

ANNEX 1 – BASIC DESCRIPTION OF EC TRADE DEFENCE INSTRUMENTS

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1. THE CONTEXT OF EC TDI

1.1 An overview of EC TDI

The objective of the European Community's Trade Defence Instruments (TDI) is to either remedy market distortions created from unfair trade practices by third countries, such as dumping or subsidies, or to address the serious deterioration of the situation of European Community producers arising from unforeseen sharp and sudden import surges (through safeguard action).

The legal basis for these instruments is provided by the relevant WTO agreements, which have been transposed into Community legislation by Council Regulation (EC) No 384/96 (the basic anti-dumping Regulation), Council Regulation (EC) No 2026/97 (the basic anti-subsidy Regulation) and Council Regulations (EC) No 517/94/ 519/94 and 3285/94 (the basic safeguard Regulations).

Anti-dumping (AD) measures were created to counter dumping practices, the most frequently encountered trade-distorting practices. Dumping occurs when manufacturers from a non-EU country sell goods in the EC below the sales price in their domestic market, or below the cost of production plus a reasonable rate of profit.

Anti-subsidy (AS) measures were designed to combat certain types of subsidies, which are made available to manufacturers by public authorities and which can also distort trade when they help to reduce production costs or cut the prices of exports to the EC unfairly.

Safeguard measures may be used by WTO members to restrict imports of a product temporarily if its domestic industry is seriously injured, or threatened with serious injury, caused by a surge in imports.

1.2 Global context of EC TDI and impact of new TDI users on EC exports

Although TDI have been around for more than 100 years, it was only in the 1970s that their use became a global phenomenon. One reason for this is the extent of GATT liberalisation that had been achieved up to and including the Tokyo Round of trade negotiations. As trade barriers came down, and trade increased, domestic industries started to feel real competition from imports. The demand for TDI measures grew in response to the increasing market share of imports.

The EC has been one of the traditional global users of TDI over the past 30 years, the other main ones being the US, Canada, Australia and New Zealand.

However, in the last decade, many other countries have started using TDI, and now EC exports face more cases in overseas markets than TDI cases opened by the EC against imports.

	EC Investigations (defensive cases)	Investigations against the EC or individual Member States (offensive cases)	% of defensive / offensive cases
1995-2004	299	394	75%
Of which:			
1995-1999	185	219	85%
2000-2004	114	175	65%

The table shows the number of AD investigations opened by the EC in proportion to those initiated by other countries against the EC¹. The last column of the table indicates the relative shift in the extent to which EC exporters are hit in other countries' AD investigations compared to EC actions.

This is an important point to realise in understanding the context of TDI. In former times, EC industry would have wished for TDI to be as restrictive as possible. However, this is no longer the case. Using TDI requires a careful balance between exercising the right to have protection against imports in clearly defined circumstances and ensuring that EC exports are not unduly hindered by other countries' use of TDI.

1.3 Which trading partners are subject to TDI?

EC TDI are applicable to all imports from outside of the EC except for EEA countries. Non-EC members of the EEA are excluded from TDI, except for products that fall outside of the EEA e.g. Norway has been subject to two AD/AS investigations in the fisheries area.

It can also be noted that TDI are not applied within the single market.

The EEA is the only customs union/free trade agreement to which the EC is a party where TDI are not applied. TDI apply to all other countries despite any free trade agreements or preferential arrangements that they may enjoy with the EC.

TDI continue to be applied against countries negotiating accession to the EC. Thus, TDI still apply to Bulgaria, Croatia, Romania and Turkey, even though the latter has a customs union with the EC.

1.4 Institutions

The institutions involved in TDI are as follows:

- **DG Trade/European Commission** - The Commission is the politically independent institution that represents and upholds the interests of the EC as a whole. It is the

¹ Note that the EC actions and the actions against the EC are counted on a different basis. The EC actions are counted on a per country basis (i.e. an investigation against one product from 5 countries counts as 5 cases. Actions against the EC are also counted on a per country basis. However, some of these cases have been initiated against the EC as a whole, in which case they only count as 1 case, while others have been initiated against several Member States (for the same product), in which case they count as several cases.

driving force within the EC's institutional system: it proposes legislation, policies and programmes of action and it is responsible for implementing the decisions of Parliament and the Council. In this way, it can be considered as the executive branch of the EC. The Commission plays a leading role in the implementation and enforcement of TDI. The Commission has several powers that allow it to take certain decisions in the TDI field. In addition, the Commission must prepare proposals for the adoption of measures by the Council.

- **Council of Ministers** - The Council is the EC's main decision-making body. It represents the member states, and its meetings are attended by one minister from each of the EC's national governments. For definitive AD and AS measures, the Council has the responsibility of adopting proposals made by the Commission. For safeguards, the Commission usually adopts measures but the Council still plays a key role in that it has the power to block such measures.
- **EC Member States** – In addition to the formal meetings of Member States in the council of Ministers, Member States also meet in an Advisory Committee for all TDI. In the Committee, the Member States will discuss all aspects of TDI investigations (e.g. initiations, provisional measures, definitive measures etc.) and debate TDI policy.
- **Court of First Instance (CFI) and Court of Justice (ECJ)** – Since 1993, the CFI has had jurisdiction over AD and AS cases. The ECJ is the court of appeal for cases falling within the jurisdiction of the CFI. There are limited opportunities to challenge safeguard measures but, to the extent that safeguards can be challenged, it is the ECJ that would hear such cases.
- **European Parliament (EP)** - The EP plays almost no role in TDI. It does discuss use of TDI within the Committee on International Trade and sometimes issues reports on the subject. MEPs also put questions to the Commission on TDI in an attempt to open up discussion or influence policy. They also address problems raised by their constituents. However, currently, the EP has no formal role in any part of the TDI process. If the new constitution is ratified by all Member States, the Parliament may have more influence over the adoption of legislation in the area of TDI, though it will still not have any role in investigations or the adoption of measures.

1.5 Summary of the EC anti-dumping and anti-subsidy regulations

EC anti-dumping rules are contained in Council Regulation (EC) No 384/96 (the "basic AD regulation"), the provisions of which came into effect on 1 January 1995.

This regulation reflects the provisions of the WTO agreement on anti-dumping agreed in the last completed round of multilateral trade negotiations (The Uruguay Round).

This regulation has been amended several times.

- Regulation 2331/96- in order to amend the provisions on adjustments necessary to compare domestic and export prices.

- Regulation 905/98 - revised non-market economy provisions to allow Russian & Chinese companies to get market economy treatment if certain conditions are met.
- Regulation 2238/2000 - Added Ukraine, Vietnam and Kazakhstan to list of countries where companies able to apply for market economy treatment.
- Regulation 1972/2002 - further amendments on adjustments between domestic & export price, the determination of costs in anti-dumping investigations and treatment of Russia as a market economy.
- Regulation 461/2004 - adopted amendments relating to voting procedures, price undertakings, time limits on reviews, anti-circumvention and anti-absorption investigations, and other procedural points.

Copies of the basic regulation and all of the above amendments can be obtained from the following web link:

http://europa.eu.int/comm/trade/issues/respectrules/anti_dumping/legis/index_en.htm

A consolidated version is available at:

http://europa.eu.int/eur-lex/en/consleg/main/1996/en_1996R0384_index.html

EC **anti-subsidy** rules are contained in Regulation 2026/97 ("the basic AS regulation) and has been amended as follows:

- Regulation 1973/2002 – Clarifies ability to use benchmarks where subsidies are given in the form of provision of cheap goods & services where there is no market for such goods/services in the country concerned. Also repeals provisions on non-actionable subsidies given expiry of corresponding WTO provisions.
- Regulation 461/2004 (similar amendments as for anti-dumping as set out above).

The EC anti-dumping and anti-subsidy regulations cover all products including coal and steel. Previously, products covered by the European Coal and Steel Community Treaty (ECSC) had separate AD and AS provisions, though substantively they were identical to the EC regulations. The ECSC, and associated TDI legislation, expired in July 2002.

2. ANTI-DUMPING AND ANTI-SUBSIDY

2.1 Summary of substantive requirements

There are four key requirements contained in the EC's anti-dumping and anti-subsidy regulations that must be met before any anti-dumping/subsidy measures can be adopted.

REQUIREMENT 1 - Imports must be dumped or subsidised

Dumping - The export price of a product sold in the EC is normally considered to be dumped if it is less than the comparable price for that product in the domestic market (nb the domestic price must at least cover costs). Whether dumping is occurring or not is determined by the calculation of a single margin of dumping.

Subsidy – Subsidised imports are those that benefit from a financial contribution by government. However, such subsidies are only countervailable if they are specific (limited to certain enterprises or regions).

REQUIREMENT 2 - The dumped or subsidised imports must cause injury

The EC industry must be suffering material injury. That is, it must be experiencing significant and measurable problems in terms of indicators such as prices, profit, market share etc.

REQUIREMENT 3 - Causal link

It must be demonstrated that the dumped/subsidised imports are causing the injury identified. In this context, it must also be ensured that injury caused by other factors is not attributed to the dumping/subsidised imports.

REQUIREMENT 4 - Community Interest

Even if dumping and/or subsidy, injury and a causal link are established, measures are only imposed if they are not against the Community interest. Community interest refers to the interests of the EC as a whole, including EC domestic industry, users and consumers.

2.2 Concept and definition of dumping

Dumping is a form of price discrimination. It occurs where the export price of a product sold in the EC is lower than the price for the same product when sold on the domestic market (domestic price; usually called normal value).

Price discrimination occurs when a product can be sold at different prices in different markets. In order to practice price discrimination, it is necessary to be able to differentiate between different customers. This differentiation of groups of customers requires some form of separation of the two markets, such that it is not possible to buy in the lower priced market and sell in the higher priced one. Thus, the ability to dump may arise from some sort of trade barrier that prevents arbitrage removing the price differential. However, for dumping to occur, there is no requirement to prove the existence of such a trade barrier. The existence of the price difference *per se* is sufficient to find dumping. It is such price discrimination

between domestic and the foreign markets that WTO Members have agreed should be condemned.

The following table clarifies what constitutes dumping:

	1	2	3	4
Domestic price in home market or analogue country	100	80	100	80
Export price to EC	100	80	80	100
EC producers' price	100	100	100	100
Dumping?	NO	NO	YES	NO

- In 1, the export price is equal to the domestic price and therefore there is no dumping.
- In 2, despite undercutting the EC price, there is no dumping as the export price is equal to the domestic price. This illustrates that the EC price is not relevant in assessing whether dumping is occurring.
- Dumping is occurring in situation 3, where the export price is lower than the domestic price.
- In 4, there is no dumping as the export price exceeds the domestic price, although price discrimination is occurring.

The key issue is that, regardless of the destination of the product (i.e. domestic or overseas markets), the ex factory price should be the same.

Although this is the basic principle behind the analysis of dumping, there is some flexibility.

- The European Commission usually uses weighted averages in calculating whether dumping is occurring. Therefore, individual consignments sold at different prices will usually not be of consequence, provided that on average the prices are not dumped and any dumped consignments are not targeted on any particular region, customer, or time period (i.e. there is a pattern of export prices that differ by region, customer or time period).
- Insignificant (*de minimis*) dumping margins are ignored. Insignificant is defined as less than 2%.
- If aggregate export volumes of the product concerned from any one country to the EC are small, they are unlikely to be the cause of any injury. EC rules confirm that no investigation will be initiated where the exports of the country concerned account for less than 1% of EC consumption, unless the exports of all such countries when grouped together account for more than 3% of EC consumption (or where imports from the country concerned account for less than 3% or 7% respectively of total imports).
- Export and domestic prices may diverge if there are differences in the product or terms of sale that account for this divergence.

An important point to note here is that there is no such thing as an 'innocent' dumper. Even if an exporter is forced to start dumping in order to stay in the market, anti-dumping rules require that export price must be equal to or greater than the domestic price. No account is taken of why dumping may have started.

2.3 The importance of cost of production

There is an important proviso to the above. In order to be used in assessing whether dumping is occurring, the domestic price must at least cover costs. Thus, dumping occurs when export price is below domestic price or when export price is below costs.

Thus, dumping may still be occurring if a company's export price is the same as the domestic price, as illustrated in the following table.

	Situation 1	Situation 2	Situation 3
Normal Value (domestic price)	100	60	100
Cost of Production	80	80	80
Export Price	60	60	90
Dumping?	Yes	Yes	Yes

- In situation 1, export price is less than domestic price.
- In situation 2, export price and domestic price are equal so there would appear to be no dumping. However, domestic price is below cost of production and cannot be used. An export price below cost of production is always a dumped price.
- In situation 3, export price is profitable but less than domestic price i.e. an export price above cost of production can still be a dumped price.

2.4 Elements of the dumping calculation

The calculation of the dumping margin is based on a simple formula:

$$\text{Dumping margin} = (\text{Normal Value} - \text{Export Price}) / \text{Export price (cif)}$$

The actual calculation, although based on this simple formula, is extremely complicated. This section, therefore, breaks down this calculation into its three components; normal value, export price (ex works or fob), export price (cif).

Normally, a dumping margin is calculated for each company that has exported during the product from the country subject to investigation².

² AD and AS investigations are initiated against countries and not individual companies.

2.5 Normal Value

(a) Definition

Normal value is the term used to describe the price of the product that is considered to be a "fair" price. Normal value is usually calculated on the basis of the price actually paid by an independent customer in the domestic market.

(b) Situations where actual domestic prices might not be used

The domestic price might not be used in the following situations:

- where there is a relationship between the producer and the domestic customer (if the product is re-sold, the price to the first independent customer would be used i.e. treating the related parties as one economic entity).
- where there are no domestic sales or the sales are insufficient to be representative
- where the domestic sales are sold at a price below cost of production
- where there is a non-market economy or, normally, where there is an economy in transition

(c) Related sales

Where the sale is made to an 'associated' party, or there is some form of compensatory arrangement between the producer and the buyer, domestic prices might not be used. They will only be used if it can be shown that the prices are unaffected by the relationship. In practice this is difficult to achieve.

(d) No domestic sales

It is clear that an alternative method of calculating normal value must be found where an exporter made no domestic sales of the product during the period under investigation. Another common occurrence is that the product type sold on the export market is different from that sold on the domestic market. In this situation, there is no domestic sale of the type that is exported. If the difference can be accounted for by a price adjustment, this will be done. Otherwise, one of the alternative methods must be used.

(e) Insufficient domestic sales

Even where there are domestic sales, the Commission may consider their volume is too low for representative price data to be obtained. Under the 5% rule domestic prices cannot be used where the volume of the domestic sales of the exporter is less than 5% of its sales volume to the EU. However, the Commission can decide, notwithstanding a sales volume below this 5% level, that the domestic prices are nevertheless still representative for the market concerned. In practice this is rare.

The test is conducted at two levels. Firstly, all domestic sales of the product concerned are measured in relation to total exports of the product concerned. If this is passed, it is then done at the level of each type of the product concerned.

(f) Prices below the cost of production

Prices are considered to be below the cost of production where the price is below the per unit fixed and variable cost of production plus selling, general and administrative costs. Thus, the relevant cost of production is the total cost of production (see below for a brief summary of key cost concepts).

Average cost = Total cost of production / Number of units produced

Marginal cost = Increase in total cost for extra unit of production.

Average cost is based on the total cost of production, including both fixed and variable costs. Marginal cost measures the variable cost associated with increasing production by one unit.

Some commentators believe that marginal cost should be used in assessing dumping. If there is spare production capacity in a factory, and it is used to start producing a new product, it is true that the actual cost of such marginal production is lower than the average cost. Thus, commercially it can make sense to sell such additional products below full average cost.

However, anti-dumping rules generally require that the domestic price (and therefore the export price) must cover all costs (including fixed costs). That is, export prices must be based on at least full average costs. If the domestic price is higher than full average costs, the export price must match the former.

These requirements can be illustrated with a simple example. If the total cost of producing 100 units is 1000 Euros, the average cost of producing each unit is 10 Euros. This 10 Euros cost will be made up of fixed costs (factory, machinery etc) and variable costs (labour, raw materials etc).

In the above example, say that the cost of producing an extra unit costs only 5 Euros (i.e. this is the marginal cost). Therefore it may be rational economic behaviour to base the export price on this cost.

In this example, however, anti-dumping rules require that a minimum 'fair price' reflects the full average cost of 10 Euros. Of course if the domestic price is higher than 10 Euros, it must be matched by the export price in order to avoid dumping. In assessing whether prices are below the cost of production, the Commission will ensure that all costs have been included. Particularly where an allocation has been made, the Commission will carefully check that the amount allocated to the product concerned is accurate.

It can be noted that sales at a loss will not automatically mean that actual prices will not be used. If less than 20% by volume of sales are at a loss, the Commission will use the actual prices of all transactions. If sales at a loss are more than 20% but less than 90%, the Commission will use the profitable sales. If sales at a loss exceed 90%, no actual prices will be used.

	Sales at a loss	Sales at a profit	Basis of domestic price
Situation 1	18%	82%	All sales
Situation 2	35%	65%	65% Profitable sales
Situation 3	92%	8%	Alternative methods

Normal value is often based partly on actual prices and partly using alternative methods

For products that have different grades/models, dumping will initially be assessed type by type. It is a common situation in anti-dumping investigations that the domestic prices of certain types of the product concerned can be used, while for other types it cannot. Given this, the actual calculation of normal value can be quite complex.

(g) Alternatives to use of domestic prices

In cases where the domestic prices of a particular company cannot be used, the Commission uses the following alternatives:

Alternative normal value 1: Prices of other producers

For each type for which there are no domestic prices, the first alternative is to use prices of other producers that are also selling in the same country.

Alternative normal value 2: Calculating a constructed normal value

If there are no such prices, the Commission will most likely use constructed normal value. This is calculated by taking the cost of production of the company concerned, adding sales and general administrative (SGA) costs and a reasonable rate of profit. This will normally be calculated on the basis of the manufacturer's own production accounting data.

When deciding on a reasonable rate of profit, the Basic Regulation gives the Institutions a certain discretion although the various methods provided for in the Basic Regulation are regularly applied in the order set out therein. There is no pick and choose. Often, the profit of other producers' domestic sales in the exporting country market will be used.

Alternative normal value 3: export prices to third countries

The Commission can use prices from the exporting country to a third country if such prices can be classified as "non-dumped". However, this method is rarely used due to the fact that the products may also be dumped and more information would have to be collected to have this option. Also, there can be problems in matching up different types if the products vary. In this way, constructing normal value has an advantage because it can be done for all product types exported and it is based on information that is already collected from exporters.

It should be noted that most cases involve products with different types or grades. Each type may be treated according to its particular situation and, therefore, it is possible that normal value is based on a mix of actual prices and alternative normal values 1 and 2.

(h) Non-market economies and economies in transition

For countries or companies operating in a non-market economy environment, the approach to determine normal value has to reflect the particular circumstances in such countries..

The countries subject to such a different approach can be split into three groups:

Group 1 - Non-market economies (non-WTO members) – Albania, Azerbaijan, Belarus, Georgia, North Korea, Tajikistan, Turkmenistan, Uzbekistan.

Group 2 – Former non-market economies which became WTO members – Armenia, Kyrgyzstan, Moldova, Mongolia.

Group 3 - Economies in transition & WTO Members – China, Ukraine, Vietnam, Kazakhstan.

For group 1, domestic prices and costs are never used. In order to produce a normal value against which the export price(s) can be compared, the Commission will usually choose a market economy third country (analogue country).

The third country must be "appropriate" and selected in a "not unreasonable manner". In reality, the choice of this country depends on a number of factors including whether prices and costs are excessive in comparison with a world average for the product concerned. Also, the Commission will consider the conditions of competition in the third country and the characteristics of its domestic industry such as the production process, scale of production, quality, access to raw materials etc. as compared to the situation of producers in the non-market economy.

For countries in group 2 and 3, the situation is slightly different. In these two groups, individual companies that are operating in a market economy environment can apply to be treated as such. It should be noted that market economy treatment (MET) is only granted where it is claimed, and where sufficient evidence is provided that the market economy environment exists.

The following criteria must be met for market economy treatment to be given:

- Decisions with regard to prices, costs and inputs are made in response to market signals without significant state interference
- Cost of major inputs reflect market values
- The companies involved maintain clear accounting records, independently audited and in line with international accounting standards
- Production costs and financial situation are not subject to significant distortions as a result of former non-market economy environment

- Legal certainty and stability are provided by bankruptcy and property laws
- Exchange rate conversions are carried out at the market rate

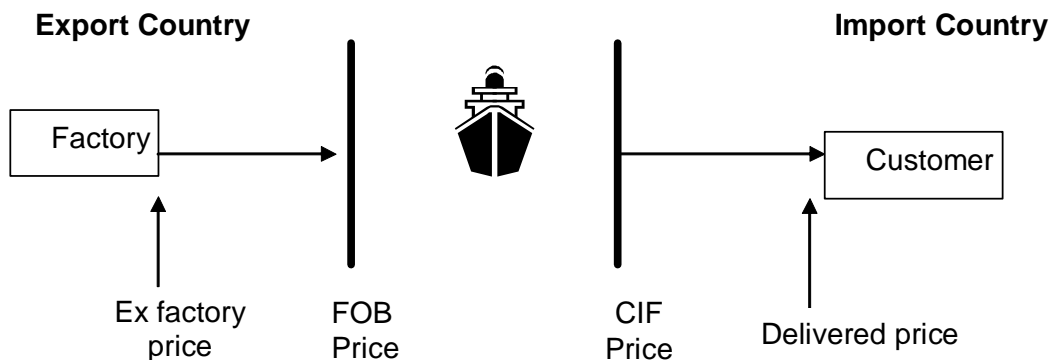
Companies in groups 2 and 3 that do not apply for MET, or those who apply but are unsuccessful, are treated in the same way as companies in group 1 (domestic prices and costs are based on the analogue country).

2.6 Export Price

(a) Definition

The export price is usually the price actually paid for the product when sold from the exporting country to the EC. It is usually calculated on an ex factory level so that it can be compared more easily to the domestic price.

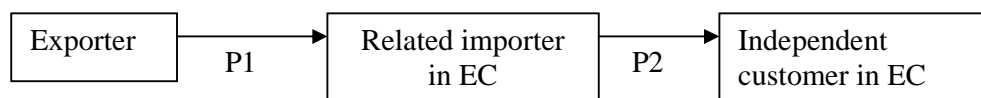
The actual costs included in the export price shown on a particular invoice will depend on the delivery terms agreed in the contract between seller and buyer. The following diagram illustrates:-



Where necessary, transport, insurance and other costs incurred in bringing the product to the point of delivery to the buyer will be subtracted to get back to the ex factory level.

(b) Related sales companies in the EC

Export prices may be considered to be unreliable where there is an association between the exporter and EC importer. In such cases the export price is calculated on the basis of the first resale price to an independent purchaser in the EC. Adjustments are then made to this price to remove all additional costs incurred after the goods arrived at the EC frontier.



- **P1 is usually considered to be unreliable.**

- **In such situations, export price is constructed;**
- **Constructed export price = P2 – costs and profits of importer**
- **Cost and profits are based on actual data from an unrelated importer.**

The Commission will be vigilant to ensure that all appropriate deductions are made. This will include deducting profit and SGA costs of the related importer. The profit will usually be based on that earned by unrelated importers of the product concerned. SGA costs will usually be based on actual costs incurred by the importing company concerned.

(c) Export price for non-market economies or economies in transition

A weighted average export price is calculated for all exporters under non-market economy treatment. The exception to this is where individual treatment has been granted.

Individual treatment means that an individual dumping calculation will be made for that company. This means that their own export prices will be used as the basis to calculate an individual dumping margin as opposed to the single one applying to all producers (based on all exporters prices aggregated). It can be noted that when individual treatment is granted, the normal value of the company will still be based on the analogue country data (unless MET has been granted).

The criteria for individual treatment are as follows:

- profit and capital invested can be repatriated (in case of foreign investment)
- export prices, quantities, and conditions and terms of sale are freely determined
- majority of shares held by private persons. Any state officials on board should be in minority or company should nonetheless be sufficiently independent from state interference.
- Exchange rate conversions carried out at the market rate.
- State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

The fundamental test underlying all above criteria is meaningful independence of the exporter from the influence of the state. A particular concern of the Institutions in this context is circumvention, *i.e.*, where exports all get re-routed through a company with the lowest duty (see also below 2.11).

2.7 Export Price (CIF)

In the formula to calculate the dumping margin given at the start of this section, the denominator used is the "CIF" export price. The reason why the Commission divides the amount of dumping (the difference between ex factory export and domestic prices) by the CIF export price is to create a readily usable figure for national customs authorities. They

receive shipments of goods valued at the CIF level for customs purposes and it is at this level of trade that an anti-dumping duty is applied.

If the actual CIF value is available (either from the invoice or a related importer), this will be the basis of the Commission's calculation. If, however, the export prices are ex works, an estimate of transport and insurance costs to the EC border must be made and added to the ex works export price for the purposes of making the dumping calculation.

2.8 Comparison and Adjustments

(a) Fair Comparison

Once the Commission has calculated normal values for each type exported, it can calculate the dumping margin by comparing export prices against those normal values. In doing this, it is obliged to ensure that the comparison is a fair one.

The Commission is required to make a comparison:

- between comparable products: comparison must be between like with like.
- at the same level of trade (that is, prices must be compared between equivalent types of sale). For example, the price to an end user will be different from the price to a distributor. If the levels of trade for export sales and domestic sales are different, an adjustment must be made. The comparison is usually done at an ex factory level.
- sold as nearly as possible at the same time.

The comparison is done for each type identified during the investigation. That is, a normal value and export price is calculated for each type.

Only products of identical specification can be directly compared with each other. Therefore, the Commission will use strict product definitions (usually via a classification system of product control numbers; "PCNs"). It is often the case that domestic sales cannot be used because they do not exactly match the types that are exported and adjustments cannot be made. All export prices are used and the job is to match up domestic transactions for each of the exported types.

(b) Adjustments

Where there are differences in the products under comparison and it is shown that the differences affect the price comparability of the products, an adjustment must be made. The Commission will make adjustments for factors of which it is aware. The regulation provides, however, that adjustments can be claimed by the exporter if evidence is provided showing that the difference affects the price comparability of the products.

Adjustments may be made to take account of the following differences :

- Physical Characteristics - on the basis of a reasonable estimate of the market value of the difference.

- Import Charges and Direct Taxes - where domestic taxes are not imposed or are refunded for export sales.
- Discounts, Rebates, and Quantities - for differences in the amounts of discounts and rebates applied to sales if it is shown that these amounts are directly linked to the sales covered by the investigation.
- Level of Trade - where the domestic and export distribution chain have distinct differences. For example, if all domestic sales are made to end users, while export sales are to distributors, this is likely to result in a price difference between domestic and export prices.
- Transport Insurance and Ancillary Costs - but only where costs are directly included in the price of the product.
- Packing - for differences in the directly related costs of packing
- Credit - where the cost of credit is included in the price (i.e. credit terms agreed at the time of invoicing)
- After Sales Costs - where costs differ for providing warranties, guarantees and technical assistance whether required by law or not.
- Commissions - where commission rates differ.
- Currency Conversions - rates of exchange will be used for the date of the sale, except where a forward contract directly related to the sale has been used. Fluctuations in exchange rates are ignored and exporters are allowed 60 days to reflect sustained changes in exchange rates in their prices.
- Other Factors - Any other factor that affects price comparability where customers consistently pay different prices on the domestic market because of differences in such factors

Two examples of adjustments that would work in the favour of the exporter are as follows:

Credit terms: domestic customers have 60 days credit while export sales are cash on delivery. The cost of credit can be deducted from the domestic price in this case.

Level of trade: export sales are made in large consignments to distributors while domestic sales are made to end-users in much smaller quantities. To the extent that there are different levels of trade, an adjustment can be made to ensure a fair comparison.

Although the Commission should be responsible for ensuring that a fair comparison is made, exporters should nevertheless make a claim and back this up by evidence to show that otherwise the price comparability would be affected.

(c) Average export price or transaction by transaction?

There are a number of ways in which the price comparison can be done.

The most common method in the past³ was for the Commission to calculate one figure for normal value (weighted average domestic price for each type) and for each export transaction to be compared to this figure on a transaction by transaction basis. This effectively produced a series of dumping margins (i.e. the value by which export price was below normal value) which were aggregated and expressed as a proportion of all export transactions⁴ to give a percentage margin of dumping. Note that under this "transaction by transaction" approach, negative dumping margins (export price greater than normal value) were counted as zero so as not to cancel out the effect of dumped transactions.

After 1995, the normal method became an average to average comparison within the model or type categories (i.e. if there are 10 models or types this calculation would be done for each model). For each of the 10 models, a weighted average normal value would be compared with a weighted average export price which by definition meant that negative dumping was allowed to offset dumped transactions). However, zeroing continued to be used between the models when aggregating the dumping found for each model. Zeroing could also be used within the model if there was a pattern of export prices that differed significantly among different purchasers, regions or time periods (so-called 'targeting').

Following the bed linen WTO dispute, the current method within the model continues to be, where possible, to compare the weighted average export price with the weighted average normal value for the period of the investigation. However, zeroing between models is now never used due to the fact that it is explicitly outlawed by WTO jurisprudence. This means that dumped imports can be cancelled out by imports sold at prices greater than normal value. Only where it appears that such dumping is 'targeted' at particular regions, customers or during particular time periods will the Commission revert to the old method of comparing export prices on a transaction by transaction basis.

2.9 How the Commission makes a dumping calculation

Calculating a dumping margin is a time consuming and complex task. The following simplified example shows how the Commission calculates the margin of dumping.

We will assume that the products under investigation are produced to only 1 specification. If there is more than one type or model, it is necessary to perform an equivalent calculation for each type.

During the period of investigation, five consignments are sold on the domestic market as listed in the table below.

The domestic sales are made in representative quantities to unrelated purchasers and all prices cover cost of production.

Normal value (domestic price) is calculated by taking a weighted average of these prices:

³ Pre-1995 when the WTO was created and the WTO anti-dumping agreement came into effect

⁴ CIF value of exports as explained above.

Units Sold	Price (€)	Units * Price
1200	140	168,000
600	135	81,000
800	145	116,000
800	132	105,600
500	151	75,500
3900		546,100

Weighted average domestic price = $546,100 / 3900 = €140$ (Normal Value)

During the same period, export consignments are indicated below. For each export transaction, the amount and value of dumping is calculated as follows:

Invoice Value (ex works)	Quantity	Export Price	Normal Value	Dumping	Dumping*Quantity
144000	1200	120.00	140	20	24000
69000	600	115.00	140	25	15000
192000	1200	160.00	140	-20	-24000
94400	800	118.00	140	22	17600
232500	1500	155.00	140	-15	-22500
731900	5300	138.09			10100

The dumping margin is calculated as follows:

$$(\text{Normal Value} - \text{Export Price}) / \text{CIF Price}$$

If it is assumed that the cif price is 10% higher than the ex factory export price, the cif price would be 151.89

Thus the dumping margin is $140 - 138.09 / 151.89 = 1.25\%$

In practice, the way in which the Commission calculates the dumping margin is to calculate for each transaction the total value of the dumping (i.e. absolute dumping margin multiplied by quantity sold). The reason for this is that there are often hundreds of transactions (or more) involving more than one grade/model (i.e. there are a number of different normal values). Rather than calculating a dumping margin for each transaction and taking a weighted average, the value of the "total dumping" is divided by the total cif value of the imports. The cif invoice value is estimated at 10% of total ex factory invoice value (i.e. $731900 * 1.10 = 805,090$).

Thus, in the example above, the dumping margin would be calculated as follows:

$$10,100 / 805,090 = 1.25\%$$

As mentioned previously, the Commission will usually calculate the dumping margin on a weighted average to weighted average basis. This is the basis on which the above calculation has been made. However, if the Commission decides that a weighted average normal value

to individual export transaction comparison is necessary, the calculation will change significantly (though these days this rarely happens). The reason why it changes is that in this circumstance, positive dumping margins (i.e. where normal value is less than export price) are counted as zero. That is, they are not allowed fully to offset the negative dumping margins.

Invoice Value	Quantity	Export Price	Normal Value	Dumping	Dumping*Quantity
144000	1200	120.00	140	20	24000
69000	600	115.00	140	25	15000
192000	1200	160.00	140	-20	0
94400	800	118.00	140	22	17600
232500	1500	155.00	140	-15	0
731900	5300	138.09			56600

In this case, the dumping margin is $56,600/805,090 = 7.03\%$.

The above calculations are all based on the assumption that there is only one type or model. This is what we have labelled as the "within model" calculation in 2.8(c) above.

If there are five models, the dumping would be calculated for each model.

Invoice Value	Quantity	Export Price	Normal Value	Dumping	Dumping*Quantity
Model 1	200	100	120	20	4000
Model 2	300	150	140	-10	-3000 or 0
Model 3	150	150	160	10	1500
					2500 or 5500

It can be seen that the total value of dumping varies according to whether the negative dumping of model 2 is allowed to offset the dumping of models 1 and 3. This is the "between model" calculation referred to above.

2.10 Insignificant dumping margin

When the dumping margin for any exporter is insignificant (*de minimis*), the investigation against that exporter is terminated. Insignificant is defined as less than 2%. Thus, in the above example, the first calculation gives a *de minimis* dumping margin, while the second calculation is clearly significant.

2.11 A global dumping margin or individual dumping margins?

Individual dumping margins are calculated for each company (except for non-market economies and for companies in non-market economies or economies in transition where neither MET or IT have been granted).

For companies operating in a non-market economy environment or in an economy in transition (where MET or IT has not been granted), the Commission will normally calculate a single country-wide dumping margin. This is due to the fact that it is not considered possible to distinguish between individual producers when there appear to be links to the state. Imports from such companies are considered to be from "one producer" and therefore only one dumping margin is calculated. This will result in the application of only one anti-dumping measure to such imports which will apply regardless of which producer has actually supplied the product. One duty is applied to prevent circumvention through the company with the lowest duty.

However, individual exporters can still claim individual treatment even in a complete non-market economy.

The table below provides a summary of the possible treatment of exporters in various different situations with regard to normal value and export price.

Status	Normal Value	Export Price	Duty Rate
Market Economy Treatment (MET)	Actual prices/costs	Actual prices	Company by company
Non-Market Economy (NME) or economy in transition for companies not receiving MET or IT	Analogue country prices/costs	Actual prices	One for all exporters
Individual Treatment (IT) in NME or economy in transition situation	Analogue country prices/costs	Actual prices	Company by company

2.12 Subsidy

(a) Definition of subsidy

Certain types of subsidies can be countervailed (i.e. anti-subsidy measures applied) when the benefit received is deemed to give an advantage to exporters. Note that such benefit does not have to arise only from export subsidies.

The definition of subsidy is a broad one. A subsidy is defined as a "financial contribution by government" which confers a benefit to the recipient.

This can include:

- direct transfer of funds e.g. grants.
- revenue foregone e.g. tax exemptions
- government provision of goods & services

However, subsidies are only countervailable if they are **specific**. To be specific, the subsidy must be limited to certain enterprises or regions. Also subsidies contingent on export performance or use of domestic over imported goods are deemed to be specific.

Thus, general government intervention in the economy that benefits all enterprises is not countervailable because it is not specific. Likewise, the setting or changing of generally applicable tax rates by any level of government entitled to do so is not considered to be a specific subsidy for the purposes of the AS Regulation.

Subsidies that are only received by certain enterprises are not automatically specific. Where there are objective criteria and eligibility is automatic, the subsidy may be considered to be non-specific. Objective criteria or conditions mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise. The criteria or conditions must be clearly set out by law, regulation, or other official document, so as to be capable of verification;

However, such subsidies can be found to be specific if there are reasons to believe they are in fact ("*de facto*") specific. In such a situation, other factors will be considered;

- is the subsidy programme used by a limited number of certain enterprises? A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific.
- is the programme predominantly used by certain enterprises?
- are disproportionately large amounts of subsidy granted to certain enterprises?
- how is discretion exercised by the granting authority in the decision to grant a subsidy? In this regard, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall, in particular, be considered.

(b) Calculation of benefit

The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipient.

In calculating benefit, the following factors are taken into account:

- Government provision of equity capital does not confer benefit unless it is inconsistent with the usual investment practice of private investors.
- A government loan has no benefit unless the rate is below the rate payable for a comparable commercial loan (*i.e.*, a loan at commercial rates is not a subsidy)
- A loan guarantee provided by government does not confer benefit unless the cost of the loan is less than what the firm would pay in the absence of a government guarantee.
- Purchase by government of goods and services is not a benefit unless consideration received is greater than "adequate", taking into account prevailing market conditions.

- Provision by government of goods and services is not a benefit unless consideration given is less than “adequate”, taking into account prevailing market conditions.

In each case, a benchmark is established against which the benefit can be judged. If there is no benefit in relation to the benchmark, there is no subsidy. However, if there is a subsidy, the benchmark can be used to put a value on the benefit received.

(c) Calculation of subsidy margin

The amount of subsidy is calculated per unit taking into account the following;

- Fees/costs and export taxes or duties specifically intended to offset the subsidy should be subtracted..
- For subsidies not related to quantity, the total value of the subsidy should be allocated over production, sales or exports of product concerned.

For more details see the Commission's "guidelines for the calculation of subsidy in countervailing duty investigations" (published in Official Journal C394 17.12.98).

(d) Insignificant subsidy margins

Subsidy margins are considered insignificant (*de minimis*) if they are below 1%. For developing countries the *de minimis* level is less than 2%.

(e) EC state aid rules

EC state aid rules contain similar definitions of subsidy and benefit. The EC state aid regime prohibits illegal subsidies under EC law. Breaching EC state aid rules requires repayment of the subsidy, a much tougher sanction than anti-subsidy measures.

However, the rules are not identical. In this regard, for example, it is possible that a subsidy may be prohibited within the EU under the state aid rules, yet not be countervailable.

2.13 Injury and causal link

Once the existence of an unfair trading practice has been established (dumping or a subsidy), the second requirement before any measures can be adopted is that there must be injury. The third requirement is that a causal link must exist between the unfair trading practice and the injury (see paragraph 2.1 of a summary of the main requirements to impose AD or AS measures).

(a) Concepts of injury

Injury occurs when dumped or subsidised imports cause problems for the EC industry. The injury determination is an extremely important part of AD and AS investigations. If there is no injury, it is not possible to take measures, even against imports that are dumped at significant dumping margins.

There are three concepts of injury used in anti-dumping or anti-subsidy investigations:

- Material injury - significant problems suffered by EC industry
- Threat of material injury - though not currently being faced, problems are imminent
- Material retardation - there is no EC industry, but the establishment of such an industry is prevented by dumped imports

(b) Determination of injury

The first point of note is that the AD or AS regulation requires that determination of injury is based on positive evidence. That is, clear, objective facts must be established by the Commission to show that the EC industry has been injured.

This requires an examination of two issues:

- Volume of dumped imports and the effect on prices in the EC market; and
- Consequent impact on the EC industry.

(c) Cumulation

With regard to the volume of imports where there is more than one country subject to investigation, the Commission will usually cumulate the imports of the various countries involved in the investigation. In this way, the injury analysis is conducted in terms of the total dumped imports, rather than at the level of the individual countries involved in the investigation. This can only be done, however, if the dumping margin and volume of imports from each country are not negligible and the conditions of competition are similar.

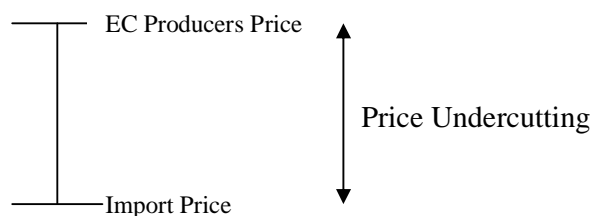
(d) Volume of dumped imports

The Commission checks whether there has been a significant increase in dumped or subsidised imports, either in absolute quantities or in terms of market share. The latter is usually the more important indicator as there are situations in which the absolute level of imports can be falling while market share increases.

This can occur where the fall in imports is less than the fall in EC sales. This results in an increased market share for exports despite a reduction in the size of the overall market.

(e) Effect on prices

In looking at the effect of imports on prices, the main consideration is the extent to which the import price undercuts the EC price.



However, the effect on prices of such imports may also be that EC prices have already decreased (price depression), or may have prevented a price increase (price suppression).

(f) Impact on EC industry

In analysing the impact of the imports on EC industry, the regulation requires an economic evaluation of the relevant economic indicators. The EC industry must clearly be suffering significant problems in order for a positive injury determination to be made.

The regulation lists typical economic factors that must be analysed in this context.

effect of past dumping/subsidy	capacity utilisation
magnitude of dumping/subsidy margin	factors affecting Community prices
actual and potential decline in sales	cash flow
Profits	Inventories
Output	employment and wages
market share	Growth
Productivity	ability to raise capital
return on investments	Investment

The regulation deliberately gives no guidance as to which indicators are the most important and it states that the list is not exhaustive. It also makes clear that any one or several of the listed factors do not necessarily give decisive guidance.

The reason for this is that injury is not always visible in the same way. The injury analysis is often focused on market shares and profits in actual investigations. However, there are cases where injury does not appear in the form of loss of market share. In certain cases, the share of the EC industry actually increased in a situation where dumping and injury were found.

In practice, the most important indicator is profitability. If profitability is unaffected, it is highly unlikely that there is injury. One reason for this is that it captures both price effects (e.g. price undercutting & underselling) and volume effects (e.g. loss of sales, reduced market share etc.)⁵.

(g) Lesser-duty rule

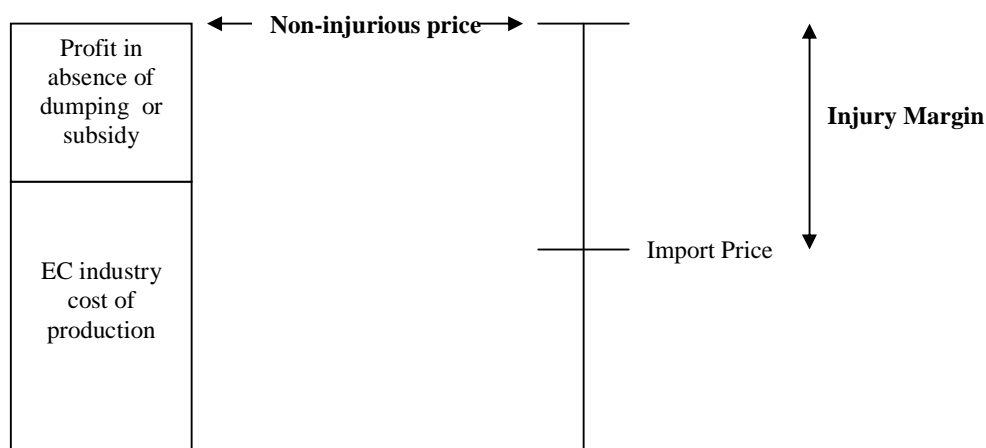
The extent to which the import price is injurious is very important given that the EC applies the lesser duty rule⁶.

⁵ Profit = Revenue – Costs; Revenue = Volume sold * Price; thus, injury either in reduced volume or reduced price will have the effect of reducing profit.

⁶ The lesser duty rule requires that the anti-dumping or countervailing (anti-subsidy) duty is the lesser of the dumping margin or the injury margin.

Therefore, a 'non-injurious price' is calculated based on the EC price that would be required to remove the injury. This is calculated by reference to the cost of production of the EC industry, with a reasonable profit added. The difference between the non-injurious price and the price of dumped imports is called price underselling. The amount of price underselling is used to calculate an injury margin for each company (or for the exporters as a whole in the case of non-market economy treatment). That is, a single % is calculated that represents the "amount" of injury being caused by dumped imports.

Price underselling (Injury margin)



The injury margin is often less than the dumping margin. It is therefore often the basis on which the level of duty is calculated, given that the EC regulation requires the lesser of the two to be used. As in the case of the calculation of dumping, adjustments are often necessary in the calculation of price underselling.

(h) Threat of material injury and material retardation

The Commission can make a positive injury determination on the basis of 'threat of injury'. This is the case where injury does not yet exist but the change in circumstances that would lead to injury is clearly foreseen and imminent.

Factors that are particularly relevant in this context include the available capacity of exporters taking into account demand in other markets; and whether sufficient stocks exist to increase exports dramatically.

This provision is very rarely used.

It is also possible that a positive injury determination can be made if there is no EC industry. The only situation where this could happen is where an EC industry has been prevented from developing (material retardation) due to dumped imports. However, this has never been used as the basis on which to take anti-dumping or anti-subsidy measures.

(i) Insignificant injury

For dumping, injury is normally regarded as negligible (*de minimis*), and proceedings terminated, where the imports from one country represent a market share of less than 1%.

An investigation should be terminated if the imports from the country concerned account for 1% or less of EC consumption. The exception to this occurs where there are a number of countries with market shares of less than 1% and where such countries collectively achieve more than 3% of EC consumption.

It can be noted that the EC has adopted rules different to those outlined in the WTO anti-dumping agreement. The latter defines *de minimis* injury as the situation where imports from the country accused of dumping are less than 3%/7% of **total imports** into the country in which the dumping complaint has been made. In most situations the EC rule is more generous.

However, where imports have a high overall market share, more than 1% of market share may still be less than 3% of total imports. That is, if total imports from all countries (including those not concerned) have a 70% market share, 1.5% market share is only a 2.1% share of imports i.e. this would not be *de minimis* under the 1% test but would be under the 3% test.

For subsidy investigations, *de minimis* injury is also less than 1% market share. However, for developing countries subsidised imports can be up to 4% of total imports before they are considered to be causing significant injury.

2.14 Causal link

A crucial part of the injury analysis is to demonstrate that dumped/subsidised imports are the cause of the injury as determined by the above criteria. The Commission must also ensure that injury caused by other factors is not attributed to dumped imports.

A positive determination of injury may reflect a number of problems faced by the EC industry, of which dumping is only one.

It may be that EC industry has been affected by a dramatic increase in the volume of non-dumped/subsidised imports from countries not accused of an unfair trading practice. On the other hand, it might be the case that changes in demand in the EU, perhaps caused by recession, have 'injured' the EC industry. Similarly, poor productivity or inadequate application of technology may explain a worsening performance.

It should be stressed that dumped imports only have to be found to be a material cause of injury. It may well be that other factors are in fact extremely significant causes of injury. As long as the dumped imports are a cause of injury, and it is material, the Commission can find causality. It is not necessary to find that the dumped imports are the sole cause of material injury.

2.15 Community Interest

The fourth and final requirement, before anti-dumping or anti-subsidy measures can be adopted, is that such measures must be in the Community interest (see paragraph 2.1).

Community interest refers to the overall interests of the European Community. By nature, the Community interest test is a forecast that examines whether the adoption of AD or AS measures would disadvantage the economy overall. More specifically, anti-dumping or anti-subsidy measures may not be applied where the Commission can clearly conclude that it is not in the Community interest to apply measures.

The Community interest part of the investigation requires an "appreciation" of all the various interests to be taken into account. These interests are generally interpreted to include: the domestic industry that is making the complaint; importers; EC industries that use the imported product and will ultimately pay a higher price (if it is used as an input in the production process); and the ultimate consumers of the product.

This is not a public interest in the broad sense, taking into account broader policy issue such as health, environment, security etc. Rather it is an economic balancing test to ensure that measures will be to the benefit of the EC.

In terms of how much importance is attached to each interest, however, the regulation states that "special attention" must be given to the need to eliminate the trade distorting effects of injurious dumping. This gives a built in tilt towards adopting measures once the first three requirements have been met (see paragraph 2.1). Thus, the negative impact of the measures really must be disproportionate in relation to the benefits, in order to reach a conclusion that such measures are not in the Community interest. Note that this additional test is not required under the WTO ADA.

2.16 Procedure

(a) Overview

The procedure for anti-dumping and anti-subsidy investigations is very similar and is summarised in the table below.

STAGE	WHAT HAPPENS	TIMING
Complaint	Industry submits evidence to the Commission requesting investigation	45 days for Commission to decide whether to initiate
Initiation	The Commission opens an investigation against one or a number of countries if there is sufficient evidence	
Questionnaire	Information must be provided by each exporter - fill in questionnaire and make other submissions. Apply for individual treatment, if relevant.	40 days after initiation to respond to questionnaire (subject to possible extension)
Verification	The Commission visits the premises of each exporter to verify the information.	Around 1 -3 months after submission of questionnaire
Provisional duties	Imposed when the Commission makes a provisional determination of dumping and/or subsidy and injury/causality/Community interest.	Minimum 60 days, maximum 9 months between initiation and provisional decision. Usually 9 months.
Price Undertakings	Offered by exporter to the Commission not to sell below a minimum price.	Can be offered at any time but not before provisional duties or after definitive duties
Definitive duties	Final measures adopted if provisional findings are confirmed.	Provisional duties can be imposed for six or nine months depending on the circumstances. For CVD, provisional measures only 4 months.
Application of measures	Duties or undertakings are valid for 5 years, unless this is changed in an interim review. If there is a review, it should normally be concluded within 12 months	
Expiry or review	Duties expire after 5 years unless an expiry review is requested and sufficiently documented.	

(b) Complaint and initiation

Although the Commission has powers to initiate in exceptional circumstances an investigation on its own initiative, almost all investigations result from the submission to the Commission of a complaint by or on behalf of the Community industry.

THE OBLIGATIONS OF THE EC INDUSTRY WHEN MAKING A COMPLAINT

A complaint must contain evidence of dumping/subsidy, injury and a causal link. It must include the best information the complainant has available on :

- the identity of the complainant (either an individual company or more usually an association of EC producers) and the products produced by it which are affected by the allegedly dumped imports.
- a description of the allegedly dumped products or amount, nature & countervailability of subsidy.
- the exporting countries concerned and the identity of all exporters who are known to be involved together with details of EC importers.
- the domestic and export prices of the third country producers.
- how these imports have affected the development of the EC market and led to injury to the EC industry particularly in terms of trends in key economic indicators such as market share, production and profitability.

Before the Commission can initiate an investigation, it must be satisfied that the complaint includes sufficient evidence of the existence of both dumping and/or subsidy and injury to justify proceeding with the case.

No investigation can be initiated where the complaint concerns a third country whose total exports of the product to the EC account for less than 1% of Community consumption, except where these exports are aggregated with exports from other third countries which collectively account for 3% or more of Community consumption.

(c) Community industry support

A complaint can only be accepted where the Commission verifies that it has been made by or on behalf of the Community industry. To do this it must evaluate the extent to which the Community industry has supported or opposed the complaint. Support or opposition is measured by reference to the percentage volume of EC production accounted for by those in support and those opposing the complaint:

- a complaint must be supported by EC producers accounting for a minimum of 25% by volume of EC production;
- where there is support from producers representing 25% or more but less than 50% of EC production, those supporting the complaint must account for a greater volume of production than those who oppose the complaint.

(d) Time Limits

The Commission has a maximum of 45 days from receipt of the complaint to decide whether or not to initiate an investigation. The reality is, however, that complainants—in case of doubt regarding the technicalities of a complaint—will hold discussions with the Commission informally; if need be, on a number of occasions. The Commission will explain what would be required for the complaint to be accepted. This means that, by the time it is formally submitted, a complaint is likely to contain sufficient evidence. Although this means that very few complaints are rejected once officially lodged, this process is useful in screening out time-wasting or weak complaints.

Once initiated, an investigation must in all cases be concluded within 15 months of initiation (13 months for AS investigations). All new investigations tend to take the full 15/13 months for AD/AS investigations respectively. These very demanding time scales create significant procedural pressures at all stages of the investigation.

(e) Consultation with EC member states on complaint

Once the Commission is satisfied that an investigation is justified, it consults the "Advisory Committee" about its intention to launch an investigation (or indeed to reject the complaint). The Advisory Committee is made up of representatives of the governments of each of the 25 EC member states. At this stage, the Commission is only under a duty to consult with the Advisory Committee. It is not obliged to take into account views expressed by the member states. However, objections raised by the committee can be of considerable practical significance in highlighting particular aspects of the complaint which the Member States believe need careful scrutiny. The final decision to impose definitive duties must be taken by the member states in the Council of Ministers. To this extent, the Commission does take account of member state views throughout the process.

(f) Information released by the Commission

No official publication is made by the Commission confirming the lodging of a complaint, indeed the Commission is under a duty to avoid publicising the fact that a complaint has been made.

The Commission will inform the government(s) concerned prior to initiating an investigation.

The first official publication is made when the Commission initiates an investigation. The initiation is formally announced in the Official Journal of the EU⁷. The Commission will also notify directly those exporters, importers and representative associations, of whom it is aware, that an investigation has been commenced. The Commission will also send them a questionnaire and a non-confidential version of the complaint. The Commission will also send out market economy and individual treatment claim forms if the investigation involves a non-market economy or an economy in transition.

⁷ The Official Journal can be consulted at the EUR-Lex website (<http://europa.eu.int/eur-lex/lex/en/index.htm>). Also, the anti-dumping section of the DG Trade website contains a 'what's new' section that gives information on initiation of cases and adoption of measures. (http://europa.eu.int/comm/trade/issues/respectrules/anti_dumping/index_en.htm).

(g) Target of investigation

Anti-dumping investigations are opened on a country basis i.e. all exporters in the country (or countries) investigated will be investigated.

In this respect, it differs from EC competition policy, where individual companies are investigated.

However, measures are generally applied on a company by company basis. That is, dumping and injury margins will be calculated for each cooperating exporter and individual duty levels applied accordingly.

Given that the cases are on a country basis, a so-called 'residual duty' will also be applied to all exports from the country being investigated. This will be set at the level of the highest individual duty applied (or even higher if there is significant non-cooperation). Thus, exports by any company not given an individual duty level will be subject to the residual duty rate. Newcomers can however subsequently request to have an individual duty rate.

(h) Questionnaire and investigation period

Having initiated an investigation, the Commission's first task is to obtain relevant information from the producers concerned on their products and prices. This information is obtained in two stages; requesting answers to a questionnaire, and verifying the accuracy of the information provided.

In the questionnaire the Commission will state the period of time to which the requested information should relate. The definition of the investigation period is of considerable importance as information relating to activities outside this time frame will not normally be taken into account. The investigation period must be of not less than 6 months, usually one year, starting immediately prior to the initiation of the proceedings.

Questionnaires are sent to exporters, EC producers, EC importers and users of the product.

(i) Description of exporters' questionnaire

The Commission generally uses a fairly standard questionnaire, which is adapted to fit the particular features of the industry in question. It will set out a description of the products concerned, the time period of investigation and the time limits within which the replies must be provided to the Commission. It also confirms the names and contact details of the Commission officials responsible for the investigation.

For exporters, the questionnaire requires that detailed information is provided in the following general areas :

- details of the exporter including ownership structure and details of shareholders; copies of published accounts with confirmation of the accounting practices used; numbers of employees and the relevant product distribution structure.
- details of the products - the nature of the products sold by the exporter with details of all products sold; copies of relevant catalogues, price lists or brochures; details of

recent year's annual turnover for the products broken down by reference to domestic and export sales; details of production capacity and levels of capacity utilisation; as well as details of the production costs, total production, domestic and export sales for all products concerned during the investigation period.

- details of sales during the period - provision of a list of all related customers of the exporter; list of export transactions to each of the 25 member states; the value of these sales and their cost of production, details of all domestic and export transactions made during the investigation period together with full documentation for selected transactions.

Similar information is requested from EC producers.

Companies situated in countries with economies in a state of transition must complete a claim form for market economy treatment if they wish to apply for it.

(j) Who should complete a questionnaire?

All EC industry producers that are making the complaint must complete a full questionnaire.

The most important players as regards exports in the investigation are the manufacturers. It is the manufacturers who are held responsible for the pricing of products that they have produced. Even if products are re-sold by trading companies, it is the producers that will have anti-dumping measures applied against their products. The difference for the trader is that he can supply from any source. Thus, products he sells may or may not be subject to anti-dumping measures depending on the source.

Traders and importers are sent questionnaires but they are much less demanding than the producers' questionnaire and it is optional to fill them in, though the information is exceptionally useful for the Commission. There is not the same incentive to cooperate as for a manufacturer. However, when the trading company or importer is related to the producer subject to anti-dumping investigation, they must fully cooperate in completing a questionnaire.

In AS investigations, a questionnaire will also be sent to the government concerned.

Note that it is the responsibility of exporters to make themselves known to the Commission (if they are not already known) and to request a questionnaire if they have not been sent one. Ignorance of the case is no defence. For this reason, governments and industry associations in the exporting country will normally try and inform all producers in an industry that the case is taking place.

(k) Time Limits for collection of information

Strict time limits apply to the collection of this information. Parties receiving questionnaires are given 30 days to reply. This time limit starts to run from the deemed date of receipt of the questionnaire, which is one week after the day it was sent to the exporter or transmitted to the appropriate diplomatic mission. Thus, 37 days from the date of initiation is the legal requirement. In practice, the Commission actually allows 40 days.

An exporter may request an extension of time to respond to the questionnaire. However, the Commission is obliged to conclude all investigations within 15 months for anti-dumping and 13 months for anti-subsidy, which means that the Commission has little flexibility. The Commission usually agrees to short extensions (for both complainants and exporters) and the request should be made in writing stating the reasons why. .

(l) Disclosing confidential information

Many companies are concerned about confidentiality. Sensitive and confidential business information must be handed to the Commission during the investigation.

The interests of the party handing over this information (complainant or exporter) are protected by stringent legal obligations imposed on the Commission. These rules provide that:

- the Commission is required to treat in the strictest confidence information which is confidential by its nature and for which confidential treatment is claimed
- the Commission may not release such information to others, including the national administrations of the member states, except where the express approval of the supplier is given. The Commission would normally ask exporters and/or EC industry if they are in agreement.
- all information received in the context of an anti-dumping or anti-subsidy investigation can only be used for the purposes of that investigation. The information cannot, for example, be transmitted to other parts of the Commission (such as DG Competition).

To ensure that the other parties involved in an investigation are aware of any accusations or explanations that are being given to the Commission, wherever a confidential (formally called "limited") submission is made, a non-confidential version must also be provided. This non-confidential version is then available for inspection by the other parties and the member states.

Non-confidential summaries must be sufficiently detailed so as to permit a reasonable understanding of the information submitted in confidence. Typically, where schedules of production costs are provided, the non-confidential version will be made up of the same schedule with the financial data deleted or provided in index form.

Should the Commission consider that a request for confidential treatment is not warranted, it cannot disregard the supplier's claim and disclose the information. In such circumstances, however, the Commission can decide not to use the "confidential" information provided.

(m) Verification visits

A verification visit is made by a small group of Commission officials (normally, two) to the premises of the exporter, Community producers, importers and users. The visit typically lasts two or three days and during this time the officials will wish to see the source information used by the exporter to prepare its response to the questionnaire. The Commission is required to confirm to the exporters in advance of the visit what type of information will be verified.

In AS investigations, as well as making on-the-spot investigations of the exporting countries, the Commission will also visit the government concerned to discuss the relevant subsidy programme(s) in detail.

(n) Provisional duties

Once all interested parties have been given an adequate opportunity to submit information and make comments, the Commission will make its provisional findings. If the following requirements are satisfied, the Commission can impose a provisional duty provided that:

- it has made a provisional affirmative determination of dumping/subsidy and injury
- the Commission is satisfied that the provisional duty is in the Community interest

Provisional duties are imposed by a Commission regulation. The regulation will specify the products and countries covered, the relevant customs tariff headings and the value of the additional duty levied. The duty is not directly payable but is given in the form of a security for payment such as a bank guarantee. The extent to which this security is called up will be determined at the time that definitive duties are imposed.

The Commission is obliged to consult the 25 Member States through the Advisory Committee prior to adopting provisional measures. However, the decision to adopt provisional measures rests with the Commission.

Provisional measures can be imposed for a maximum 9 months, subject to the overall time limit of 15 months. Usually, however, the Commission takes 9 months to make a provisional decision, leaving only a further 6 months before a definitive decision must be made.

The Commission will spend this time further analysing the information, perhaps asking additional questions of any of the parties involved, as it moves towards a definitive decision.

Immediately following the imposition of provisional duties, there is an opportunity for further submissions to be made, both orally and in writing. These are usually made in response to the detailed documents received from the Commission disclosing their findings.

(o) Definitive duties

Definitive duties are imposed by Council Regulation, adopted following a proposal made by the Commission. The proposal is considered to be adopted unless there is a simple majority of Member States that oppose it. To reject AD or AS measures, therefore, the proposal would have to be rejected by at least 13 Member States⁸.

An investigation can be terminated by a Commission Decision where, following discussions in the Advisory Committee, no member state objects and the Commission concludes that protective measures are unnecessary (due to no dumping, injury, causal link or Community

⁸ Previously, a Council Regulation imposing AD or AS measures had to be adopted by a simple majority of Member States. However, a new regulation adopted on 8 March 2004 (Official Journal J L77 13.3.2004) amended the voting system to its current form.

interest). Where member states do object, the Commission is required to submit to the Council a proposal that the investigation should be terminated. To prevent termination, the Council must reject the proposal by a qualified majority vote within one month.

Definitive duties are imposed on all relevant products of the stated origin arriving in the EC from all sources except from exporters from whom price undertakings have been accepted or who have been found to have 0% dumping or injury margins. Definitive duties are usually imposed for the maximum period of five years but are supposed only to remain in force for as long as they are required to remove the injury caused by the dumping.

The regulation imposing definitive duties will also confirm whether and to what extent the provisional duties are to be collected. Where the definitive duty is greater than the provisional duty, the difference cannot be collected. Where the definitive duty is lower than the provisional duty, the provisional duty can only be confirmed to the extent of the level of the definitive duty.

Prior to the imposition of definitive duties, the Commission will provide a final disclosure which provides a last opportunity to respond to the Commission's findings.

(p) Undertakings

Once the Commission has assessed the information provided at verification, and if the exporter is in a position where a provisional assessment of dumping and injury has been made against it, the exporter can explore whether the Commission would accept a voluntary price undertaking rather than anti-dumping duties.

Price undertakings are a form of anti-dumping or anti-subsidy measure equivalent in effect to anti-dumping or countervailing duties. By offering an undertaking, an exporter commits himself to increase his prices to levels which eliminates the injurious effect of the dumping or subsidisation found. These price levels are the so-called 'minimum price, i.e. the exporters commits himself not to sell the specified products on the EC market below the minimum price. The same rules are applicable as those used to establish rates for provisional and definitive duties.

The Commission may refuse to accept an undertaking offer and will do so, notably if it is not satisfied that the injurious effect of the dumping is thereby eliminated or if it considers it as impractical. The latter may happen, for example, where the number of relevant exporters or products is large. A past history of failing to observe undertakings is also likely to result in the Commission rejecting an exporter's offer.

Undertakings may be offered at any time up to the final date at which representations may be given before definitive duties are imposed. In practice this means up to the deadline given for comments upon the definitive disclosure.

(q) Types of duty

Duties are usually *ad valorem*, i.e. they impose a percentage duty payable on the CIF price of imports on arrival in the EC (free of duties). The duty paid varies according to the actual price of the product.

In certain cases, the Commission can decide to use specific duties. This imposes a duty on the basis of a measure of the quantity of goods imported. Such duties can be used where the products are raw materials (for example, 100 Euro per metric ton). They can also be in the form of a variable duty.

(r) No double counting of subsidies and dumping

No product can be subject to both AD and AS measures for the purpose of dealing with one and the same situation arising from dumping and export subsidisation.

The logic of this is that an export subsidy has the effect of reducing the export price. If the export price is, as a result, reduced below the level of the normal value, this will create dumping. Thus, applying AS and AD measures in such a situation would be dealing twice with the same issue.

Thus, where there are parallel AS and AD investigations, and there is an element of export subsidy in the subsidy margin, this would be subtracted from the dumping margin.

(s) Level of duty (lesser duty rule)

Both provisional or definitive dumping duties can only be imposed to cover the extent of the dumping margin found to exist. The actual dumping margin provides the absolute limit to the duty rate that can be imposed. However, as dumping duties may only be imposed to the extent required to remove injury, the Commission must adopt a lower duty rate than the maximum rate where a lower rate would be sufficient to remove the injury to the EC industry. To establish whether a lower duty rate is appropriate the Commission will compare the EC price required to remove the injury (non-injurious price) with the price of the dumped imports. This is taken as an indicator of the injury margin (see paragraph 2.13(g)).

The non-injurious price is based on a weighted average cost of production for EC industry plus a reasonable rate of profit (based on what they could earn in the absence of injurious dumping or subsidies).

THE LESSER DUTY RULE	
EU producers' costs	100
Profit margin in absence of dumping/subsidy, say, 6%	6
Price required to remove injury (non-injurious price)	106
Export price of company A (cif level)	80
Injury Margin [(106 – 80) / 80]	32.5%

In the above example, the export price of company A has to be increased by 32.5% to be non-injurious.

The above applies *mutatis mutandis* to antisubsidy proceedings.

2.17 Issues that can arise during period of anti-dumping measures

There are a number of issues that can arise during the period that definitive anti-dumping measures are in place of which the exporter should be aware.

(a) Absorption

Anti-dumping duties are designed to increase the price of dumped products on the EC market thereby removing injury.

Where it can be shown that anti-dumping duties have not led to an equivalent increase in selling prices in the EU, or to a drop in export prices, the Commission can re-calculate the dumping margin to investigate if the duty has been absorbed through lowering the selling price.

(b) Circumvention

Anti-dumping duties only apply to products of a specific origin. The place of shipment is of limited importance. If anti-dumping duties are payable on imports of a certain product with a certain origin these duties will still be payable if a consignment of the product is shipped to the EC through another country .

Where there are customs offences in order to try and avoid anti-dumping measures, such measures can be extended to cover sales of products from third countries where circumvention is taking place. The circumvention rules can also be applied to assembly operations taking place in the EC or in third countries.

Circumvention exists where it is shown that there has been a change in the pattern of trade between third countries and the EC, resulting from an activity (processing or working) for which there is insufficient due cause or economic justification other than the avoidance of the duty.

Circumvention investigations are initiated where requested, and where sufficient evidence is shown that such activities are taking place. Investigations are to be concluded within a period of 9 months from initiation.

(c) Suspension of duties

Where the Commission accepts that it would be in the Community interest to suspend the imposition of anti-dumping duties, it may do so after consultation with the Advisory Committee. A decision to suspend duties will apply for 9 months and may be extended for a further period not exceeding one year by decision of the Council of Ministers.

A suspension of duties will only be in the Community interest where it can be shown that market conditions have temporarily changed such that injury would be unlikely to recommence as a result of the suspension. Before a suspension decision can be taken, the Commission must consult with the Community industry concerned.

(d) Refunds

Where an importer of products into the EC can show that its products have been imported into the EC at prices which eliminate the dumping margin, or reduce that margin to a level below that of the duties in force, the importer may apply for a refund of the anti-dumping duties it has had to pay.

Requests for refunds must be submitted to the member state in which the goods were originally imported into the EC and within 6 months of the date on which the definitive duties were levied or of the decision to collect payment of the provisional duties.

In practice, obtaining refunds requires a significant effort on the part of the exporting producer, because a full dumping calculation must be performed. As a result, not many applications are made (see annex 7, 1.1).

To assist in the process, the Commission has recently published a guide on obtaining refunds. This can be obtained at the following website address:

http://europa.eu.int/comm/trade/issues/respectrules/anti_dumping/refund/index_en.htm

2.18 Reviews

The right to request reviews is available to exporters, importers and the EC industry alike. There are four main reasons for applying for a review.

- Exporters, importers, the EC industry and other interested parties (as well as the Commission acting at its own initiative and the member states) can request a review to determine whether the continued application of the measure concerned is justified or whether the level of the measure is still appropriate if there has been a change of circumstances (**interim review**). Such a review cannot be requested until a definitive measure has been in force for at least one year. The Commission can self-initiate a review at any time.
- A review procedure is also used to offer individual treatment to exporters who did not export the products to the EC during the investigation period (**newcomer review**)⁹. If the Commission accepts an application for review by a new exporter, – which must *inter alia* show that it is not related to any exporters already covered by the relevant regulation – it will adopt an amending regulation excluding the producer from the scope of the anti-dumping duties, and making its imports subject to registration pending completion of its investigation. Following the review, the Commission will propose that the new exporter has its own anti-dumping duty. This will usually turn out to be lower than the residual duty which would otherwise have been payable.
- EC industry is given the opportunity, at the latest three months before the expiry of the regulation imposing definitive anti-dumping duties, to request a review of the current EC market position with the intention of convincing the Commission and Council to renew the definitive duties for a further five year period (**expiry review**). The effect of initiating such a review enables the life of the original regulation to be extended past the initial 5 year limit pending the outcome of the review.

⁹ Newcomers who did not participate in the original investigation otherwise pay the residual duty rate.

2.19 **Judicial review**

During the course of an anti-dumping proceeding, the Commission carries out the tasks of the administrative body responsible for the investigation. As has been stated, the EC rules require that the procedures it uses and decisions it takes must be fair. To do this, the Commission must observe a number of general procedural safeguards.

The EC Treaty (Article 190) provides that all EC Regulations, Directives and Decisions must state the reasons and basis on which they were adopted. Article 173 of the EC Treaty enables parties who are directly and individually concerned by a Regulation imposing an anti-dumping duty to contest the validity of the Regulation by bringing proceedings before the European Courts (in trade cases initially before the Court of First Instance and, on appeal, on a point of law only, to the European Court of Justice). The Court of First Instance will carry out a review, not a retrial of the issues raised in the case. It will look to see if the evidence relied on and the procedures followed in the contested Regulation are accurate and justified.

On average, it will take the CFI 2 years and the ECJ 2-3 years to hand down judgements.

3. **SAFEGUARDS**

3.1 **Summary of EC Safeguard Regulations**

The principal EC regulation that authorises the adoption of safeguard measures is Council Regulation (EC) No 3285/94 on common rules for imports. Note that safeguard measures can only be adopted against imports from all sources and not targeted against specific countries (except as allowed for below).

Regulation 3285/94 applies to all products from all countries except as follows:

- Products originating in certain third countries listed in Regulation 519/94. This applies to imports of products originating in certain countries, excluding textiles products covered by 517/94. The countries are non-WTO members considered to be non-market economies for the purpose of EC safeguard rules: Armenia, Azerbaijan, Belarus, Kazakhstan, North Korea, Russia, Tajikstan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.
- Textile products subject to specific import rules under Regulation 517/94. It applies to certain non-WTO member third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Community import rules. It is used to apply quotas against non-WTO members such as North Korea, Serbia and Montenegro.
- Regulation 3030/93 allows safeguard measures to be adopted against textiles from non-WTO members that have bilateral agreements with the EC: Belarus, Russia, Ukraine, Uzbekistan, and Vietnam. It also allows China specific safeguards to be adopted on textile products.
- Regulation 427/2003 allows China specific safeguards to be adopted on all products..

3.2 Substance

First, it must be established that there has been a **significant increase in imports**.

The increase in imports must be as a result of **unforeseen circumstances**. WTO jurisprudence has confirmed that this is a requirement, and more particularly, that the circumstances must not have been foreseen at the time of the last tariff negotiations (i.e. Uruguay Round). In this sense, almost any event now would have been unforeseen in 1994 at the finalisation of the Uruguay Round. Recent Commission practice places emphasis on the suddenness of the increase in imports.

The investigation must then determine whether the increased imports are causing or threatening to cause **serious injury** to Community producers concerned.

 Serious injury – significant overall impairment.

 Threat of serious injury – serious injury is clearly imminent.

There is no real definition of serious injury relative to material injury that allows a clear understanding of the difference between the two. It is clear that serious injury is worse than material injury and, to this extent, injury must be worse than the level required for AD or AS investigation.

As a general rule, for serious injury, it must be found that the majority of producers are facing a downward trend in profitability and making losses. Material injury does not require losses but rather a negative trend.

In accordance with WTO jurisprudence, the increase in imports must have been sudden, recent, sharp and significant.

In order to make the injury determination, the Commission will examine a series of economic factors. For example it will examine the trend in imports (volume/price etc). and the consequent impact on EC products.

Factors other than imports which are causing injury must be considered by the Commission. WTO jurisprudence requires that other factors causing injury must be separated and distinguished. Although some commentators disagree with the interpretations made by the Appellate Body in recent years, this interpretation seems to require formal measuring and separation of the factors of injury. The Commission does not do this. Nevertheless, the Commission is thorough in looking at other factors and in trying to identify the overall trend of the various injurious factors, and whether there is a consistent picture. It is arguable that to do any more is not possible.

Any measures must be determined not to be against the **Community interest**. There is no guidance on how this should be analysed by the Commission comparable to that given in the AD and AS regulations. Nevertheless, Commission practice is to consider the various interests mentioned under the AD and AS Community interest provisions, to ensure that the EC is not seriously disadvantaging itself by adopting such measures.

3.3 Procedure

Unlike AD and AS, industries cannot formally submit safeguard **complaints**. It is Member States that have such a right. Member States must inform the Commission if trends in imports appear to call for surveillance or safeguard measures.

In practice, therefore, an industry that believes safeguard action might be justified would present the evidence to one or more Member States, in addition to the Commission.

An **investigation**, if justified, is initiated by the Commission within one month of receipt of information from a Member State. A notice is published in the Official Journal.

At this point, the Commission seeks all **information necessary**. In recent cases, the Commission has sent questionnaires to all countries exporting the product (though this is not required either under WTO rules or by the EC safeguard regulation).

Views of **interested parties** will be taken into consideration and thus there is the opportunity to submit written comments and request oral hearings..

Provisional safeguard measures can be adopted a) in critical circumstances and b) where preliminary determination provides clear evidence that increased imports have caused or are threatening to cause serious injury. The maximum duration of such provisional measures is 200 days. Such measures can only be duties (i.e. quotas cannot be used as provisional measures).

Definitive safeguard measures can take any form including duties or quotas. In deciding on measures, the regulation emphasises the desirability of maintaining traditional trade flows. In this regard, if quotas are adopted, they should be set not lower than the average level of imports over the last three years (unless a different level is necessary to prevent or remedy serious injury). Further, the way in which the quota is allocated may be agreed with countries having substantial interest in supplying the product.

For safeguards, there is a significant political dimension to the **decision-making** process. It is not clear that the decision to adopt measures can be challenged in court, which at face value gives the Commission and Member States considerable discretion in adopting safeguard measures. However, in practice (in the few safeguard investigations opened by the EC in recent times), the Commission treats the decision to adopt safeguards as a technical matter. Safeguards will not be adopted purely on political grounds but only where a substantive case exists.

Decision-making is complicated not least because there are two tracks to follow for a safeguard to be adopted:

- proposal by the Commission and measures adopted by the Council by qualified majority
- complicated procedure whereby Commission decides to impose measures. If one Member State opposes, the decision is referred to the Council. Within 3 months, the Council can, on a qualified majority, take the decision to conform, amend or revoke

the measures. If the Council fails a decision within the 3 months, the Commission decision shall be revoked.

It is up to the Commission which route is followed.

Developing countries are excluded from any safeguard measures where they account for less than 3% of imports.

The **duration of measures** is limited to the period of time necessary to prevent/remedy serious injury and to facilitate adjustment on the part of Community producers. Safeguards can be in place for a maximum of four years from the adoption of provisional measures. Such measures can be extended where a) they are necessary to prevent or remedy serious injury b) there is evidence that EC producers are adjusting. The absolute maximum duration of a safeguard measure is 8 years.

For measures lasting more than 1 year, the measure must be progressively liberalised.

Note also that measures lasting more than 2 years would invoke the compensation clause of the WTO safeguards agreement (i.e. equivalent concessions such as tariff reductions on other products would have to be offered to the countries affected by the quota).

There are various restrictions on the re-application of safeguards. For example, where imports have already been subject to safeguard measures, **no new measure can be adopted for at least two years** and longer if the previous measure was in effect for longer period.

Investigations must be completed within a maximum of 10 months for terminations and 9 (or 11) months where measures are being adopted.

The extent to which safeguards can be subject to **judicial review** in the European Court of Justice is uncertain. Measures can be challenged but the opportunity to do so may be limited. Note that the CFI has no jurisdiction to review safeguard measures.