A REPORT ON TRADE REMEDIES AND RULES OF APPLICATION

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Introduction

1. The Report on G-20 Trade and Investment Measures issued by the WTO, OECD and UNCTAD on September 14, 2009, predicted that “based on historical patterns of anti-dumping and safeguard activity in previous business cycles, it is to be expected that the current economic crisis will result in a significant increase in the use of these measures, but only after a lag given the procedural requirements before applying definitive duties.” While antidumping actions by G-20 countries are running at about the same level as last year, safeguard measures have already dramatically increased. This, then, is an apt occasion to review the trade measures that are available under the General Agreement on Tariffs and Trade (“GATT”).

2. The GATT authorizes three trade remedies that can be utilized by members of the World Trade Organization (“WTO”) to address troublesome imports: antidumping measures and countervailing duties, which are authorized by Article VI, and safeguards which are authorized by Article XIX. Detailed roadmaps for the application of these measures were adopted in the Uruguay Round implementing agreements that each WTO member is required to observe in applying trade measures against imports from other WTO member countries.

3. Members whose exports are subject to such measures may request the WTO Dispute Resolution Body (“DSB”) to review the action taken for consistency with the relevant GATT obligations. If the measure is found to be inconsistent with those obligations, the DSB can order that non-compliant measures be brought into conformity or eliminated. Failure to respect a decision by the DSB can lead to retaliatory measures by the country affected by the inconsistent measure. While retaliation is often effective in inducing compliance, there are a number of instances where members have tolerated retaliation in lieu of complying with the DSB decision.

4. This Report will summarize the rules governing application of these three trade remedies and will point out the major areas where there are proposals to amend the antidumping and countervailing duty implementing agreements in the Rules Negotiations that are one of the four main pillars of the DOHA Round which has been underway since the Development Agenda was agreed to by WTO members in November 2001.

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1 See Report on G20 Trade and Investment Measures (14 Sept. 2009) at 11. The WTO Report of the Committee on Anti-Dumping Practices, G/L/902 (26 Oct. 2009), reports 281 provisional and final measures in the period July 1, 2008-June 30, 2009, as contrasted to 201 the previous year. Moreover, the Committee indicated that a number of members had not filed notifications. Report, ¶ 13.

2 “Measures” as used in this Report refers to action taken against imports pursuant to the WTO Agreements.

3 As of October 1, 2009, there were 62 dispute resolution proceedings involving antidumping duties, 20 involving countervailing duties and 27 involving safeguard measures. A compilation is available on the WTO’s Dispute Settlement Gateway, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

5. There is also a discussion of the special rules that apply when these trade remedies are applied against imports from the nonmarket economies. The discussion focuses on China which is not only the most frequent target of antidumping and countervailing duty actions by WTO members, but is also a frequent user of the antidumping measure and has recently initiated countervailing duty investigations of imports from the United States.

6. China is in a unique situation as a result of special provisions in its WTO Accession Protocol concerning the application of the antidumping and countervailing duty measures to its exports by WTO members. The Accession Protocol also authorizes WTO members to adopt safeguards applicable uniquely to Chinese imports such as those that were recently applied by the United States in a case involving Chinese passenger vehicle and light truck tires.

I. Summary of trade remedy measures

7. WTO members that utilize the trade remedies authorized by the GATT must conform their actions to the very specific and detailed substantive and procedural provisions of the governing agreements. Due to the large number of disputes concerning the application of trade remedies, there is an evolving jurisprudence developed by the WTO Appellate Body that interprets both the GATT Articles and implementing agreements. The result is a relatively uniform application of the trade remedies by all WTO members, with the exception of discretionary provisions such as lesser duty which are discussed in detail below. For this reason, the following summary of the remedies is based on the respective Agreements that elaborate on the principles of the provisions of GATT Articles VI and XIX as, to the extent applicable, interpreted by the Appellate Body.

A. Antidumping measures

8. The antidumping remedy is authorized by GATT 1947 Article VI, which provides that 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 ...." (Emphasis added.) Article VI.1 then defines "normal value" as the comparable price of the like product in the exporting country. In the absence of such a price, the normal value is either the highest price for the export of the like product to a third country or the cost of production in the country of origin plus a reasonable addition for selling cost and profit. In addition, Article VI.1 requires the administering authority to give "due allowance" for differences affecting price comparability.

9. In recognition that this sparse language could be applied by members with inconsistent results, detailed methodologies and procedures applicable to antidumping investigations were adopted in the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). This Agreement is designed to encourage uniform application of the antidumping measure in all the Members that chose to utilize it on behalf of their domestic industries. This is made clear by the Article 1 of the Agreement, which provides that an antidumping measure "shall" be applied by WTO member only "pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement."

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i) General rules of application:

10. Article 2 of the AD Agreement states that the “preferred” method of determining normal value is the use of prices in the home market for the like product, but only if there are sufficient sales to use for comparison purposes. Where there are sufficient domestic sales, the normal value is based on ex-factory prices, reduced by any inland freight and other similar charges incurred in delivery of the product by the foreign producer to its domestic customers.

11. When there are inadequate domestic sales of the like product, the investigating authority can elect to base the normal value on the highest price charged by the foreign producer on sales of the like product to third countries or, alternatively, on the cost of production. Either method is acceptable. The cost of production can also be used if all sales in the domestic market are at prices below unit (fixed and variable) costs of production, plus administrative, selling and general costs. When the cost of production is used as the normal value, the fully distributed cost calculation (as opposed to marginal cost) also includes profits.

12. There are special rules in most countries that apply the antidumping measure for determining the normal value of imports from nonmarket economies (“NMEs”). These rules are discussed in a special section later in this Report.

13. Article 2.4 of the AD Agreement states that a “fair comparison” shall be made between the normal value and export price in calculating the margin of dumping. Thus, after determining the normal value and the export price into the importing country, various adjustments are made to arrive at the ex-factory level, which is where the “fair comparison” is made. Thus, there is an adjustment to delete transportation costs (both foreign and local), importation expenses, processing in the country of importation or in a third country, and other such costs. Additional adjustments are made for differences in quality, credit, and other circumstances of sale unique to the foreign producers.

14. After calculating normal value and export prices, Article 2.4.2 requires the investigating authority to calculate the dumping duty margin by comparing the weighted average normal value to the weighted average export price at the same level of trade. (Another possibility is to make transaction by transaction comparisons and then average the results.) The product is considered dumped if the export price is lower than the normal value of that product in the producer’s home market. The difference between the two prices is the margin of dumping, which is then divided by the domestic price to determine the dumping duty percentage.

ii) The zeroing controversy:

15. In calculating the margin of dumping, some countries employ a methodology called “zeroing,” which often results in higher margins because it generally ignores prices in the importing country market that are above the weighted average normal value. Pursuant to this methodology, if the export price is less than normal value, it is deemed dumped and is taken into account in the calculation, but if the export price exceeds normal value the difference is considered to be zero. For example, consider a "like" product with two models:

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7 Id., Article 2.1. Sufficient sales are generally found when domestic sales account for five percent or more of sales to the importing member. See Article 2.2, fn 2.

8 Id. Costs are normally concluded on the basis of records kept by the exporter provided they are kept in accordance with generally accepted accounting principles. See Article 2.2.1.1.
<table>
<thead>
<tr>
<th>Normal Value</th>
<th>Export Price</th>
<th>Difference</th>
<th>Deemed Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>Model A</td>
<td>100</td>
<td>110</td>
<td>+10</td>
</tr>
<tr>
<td>Model B</td>
<td>100</td>
<td>90</td>
<td>-10</td>
</tr>
</tbody>
</table>

16. By treating the margin on Model A as zero, the administering authority would calculate a dumping margin of 10, which would be converted into a percentage duty to be applied to the like product (i.e., Models A and B). This margin would not exist if the exporter was given “credit” for the amount by which sales of Model A exceed the normal value. This methodology is defended on the basis that Members have never agreed to require an offset for non-dumped transactions and that the injurious dumping of Model B in the above example would not be remedied without the application of zeroing.

17. Zeroing was first found to be inconsistent with Article 2.4 by the Appellate Body in a dispute involving zeroing as applied by the European Communities in an investigation involving bed linens from India. Subsequently, additional Appellate Body decisions involving the use of this practice by the United States have concluded that that zeroing in all circumstances is not permitted by Article 2.4 of the Antidumping Agreement and Article VI:2 of GATT 1994. The United States has accepted the Appellate Body decisions in the case of average to average comparisons in investigations, but has yet to comply with the other decisions.

18. Participants in the Rules negotiations have submitted numerous proposals to amend the AD Agreement to require that zeroing be prohibited in every antidumping calculation. On the other hand, the United States has proposed an amendment that would permit zeroing in certain circumstances. This is a hotly debated issue and the Chairman’s latest text notes that “Delegations remain profoundly divided on this issue.”

iii) The injury determination:

19. Before imposing an antidumping duty, the administering authority must make a determination that the effect of the dumping is such as to cause or threaten material injury to the domestic industry producing the like product. Article 3 of the AD Agreement sets out a number of factors that are to be taken into account in the determination of injury or threat of injury by the investigating authority, but does not specifically define injury. In the U.S. antidumping statute, material injury is defined as harm that is more than inconsequential, insignificant, or immaterial. This formulation has not been challenged before the WTO.

20. Among the factors that can demonstrate material injury are, according to Article 3.2, the effect of the dumped imports on prices, increases in the volume of dumped imports (whether actual or relative to domestic production), downward trends in financial and operating data (production, shipments, profits, etc.).

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9 European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linens from India, WT/DS141/AB/RW (8 Apr. 2003). After that decision, the EU abandoned the use of zeroing.


11 Draft Consolidated Chair Texts of the AD and SCM Agreements (“Consolidated Chair Text”), TN/RL/W/236, at 6 (18 Dec. 2008).

12 19 U.S.C.§ 1677(7)(A)
etc.), and price undercutting or depression. Operating losses are not necessary to demonstrate material injury if it is otherwise clear that the industry would have been better off absent the dumped imports.

21. Many antidumping determinations are based on a finding that dumped imports threaten material injury, as permitted by Article 3.7. Threat determinations must be based on facts and not conjecture and the threatened injury must be shown to be about to occur. Material injury can be considered imminent if, for example, there is a significant rate of increase of dumped imports, there is unused foreign capacity, and the import prices are depressing domestic prices and related factors.

iv) Discretionary provisions of the AD agreement:

22. While most of the provisions of the AD Agreement are mandatory, and therefore must be applied by all WTO members that use the antidumping measure, two that are discretionary have been the subject of considerable debate in the Rules Negotiations. The discretionary provisions are in Article 9.1 of the AD Agreement which states that it is “desirable that the imposition of dumping duties 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.”

23. The United States does not apply the discretion suggested by Article 9.1. Instead, the Department of Commerce is obligated to impose a duty in the full amount when there is a finding of injury or threat of injury to the domestic industry as a result of the dumping. (19 U.S.C. 1673.) There is no discretion to apply a lower duty to take into account public interest considerations or to modulate the amount of the duty to the level that could be expected to offset the injury.

24. In contrast, the application of duties is permissive in a number of countries. For example, the EC Regulations provide that an antidumping duty “may be applied” to dumped imports that cause injury. These regulations also require that the authorities take into account “all the various interests taken as a whole,” including those of domestic users and consumers, when setting the antidumping duty. They also require that no duty be applied where to do so would be contrary to the “Community interest.” The EU and other members also require that the authorities set the duty at the level necessary to offset the injury rather than utilize the calculated margin.

25. There is a sharp disagreement among the delegates in the Rules Negotiations on the question whether the “public interest” and “lesser duty” provisions of Article 9.1 should be modified. Numerous countries have urged that Article 9.1 should be mandatory rather than permissive, so that authorities would be obligated to take into account public interest considerations in setting the antidumping duty and to set the duty at the level that would be considered sufficient to eliminate the injury even if less than the actual duty that would be applied taking into account the difference between normal value and export price.

26. These proposals have been vigorously opposed by the United States which adopted mandatory substantive rules and procedures in 1979 after Congress responded to industry complaints about the discretionary application of the antidumping law by the U.S. Treasury Department. In the same year, the

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13 EC Council Regulation (EC) No. 384/96 of 22 December 1995 on Protection Against Dumped Imports from Countries not Members of the European Union. Article 21.1. (“Measures, as determined on the basis of dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.”)

14 Id., Article 9.4. (“The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the community industry.”)

15 See Consolidated Chair Text at 18-19. (“Participants are sharply divided....”).
administration of the antidumping law was transferred to the Commerce Department, a transfer that was generally interpreted as signaling an intention to eliminate discretionary application of trade remedies. Given this history, it is not surprising that there is no interest in restoring discretion to the setting of duties in the United States.

v) **Periodic and sunset reviews:**

27. Article 11.1 states that an antidumping duty shall remain in effect only as long as necessary to counteract dumping. More specifically, once a dumping measure takes effect, the rate of duty must be reviewed periodically at the request of any interested party and there must be a "sunset" review to determine whether the measure should remain in effect.

1. **Periodic reviews:**

28. Article 11.2 requires the authorities to periodically review the "need for continued imposition of the duty..." The method of compliance with this provision depends on the "system" in place in the Member applying duties. In practice, antidumping measures are applied either prospectively or retrospectively.

29. In the prospective system, the duty is determined based on sales in year one and applied to all imports in year two. If the export price is lower than the prospective normal value, duties are assessed; however, if the export price is higher than the prospective normal value, no duties are assessed. Supposedly, there is a review at the end of year two to determine if the imports were actually dumped and the amount of duties paid is adjusted to reflect the results of the review. Those results may then be used as the basis for the applicable duty in following years.

30. The retrospective system (which is used in the United States) collects provisional duties based on the previous year's margin. At the end of the year, there is a review of the sales and a comparison to their normal value. If the exporter raised the export price to eliminate the estimated margin of dumping, the duties collected are refunded with interest. On the other hand, if the export prices continued to exceed the contemporaneous normal value, then the excess is required to be paid by the exporter with interest.

2. **Sunset reviews:**

31. Article 11.3 of the AD Agreement also requires that a "definitive anti-dumping duty" shall be terminated not later than five years after its imposition unless the authorities determine that termination of the duty would likely lead to continuation or recurrence of the dumping. The duty can remain in effect pending the outcome of the "sunset" review.

32. Sunset reviews have been an issue in the Rules negotiations where a number of participants have advanced various proposals ranging from a mandatory termination of measures after five years to a more rigorous application of the standards for termination of duties.17

B. **Countervailing duties**

33. GATT article VI.3 authorizes the imposition of countervailing duties to offset the "amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the

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16 See, e.g., EC Council Regulation (Dumping), Article 11.8.
17 Consolidated Chair Text at 23. ("Delegations have widely differing views regarding various aspects of the sunset issue.").
manufacture, production or export of such product in the country of production…. As is the case with antidumping duties, Article VI.3 requires a determination by the administering authority that the effect of subsidization “is to cause or threaten material injury to an established domestic industry…. To add substantive requirements to the principles of Article VI, the contracting parties to the GATT approved an Agreement on Subsidies and Countervailing Measures (“SCM”) as part of the Uruguay Round Agreements. These requirements are mandatory inasmuch as SCM Article 10 states that “countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement ….”

i) Initial comment:

34. While the SCM provides the framework for the application of countervailing duties, it also provides for challenges to subsidies through the DSB. For example, SCM Article 5, which is in the Part relating to “actionable” subsidies, provides that no “Member should cause, through the use of any subsidy...adverse effects to the interests of other Members ....” This obligation may be enforced by submitting to dispute resolution any claim by a member of the WTO that another member’s subsidies are causing adverse effects to its interests. While frequently used by members, including the ongoing dispute over Airbus financing, this aspect of the SCM is beyond the scope of this Report which focuses on trade remedies including the countervailing duties which are also authorized by the SCM.

ii) General rules of application:

35. Subsidies are defined by Article 1.1 of the SCM to include financial contributions by a government such as grants, below commercial rate loans or equity infusions, certain tax credits, etc., which confer a benefit on the recipient. The subsidy definition also includes situations where the government provides goods or services to a recipient at below-market rates (such as selling raw materials at a discounted price). Government programs that fit these criteria are classified as either domestic or export subsidies.

36. A domestic subsidy is one that benefits the recipient without regard to whether it is used for domestic or export production. For example, a government loan to a steel producer that sells in both the domestic and foreign markets will be deemed a “domestic” subsidy if it is made at a rate of interest that is lower than the interest charged to that producer by its regular commercial bankers.

37. In order for a domestic subsidy to be countervailable, it must also be found to be “specific” within the specificity rules of Article 2. That is, the government program must be limited to an industry or limited group of industries. This limitation can either be imposed by law or regulation (“de jure”) or result from the factual circumstances (“de facto”). An example of a de facto subsidy would be where a limited number of industries are the predominant users of the program even though the program is legally open to all industries19.

38. Export subsidies are government programs that provide a benefit to the recipient and that are contingent on export performance. These subsidies are presumed to be specific pursuant to SCM Article 2.3 and are prohibited under Article 3. Since export subsidies are prohibited, the administering authorities do not have to make a specificity determination in a countervailing duty action involving them. Otherwise,

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19 Article 2.1(c). The discretion of the granting authorities is an important consideration in de facto specificity analysis.
however, all of the prerequisites to a countervailing duty determination must be met by the investigating authorities.

39. There is a "list" of export subsidies in an Annex to the SCM. The list is characterized as "illustrative" and there is a debate whether it is mandatory or simply guidance. In any event, the list is instructive. For example, items (j) and (k) on the illustrative list deal with export insurance programs and credits granted by governments to special institutions at rates below what the government has to pay for the funds when borrowed on international capital markets. This "cost to the government" test is a deviation from the normal rule that the amount of the subsidy is based on the value to the recipient. There are proposals to the Rules negotiations to change the export credit to use the benefit to the recipient.

iii) Calculation of the subsidy amount:

40. SCM Article 14 provides that the calculation of the amount of the subsidy has to be "transparent and adequately explained" by the administering authorities. Article 14 then provides the following guidelines: a domestic subsidy is provided when: (a) the government provides equity in circumstances where a private investor would not have made the investment with its own funds; (b) the government provides a loan at a lower rate than would be paid under a comparable commercial loan; (c) the government provides a loan guarantee and the borrower pays less for the loan than it would absent the guarantee; and (d) the government provides goods and services for less than adequate remuneration.

41. While the guidelines do not specifically say so, the value of the subsidy is usually the difference in the amount paid by the beneficiary and the commercial rate. For example, consider a USD 10 million grant by the government to a company whose assets have an average useful life of 10 years. Under the U.S. practice, the subsidy would be allocated to each of the 10 years following the date of the grant. In each year, the USD 1 million allocated subsidy amount would be multiplied by the ratio of exports to domestic production and the result divided by the number of units exported to arrive at the subsidy value per unit.

42. The countervailing duty rate for export subsidies is normally calculated by reference to the illustrative list. In other words, the subsidy value of a direct tax rebate on export would be used to calculate the CVD. On the other hand, items (j) and (k) suggest the subsidy value of export credits should be the difference between the cost to the government and the rate charged the beneficiary which is a deviation from the normal rule. The cost to government approach has been rejected by the United States which uses the difference between the rate charged by the government and the commercial rate in calculating the countervailing duty. There are proposals to the Rules negotiations to adopt the benefit to the recipient measure for these subsidies.

43. As is the rule in antidumping investigations, Article 15 of the SCM provides that the subsidy rate can only be applied in the form of a duty on imports from the subsidizing country if there is a determination that the imports benefiting from the subsidy have caused or threaten injury to the domestic industry producing the like product.

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20 SCM, Annex 1(a).
21 Consolidated Chair Text at 39, note 6.
22 Id. at 73.
24 Chairman's Consolidated Text at 73.
iv) The VAT rebate.

44. The illustrative list of export subsidies provides that the non-excessive rebate on export of indirect taxes (such as value added taxes) is not deemed to be an export subsidy. For example, if a producer pays an X% VAT on domestic sales, the rebate of that payment on export sales is not considered an export subsidy. In contrast, the full or partial exemption, remission or deferral of direct taxes (which include income taxes) specifically related to exports are deemed export subsidies which are prohibited. Thus, if a Member provides a rebate of the income tax attributable to an export that is a prohibited export subsidy.

45. The disparity between the treatment of direct and indirect taxes in connection with exports has been criticized as prejudicial to domestic industries and exporters in countries that do not rely on a VAT system for the majority of their tax revenues. 25

46. The differential treatment of direct and indirect tax rebates in paragraph (g) of SCM Annex I reflects a longstanding understanding that the rebate of indirect taxes on exportation is appropriate to prevent double taxation. In other words, if country A imposes a value added tax on a product that is exported, it is presumed that the same product will be taxed again in the destination country. This “double taxation” is avoided by rebating the tax paid in the exporting country.

47. The avoidance of double taxation was the rationale relied on by the Treasury Department in 1997, shortly after the first U.S. countervailing duty law was adopted, in ruling that the non-excessive rebate of indirect taxes would not be deemed an actionable subsidy under U.S. law. That interpretation was upheld by the 1978 Supreme Court decision in Zenith Radio Corporation v. United States. 26 In Zenith, the Court acknowledged that there were disputes among economists about the fairness of permitting non-excessive rebates of indirect taxes under the countervailing duty law of a country (like the United States) that does not apply a national VAT. However, the Court concluded that the economic arguments were not sufficiently overwhelming to justify the challenge to a long-standing interpretation by the agency entrusted with administration of the law. 27

48. The United States has made an informal proposal concerning the indirect tax issue in the Rules negotiations. 28 However, there appears to have been little interest in addressing this issue and there is no mention of it in the Chair Consolidated Text.

v) Discretionary provisions of the SCM:

49. Article 19.2 of the SCM provides, as does the AD Agreement, that “it is desirable that the imposition shall be permissive … and 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…. ” In addition, procedures should be established to allow the authorities to take into account the views of the interested parties that might be affected by the countervailing duty.

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27 The Court also noted that even “modern economists do not agree on the ultimate economic effect of remitting indirect taxes....” Id, at 446, citing Executive Branch GATT Studies, Senate Committee on Finance, 93d Cong., 2d Session (1974).

28 See, for example, Communication from the United States, Subsidies Disciplines Requiring Clarification and Improvement, TN/RL/W/78, March 19, 2003, at 4.
50. In the United States, authorities must apply the full amount of the duty determined from the subsidy calculation (19 U.S.C. 1671(a)). And, the authorities do not take into account the views of the public in setting the amount of the duty. In contrast, Article 15.1 of the EC Regulation\(^{29}\) provides that the amount of the countervailing duty should be less than the amount of subsidies if "such lesser duty were to be adequate to remove the injury to the Community industry." In addition, Article 31 authorizes the imposition of CVDS only after a determination that the Community interest "calls for intervention."\(^{30}\)

51. The Consolidated Chair Text does not mention any proposals to make the Provisions of Article 19.2 mandatory.

C. Safeguards

52. The GATT negotiators anticipated that the initial tariff cuts that would be put in place after the GATT commitments took effect could have "unforeseen" consequences that would injure domestic industries unaccustomed to the new competition from imports. Accordingly, Article XIX was adopted to authorize temporary measures such as increased tariffs or quotas when "as a result of unforeseen developments and of the obligations incurred by a contracting party under this Agreement," a product is being imported in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic industries producing the like product.

i) General rules of application

53. The Agreement on Safeguards ("SG Agreement"), which was adopted as one of the Uruguay Round Agreements, details rules for the application of safeguard measures.\(^{31}\) The drafters of the SG Agreement did not include the requirement that "unforeseen developments" be found as a condition of imposing a safeguard. This eliminated a hurdle to the application of safeguards since many rounds of tariff reductions make it difficult to ascribe increased imports to the unanticipated results from a tariff concession. However, the Appellate Body has subsequently ruled that the failure to specifically amend Article XIX in the WTO Agreement required that this requirement remain as a condition to imposing a safeguard.\(^{32}\)

54. As is the case with the antidumping and countervailing duty agreements, Article 2.8 of the SG Agreement provides that a Member may impose a Safeguard Measure "only if that Member has determined" that the procedures mandated have been followed. There must be, according to Article 2.1 a determination that the product under investigation "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." This is a stricter standard than applies in the case of AD or CVD investigations in that there must be (i) increased quantities of the imports and (ii) the injury caused or threatened must be "serious," as contrasted to "material."

\(^{29}\) Council Regulation (EC) No. 2026/97 of 6 October 1997 on Protection against Subsidized Imports from Countries Not Members of the European Community.

\(^{30}\) Id., Article 31: "Measures, as determined on the basis of subsidization and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures."

\(^{31}\) Article XIX of GATT 1994, Agreement on Safeguards ("Safeguards Agreement").

\(^{32}\) See Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Certain Steel Product, ("U.S. Steel Safeguard").
55. Article 4.1 of the SG Agreement defines serious injury "as a significant overall impairment in the position of a domestic industry "and threat of serious injury" as serious injury that is clearly imminent...." In the evaluation whether serious injury or threat exists, Article 4.2(a) requires the authorities to evaluate all factors of an objective and quantifiable nature concerning the domestic industry in particular the rate and amount of the increase in imports, which can be either absolute or relative to domestic production.

56. Safeguard measures are defined in Article 2 of the SG Agreement as emergency actions which must be temporary and imposed on a most favored nation basis. They must be progressively liberalized at regular intervals during the period of application. Article 7.1 provides that the maximum duration of a safeguard is four years, but that period can be extended an additional four years if necessary to prevent or remedy serious injury and there is evidence the industry is adjusting. Article 7.3 limits the total period of a safeguard to eight years.

ii) Application of safeguards:

57. Before applying a safeguard measure, the party proposing to do so must consult with the other contracting parties having a substantial interest as exporters of the product. In applying a safeguard measure, Article 8 provides that the Member should "endeavor" to maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting Members. In practical terms, this means that the safeguard should be offset by liberalization of another tariff concession. For example, if the trade "cost" of the safeguard is X dollars, tariffs on other products should be reduced sufficiently to yield X dollars as trade value to exporters. In this way the "balance of concessions" made in the most recent negotiation is maintained.

58. Absent such agreement, the affected exporting Members individually may suspend substantially equivalent concessions and other obligations. However, this right cannot be exercised during the first three years of the application of a safeguard measure if the measure is taken based on an absolute increase in imports, and otherwise conforms to the provisions of the Agreement. As a result most safeguard actions are limited to three years in duration.

59. Article 9 provides a special rule for developing countries. Safeguard measures shall not be applied to low volume imports from developing country Members whose products account for no more than three percent of the total subject imports. However, if products originating in those low-import-share developing country Members collectively exceed nine percent of imports then the safeguard will be applicable to them.

II. Special Rules for Non-Market Economies

60. For many years, the non-market economies ("NME") have been subjected to special treatment under virtually all national antidumping and countervailing duty laws. While this treatment would be in conflict with the MFN obligations of GATT Article 1, this issue was never submitted to the GATT or, after 1994, WTO dispute resolution. Moreover, until recently, members that had adopted countervailing duty laws did not, as a matter of practice, apply them to imports from NMEs.

61. Currently, the most contentious NME issues relate to the application of the antidumping and countervailing duty measures to imports from China.

62. China is a special case that merits discussion since it is the most frequent target of antidumping actions, its exports have recently been subject to countervailing duty actions and the United States has just imposed a special safeguard applicable only to Chinese imports of passenger vehicle and light truck tires. Other WTO members have also utilized this special safeguard.
63. China has been a member at the WTO since 22 December 2001. China’s accession Protocol addressed three very important issues relevant to this Report: the treatment of China as an NME for purposes of the Antidumping Agreement, the use of alternative benchmarks in countervailing duty investigations of Chinese exports, and the application of a special safeguard action which would only apply to Chinese exports.

A. Antidumping Investigations

64. With respect to antidumping, many countries have considered the home market price or cost methodology required by Article 2.1 of the AD Agreement inappropriate for NMEs and, as a result, have developed special rules for determining normal value in investigations involving imports from such countries. These measures range from the use of prices for the similar product in a market economy as the NME normal value to the use of a “factors of production” approach to construct a normal value, which is the method used in the United States. This differential treatment of Chinese products in antidumping investigations would normally violate China’s right to nondiscriminatory treatment once it became a member of the WTO.

65. To deal with this incipient problem, Article 15(a) of the Accession Agreement with China provides that authorities investigating whether Chinese imports are being dumped are authorized to use either domestic prices or costs for the industry under investigation (the methodology required by Article 2.1 of the Antidumping Agreement), or an alternative methodology:

15(a)(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production or sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

15(a)(ii) The importing Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

66. Article 15(d) provides that these provisions shall expire 15 years after accession or in 2016: thereafter, antidumping investigations involving China will be required to observe the Article 2.1 methodology of the Antidumping Agreement.

67. Some countries have chosen to treat China as a market economy and apply the normal value methodology prescribed by Article 2.1 of the Antidumping Agreement, while others are considering doing so. However, the United States and Europe (among others) continue to treat China as a NME and either make a case-by-case determination whether market economy conditions exist in the industry under investigation or routinely employ normal value methodologies that are not based on a strict comparison with domestic Chinese prices or costs.

68. The U.S. Department of Commerce, which has never used actual Chinese prices or costs in antidumping investigations, begins the analysis with the rebuttable presumption that all companies in a NME are subject to government control and should be assigned a single, China-wide, antidumping duty rate. That rate is based on a comparison of the normal value determined by factors of production cost

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33 Accession of the People’s Republic of China, November 10, 2001, WT/L/432.
approach to the export price. However, exporters can rebut this presumption and may be entitled to a separate rate if they can demonstrate that their costs and prices are established independent of State control. Nonetheless, even in these cases, the separate rate is based on the factors of production method rather than the actual costs and prices of the exporter. A proposal to adopt a “Market Oriented Enterprise” methodology that would be available to Chinese respondents has languished in the face of domestic industry opposition.

69. The European Council theoretically has a more flexible approach to antidumping investigations involving NMEs such as China. Article 2(7) of the EC Basic Regulation concerning antidumping provides that “normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, or any other reasonable basis...” However, if the respondent can demonstrate that market economy conditions prevail for one or more of the producers subject to the investigation, then the methodology specified in Article 2.1 of the Antidumping Agreement for market economy respondents applies.

70. A recent decision by the Court of First Instance in Zhejiang Xinan Chemical Industrial Group Co. Ltd v. Council of the European Union potentially eases the way for Chinese respondents to argue for the determination of normal value based on actual prices or costs in China. The European Council first adopted anti-dumping measures against imports of glyphosate from China by Zhejiang Xinan Chemical Industrial Group Co. Ltd. (“Zhejiang”), a Chinese producer and exporter of glyphosate, in February 1998.

71. Following the Commission’s initiation of a review of these measures, the company requested status as an enterprise operating under market economy conditions (“MES”) pursuant to Article 2(7) of the Basic Regulation. However, the Council ruled that the company had failed to establish that it had satisfied that “decisions of firms regarding prices, costs and inputs...are made in response to market signals reflecting supply and demand, and without significant State interference in this regard,” the first criteria in Article 2(7)(a). Since the Council determined that the company had successfully met all the other criteria of Article 2(7)(a), it was clear that the Council based its decision solely on the ground that state control of the company through stock ownership meant that it could not show that its “decisions were taken without significant State interference.”

72. In reversing this decision, the Court noted that although the company’s private shareholdings were dispersed widely, this fact alone did not lead to the conclusion that “the State shareholders are in a position different, or act differently, to a private minority shareholder which, because of the dispersion of the majority shareholding, in fact controls the shareholders’ meetings,” and could not “constitute a ground

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34 The factors of production approach calculates the amount of material, hours of labor, etc., consumed in producing the product and then values those factors based on prices in a market economy country at a comparable level of development to the exporting country under investigation and is a substantial producer on the same or similar product. See Charles Owen Verrill, Jr., Non-Market Economy Dumping: New Directions in Fair Value Analysis, 21 Geo. Washington J. of International Economic Law and Economics 427 (1988).
37 Judgment of the Court of the First Instance of the European Communities (Fourth Chamber), June 17, 2009, Case T-498/04.
38 Id. at ¶ 39.
for refusing the applicant MES." In sum, the court held that the authorities "did not take account of all the relevant evidence which the applicant had put forward to demonstrate that it made its decisions in response to market signals and without significant State interference." 39

73. The reluctance to treat China as a market economy in antidumping investigations is not limited to the U.S. and EU. Brazil has negotiated a memorandum of understanding 40 with China that authorizes use of the Article 2.1 standard in determining normal value, but it has never been implemented by legislation. Argentina has a similar MOU, but as well has not accorded Article 2.1 treatment to Chinese imports in antidumping investigations.

B. Countervailing Duties

74. Prior to its WTO accession, China was (like other NMEs) essentially "exempted" from the countervailing duty laws of most countries. Because this "exemption" would be a violation of the MFN rights of other members, Articles 10 and 15(b) of the Accession Agreement specifically define China's obligation regarding subsidies. These Articles also clearly indicate that the negotiators anticipated that CVDs would be assessed against Chinese imports in accordance with the requirements of the SCM.

75. First, Article 10 ("Subsidies") sets out China's obligations regarding subsidies, including a requirement that China notify the WTO about any subsidies currently provided and a commitment to eliminate all subsidies prohibited under Article 3 of the SCM (that is, export subsidies and subsidies contingent on use of local materials).

76. Then, Article 15 provides that in CVD actions, the parties shall use the provisions of the SCM in determining the existence and amount of subsidization unless there are special difficulties in doing so. In that event, the importing WTO Member may "use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks." When that is the case, alternative benchmarks may be utilized in measuring subsidization, including benchmarks external to China such as commercial lending rates in other countries.

77. Since China's accession to the WTO, a number of countries have brought actions against Chinese imports under their CVD laws. They include Australia, Canada, South Africa and the United States.

i) U.S. Practice:

78. In 1984, the Commerce Department dismissed CVD actions filed against imports from Poland and East Germany on the grounds that, in a non-market economy, the concept of a subsidy or government financial assistance had little meaning. Therefore, it would not be possible to reasonably calculate a duty, decision that was upheld by the Court of Appeals for the Federal Circuit in Georgetown Steel v. United States. 41 However, in a 2007 decision, the Department reversed this policy in an investigation involving coated paper from China and determined that CVDs could be applied against Chinese imports under the

39  Id. at ¶ 160.

40  Memorando de Entendimiento entre a Republica Federative de Brasil E. A Republica Popular Da Clem Sobre Cooperacao em Materia De Commercio E. Investimento, November 12, 2004.

41  Georgetown Steel v. United States, 801 F.2d 1308 (Fed. Cir. 1986). The Court based its decision on the customary administrative law principle that agency interpretations of a statute will be upheld if reasonable even if other interpretations were possible.
U.S. countervailing duty law. The Department reasoned that, while China is still a NME for purposes of the antidumping law, it no longer resembles the centrally-planned, Soviet-style NMFs in place when the policy upheld in Georgetown Steel had been fashioned.

79. In applying the CVD law to Chinese imports, the Department elected to use the alternative benchmark approach authorized by Article 15(b) of the Accession Agreement. For example, in calculating the benefits afforded by interest subsidies, Commerce rejected local bank rates because they were deemed to be controlled by the Chinese Government, and relied instead on the average commercial bank lending rates in the World Bank’s “lower middle income countries” (excluding those that are not market oriented).

80. A key finding in the U.S. decision was that Chinese state-owned enterprises carry out essentially governmental functions in providing goods and services within the meaning of SCM Article 1.1(a)(1)(iv). Since the provision of these goods and services was for less than “adequate remuneration,” a benefit was conferred on the purchaser which the Department included in the calculation of the CVD percentage.

81. Since the 2007 CVD investigation involving China, numerous additional petitions alleging subsidization of imports from China have been filed and there has been a preliminary determination in a CVD action against imports of polyethylene retail carrier bags from Vietnam, which is also deemed a NME by the United States. 43

ii) The “Double Counting” Argument:

82. GPX International Tire Corporation, one of the respondents in an early countervailing duty decision involving Chinese imports, appealed the Commerce decision to the U.S. Court of International Trade claiming among other things that the application of countervailing duties to a NME product while applying the factors of production normal value methodology in a simultaneous antidumping investigation involving the same product amounts to “double counting.” (Note that this argument relates only to domestic subsidies because there is a separate statutory provision concerning export subsidies that applies in all AD investigations). 44

83. This is a complex issue which arises out of the use of the surrogate methodology in the calculation of the normal value in antidumping investigations. In market economy investigations, the authorities use home market prices as the measure of normal value if possible. If there is a simultaneous countervailing duty investigation of domestic subsidies involving the same product, the Department assumes that the producer lowered its domestic and foreign price to reflect those subsidies. Therefore, the subsidy has no effect on the dumping margin and adding a CVD as well as an AD has no overlapping effect.

84. In an AD investigation involving an NME, however, the home market price of the producer is normally not used; instead, the administering authority typically constructs a surrogate price, which is presumably not subsidized, as the normal value. Hence, the actual export price is compared to a presumptively subsidy free normal value. This would not be a problem if there were evidence that the Chinese exporter lowered its price to reflect the domestic subsidy. However, the Department argues that it would be speculative to assume that the domestic subsidy had any impact on the export price. Therefore, it

44 Pursuant to 19 U.S.C. § 1677a, Commerce is required to make an adjustment to export prices in margin calculations for export subsidies by the amount of any CVD imposed. This adjustment is also made in NME investigations.
declines to adjust the dumping margin to reflect any CVD applied to the same product due to domestic subsidies and, as a result, there is an argument that the dumping duty may overlap with the countervailing duty.

85. In a decision released on September 18, 2009, Judge Restani of the U.S. Court of International Trade accepted the possibility of “double counting” in holding as follows:

For the reasons stated below, the court finds that Commerce is not barred by statutory language from applying the CVD law to imports from the PRC, but that Commerce’s current interpretation of the NME AD statute in relation to the CVD statute here was unreasonable. If Commerce is to apply CVD remedies where it also utilizes NME AD methodology, Commerce must adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to products from an NME country and avoid to the extent possible double counting of duties.45

86. In other words, the burden is placed on Commerce to demonstrate that no “double counting” is involved when the factors of production method is used to calculate dumping margins and there is a simultaneous CVD proceeding involving the same product.

87. This decision does not necessarily mean that Commerce will have to immediately change the procedures it currently uses in other CVD investigations involving NMEs. First, Commerce will revise its findings in the GPX case and report them to the court in a remand determination. After the court reacts, there may be a further remand or an appeal to a higher federal court. In the meantime, Commerce will likely continue to apply its present methodology.

iii) The WTO Challenges:

88. China has also initiated despite resolution to challenge the Department’s simultaneous application of antidumping and countervailing duties on Chinese imports in investigations involving circular welded carbon quality steel pipe and laminated woven sacks.46 Numerous issues are raised in this dispute, including alleged double counting and whether certain state owned enterprises are public bodies which have provided goods or services to producers for less than adequate remuneration. The WTO proceedings, which are still before the panel established in March, are being closely followed and there are a number of third countries that have joined the proceedings in support of the U.S. position.

iv) Currency Manipulation as a Subsidy:

89. China maintains an exchange rate regime that pegs the value of the Chinese currency (the “Renminbi”) to a basket of currencies that is heavily weighted by the U.S. dollar. Numerous commentators have argued that this practice gives Chinese exports an unfair advantage in foreign trade and it has been a matter of constant tension between the United States and other countries that have experienced severe trade imbalances with China.47

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45 GPX International Tire Corp. v. United States, Consol Court No. 08-00285, Slip Op. 09-103, at 2-3, (Sept. 18, 2009).


90. Several countervailing duty petitions have been filed with the Department of Commerce which contend that China’s currency regime acts as a price support for Chinese exporters of various products resulting in excess currency and therefore its effects should be countervailable under U.S. law. These petitions argue that the currency regime is a subsidy based on several GATT Articles. First, it is argued that Article XVI.1 of the GATT requires notification of "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports from ... its territory...." This concept is adopted in SCM Article 1.1(a)(2), which defines a subsidy as "any form of income or price support in the sense of Article XVI of GATT 1994...." Finally, it is noted that Item (b) on the illustrative list of export subsidies includes "currency retention schemes and any similar practices which involve a bonus on exports."

91. The Department has, however, refused to initiate an investigation of these allegations on the grounds that "Petitioners have failed to sufficiently allege that the receipt of the excess RMB is contingent on export or export performance because receipt of the excess RMB is independent of the type of transaction or commercial activity for which the dollars are converted...." Therefore, according to Commerce, "Petitioners have failed to properly allege the specificity element." The refusal to initiate on this allegation is not immediately appealable.49

C. Special Safeguards

92. The Chinese Accession Protocol also authorizes any WTO member to adopt laws or regulations that provide for a special safeguard applicable only to China for a period of 12 years after the date of accession. Specifically, Article 16.1 provides as follows:

In cases where products of Chinese origin are being imported into the territory of any WTO member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected Member should pursue application of a measure under the Agreement on Safeguards.

93. In the event these consultations do not lead to an agreement, then the importing Member can "withdraw concessions or otherwise limit imports only to the extent necessary to prevent or remedy the market disruption."

94. The United States implemented this authorization in Section 421 of the Trade Act of 1974, 19 U.S.C. 2451, et seq. Under the statute, a domestic industry is authorized to file a petition alleging market disruption with the International Trade Commission ("ITC"). If there is an affirmative determination that market disruption is present, the ITC formulates a remedy that it deems appropriate to prevent or remedy the market disruption. This remedy is then transmitted to the President who is authorized to accept, modify or reject the ITC recommendation. Normally, the ITC recommends a three year, digressive remedy, largely because if the measure is taken for a longer period, China has the right, under Article 16(6) of the Accession Agreement to suspend the application of substantially equivalent concessions with respect to the trade of the WTO Member taking the action.

49 Id. at 54706.
95. During the George W. Bush Administration, six Section 421 actions were filed, with four resulting in affirmative determinations of market disruption by imports from China. However, in each case, the ITC recommendation of a remedy was rejected by the President.  

96. The practice of rejecting relief when Section 421 determinations were submitted by the ITC was put to the test in the early stages of the Obama administration when the United Steelworkers Union filed a Section 421 case involving certain passenger vehicle and light truck tires. The ITC made an affirmative determination of market disruption and recommended a sizeable tariff of 55 percent in the first year, 45 percent in the second year, and 35 percent in the third year. After receiving the ITC report, President Obama approved a remedy, but reduced the applicable tariffs to 35, 30 and 25 percent.  

97. Under U.S. law, there is no appeal to the courts from a special safeguard proclamation by the President. However, China challenged the Section 421 action in the WTO on 14 September 2009 by requesting formal consultations pursuant to Articles 1 and 4 of the DSU, Article XX III(i) of GATT 1994 and Article 14 of the SG Agreement. According to the request for consultations these China specific restrictions violate the Accession Protocol because the "U.S. statute expressly defines 'significant cause' more narrowly than required by the ordinary meaning of that phrase as used in Article 16.4 of the Protocol of Accession." Other claims challenge the factual findings and a host of other determinations in the decision.  

Conclusion  

98. The antidumping and countervailing duty remedies have long been measures that are utilized to deal with market distortions. In the United States, countervailing duties were first authorized by Congress in 1897 and antidumping duties in 1921. Safeguards also have a long history: These remedies were acknowledged as legitimate in 1947 when the GATT was adopted provided the criteria in Articles VI (antidumping and countervailing duties) and XIX (safeguards) were met. However, those criteria were open to significant interpretive differences and because of the consensus rule in GATT dispute resolution, there was no consistency in the application of these measures by GATT members. It was not until 1994 that mandatory, detailed rules were adopted for the application of all three measures in the form of agreements applicable to all WTO members. These agreements, as interpreted by the Appellate Body (albeit not without controversy), appear to be leading to an architecture of trade remedy law that can be looked to by both importers and exporters as the preferred approach to market distortions. This trend will be enhanced if there is a commitment by all members that use these measures to transparency in the application of the rules.

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