

CHAPTER 11

Response to unfair trade practices: rules on the use of countervailing and anti-dumping duties

Summary

The GATT rules deal with two types of “unfair” trade practices which distort conditions of competition. First, the competition may be unfair if the exported goods benefit from subsidies. Second, the conditions of competition may be distorted if the exported goods are dumped in foreign markets.

In common parlance, it is usual to designate all low-cost imports as dumped imports. The Agreement on Anti-dumping Practices (ADP), however, lays down strict criteria for determining when “a product is to be considered as being dumped”. In general, a product is considered dumped if the export price is less than the price charged for the like product in the exporting country.

The Agreements on Anti-dumping Practices and on Subsidies and Countervailing Measures (SCM) authorize countries to levy compensatory duties on imports of products that are benefiting from unfair trade practices. However, an importing country can levy countervailing duties on subsidized imports and anti-dumping duties on dumped imports only if it is established, on the basis of investigations carried out by it, that such imports are causing “material injury” to a domestic industry. Investigations for the imposition of such duties should ordinarily be initiated on the basis of a petition made by or on behalf of an industry, alleging that imports are causing it injury.

The two Agreements lay down similar criteria for determining injury. The procedures for carrying out investigations for the levy of anti-dumping and countervailing duties are likewise similar.

As noted in chapter 9, the rules permit countries to take safeguard actions restricting imports for temporary periods when, as a result of a sudden and sharp increase in imports, serious injury is caused to the domestic industry of the importing country. The increased imports covered by these particular rules are not attributable to unfair trade practices by foreign suppliers.

However, the GATT rules acknowledge that the rise in imports may indeed be due to the adoption of unfair trade practices by foreign suppliers. The rules therefore lay down the basis on which governments may levy compensatory duties on imports of products benefiting from such unfair practices. They deal with two forms of unfair trade practices which distort conditions of competition. First, the competition may become unfair if the exported goods benefit from specific subsidies. Second, the conditions of competition may be distorted if the producer dumps its goods in foreign markets.

The basic provisions of GATT 1994 on the use of subsidies have been elaborated by the Agreement on SCM. As noted earlier, the basic aim of these provisions is either to prohibit or to restrain the use of subsidies that cause adverse effects to the interests of other Members. However, where the use of permitted subsidies results in material injury to a domestic industry in an importing Member, the rules permit that importing Member to take remedial measures which could take the form of countervailing duties on subsidized imports. Likewise the Agreement on Anti-dumping Practices (full title: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994), which elaborates the basic GATT rules on dumping, authorizes Members to levy anti-dumping duties on dumped imports.

In general, a product is considered dumped if the export price is less than the price charged for the like product in the exporting country. Broadly speaking, a producing enterprise is able to charge higher prices on sales in the domestic market if, as a result of a high level of protection, foreign competition is absent or weak.

The rules of the Agreements on SCM and ADP do not *per se* condemn dumping or subsidization. They recognize that the lower prices of imported goods arising from dumping or subsidization could benefit industrial users and consumers in the importing countries. The two Agreements therefore lay down an important principle: that compensatory duties in the form of countervailing duties on subsidized imports and anti-dumping duties on dumped imports cannot be levied solely on the ground that a product has benefited from a subsidy or that it is being dumped. They can be levied only if it is established after an investigation, which must normally be initiated on the request of a domestic industry, that dumped or subsidized imports are causing “material injury” to that industry.

Similar principles apply when governments take safeguard measures to restrict imports in order to assist a domestic industry that is being injured by a sudden and sharp increase in imports. The standard of “injury” to the industry that must be established to justify safeguard actions is, however, much higher than that required for the levy of countervailing or anti-dumping duties. In the case of safeguard actions, injury to the industry must be “serious”; in the case of countervailing and anti-dumping duties, a lower standard of proof of material injury is adequate. The difference in standards is attributable to the fact that, in the first instance, the industry’s problems do not arise from unfair competition, while in the second, these are due to the unfair trade practices of foreign producers.

This chapter discusses the following subjects:

- ❑ The concept of dumping as embodied in GATT law,
- ❑ The rules and procedures that countries must follow in levying anti-dumping and countervailing duties.

The rules that the Agreements on SCM and ADP lay down for the levy of these compensatory duties are similar. Furthermore, at the national level, the authorities responsible for investigating petitions for the levy of countervailing and of anti-dumping duties are the same in most cases.

Concept of dumping as embodied in GATT law

In common parlance, it is usual to designate all low-cost imports as dumped imports. The Agreement on Anti-dumping Practices, however, lays down strict criteria for determining when an imported product should be treated as being

Agreement on Anti-dumping Practices, Article 2:1

dumped. In particular it states that “a product is to be considered as being dumped”, if its export price is less than the price at which a like product is sold for consumption in the exporting country. In other words, if on the basis of a comparison of the export price and the home consumption price in the exporting country it is found that the latter price is higher, the product could be treated as being dumped.

The Agreement, however, provides that the determination of dumping on the above basis may not be appropriate:

Agreement on Anti-dumping Practices, Article 2:2

- Where sales in the domestic market of the exporting country are not in the ordinary course of trade (e.g. sales below the cost of production), and
- Where the volume of sales in the domestic market is low.

In these cases, the Agreement permits dumping to be determined by comparing the export price with:

- A comparable price charged for the like product when exported to a third country, or
- A constructed value, calculated on the basis of the production costs of the imported product, plus general, selling and administrative costs, and profits.

However, in order to ensure to the maximum extent possible that dumping is being determined on the basis of a comparison of the export price with the price for home consumption in the exporting country, the Agreement lays down the so-called *5% representative test*. The investigating authorities must use for price-comparison purposes prices charged to third country markets or use constructed values calculated on the basis of the cost of production if the value of sales in the domestic market of the exporting country constitutes less than 5% of the sales of the products to the importing country.

Agreement on Anti-dumping Practices, Article 2:2, footnote 2

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Rules and procedures for levying countervailing and anti-dumping duties

Main criteria for the levy of duties

Injury to domestic industry

The basic rule which the Agreements on ADP and SCM lay down is that anti-dumping and countervailing duties should be levied only where it has been established on the basis of investigations that:

- There has been a significant increase in dumped or subsidized imports, either in absolute terms or relative to production or consumption; and
- The prices of such imports have undercut those of the like domestic product, have depressed the price of the like product or have prevented that price from increasing; and
- As a result, injury is caused to the domestic industry or there is a threat of injury to the domestic industry of the importing country.

Agreement on Anti-dumping Practices, Article 3;
Agreement on Subsidies and Countervailing Measures, Article 15

Causal link between dumped, subsidized imports and injury to the domestic industry

The two Agreements specify that, in determining whether dumped imports are causing injury to the domestic industry, “relevant economic factors having a bearing on the state of the industry” should be taken into account (see box 26

Box 26**Factors to be taken into account in determining material injury to domestic industry**

(Agreement on Anti-dumping Practices, Article 3; Agreement on Subsidies and Countervailing Measures, Article 15)

The Agreements on SCM and ADP provide that the determination of whether subsidized or dumped imports are causing injury to a domestic industry should be made on the basis of all “relevant economic factors having a bearing on the state of the industry”. Such factors include:

- ❑ Actual or potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity;
- ❑ Effects on domestic prices;
- ❑ Actual or potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

In the case of anti-dumping investigations, one of the other factors to be taken into account is the magnitude of the margin of dumping. Likewise in investigations for the levy of countervailing duties on imports of agricultural products, an additional factor to be taken into account is whether there has been an increased burden on government support programmes.

The two Agreements clarify that the above list of economic factors is illustrative and not exhaustive, and that “one or several of these factors necessarily give decisive guidance”.

The Agreements further stipulate that the investigating authorities must also examine whether any factors other than subsidized or dumped imports are causing injury to domestic industry. Countervailing or anti-dumping duties should not be levied if the main factors responsible for the difficulties of the industry are factors other than subsidized or dumped imports. Such factors could include:

- ❑ Contraction in demand or changes in the patterns of consumption;
- ❑ Trade restrictive practices of, and competition between, foreign and domestic producers;
- ❑ Developments in technology and export performance; and
- ❑ Productivity of the domestic industry.

for a listing of these factors). Furthermore, for anti-dumping or countervailing duties to be levied, it must be clearly established that there is a causal link between dumped or subsidized imports and the injury to the industry.

Where the problems being encountered by the domestic industry are caused by such factors as “contractions in demand or changes in the pattern of consumption” and cannot be directly attributed to dumped or subsidized imports, anti-dumping or countervailing duties must not be levied. Furthermore, such duties must not be levied where increased imports are adversely affecting only a few producers. They can be levied solely when it has been established that the imports are posing problems to the producers “whose collective output of the product constitutes a major proportion of the total domestic production” of the industry.

Cumulation of imports

Normally when imports from several countries are subject to investigations, the assessment of whether such imports are causing injury to the domestic industry has to be made separately for each country. The Agreements, however, allow the investigating authorities in certain situations to assess the combined effects of all imports under investigation in determining injury. Such cumulation of imports is allowed only if:

- ❑ The dumping margin or the amount of subsidization of each individual country exceeds a *de minimis* level;
- ❑ The volume of imports from each country is not negligible; and
- ❑ Such cumulative assessment is appropriate in the light of conditions of competition between imported products and the conditions of competition between the imported products and like domestic products.

Standing of petitioners

It is important to note that the two Agreements stipulate that, save in exceptional situations,¹⁶ anti-dumping or countervailing investigations shall be initiated only on the basis of a complaint made “by or on behalf” of the domestic industry.

Further, in order to ensure that applications for the levy of such duties are made only when a substantial number of producers are affected, the Agreements lay down two complementary criteria:

- ❑ First, the producers supporting the application must account for over 50% of the production of the producers who express an opinion either in support of, or against, the petition.¹⁷
- ❑ Second, the producers supporting the application should account for at least 25% of the industry’s total production.

The investigating authorities are under an obligation to ascertain whether petitioners have such standing before initiating an investigation.

Procedural rules

Information to be provided in the application

The Agreements further stipulate the type of information (see box 27) that the petitioning industry must provide in its application in order to substantiate its claim that dumped or subsidized imports are causing it injury.

A large number of applications that are unsubstantiated or do not meet the criteria described above are in practice rejected by investigating authorities. As the mere submission of such applications often creates uncertainty in trade, the Agreements require the investigating authorities to avoid publicizing the submission of applications. However, after the decision is taken to initiate investigations, authorities are obliged to give public notice of the initiation of investigations giving, *inter alia*, the names of the exporting country or countries, the basis on which dumping or subsidization is alleged and a summary of the allegations on which the claim for injury is based.

Notification to governments

In addition, the investigating authorities are required to notify the governments of exporting Members of the receipt of a properly documented complaint and before initiating anti-dumping or countervailing investigations. As soon as an investigation is initiated, the authorities must make available the full text of the written application to the governments of the exporting countries. Furthermore, the SCM Agreement imposes an obligation on the investigating country to enter into consultations with the government of the exporting

Agreement on Anti-dumping Practices, Article 5.4; Agreement on Subsidies and Countervailing Measures, Article 11.4

Agreement on Anti-dumping Practices, Article 5.5; Agreement on Subsidies and Countervailing Measures, Article 11.5

Agreement on Anti-dumping Practices, Article 12.1; Agreement on Subsidies and Countervailing Measures, Article 22.2

Agreement on Anti-dumping Practices, 6.1.3; Agreement on Subsidies and Countervailing Measures, 12.1.3

Agreement on Subsidies and Countervailing Measures, Article 13

¹⁶ The government of an importing country can initiate action for the levy of anti-dumping and countervailing duties only in exceptional circumstances.

¹⁷ A section of the producers may not wish to express an opinion either for or against the petition. The share of such producers is to be excluded in arriving at the percentage.

Box 27***Information to be provided in applications for the levy of anti-dumping or countervailing duties***

The application for the levy of anti-dumping and countervailing duties should contain the following information:

- ❑ *The volume of the domestic production of the producers making the application;*
- ❑ *Description of the alleged dumped or subsidized product;*
- ❑ *The names of the exporting countries, each known exporter or foreign producer, and a list of the importers of the product;*
- ❑ *Information on dumping/subsidization:*
 - *In applications for anti-dumping action, such information should include prices at which the product is sold in the domestic market of the exporting country and information on export prices.*
 - *In applications for countervailing duties, such information should include evidence of the existence, amount and nature of the subsidy.*
 - *Information regarding injury and causality.*
 - *Information on the volume of dumped or subsidized imports.*
 - *Information on the adverse effects of such imports:*
 - *On domestic prices, and*
 - *On the domestic industry.*

country after the petition is accepted but before the investigations begin. Such consultations provide the government of the investigating country an opportunity to ascertain whether, taking into account the information presented in the application on the alleged injurious effects of subsidies on the industry, the exporting country is prepared to modify its subsidy practices so as to reach mutually acceptable solutions.

Right to give evidence

The rules of the two Agreements further aim at ensuring that, once investigations have begun, exporters and importers of the alleged dumped or subsidized products, the governments of the exporting countries, and other interested parties (e.g. trade or business associations of which the exporters or producers are members) have adequate opportunity to tender oral and written evidence to rebut the claim made by the petitioners and to defend their interests. Towards this end, the Agreements specifically provide that:

- ❑ The full text of the application should be made available to all known exporters alleged to be dumping or benefiting from subsidies and to the governments of the exporting countries concerned;
- ❑ The evidence presented by one party should be promptly made available to the other parties participating in the investigations; and
- ❑ Parties have a right to see all information (excluding confidential information) used by the investigating authorities during the investigations to help them in preparing their presentations.

Agreement on Anti-dumping Practices, Article 6.1;
Agreement on Subsidies and Countervailing Measures, Article 12.1

Agreement on Anti-dumping Practices, Article 6.12;
Agreement on Subsidies and Countervailing Measures, Article 12.10

In addition, the two Agreements provide that, in anti-dumping and countervailing investigations, industrial users and organizations of consumers of the products under investigation shall be given an opportunity to express their views on whether the case meets the statutory criteria for the levy of such duties (i.e. dumping or subsidization, injury and causality).

This provision can be used to safeguard the essential interests of users and consumers when the authorities consider that the levy of such duties could lead to an unjustified rise in prices.

Provision of information by exporters and the best information rule

While giving exporting enterprises the right to defend their interests during the investigations, the Agreements also oblige them to cooperate with investigating authorities and to provide the latter with any information they may request on production costs and other matters. In practice, investigating authorities require such information to be given on the basis of a questionnaire and within a period of not less than 30 days of the request for information. Where enterprises are not able to reply within that period, the Agreements call on investigating authorities to consider requests for extension with sympathy and to assist the enterprises, if requested, in providing the information in the format required. Where, however, producing enterprises refuse to cooperate or do not provide the information demanded within a reasonable period of time, the investigating authorities can take decisions on the basis of the best information available, i.e. information provided by the petitioning industry.

On-the-spot investigations

Investigating authorities often find it necessary to undertake on-the-spot investigations to verify the information provided by exporters or producing companies in response to the questionnaire or to collect additional information. The Agreements stipulate that such investigations can be carried out only with the agreement of the exporters or producers concerned and if the government of the exporting country does not object to the investigations. Sufficient advance notice of the intended visit should be given. The notice should indicate the type of the information needed so that the exporters/producers can prepare themselves to provide that information.

A refusal to permit an on-the-spot investigation could result in use by the authorities of the best information available.

Methodological rules

The methods used by the investigating authorities to calculate the per unit subsidy received by a product or the margin of dumping can greatly influence the level of countervailing or anti-dumping duties to be paid. The two Agreements therefore provide certain guidelines for the investigating authorities to follow in making these calculations.

Agreement on SCM

The SCM Agreement provides that the national legislation or implementing regulations of member countries should specify the methods to be used by the investigating authorities in determining per unit subsidy. In addition, to ensure transparency, it imposes an obligation on the investigating authorities to explain in their decision how the per unit subsidization was arrived at by using the method specified in the legislation.

Agreement on ADP

Price comparison: general principles

As noted earlier, a product is considered dumped only if the foreign producer's export price is lower than the price charged for home consumption in the country of export. The margin of dumping is therefore determined primarily by comparing these two prices.

Agreement on Anti-dumping Practices, Article 6.1.1;
Agreement on Subsidies and Countervailing Measures, Article 12.1.1

Agreement on Anti-dumping Practices, Article 6.7 and Annex I;
Agreement on Subsidies and Countervailing Measures, Article 12.6 and Annex VI

Agreement on Subsidies and Countervailing Measures, Article 14

Agreement on Anti-dumping Practices, Article 2.4

The ADP Agreement sets out guidelines to ensure a fair comparison between the home consumption price and the export price. In particular, it states that such comparison should 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 should also be made for “differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics” and other factors affecting price comparability.

In making a price comparison, the question often arises of what benchmark to use in determining the price for home consumption when the producer is selling in the home market at prices below average production costs or at a loss. A producer who over a long period has been selling a product at a loss in its domestic market would be able to dump it in foreign markets only by making use of its sales profits from other products (i.e. cross-product subsidization). A number of countries have in the past excluded such domestic sales in determining domestic consumption prices. In order to ensure uniformity in the practices adopted by investigating authorities for that purpose, the Agreement provides that sales in the home market below fully allocated production costs (including administrative and selling costs) may be disregarded only when:

Agreement on Anti-dumping Practices, Article 2.1.1 and footnotes 3, 4, 5

- Such sales are made over an extended period (normally one year);
- The average selling price in the home market is less than the weighted average unit cost; or
- The volume of sales below unit cost is more than 20% of the total; and
- The costs are not recovered over a reasonable period.

Averaging prices

Agreement on Anti-dumping Practices, Article 2.4.2

To arrive at the margin of dumping by comparing the exporter’s domestic and export prices, investigating authorities often use a system of averaging, particularly when a large number of small transactions are involved. In order to ensure that, in such cases, prices are compared on an apple-to-apple basis, the Agreement requires that comparison should normally be based on:

- Either the weighted average of home consumption prices with the weighted average of the prices of all export transactions,
- Or the home market prices and export prices on a transaction-to-transaction basis.

The Agreement permits an exception to this general rule when export prices differ significantly among purchasers, regions or periods. In such instances, a weighted average home consumption price may be compared with the price of an individual export transaction.

Currency conversion

Agreement on Anti-dumping Practices, Article 2.4.1

Comparing the home consumption price with the export price normally involves the conversion of the latter into the exporting country’s currency. Because of fluctuations, the rate used for currency conversion could greatly influence the margin of dumping. In order to ensure consistency in the methods used by investigating authorities, the ADP Agreement provides that the exchange rate prevalent on the date of sale should be used for conversion purposes. However, if the transaction is based on an exchange rate stated in a forward contract, that rate should be used.

Constructed value

The Agreement on ADP recognizes, as noted earlier, that where the volume of domestic sales is “low”, the consumption price in the exporting country may not

Agreement on Anti-dumping Practices, Articles 2.2, 2.3

provide a proper basis for price comparison. In such cases, the Agreement permits the investigating authorities to use, for price comparison purposes, a constructed value instead of the domestic consumption price. The constructed value is calculated on the basis of cost to the exporting industry of producing the product. Box 28 describes the guidelines which the Agreement on ADP lays down for calculating constructed values.

Box 28

Guidelines for calculating constructed values

(Agreement on Anti-dumping Practices, Articles 2.2 and 2.3)

When investigating authorities decide, for price comparison purposes, to replace the consumption price in the exporting country, with a constructed value calculated on the basis of the production costs of the exporting industry, the ADP Agreement lays down principles for arriving at such a value. In particular, it states that the costs should “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”. The Agreement further provides that the amounts for administrative, sales and general costs and profits should 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.” However, when it is not possible to determine such amounts on the above basis, the Agreement provides that they can be determined on the basis of:

- Actual data from other exporters or producers of products in the same general category;*
- The weighted average of the costs and profits of other exporters of the same product; and*
- Any other reasonable method, as long as the amount does not exceed that of the exporters or producers of the same general category of product.*

De minimis rule

Very often during the course of preliminary investigations, the authorities are satisfied that it will not be possible for the petitioners to establish injury as the margin of dumping is small or import penetration is negligible. The ADP Agreement provides that the application should be immediately rejected and the investigation terminated if:

Agreement on Anti-dumping Practices, Article 5.8

- The margin of dumping is *de minimis*, i.e. less than 2%, expressed as a percentage of the export price; or
- The volume of imports from a particular country is less than 3% of all imports of like products into the importing country. However, this rule does not apply when countries with individual shares of less than 3% collectively account for more than 7% of imports of the product under investigation; or
- The injury is negligible.

Agreement on Subsidies and Countervailing Measures, Article 11.9

Likewise, the SCM Agreement requires the authorities to terminate investigations in the situations described below.

- In the case of a product originating from a developed country, where:
 - The amount of subsidy is *de minimis*, i.e. less than 1%, or
 - The volume of subsidized imports or the injury is negligible.

Agreement on Subsidies and Countervailing Measures, Article 27.10

- ☐ In the case of a product originating from a developing country, when:
 - The level of subsidies granted does not exceed 2% of the value calculated on a per unit basis,
 - The subsidized imports are less than 4% of total imports of the importing country. However, the rule does not apply when developing countries with individual shares of less than 4% collectively account for more than 9% of total imports.

Lesser duty rule

Agreement on Anti-dumping Practices, Article 9.1;
Agreement on Subsidies and Countervailing Measures, Article 19.2

In this context, it is also important to note that both the ADP and SCM Agreements emphasize that, after completion of the investigations, the governments should carefully consider whether additional duties should be levied even if “all requirements regarding their imposition are met”.

They further encourage the use of the lesser duty rule. Under this approach even after it is established that dumped or subsidized imports are causing injury to the domestic industry, the decision on whether the amount of duty should be the full margin of dumping or the full amount of subsidy or less should be made by the appropriate governmental authorities and, if a lesser duty is adequate to remove the injury to the domestic industry, the lesser duty should be levied. This principle is followed by some countries which, after the investigations are completed, try to determine the injury margin and levy duty on the basis of that margin if it is lower than the dumping margin or the amount of subsidy.

Provisional measures

Agreement on Anti-dumping Practices, Article 7;
Agreement on Subsidies and Countervailing Measures, Article 17

The two Agreements further authorize provisional measures – in the form of cash deposits or bonds – to be taken when the investigating authorities judge that such measures are “necessary to prevent injury being caused during the investigation.” However, the Agreements stipulate that such provisional measures should be taken only after the investigating authorities have made a preliminary affirmative determination of dumping or subsidization and consequent injury to the domestic industry. If a definitive decision is made to levy duty and the duty is higher than the cash deposit or bond, the difference is not collected from the importer. The importer, however, has a right to claim for reimbursement of the difference when the definitive duty is lower than the cash deposit.

Price undertakings

Agreement on Anti-dumping Practices, Article 8;
Agreement on Subsidies and Countervailing Measures, Article 18

Exporters can avoid anti-dumping or countervailing duties by undertaking to increase their export prices. However, to prevent exporters from being required to give such price undertakings even when their exports are not causing injury to the domestic industry of the importing country, the Agreements permit such price undertakings only after the investigating authorities have made a preliminary affirmative determination of injury to the domestic industry and of dumping or subsidization. They further stipulate that the decision to offer a price undertaking should be left to the exporter and that “no exporter shall be forced to enter into such undertakings.” It is also possible that the authorities of the importing countries may consider the acceptance of undertakings impractical; this would be the case when the “number of actual or potential exporters is too great”.

Disclosure prior to final determination

Agreement on Anti-dumping Practices, Article 6.9;

The two Agreements stipulate that the investigations should be completed within a period of one year, and in no case more than 18 months after its

Agreement on Subsidies and Countervailing Measures, Article 12.8

initiation. Before making the final determination, the investigating authorities are required to “disclose” to the interested parties (e.g. exporters or producers under investigation, their governments, and importers) the essential facts on which the decision to apply the duty is made.

Determination of the amounts of subsidy and dumping margins

Agreement on Anti-dumping Practices, Articles 6.10, 9.2; Agreement on Subsidies and Countervailing Measures, Article 19.3

It is important to note that the Agreements visualize that as far as possible the amounts of countervailing and anti-dumping duties should be determined separately for each exporter or producer. The amounts of duties payable could therefore vary according to the element of subsidy in the price or dumping margin determined for each exporter. However, the investigating authorities may determine duties on the basis of statistically valid samples (or the largest volume of exports from the country in question) when the number of exporters or producers is so large as to make the calculation of individual subsidy elements or dumping margins impracticable. In making such a selection, the investigating authorities are urged to consult the exporters or producers concerned and to make the selection preferably with their consent. In addition, any exporter or producer not included in the sample has a right to request that the dumping margin should be fixed separately for it.

Sunset clause

Agreement on Anti-dumping Practices, Article 11; Agreement on Subsidies and Countervailing Measures, Article 21

The Agreements further require that the continued imposition of anti-dumping and countervailing measures (duties and price undertakings) should be kept under constant review. Such reviews should be conducted by the authorities on their own initiative or upon request by any interested party. If as a result of such a review the authorities conclude that the measures are no longer warranted, these measures should be terminated. In addition, the Agreements have a sunset clause, under which anti-dumping and countervailing measures automatically expire five years after their imposition, unless a review of the cases determines that, in the absence of such measures, dumping and injury will continue or recur. Reviews for this purpose must be initiated before the sunset date and should normally be concluded within one year.

Business implications

For business persons, knowledge of the complex rules on the levy of anti-dumping and countervailing duties is essential in their capacities as exporters and producers whose interests may be adversely affected by the unfair price practices of producers in other countries.

In recent years, there has been a steady increase in the number of petitions for anti-dumping and countervailing actions by both developed and developing countries (see box 29). Enterprises in many developing countries are finding that as their exports of manufactured products rise, there are increasing pressures from industries in the importing countries for the levy of such duties, on the grounds that the goods are being dumped or subsidized. Such duties may be levied on any imported product, including such products as textiles, which are of considerable importance in the trade of developing countries.

In the circumstances, it is becoming essential for enterprises to be familiar with the rules applicable in this area. An understanding of the rules could, for instance, enable an exporting enterprise to take precautionary steps to avoid

Box 29**Anti-dumping and countervailing actions taken by WTO members in 1997****Anti-dumping investigations**

During the period 1 January - 31 December 1997, a total of 240 anti-dumping investigations were initiated by WTO member countries. The most active Members were the following:

Country/area	Number of investigations initiated
Australia	42
European Community	41
South Africa	23
United States	16
Argentina	15
Korea, Rep. of	15
Canada	14
India	13
Brazil	14
Malaysia	8
Mexico	6

In terms of the export products investigated during the year, the European Community had the largest number (59), followed by China (31), Taiwan Province, China (16), Republic of Korea (16), United States (15) and Japan (12).

At the end of 1997 there were 880 anti-dumping measures in force in various member countries. Of these 34% were maintained by the United States, 16% by the European Community, 10% by Canada and 9% by Mexico. Other countries accounted for less than 5% of the measures taken.

Countervailing actions

During the period 1 January to 31 December 1997, 16 investigations for the levy of countervailing duties were initiated by member countries.

At the end of 1997 there were a total of 87 countervailing actions in force in member countries.

anti-dumping actions in foreign markets where there are increasing pressures from industrial and other groups for such actions. While it may continue to charge export prices that are lower than its domestic prices in markets where it faces no threat, it should avoid doing so in markets where anti-dumping actions are possible. In such markets, anti-dumping duties can be avoided if the exporter does not allow the difference between its domestic price and export price to fall below a reasonable margin. As noted, if the margin is *de minimis* or less, investigating authorities are required to reject applications for the levy of duties. Investigating authorities also take into account the share of an exporting country in total imports of a product. It would be in the interest of the exporting enterprise not to allow its exports to rise to a market where it is apprehensive of a petition for anti-dumping action and, where possible, to diversify its trade to other markets.

When investigations begin, the Agreements give exporting enterprises (and the trade or business associations to which they belong) the right to defend their interests. The ADP Agreement obliges them to provide information on the cost of production and other matters on the basis of a questionnaire sent by the investigating authorities. It is essential for exporters to cooperate with these

authorities and to give them the required information, the reason being that in anti-dumping cases the duty payable is fixed separately for each exporting enterprise on the basis of the margin between the price charged by it in its domestic market and its export price.

The Agreements also oblige the investigating authorities to notify the governments of the exporting countries of their decision to begin investigations. The governments have a right to tender evidence against the petition and to defend the interests of their exporters. As the legal and other costs of participating in investigations are substantial and are often beyond the resources of small and medium-sized enterprises, it is often necessary for them to rely on their governments to defend their interests.

The Agreements also seek to protect the interests of enterprises which find that they are being injured or hurt as a result of the unfair pricing practices of foreign suppliers. The affected enterprises have the right to petition their national investigating authorities for the levy of anti-dumping duties if the imports are being dumped and for the levy of countervailing duties if the imports are being subsidized. However, the Agreements lay down strict conditions for invoking that right. In particular, an application for the levy of duties can be made only if it has *standing*, i.e. the support of producers accounting for at least 25% of the total domestic production of the product alleged to be dumped or subsidized. In addition, the application must provide information establishing a causal link between increased dumped and subsidized imports and injury to the producers in the form of loss of production, domestic sales or loss of jobs.

As noted earlier, complaints of dumping or subsidized imports are also on the increase in most developing countries implementing liberalization measures. While many of these complaints are due to the inability of domestic industries, long accustomed to heavy levels of protection, to adjust to the changed competitive situation resulting from the removal of tariffs and other barriers, some complaints about unfair price practices of foreign suppliers are undoubtedly genuine. A better understanding of the Agreements will enable the affected producing enterprises to make appropriate use of their right to petition the authorities for the levy of anti-dumping or countervailing duties in such cases. The stringent conditions the Agreements lay down will ensure that such duties are levied only when the dumped or subsidized imports are established to be causing injury to the industry concerned.