr>
<tr>
<td>Must examine trends over time to properly assess significance of recent imports;</td>
</tr>
<tr>
<td>Endpoint to endpoint analysis insufficient.</td>
</tr>
</tbody>
</table>
Unforeseen developments and obligations incurred

- Introduction
- The Effect of Obligations Incurred
- Unforeseen Developments

Introduction

Two concepts:
- Unforeseen developments
- Obligations incurred

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (Emphasis added)

—Article XIX, paragraph 1(a) GATT 1994
### Unforeseen developments and obligations incurred

#### The effect of obligations incurred

With respect to the phrase “of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .,” we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member’s Schedule is subject to the obligations contained in Article II of the GATT 1994.

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#### Unforeseen developments

- **Must have been unexpected**

  [T]he ordinary meaning of the phrase “as a result of unforeseen developments” requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been “unexpected.”

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The Agreement on Safeguards (ASG) Powerpoint

Unforeseen developments and obligations incurred

Unforeseen developments

- Must have **resulted** in the increased imports of **each** product concerned

[When an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that "unforeseen developments" resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the "unforeseen developments" at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of "unforeseen developments" must be performed for each product subject to a safeguard measure.]

—Appellate Body, US-Steel Safeguards, paragraph 319

Unforeseen developments and obligations incurred

Unforeseen developments

- Must demonstrate unforeseen developments
- Must provide reasoned conclusions
- Disjoined references throughout report do not satisfy the obligation

Article 3.1 of the Agreement on Safeguards requires that the competent authority set out "reasoned conclusions" on all "pertinent issues of fact and law." One of those "issues of law" is the requirement to demonstrate the existence of "unforeseen developments" that have resulted in increased imports causing serious injury. In our view, therefore, it was for the USITC to provide a "reasoned conclusion" on "unforeseen developments." A "reasoned conclusion" is not one where the conclusion does not even refer to the facts that may support that conclusion. As the United States itself acknowledges, "Article 3.1 thus assigns the competent authorities—not the panel—the obligation to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." A competent authority has an obligation under Article 3.1 to provide reasoned conclusions; it is not for panels to find support for such conclusions by cobbling together disjointed references scattered throughout a competent authority’s report.

—Appellate Body, US-Steel Safeguards, paragraph 326 (footnote omitted)


Introduction

- Article 2.1: Introduces the general concept that safeguard measures may only be applied where it has been determined that the product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products. Conceptually, an injury determination for safeguards is similar to that for dumping or subsidization.

- Injury determination involves four interrelated and sometimes overlapping steps:
  - Determination of the Like or Directly Competitive Product,
  - Determination of the Domestic Industry,
  - Determination of Serious Injury or Threat thereof, and
  - Determination of Injury Caused by Increased Imports.
Injury

Like product

- Important for defining domestic industry
- Like OR Directly Competitive Products

Domestic industry

2 Elements:
- Producers
  - Those who grow or manufacture an article;
  - Those who bring a thing into existence.
- Particular products which must be produced by domestic producers
  - Like or directly competitive products;
  - Definition focuses exclusively on the producers of a very specific group of products;
  - Producers of products that are not “like or directly competitive products” do not, according to the text of the treaty, form part of the domestic industry.

Appellate Body, US-Lamb

"In determining injury or threat thereof, a “domestic industry” shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products."

—Article 4.1(c)
###基本因素

在决定增加进口是否造成或即将造成严重伤害时，主管当局应当评估所有相关因素的客观和可量化性质，特别是进口产品增加的率和数量在绝对和相对意义上，增加进口在市场份额中的占比，以及销售、生产、生产力、产能利用率、利润和损失，以及就业的变化。

——Article 4.2(a)

- **严重伤害**：对国内行业“总体显著损害”（Article 4.1(a)）
- **严重伤害威胁**：严重的伤害显然是迫在眉睫的；必须基于事实，而不能仅仅基于指控、推测或遥远的可能性（Article 4.1(b)）

###严重的伤害和严重伤害威胁

- **严重的伤害和严重伤害威胁**的更高标准，高于ADA和ASCM伤害（上诉机关，US-Lamb），必须基于**客观数据**代表国内行业的整体状态，必须评估所有4.2(a)因素和其他所有相关因素，并评估整体国内行业的状态。
Serious injury and threat of serious injury

- Threat of serious injury: special considerations
  - Evaluate 4.2(a) factors;
  - Data from most recent past, in principle, most relevant, but must analyze in light of long term data in order to assess significance (Appellate Body, US-Lamb);

Causation

Main goal: To determine whether there is a “causal link” between the increased imports concerned and injury to the domestic industry which involves a “genuine and substantial” relationship of cause and effect.

The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

—Article 4.2 (b)
Caution

Two steps

- **Nonattribution**: distinguishing effects of injury to the domestic industry caused by the increased imports under consideration from other sources of injury; and

- **Assessment of injury**: Ascertaining whether there is injury caused by increased imports; that is, whether there is a causal link between the increased imports concerned and injury to the domestic industry that involves a genuine and substantial relationship of cause and effect.

Increased imports do not have to be the sole cause of injury.

Relationship between import levels and changes to relevant injury factors is the central means of analysis of a causation determination (Appellate Body, *Argentina-Footwear* (EC)).

Must be “genuine and substantial” relationship of cause and effect.

[The term “the causal link” denotes, in our view, a relationship of cause and effect such that increased imports contribute to “bringing about,” “producing” or “inducing” the serious injury.

Causation

- Must assess effects of other causes,
- Must take account of all factors known to exist,
- Do not necessarily have to assess cumulative effects of other causes (Appellate Body, *US-Steel Safeguards*).

Application of safeguard measures

- Introduction
- Only to the Extent Necessary
- Form of Measures
- Provisional Measures
- Parallelism
- Duration and Review
- Concessions
Introduction

- The right to apply a safeguard measure is defined with respect to the basic factors discussed above:
  - imports in “such increased quantities,”
  - unforeseen developments and obligations incurred, and
  - injury to the domestic industry caused by imports of the product concerned.
- This section discusses substantive rules related to the application of safeguard measures.

Introduction

- Members may take or seek emergency action on imports of particular products only if such action conforms to Article XIX GATT 1994 and the provisions of that Article applied in accordance with the ASG.
- ASG prohibits grey area measures (Article 11) and generally requires safeguard measures to be applied on a nondiscriminatory basis (Article 2.2).
- Other important substantive rules related to the application of safeguard measures.
Application of safeguard measures

Only to the extent necessary

- **Article 5.1**: A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.
- Only to offset injury caused by increased imports and not other injury (Appellate Body, *US-Line Pipe*). 

Form of measures

- In principle, any form so long as applied irrespective of source; but
- If a Member seeks to impose a **quantitative restriction**, Article 5.1 contains special rules:
  - Article 5.1: “such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.”
  - No general obligation for authorities to provide justifications (Appellate Body, *Korea-Dairy*).
Application of safeguard measures

Form of measures

- Articles 5.2(a) and (b): Rules for allocation of quotas
  - May seek agreement;
  - If not, based on recent representative data concerning total quantity or value of imports;
  - May depart from above rules in some circumstances; consultations must be conducted under auspices of Committee on Safeguards;
  - Exception may not be applied to a case of threat of serious injury;
  - Duration cannot be longer than 4 years.

Provisional measures

- May be applied in “critical circumstances where delay would cause damage which it would be difficult to repair” (Article 6);
- Must make a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury;
- Must not exceed 200 days;
- Should take the form of tariff increases to be promptly refunded if the subsequent investigation does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry.
The Agreement on Safeguards (ASG) Powerpoint

Application of safeguard measures

Parallelism

Requirement that the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure under Article 2.2

Appellate Body derived this requirement from the “parallel” language found in the first and second paragraphs of Article 2.

Article 2.1
- A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

Article 2.2
- Safeguard measures shall be applied to a product being imported irrespective of its source (emphasis added).

Application of safeguard measures

Duration and review

- Duration:
  - Initial application 4 years or less and can be extended;
  - No longer than 8 years (with special rules for developing country Members);
  - If duration more than 1 year, must be progressively liberalized.
The Agreement on Safeguards (ASG) Powerpoint

Application of safeguard measures

### Duration and review

- **Review**
  - If duration greater than 3 years, required to review not later than mid-term of measure and, if appropriate:
    - Withdraw; or
    - Increase pace of liberalization.
  - If extended beyond initial maximum 4-year period, investigating authority must determine that:
    - Measure continues to be necessary to prevent or remedy serious injury; and
    - There is evidence that industry is adjusting.

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Application of safeguard measures

### Duration and review

- **Measures after expiration**
  - May not be applied again for 2 years or for a period equal to the duration of the previously applied safeguard, whichever is greater (with special rules for developing country Members);
  - Measure lasting 180 days or less and not applied more than twice in a 5-year period can be applied again after 1 year.
### Application of safeguard measures

#### Concessions

- Preference for Members applying safeguards to offset adverse effects;
- **Article 8.1**: Member imposing safeguard measure “shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure.”

#### Concessions

- **Unilateral measures by affected Members:**
  - If no agreement is reached within 30 days in the consultations, then the affected exporting Members may suspend the application of substantially equivalent concessions or other obligations; **BUT**
  - If the safeguard measure has been taken as a result of an absolute increase in imports and it conforms to the provisions of ASG, a Member may not take such suspension measures during the **first 3 years** that the safeguard measure is in effect.
### Domestic procedures

- Introduction
- Notifications
- Consultations
- Publication and Explanation of Determinations
- Confidentiality
- Other Interested Party Rights

#### Introduction

**Article 3.1 basic requirement**

A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994.
Notifications

- Article 3.1: Reasonable public notice to all interested parties
- Article 12.1: Member must immediately notify the Committee on Safeguards upon:
  - initiating an investigatory process relating to serious injury or threat thereof and the reasons for it,
  - making a finding of serious injury or threat thereof caused by increased imports, and
  - taking a decision to apply or extend a safeguard measure.

Notifications

Must immediately notify all pertinent information related to Article 12.1(b) and Article 12.1(c):

Article 12.2 requires all information listed in Article 12.2 and all Article 4.2 information (Appellate Body, Korea-Dairy).

In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

—Article 12.2
Consultations

- **Article 12.3:** A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*:
  - reviewing the information provided to the Committee on Safeguards concerning findings of serious injury or threat thereof and decisions to apply or extend a safeguard measure,
  - exchanging views on the measure, and
  - reaching an understanding on ways to achieve a balance of concessions as set out in paragraph 1 of Article 8.

Consultations

- If a Member imposes a provisional safeguard measure, Article 12.4 provides that consultations must be initiated immediately after the measure is taken.
- A Member proposing to apply a safeguard measure must provide exporting Members with *sufficient information* and *time* to allow for the possibility, through consultations, for a *meaningful exchange of information* (Appellate Body, *US-Wheat Gluten*).
Domestic procedures

Publication and explanation of determinations

- **Article 3.1:** Competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.
- **Article 4.2(c):** Competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined (concerning the determination of injury or threat thereof).
- **Reasoned conclusions:** Authorities must provide reasoned and adequate explanations; applies throughout ASG.
- **Public explanations:** To make “public” means “to make generally available through an appropriate medium” (Panel, Chile-Agricultural Products).

Confidentiality

- **Article 3.2:**
  - Any information which is
  - by nature confidential, or
  - which is provided on a confidential basis;
  - Shall be treated as such by the competent authorities upon a showing of cause.
- Investigating authorities may request nonconfidential summaries.
### Confidentiality

- **Right to disregard information**
  - **IF** two circumstances are present:
    - If the competent authorities find that a request for confidentiality is not warranted; and
    - If the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form;
  - **THEN**, the authorities may disregard such information
  - **UNLESS** it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

### Other interested party rights

- **Article 3.1:** A safeguard investigation shall include "public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest.”
Developing country members

- Application of Safeguard Measures
- Duration of Safeguard Measures

Article 9.1: Safeguard measures shall not be applied against a product originating in a developing country Member as long as:

- Its share of imports of the product concerned in the importing Member does not exceed 3%; and
- Developing country Members with less than 3% import share collectively account for not more than 9% of total imports of the product concerned.

Tariff quota constitutes application of a measure even if a duty is never applied (Appellate Body, *US-Line Pipe*).

Member must take “all reasonable steps” to ensure that *de minimis* imports are excluded (Appellate Body, *US-Line Pipe*).
Developing country members

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<th>Duration of safeguard measures</th>
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<tr>
<td>- Maximum duration = 10 years (Article 9.2).</td>
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<tr>
<td>- May reapply after 2 years or period equal to half the duration of the previous measure, whichever is greater (Article 9.2).</td>
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Members,

Having in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;

Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;

Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and

Recognizing further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for;

Hereby agree as follows:

**Article 1: General Provision**

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

**Article 2: Conditions**

1. A Member\(^1\) may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below,

\(^1\) A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.
that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

**Article 3: Investigation**

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.
Article 4: Determination of Serious Injury or Threat Thereof

1. For the purposes of this Agreement:

   (a) “serious injury” shall be understood to mean a significant overall impairment in the position of a domestic industry;

   (b) “threat of serious injury” shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and

   (c) in determining injury or threat thereof, a “domestic industry” shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

   (b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.
(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

Article 5: Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of
Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

Article 6: Provisional Safeguard Measures

In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.

Article 7: Duration and Review of Safeguard Measures

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.

3. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of
application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

6. Notwithstanding the provisions of paragraph 5, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:

(a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and

(b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

**Article 8: Level of Concessions and Other Obligations**

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the
application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

**Article 9: Developing Country Members**

1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.2

2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

**Article 10: Pre-existing Article XIX Measures**

Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied.

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2 A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.
The Agreement on Safeguards

or five years after the date of entry into force of the WTO Agreement, whichever comes later.

Article 11: Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.⁵ ⁴ These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

2. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject

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³ An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

⁴ Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.
to not more than one specific measure per importing Member,\(^5\) the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

**Article 12: Notification and Consultation**

1. A Member shall immediately notify the Committee on Safeguards upon:

   (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

   (b) making a finding of serious injury or threat thereof caused by increased imports; and

   (c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

\(^5\) The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.
3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.

5. The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7. Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.

8. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.

9. Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 3 of Article 11.

10. All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

11. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest.
or would prejudice the legitimate commercial interests of particular enterprises, public or private.

**Article 13: Surveillance**

1. A Committee on Safeguards is hereby established, under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

   (a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

   (b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;

   (c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;

   (d) to examine measures covered by Article 10 and paragraph 1 of Article 11, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;

   (e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are “substantially equivalent,” and report as appropriate to the Council for Trade in Goods;

   (f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and

   (g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

2. To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.
**Article 14: Dispute Settlement**

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement.

**ANNEX: Exception Referred to in Paragraph 2 of Article 11**

<table>
<thead>
<tr>
<th>Members concerned</th>
<th>Product</th>
<th>Termination</th>
</tr>
</thead>
<tbody>
<tr>
<td>EC/Japan</td>
<td>Passenger cars, off road vehicles, light commercial vehicles, light trucks (up to 5 tonnes), and the same vehicles in wholly knocked-down form (CKD sets).</td>
<td>31 December 1999</td>
</tr>
</tbody>
</table>
Trade Remedies—A Tool Kit

The modules in this tool kit concern the World Trade Organization’s Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards. The tool kit provides a very comprehensive insight to the rules enshrined in these agreements, as applied in practice, with special emphasis on the dispute settlement cases of interest to the Greater Mekong Subregion. The aim is to equip readers with the basic knowledge and understanding necessary to grasp and analyze the complex issues invoked in applying these laws. The tool kit offers valuable guidance to readers who desires to explore trade laws.

About the Asian Development Bank

ADB’s vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries substantially reduce poverty and improve the quality of life of their people. Despite the region’s many successes, it remains home to two-thirds of the world’s poor: 1.8 billion people who live on less than $2 a day, with 903 million struggling on less than $1.25 a day. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

Based in Manila, ADB is owned by 67 members, including 48 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.